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Law Reform Commission

Report

141

Encouraging appropriate early guilty pleas

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December 2014

The Hon B Hazzard MP
Attorney General and Minister for Justice
Level 19, 52 Martin Place
SYDNEY NSW 2000

Dear Attorney

Encouraging appropriate early guilty pleas

We make this report pursuant to the reference to this Commission received 1 March 2013.

The Hon Anthony Whealy QC
Commissioner

December 2014

Deputy Chief Magistrate Jane Mottley
Commissioner

December 2014

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The recommendations of this report are the Commission's and do not necessarily reflect the views of the Expert Advisory Panel.

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- Legal Aid NSW.

Terms of reference

Refer to the Law Reform Commission an inquiry pursuant to s 10 of the *Law Reform Commission Act* 1967, 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; and
- any related matters the Commission considers appropriate.

[*Reference received 1 March 2013; updated 31 July 2013*]

Abbreviations

AIC	Australian Institute of Criminology
ALS	Aboriginal Legal Service (NSW/ACT) Limited
AVL	Audio-visual link
BOCSAR	NSW Bureau of Crime Statistics and Research
CAN	Court Attendance Notice
CCC	Criminal case conferencing
CCCTA	*Criminal Case Conferencing Trial Act 2008* (NSW)
CCTV	Closed circuit television
CDPP	Commonwealth Director of Public Prosecutions
CPA	*Criminal Procedure Act 1986* (NSW)
CPS	Crown Prosecution Service (England and Wales; Alberta)
CP15	NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013)
CSPA	*Crimes (Sentencing) Procedure Act 1999* (NSW)
DPP	Director of Public Prosecutions
EGPH	Early Guilty Plea Hearing (England and Wales)
EGPS	Early Guilty Plea Scheme (England and Wales)
ERD	Early Resolution with Discount (proposed)
ERISP	Electronically Recorded Interview with a Suspected Person
FASS	Forensic and Analytical Science Service
FSG	Forensic Services Group
IDRS	Intellectual Disability Rights Service
LEPRA	*Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)
MHRT	Mental Health Review Tribunal
NGO	Non-government organisation
NSWPF	NSW Police Force

ODPP	Office of the Director of Public Prosecutions
VCCC	Voluntary criminal case conferencing
VIS	Victim Impact Statement

Executive summary

The case for reform (Chapters 1 and 2)

0.1 The great majority of criminal cases end with the defendant entering a guilty plea and a court then imposing a sentence. Securing appropriate guilty pleas early in a criminal matter is desirable, and indeed necessary, for the effective and efficient operation of the criminal justice system. If a matter is to proceed on a guilty plea, then obtaining that plea early is more efficient, often better for the defendant, and certainly better for victims and witnesses.

0.2 It makes sense then that we have been asked to review criminal proceedings in NSW to find ways to encourage appropriate early guilty pleas.

0.3 All the submissions have outlined significant concerns with the current system for dealing with indictable matters. The stakeholders with the most involvement in the system - the Office of the Director of Public Prosecutions (ODPP) and Legal Aid NSW - have urged us to consider fundamental reforms in this jurisdiction. From the evidence we believe that it is not an overstatement to say that indictable proceedings have major systemic issues and are presently in, or approaching, a state of crisis. For this reason our review has focused on indictable proceedings.

0.4 The statistical evidence is stark and paints a compelling picture. In 2013, 83% of all criminal matters proved in the District Court of NSW were resolved by a guilty plea. 35% (915) of all proven guilty pleas occurred late, after the matter had been committed for trial. In the 2012/13 financial year, 66% of all late guilty pleas occurred on the day of trial. The majority of guilty pleas entered on the first day of trial were not to the original charge (63% in 2012).

0.5 Late guilty pleas, especially day-of-trial pleas, cause considerable inefficiency. For example, each of the 915 matters involving a late guilty plea would have been mentioned probably more than twice in the Local Court; have undergone committal proceedings in the Local Court; and been arraigned in the District Court before being listed for trial. In matters that resolved on the day of trial, juries may have already been empanelled.

0.6 Late guilty pleas cause:

- The resources of the NSW Police Force (NSWPF) to be diverted from other necessary work and police witnesses to be inconvenienced.
- The resources of the ODPP and Legal Aid NSW to be depleted in preparation for a trial that will never take place.
- The District Court to over-list, which causes serious difficulties for other participants.
- Victims of crime and those close to them prolonged distress and uncertainty awaiting the commencement of a trial that will not occur.

0.7 There are other symptoms of problems in the system. Many matters that commence on the indictable path are withdrawn or resolved in the Local Court. In 2012/13, 41%

of indictable matters did not proceed to the District or Supreme Court mostly because they were dropped by the prosecution or the charge was downgraded and resolved in the Local Court.

0.8 Charging practices are one of many interrelated systemic factors that contribute to the entry of late guilty pleas in NSW. We identify ten obstacles to early guilty pleas, including problems attaining a sufficient brief of evidence; a defence expectation of overcharging and charge reductions as the case proceeds; late involvement of Crown Prosecutors or senior prosecutors with authority to negotiate; and the inconsistent application of the discount on sentence for the utilitarian value of early guilty pleas. The factors reinforce one another in complex ways. For example:

- Late service of the brief of evidence drives defendants' expectations of a changed basis of the case and consequent charge variation.
- Late briefing of prosecutors leads to late reassessment of the charge, late negotiations, late change to the charge, and a greater likelihood that a sentencing discount will be available even for a day-of-trial plea. These factors inhibit the proper purpose of sentence discounts as an incentive for the utilitarian value of an early guilty plea.

0.9 This interplay creates a self-reinforcing system in which delaying the entry of a guilty plea is a normal, and sometimes necessary, strategy. System reforms are necessary to address these intertwined factors properly.

Overcoming the obstacles to early guilty pleas: a blueprint for change (Chapter 3)

0.10 In order to promote efficiencies and encourage appropriate early guilty pleas, indictable proceedings need to be significantly recast. We propose a blueprint for change to indictable proceedings that switches resources from the end of the process to the beginning.

0.11 The elements of our blueprint are interdependent. The key elements, the details of which are explained in the chapters to follow, are:

- **Early charge advice**: The ODPP should settle the charge before the matter proceeds. There should be no expectation that the charge will be varied later in the proceedings.
- **A framework for disclosure**: The NSWPF must supply the ODPP, and the ODPP must supply the defendant, with an initial brief of evidence containing the key available evidence to support early determination of the charge and defence assessment of the case. This will not be to the same level of detail as needed for a trial.
- **Case management**: Local Court case management should move the matter towards resolution. Case management replaces the current system of committals and includes the court overseeing disclosure, the criminal case conference and, in limited cases, the giving of oral evidence.
- **Meaningful structured negotiations:** A mandatory criminal case conference should be held in all cases.

- **Sentence discount**: Statute should provide a scheme of clear maximum sentence discounts for the true utilitarian value of an early guilty plea. It should reward early guilty pleas and discourage late guilty pleas.

0.12 Many of these elements require legislative change. We also recommend they be underpinned with a single joint practice note issued by the Chief Justice, the Chief Judge of the District Court and the Chief Magistrate that sets out the indictable process from beginning to end, and establishes processes and case management standards.

Early charge advice (Chapter 4)

0.13 One of the key obstacles to attaining early guilty pleas is the expectation that the initial charge is going to be amended by the ODPP at some later point in proceedings, often as late as the day of trial.

0.14 The causes of late variations to charges are complex. They include late service of the key elements of the brief; discontinuity of carriage so that the charge is reviewed by multiple prosecutors; the late introduction of new evidence; and the late participation of Crown Prosecutors. Early and informed consideration of the charge by senior prosecutors is the key to breaking this cycle.

0.15 Our blueprint provides an early charge advice regime that will change current criminal procedure by allocating a specific time period for ODPP review of the charge after it is laid by the NSWPF, but before it progresses to be case managed in the Local Court. In this system:

- A police charge is laid and the matter comes before the Local Court where any questions of bail or remand are determined.
- The proceedings would then be adjourned for charge advice to be sought.
- In order to proceed further, the ODPP must confirm or amend and then certify the charge. (The ODPP might also withdraw the charge or the election.)
- The NSWPF will retain carriage of the matter until a certified charge is received. Once a charge is certified, the ODPP would take over the prosecution.

0.16 This process relies on the NSWPF giving the ODPP the key evidence early, and a Crown Prosecutor or a senior prosecutor being allocated to assess and review the evidence to determine the charge that should proceed. The aim is to get the charge right early, and so limit charge variations as the matter proceeds. All stakeholders agree that early charge advice is pivotal to improving the system and encouraging appropriate early guilty pleas.

Disclosure in the Local Court (Chapter 5)

0.17 In indictable proceedings a brief of evidence must be served before the committal hearing in the Local Court. Current disclosure of the brief of evidence occurs in an erratic and ill-defined way. Service is often late or incomplete. This problem is

compounded by delays in obtaining forensic analysis and in a lack of published guidance around the nature and extent of the evidence required for committal.

0.18 Efficient and effective disclosure is necessary to any program if it is to encourage appropriate early guilty pleas. Until the key evidence is available, neither the ODPP nor the defence can make properly informed decisions about the charge. A clear and structured disclosure framework for indictable matters is necessary to underpin early charge advice, Local Court case management and criminal case conferencing.

0.19 Effective disclosure requires that the ODPP has sufficient evidence to confirm the charge and the defence has sufficient evidence to assess the strength of the charge. This must be balanced against not expending unnecessary time and resources in producing evidence when the defendant is ultimately likely to plead guilty.

0.20 We recommend a legislative requirement that disclosure in the Local Court should consist of an initial brief of evidence, which is to include the key available evidence that forms the basis of the prosecution case. This should provide a practical and sufficient starting point for the defence to know the prosecution case and to make an informed decision as to whether to plead guilty. It is not the function of the initial brief to provide all evidence relevant to the case, nor is it to provide all the technical evidence that might be required should the matter proceed to trial.

0.21 The initial brief of evidence that is supplied from the NSWPF to the ODPP for the purposes of charge advice should be the same initial brief of evidence that is then supplied from the ODPP to the defence.

0.22 We do not itemise a list of the material that should be included in the initial brief. We consider it best that, for cases prosecuted by the ODPP, guidelines as to the material required for the initial brief be worked out by the NSWPF and the ODPP and published in the ODPP's Prosecution Guidelines. The guidelines should be developed with the input of members of the legal profession, including Legal Aid NSW, the Aboriginal Legal Service (NSW/ACT) Ltd, the Public Defenders, the Law Society of NSW and the NSW Bar Association.

0.23 Comprehensive and full disclosure should occur under the pre-trial disclosure provisions in the *Criminal Procedure Act 1986* (NSW) (CPA) in the Supreme and District Courts only if the matter proceeds to trial.

Local Court case management for offences dealt with on indictment (Chapter 6)

0.24 Case management in the Local Court currently happens by way of the committal process. It does not specifically operate to achieve early resolution of the matter, although this is often the outcome.

0.25 The Local Court is the best place to focus the parties on early resolution. It is the most efficient and practical location in which to resolve indictable matters by way of a guilty plea. The Local Court is less expensive than the higher jurisdictions; it has a

wide geographical reach; and magistrates are generally skilled at case management.

0.26 To maximise the prospect of identifying guilty pleas early, we propose a system of Local Court case management to replace the committal process, where each event moves the case forward towards its outcome - whether guilty plea or trial. Under our blueprint Local Court case management will encompass:

- service of the initial brief of evidence by the prosecution on the defence
- putting the defendant into contact with Legal Aid NSW where necessary through Legal Aid's duty lawyer scheme, which operates out of the Local Court
- mandatory criminal case conferencing
- the court determining applications to cross-examine a prosecution witness, and conducting the cross-examination for successful applications, and
- requiring a plea before the matter leaves the Local Court so that the matter may be progressed to trial or sentencing in the District or Supreme Court.

Mandatory criminal case conferencing (Chapter 7)

0.27 Currently, there is no formal structure or mandated requirement for the parties to conduct meaningful discussions while the matter remains in the Local Court.

0.28 A previous attempt to resolve matters early and alleviate late guilty pleas in the District Court through criminal case conferencing in the Local Court ran from 2006 to 2012. It was cancelled based on evidence that the program had not met its stated objective. There were a range of implementation problems:

- the participants did not always have the authority to negotiate
- the program was not consistently implemented across the state, and
- the court could not always be relied upon to apply the relevant discount to an early plea that resulted from a criminal case conference.

0.29 Despite this, the majority of stakeholders support the reintroduction of criminal case conferencing. We agree. Properly implemented, case conferencing provides an important opportunity to discuss the case and resolve it (or refine the issues in it). Under our blueprint, unless there is an earlier guilty plea, criminal case conferencing is to be required by legislation in all matters. It will require engagement by defence representatives and ODPP prosecutors, each having the authority to negotiate and resolve the matter. Guilty pleas entered after the conference in the Local Court will generally qualify for the maximum utilitarian discount in sentencing.

Committal proceedings (Chapter 8)

0.30 Historically committal proceedings served the purpose of ensuring that there was sufficient evidence for the defendant to be committed to stand trial. However, most committal proceedings now occur "on the papers" without oral evidence, or are

simply waived. Oral evidence in a committal hearing is rare. Only 1% of committal matters commenced in the Local Court are discharged by the magistrate.

0.31 Our blueprint proposes replacing committal proceedings with Local Court case management, and removing the court's decision whether or not to commit. This is a contentious issue, and there is a strong contrary view. However, the majority of the Commission consider that the committal process is not currently needed as a practical filter and could be removed if the other elements of the blueprint – which, taken together, provide better safeguards - are implemented. In the majority view, the resources spent on committals would be better directed to the front end of the process to create a more effective and efficient criminal justice system.

0.32 Our blueprint, however, retains the current process for oral evidence to be given in the Local Court. When used appropriately, it can have the effect of prompting pleas of guilty or leading to a change in or withdrawal of the charge. We propose that the limits in s 91 and s 93 of the CPA should be retained. These require "substantial reasons why, in the interests of justice" the witness should be called to give oral evidence, and "special reasons" if the witness is the alleged victim of an offence involving violence.

Application of the discount (Chapter 9)

0.33 Sentence discounts for the utilitarian value of a guilty plea provide an incentive for defendants to enter an appropriate guilty plea early. The application of the sentence discount for the utilitarian value of a guilty plea is, however, inconsistent.

0.34 Currently, for offences against NSW laws, a defendant can receive a sentence discount for the utilitarian value of a guilty plea of up to 25%. Generally the maximum discount should only be applied for a guilty plea given at the earliest available opportunity. However, late entry of evidence and late variations of charges can mean that the "earliest available opportunity" often occurs late in proceedings. Conversely, there is no guarantee that the court will give a maximum discount even where the guilty plea was entered early in the Local Court. This has generated a pronounced scepticism from participants in the system regarding the application of the discount. To a large degree, this has undermined the early resolution objectives of sentence discounting.

0.35 If sentence discounts are to operate as an effective incentive to the entry of an appropriate early guilty plea, the maximum discount for an early plea must be significantly more than for a later plea. Importantly, the cut-off point at which the maximum is no longer available must be strictly defined and consistently applied.

0.36 We recommend a three tiered statutory discount regime. The maximum discount of 25% for the utilitarian value of the plea will only be available for the entry of a guilty plea in the Local Court. This discount should be available later only if the defendant offered to plead to the charge on which he or she is ultimately convicted or in some cases of unfitness. A discount of up to 10% will be available for guilty pleas entered in the higher courts, and a maximum of 5% will be available for day-of-trial pleas.

Case management in the Supreme and District Court (Chapter 10)

0.37 We aim to encourage early appropriate guilty pleas in the Local Court. However, the need to ensure that cases progress, and to continue to explore the possibility of a guilty plea, does not end once the case reaches the Supreme and District Courts. There remains a potential to identify guilty pleas earlier once a matter has reached the higher courts, and to undertake better pre-trial case management to enable trials to progress more efficiently. The legislation is there to support this, but it is underused.

0.38 Currently, the sheer volume of trial matters that enter the District Court overwhelm the court, and the existing case management provisions of the CPA are rarely used. Matters are instead set for trial at arraignment. The court then over-lists on the day of trial with the knowledge that over half the matters will resolve on or before the first day of trial.

0.39 Our blueprint for Local Court procedures should significantly reduce the number of matters that are listed for trial in the District Court and then resolved other than by trial. This will free up the court and court resources so that there can be effective case management under the CPA, including mandatory disclosure.

0.40 We recommend that the joint practice note bring forward the timeframes for disclosure and case management and that a complex trial management list be established in the District Court.

Victims and the indictable criminal justice system (Chapter 11)

0.41 Victims of indictable offences experience dissatisfaction with the current indictable system, principally relating to a lack of information and concerns about charge negotiations, delay and sentence discounts for guilty pleas. Particularly, victims often feel disempowered and disenfranchised when a defendant enters a guilty plea to a negotiated charge that the victim does not believe adequately represents his or her experience. This feeling is compounded when this is followed by the defendant receiving a discount on sentence.

0.42 We recommend strengthening the ODPP's communication with victims. Implementation of the blueprint will settle the charge earlier in proceedings and involve continuity of approach by the ODPP. This should improve the experience of indictable proceedings from a victim's perspective. The statutory sentence discount regime will mean that everyone will have the same expectation about the level of discount to be received for a guilty plea, and it will be well understood that only genuine early guilty pleas will be eligible for the maximum discount.

Reform of criminal justice agencies and evaluation of the blueprint (Chapter 12)

0.43 The changes outlined in this report will not work unless they are supported by operational and cultural change in the agencies and from practitioners that make up

the criminal justice system. This means major structural, operational and cultural reforms in the key agencies, including:

- involving Crown Prosecutors and senior prosecutors earlier in ODPP processes
- the ODPP and the NSWPF complying with the new disclosure regime
- restructuring the fee scale and panel system at Legal Aid NSW, and
- developing new procedures in support of case management in the courts.

0.44 The legal profession will also need to actively participate.

0.45 Current datasets do not tell the full story about the operation of indictable proceedings. Robust evaluation of the blueprint will depend on capturing the most useful data, including timeliness data and data that tracks when guilty pleas are entered. Data collection must improve. Evaluation of the blueprint should comply with the *NSW Government Evaluation Framework.*

Safeguarding against inappropriate guilty pleas (Chapter 13)

0.46 Our closing chapter discusses safeguards in the blueprint to mitigate inappropriate guilty pleas.

Recommendations

Overcoming the obstacles to early guilty pleas: a blueprint for change

3.1 Single practice note (page 53)

The Chief Justice, the Chief Judge of the District Court and the Chief Magistrate should develop a single joint practice note to support the operation of reforms in the management of indictable matters.

Early charge advice

4.1 Implement early charge advice based on a post charge model (page 76)

Early charge advice should be implemented based on the post charge model in Recommendations 4.2-4.6.

4.2 Legislate for charge determinations and certification (page 81)

The *Criminal Procedure Act 1986* (NSW) should be amended to require the Office of the Director of Public Prosecutions and other relevant prosecuting authorities to:

(a) confirm, amend or withdraw the charge, and

(b) certify the confirmed or amended charge

before an indictable matter proceeds to case management in the Local Court.

4.3 Implement professional practices to ensure the timeframe is met (page 82)

The time for the NSW Police Force to provide the initial brief of evidence to the Office of the Director of Public Prosecutions (ODPP) should be set out in:

(a) a protocol between the NSW Police Force and the ODPP

(b) the Prosecution Guidelines of the Office of the Director of Public Prosecutions NSW, and

(c) any NSW Police Force operating procedures.

4.4 Joint practice note to allow a reasonable time for charge determinations (page 83)

The joint practice note in Recommendation 3.1 should allow reasonable time for the NSW Police Force to supply the initial brief of evidence to the Office of the Director of Public Prosecutions (ODPP) and for the ODPP to provide a charge determination.

4.5 Timing of charge determination and certification (page 85)

(1) The *Criminal Procedure Act 1986* (NSW) (CPA) should require the Office of the Director of Public Prosecutions (ODPP) or other relevant prosecuting authority to certify or withdraw the charge within a timeframe ordered by the Local Court. This must be within six months from the first adjournment.

(2) The NSW Police Force or other relevant investigating authority should retain carriage of the matter until the ODPP or other relevant prosecuting authority makes a charge determination.

(3) Where the ODPP or other relevant prosecuting authority has not provided a charge determination, the NSW Police Force or other relevant investigating authority must inform the Local Court of the reasons for non-compliance with the timeframe.

(4) Where the ODPP or other relevant prosecuting authority has not made a charge determination within the timeframe, the CPA should provide that the Local Court may:

(a) adjourn the matter, or

(b) dismiss the matter.

Dismissal should not prevent police laying the charge again at a later date.

(5) Section 118 of the CPA should be amended so that the Local Court's power to award costs applies where there has been unreasonable conduct or unreasonable delay before the charge is certified.

4.6 Expand pre charge advice (page 91)

The current protocol between the Office of the Director of Public Prosecutions and the NSW Police Force on pre charge advice should be reviewed with a view to promoting and increasing its use.

Disclosure in the Local Court

5.1 Statutory early disclosure regime in the Local Court (page 117)

(1) The *Criminal Procedure Act 1986* (NSW) should provide that:

(a) the NSW Police Force must provide an initial brief of evidence to the Office of the Director of Public Prosecutions (ODPP), for the purpose of making the charge determination, and

(b) the ODPP or other relevant prosecuting authority must provide an initial brief of evidence to the defendant.

(2) The joint practice note in Recommendation 3.1 should provide guidance in setting the timeframe for disclosure to the defendant in paragraph (1)(b).

5.2 Initial brief of evidence to be ready before charge can be certified (page 118)

The *Criminal Procedure Act 1986* (NSW) should state that the Office of the Director of Public Prosecutions or other relevant prosecuting authority cannot certify the charge until it can provide the defendant with the initial brief of evidence.

5.3 Content of disclosure (page 118)

The *Criminal Procedure Act 1986* (NSW) should state that the initial brief of evidence is to include the key available evidence that forms the basis of the prosecution case.

5.4 Prosecution Guidelines to specify material to be included in initial brief (page 120)

(1) The Prosecution Guidelines of the Office of the Director of Public Prosecutions NSW should specify the material to be included in the initial brief of evidence.

(2) The disclosure guidelines in paragraph (1) should be developed in consultation with the NSW Police Force and the legal profession, including Legal Aid NSW, the Public Defenders, Aboriginal Legal Service (NSW/ACT) Ltd, the Law Society of NSW and the NSW Bar Association.

(3) The ODPP should consider including in the disclosure guidelines material that is not in admissible or final form, such as presumptive forensic testing certificates, handwritten or electronically recorded statements (where practical) and transcripts of key excerpts from telephone intercepts or surveillance devices.

5.5 Disclosure certificate to accompany initial brief of evidence (page 122)

(1) The *Criminal Procedure Act 1986* (NSW) should require that a disclosure certificate accompany the initial brief of evidence.

(2) The certificate should be signed by the prosecuting authority and state that the authority has disclosed all of the key available evidence that forms the basis of the prosecution case for the present charge.

Local Court case management for offences dealt with on indictment

6.1 Statutory case management regime in the Local Court (page 139)

(1) The *Criminal Procedure Act 1986* (NSW) should:

(a) provide for case management of proceedings for indictable offences in the Local Court

(b) provide that this case management in the Local Court is for the purpose of facilitating:

(i) disclosure of the initial brief of evidence from the prosecution to the defence

(ii) mandatory criminal case conferencing in accordance with Recommendation 7.1

(iii) oral evidence of prosecution witnesses (where permitted) in accordance with Recommendation 8.2, and

(iv) the entry of a plea in the Local Court

(c) specify that the defendant must enter a plea while the matter is in the Local Court, but may do so at any time.

(2) The joint practice note should set out the detail of the Local Court case management scheme.

6.2 Assess likely guilty pleas early (page 142)

(1) The police, prosecution and defence, drawing on their experience and judgment, should assess every case from the time of charge to determine whether it is likely to resolve in an early guilty plea.

(2) Criteria for assessment should refer to the strength of the evidence and be included in the Prosecution Guidelines of the NSW Office of the Director of Public Prosecutions.

6.3 Issues of fitness in the statutory regime (page 144)

If the blueprint is implemented, the *Mental Health (Forensic Provisions) Act 1990* (NSW) should be amended to provide that where the question of unfitness is raised in the Local Court in respect of a matter to be dealt with on indictment:

(a) the matter should be removed to the District Court or Supreme Court for a fitness inquiry, and

(b) if the defendant is found to be fit, whether during the hearing or subsequently by the Mental Health Review Tribunal, the matter should, in an appropriate case, be remitted to the Local Court for completion of the case management process.

6.4 Centralised case management courts (page 147)

(1) The Chief Magistrate, in consultation with the Office of the Director of Public Prosecutions (ODPP) and Legal Aid NSW, should designate centralised Local Court locations for conducting case management of proceedings for indictable offences in the Local Court.

(2) Centralised courts should:

(a) have audio-visual link facilities available, and

(b) where possible, be located in areas where the ODPP and Legal Aid NSW have an office.

(3) The joint practice note in Recommendation 3.1 should outline the circumstances in which a defendant and his or her legal representative may be able to appear at a Local Court case management appearance by way of audio-visual link.

(4) The ODPP and Legal Aid NSW should review their catchment areas for indictable offences with a view to aligning them with each other as much as possible.

Mandatory criminal case conferencing

7.1 Mandatory case conferencing (page 161)

The *Criminal Procedure Act 1986* (NSW) should provide that, unless a guilty plea is entered, a criminal case conference must occur and is to take place before the final case management appearance in the Local Court.

7.2 Identifying whether the power to dispense is necessary (page 161)

The implementation team in Recommendation 12.6 should determine, once there is adequate experience of the new system, whether the court needs to have the power to dispense with criminal case conferencing to avoid waste.

7.3 Flexible form of criminal case conference (page 163)

The *Criminal Procedure Act 1986* (NSW) should provide that attendance at the criminal case conference can be in person, by telephone or by audio-visual link.

7.4 Content of the case conference certificate (page 166)

(1) The *Criminal Procedure Act 1986* (NSW) should provide that a case conference certificate, detailing the outcome of the conference, must be lodged with the Local Court before the final case management appearance.

(2) The implementation team in Recommendation 12.6 should determine the form and content of the case conference certificate.

Committal proceedings

8.1 Abolish the committal decision (page 208)

The *Criminal Procedure Act 1986* (NSW) should be amended to remove committal hearings and replace them with a requirement that the magistrate allocate the matter for trial or sentence on the entry of a plea to an offence to be dealt with on indictment.

8.2 Maintain the Local Court's ability to hear oral evidence (page 214)

(1) The *Criminal Procedure Act 1986* (NSW) (CPA) should continue to include a procedure for a prosecution witness to give oral evidence in the Local Court.

(2) The Local Court should only be able to direct oral evidence if the grounds in s 91(3) or s 93(1) of the CPA are made out.

(3) The joint practice note in Recommendation 3.1 should include directions about the timing and the procedure to be followed when an application is made for a prosecution witness to give oral evidence.

Applying the discount on sentence

9.1 A three tiered statutory discount stream (page 230)

(1) The *Crimes (Sentencing) Procedure Act 1999* (NSW) should set out statutory discounts that recognise the utilitarian value of guilty pleas.

(2) The statutory discounts should have three tiers:

(a) guilty pleas entered in the Local Court should receive a maximum discount on sentence of 25%

(b) guilty pleas entered after the matter leaves the Local Court should receive a maximum discount on sentence of 10%, and

(c) guilty pleas entered on the first day of trial or after should receive a maximum discount on sentence of 5%.

(3) The court should quantify the reduction in penalty given for the utilitarian value of the guilty plea.

9.2 Early resolution with discount stream (page 230)

The joint practice note in Recommendation 3.1 should establish an early resolution with discount stream in the Supreme and District Courts for matters where the defendant has pleaded guilty in the Local Court.

9.3 Court to give reasons why maximum discount not applied (page 231)

Where the discount given for a guilty plea in the early resolution with discount stream is less than 25%, the court should record its reasons why the maximum discount was not given.

9.4 When 25% discount available for late guilty pleas (page 234)

The maximum 25% discount should be available only for pleas entered after a matter leaves the Local Court if:

(a) the defendant offered to plead guilty to a lesser charge in the Local Court, and that plea is later accepted by the prosecution or the charge is found at trial, or

(b) the defendant was found unfit to be tried and:

(i) proceedings have recommenced after a finding of fitness, and

(ii) the defendant enters a plea of guilty at the first appearance.

Case management in the Supreme and District Courts

10.1 Case management in the Supreme and District Courts (page 249)

(1) The joint practice note in Recommendation 3.1 should provide for a trial case management stream in the Supreme and District Courts. The timetables and events may differ for each court but should be broadly aligned.

(2) The joint practice note should move the current timetables for case management and pre-trial disclosure in the Supreme and District Courts forward to allow identification of any further guilty pleas, and to use pre-trial orders more effectively to narrow the issues for trial.

(3) The District Court should establish a complex trial management stream to assist in more actively managing complex matters, including multi-defendant matters.

Victims and the indictable criminal justice system

11.1 Revise Prosecution Guidelines that relate to victims (page 270)

(1) The Office of the Director of Public Prosecutions should hold a conference with the victim of an indictable offence before the criminal case conference. The Crown Prosecutor or senior prosecutor assigned to the case should attend the conference with the victim.

(2) The Director of Public Prosecutions should revise guidelines in the Prosecution Guidelines of the Office of the Director of Public Prosecutions NSW that relate to victims, to reflect the new procedure in the blueprint.

11.2 Improve communication with victims (page 272)

(1) The Office of the Director of Public Prosecutions should:

(a) provide additional training to solicitors and Crown Prosecutors to ensure they are aware of their obligations to victims

(b) consider giving victims the opportunity to put their views in writing about any proposed negotiations with the defendant, and

(c) distribute information about the criminal justice system to victims of indictable offences when they are first consulted.

(2) The NSW Police Force should update its policies about communicating with victims of indictable offences to require investigating officers to provide information about early charge advice.

Reform of criminal justice agencies and evaluation of the blueprint

12.1 Increase accountability by enhancing data collection and analysis (page 278)

(1) The implementation team in Recommendation 12.6 should:

(a) establish a data set of performance indicators that, in particular, tracks the timing of guilty pleas, and

(b) review the information technology systems used to support court case management to ensure they capture the data set of performance indicators.

(2) The NSW Bureau of Crime Statistics and Research should collect and publish the data.

12.2 Review of Legal Aid NSW panel arrangement (page 279)

Legal Aid NSW should review its panel arrangement, and consider measures that:

(a) improve the data collected to measure practitioner performance

(b) impose stricter reporting arrangements in matters that resolve with a guilty plea on the day of trial, and

(c) limit panel membership to those practitioners who demonstrate their ability to represent their clients efficiently and effectively, noting the need to maintain a contestable framework so that lawyers who wish to compete for legal aid work can do so.

12.3 Review of Legal Aid NSW fee structure (page 281)

Legal Aid NSW should review its fee structure to align with the blueprint and ensure that there are incentives for practitioners to resolve matters with appropriate early guilty pleas.

12.4 ODPP front loading of resources (page 283)

The Director of Public Prosecutions should review the processes of the Office of the Director of Public Prosecutions to ensure that:

(a) senior prosecutors are involved in early charge advice

(b) there is continuity of approach so far as possible, and

(c) the opportunities afforded by the blueprint are optimised.

12.5 Crown Prosecutor reforms (page 284)

The *Crown Prosecutors Act 1986* (NSW) should be reviewed to ensure the functions of Crown Prosecutors are consistent with the blueprint reforms.

12.6 Create an implementation team (page 289)

(1) The Secretary of the Department of Justice should appoint an implementation team convened by the Department and including representatives from:

(a) the NSW Police Force

(b) the NSW Office of the Director of Public Prosecutions

(c) Legal Aid NSW

(d) the Public Defenders

(e) Aboriginal Legal Service (NSW/ACT) Ltd

(f) the NSW Bar Association

(g) the Law Society of NSW

(h) the heads of jurisdiction

(i) court administrators

(j) the NSW Bureau of Crime Statistics and Research, and

(k) the Commonwealth Director of Public Prosecutions.

(2) The implementation team should develop and be responsible for an implementation strategy for the cross-agency operation of the blueprint.

12.7 Evaluate the operation of the blueprint (page 290)

(1) The implementation team in Recommendation 12.6 should develop a program for evaluating all elements of the blueprint reforms. The program should accord with the government's evaluation framework, including process and outcome evaluations.

(2) The implementation team should establish at the outset a clear data set to measure the outcomes sought. The necessary changes to supporting information technology systems should be made to ensure the data can be captured.

1. Introduction

In brief

This introductory chapter presents the terms of reference and places the report in context, including the deep stakeholder engagement we undertook to develop its recommendations.

We conclude that achieving early guilty pleas is crucial to a more efficient and effective criminal justice system, including preventing waste and alleviating distress for victims and witnesses. The reforms we propose aim to maximise the number of guilty pleas in the Local Court (an "early plea"), and minimise pleas in the higher courts ("late pleas").

We identify 10 obstacles to early guilty pleas, which together form a self-reinforcing system. To solve these problems, broad system change is required, with new ways of thinking and working for all participants.

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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 of reference were updated to clarify that the inquiry covered all criminal matters.

1.2 The terms of reference require us to conduct:

> an inquiry, pursuant to section 10 of the *Law Reform Commission Act* 1967, 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; and
- any related matter the Commission considers appropriate.

1.3 The terms of reference required us in particular to consider the current working of the criminal justice system and to determine whether models might be developed to encourage early pleas of guilty.

The report in context

1.4 The NSW criminal justice system, from time to time, undergoes scrutiny, development and evaluation. In that context we have been involved with and received information from the Trial Efficiency Working Group, the NSW Sentencing Council and the District Court Spike Working Group. In addition, our stakeholders have been heavily involved in developing a Criminal Justice Strategy for NSW. The work of the NSW Government and the Legislative Council Standing Committee on Social Issues on domestic violence has also been informative.

1.5 The NSW Bureau of Crime Statistics and Research (BOCSAR) has produced some statistics on the entry of guilty pleas, which we have used to inform our recommendations. Academic publications in the field by Professor Roach Anleu, Professor Mack and Dr Flynn have also been extremely instructive in this reference.

1.6 The recommendations contained in this report will contribute to the achievement of Goal 18 in the NSW Government's *NSW 2021* plan, namely to increase community confidence through an efficient court system, and to increase victims' and community understanding of our justice system.

Our process

1.7 We have consulted widely and taken into careful consideration the views of all major stakeholders. Throughout the course of this reference we have spoken with stakeholders from all aspects of the criminal justice system. This includes defence advocates, prosecutors, police, magistrates, judges and victim advocates.

1.8 In June 2013 we invited preliminary submissions to the terms of reference. We received 11 submissions. Between June and October 2013, we engaged with 15 stakeholder groups, including the NSW Police Force (NSWPF); the NSW Office of the Director of Public Prosecutions (ODPP); Legal Aid NSW and the Public Defenders; the Local Court and District Court of NSW; the Law Society of NSW and NSW Bar Association; and a number of local and international academics with expertise in the area.

1.9 The submissions and consultations informed our research and prompted our consultation paper *Encouraging Appropriate Early Guilty Pleas: Models for Discussion* (CP15) in November 2013.

1.10 The consultation paper, which was widely distributed, presented approaches that other jurisdictions had taken to address issues outlined in the ten obstacles to early

guilty pleas (see para 1.45 below), and asked stakeholders to comment on what model or models should be adopted in NSW.

1.11 We received 15 submissions to our consultation paper. A common theme in the submissions was that a significant rethink is required of the process for cases dealt with on indictment. It was suggested that a new simpler, clearer and fairer process is needed that also deals efficiently with sentencing cases – since guilty pleas and sentencing represent the bulk of the criminal process.

1.12 There was general support for early charge advice from the ODPP to the police. The obvious benefits of bringing the parties with the authority to negotiate together early under a criminal case conference were iterated by most stakeholders. The abolition of committals garnered a good deal of support in some quarters - admittedly not unanimously - as did the implementation of a statutory sentence discount regime for the utilitarian value of the plea.

1.13 We have conducted 25 further consultations since the release of our consultation paper. The submissions of Legal Aid NSW and the ODPP suggested similar models. As a consequence, we held a workshop with them to explore common points. This was followed by a meeting with Legal Aid NSW, the ODPP and the NSWPF.

1.14 In total:

- Our reference has received 26 submissions. Preliminary submissions and submissions received in response to our consultation paper are listed at Appendix A and are available on our website.
- We conducted 41 consultations which included meeting in excess of 110 people. The consultations have taken a number of forms including meetings with individuals, roundtables, observations and workshops. All consultations are listed in Appendix B.

1.15 Members of our Division provided ongoing legal expertise. We engaged academic experts to secure ongoing advice and assistance regarding contemporary studies in the fields and applicable legal theories.

1.16 We thank our Division and experts, all those who made submissions and all who contributed to our consultations. These submissions and contributions were an essential part of the fabric of this report. We also thank the many people who helped to organise consultations and the significant number of people who assisted us to understand the practical operation of the criminal justice system and related agencies.

The scope of this report

1.17 Below we discuss the omission of summary criminal proceedings from the report and the extent to which our proposed reforms will affect Commonwealth prosecutions. Late guilty pleas occur in summary proceedings. However, late guilty pleas are more common and have the most impact in indictable proceedings, which can include Commonwealth offences. Our stakeholders identified major issues with

indictable proceedings, and our report focuses on improving the rate of early guilty pleas in this jurisdiction.

Summary/indictable proceedings

1.18 In July 2013 our terms of reference were expanded to explicitly include the summary jurisdiction. The Local Court hears the majority of criminal matters in NSW, most of which are finalised with a guilty plea. In 2013, the Local Court dealt with 104 982 people on 242 337 charges:[1] 88.7% (93 075) of people were found guilty of which 73% (68 341) entered a guilty plea.[2]

1.19 Of all people sentenced in the Local Court, 34 431 were fined, 13 600 received a bond without conviction, 13 480 received a bond with supervision and 7408 were imprisoned.[3] Drink driving was the most common offence.[4]

1.20 We do not know at what point in the proceedings guilty pleas were entered, or to what offences. However, BOSCAR reports that guilty pleas which resulted in a sentence being passed generally took a median of 32 days from first appearance to determination in the summary jurisdiction.[5] This tends to indicate that generally pleas are offered early in summary proceedings. This inference was well supported in consultations, where it was submitted that the late entry of guilty pleas in summary proceedings is not an issue that causes delay or consumes resources as it does in the District Court.

1.21 Nonetheless, in the consultation paper we reviewed case management practices in other summary jurisdictions with emphasis on case conferencing programs. Particular focus was given to the Victorian program of summary case conferences. This is a program where the parties meet privately to discuss the issues with an objective of resolving the matter. Statistics from that jurisdiction showed that 44% of all matters that underwent a summary case conference resolved in a guilty plea.[6]

1.22 The stakeholder response to introducing criminal case conferencing or other case management practices into the NSW summary jurisdiction was lukewarm, indicating little appetite for reform in this jurisdiction. Further case management and the introduction of case conferencing was not supported by the NSW Bar Association,[7]

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1. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2013* (2014) Table 1.1 and 1.2.
2. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2013* (2014) Table 1.3
3. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2013* (2014) Table 1.7-1.11.
4. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2013* (2014) Table 1.1 and 1.2. There were 19 098 people were charged with drink driving, followed by assault (15 454) and driving licence offences (12 284).
5. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2013* (2014) Table 1.13. Matters that went to a defended hearing generally took 107 days.
6. Information provided by Victoria Police (22 October 2013); NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) [10.8].
7. NSW Bar Association, *Submission EAEGP4*, 9.

Legal Aid NSW[8] nor by the Chief Magistrate of the Local Court.[9] The Chief Magistrate's submission referred to the Productivity Commission's *Report on Government Services* to show that the Local Court of NSW currently outperforms all other magistrates' courts in Australia. The Chief Magistrate also pointed to the low proportion of matters that proceed to a defended hearing, currently just under 15%.[10]

1.23 Police prosecutors conduct the majority of prosecutions in the Local Court. By contrast, they supported further case management by the court. This included court intervention and sentence indications.[11] The Chief Magistrate opposed the introduction of sentence indications in the summary jurisdiction, and observed that, in regional areas with only one magistrate, the scheme (which relies upon at least two magistrates – one to give the indication and the other to preside over the hearing where the indication is not taken up) would fail.[12] The ODPP saw some value in case conferencing in the summary jurisdiction but only in more serious matters.[13] The Law Society of NSW and NSW Young Lawyers were not opposed to case conferencing so long as the police prosecutor had full authority to negotiate.[14]

1.24 After reviewing the data and all stakeholder submissions, and having conducted consultations in the area, it is our view that there is currently little need for major reform in criminal procedure in the summary jurisdiction. This does not mean that there is no need for further streamlining. Rather, by comparison, the need for reform in the indictable jurisdiction is particularly stark. Accordingly, we limit the scope of our review to the area where the major problem resides, that is indictable proceedings that are intended to resolve in the District Court.

Commonwealth prosecutions

1.25 Offences against the laws of the Commonwealth are prosecuted primarily by the Commonwealth Director of Public Prosecutions (CDPP).[15] Indictable Commonwealth offences relate to matters such as fraud, serious drug offences, counter-terrorism, money laundering, human trafficking, people smuggling, child exploitation and cybercrime.[16]

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8. Legal Aid NSW, *Submission EAEGP11*, 21-22.
9. Chief Magistrate of the Local Court of NSW, *Submission EAEGP6*, 5.
10. Chief Magistrate of the Local Court of NSW, *Submission EAEGP6*, 5.
11. NSW Police Force, *Preliminary Submission PEAEGP11*, 1-2.
12. Chief Magistrate of the Local Court of NSW, *Submission EAEGP6*, 5.
13. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 12.
14. NSW Young Lawyers, Criminal Law Committee, *Submission EAEGP12*, 18; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission EAEGP9*, 6.
15. The NSW Director of Public Prosecutions may prosecute Commonwealth offences if he or she, with the consent of the Attorney General, holds an appointment to do so: *Director of Public Prosecutions Act 1986* (NSW) s 24.
16. Commonwealth Director of Public Prosecutions, "Crimes We Prosecute" <http://www.cdpp.gov.au/crimes-we-prosecute/>.

1.26 Prosecutions for indictable Commonwealth offences are conducted in the main in state courts.[17] State laws regarding arrest, custody, bail, procedure, evidence and the competency of witnesses apply to Commonwealth prosecutions conducted in state courts.[18] There is, however, a separate sentencing regime that applies to federal offences.[19]

1.27 Commonwealth prosecutions make up only a small proportion of the total number of indictable prosecutions conducted in NSW each year. For example, in 2012/13, 283 CDPP matters were committed for trial or sentence; compared with 3506 NSW ODPP matters during the same period.[20]

1.28 The structure and role of the CDPP differs from that of the ODPP in a number of significant respects. First, the CDPP briefs private barristers to conduct prosecutions on its behalf. Secondly, the CDPP has an established system of pre charge advice, where an investigating agency (mostly the Australian Federal Police) will forward a brief of evidence to the CDPP for a determination as to whether to commence a prosecution and, if so, on what charge or charges.[21] Commonwealth prosecutions are often the result of lengthy investigations and there is generally little need for immediate arrest and detention. Finally, unlike the ODPP, the CDPP assumes carriage of the matter from the outset. There is no initial period prior to committal where a police prosecutor has carriage of the matter.[22]

1.29 Many, but not all, of our recommendations are intended to apply to indictable Commonwealth prosecutions conducted by the CDPP in NSW. The application of our recommendations to the CDPP is discussed in relevant places throughout the report. For example, our recommended scheme of early charge advice in Chapter 4 is, for the most part, expressed not to apply to the CDPP. This is because the CDPP already has a comprehensive process of pre charge advice in place between it and the relevant investigating agencies. The restructuring of the sentence discount that we recommend in Chapter 9 cannot apply to Commonwealth offences due to the separate sentencing regime under the *Crimes Act 1914* (Cth). However, other procedural reforms, such as those relating to disclosure, case management in the Local Court and criminal case conferencing are intended to apply to both the CDPP and ODPP. We consider they will create efficiencies and save resources in both Commonwealth and state prosecutions.

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17. *Judiciary Act 1903* (Cth) s 68(2). The Federal Court of Australia has a limited indictable criminal jurisdiction to hear prosecutions for serious cartel offences: *Federal Court of Australia Act 1976* (Cth) pt III div 2A.
18. *Judiciary Act 1903* (Cth) s 68, s 79(1).
19. *Crimes Act 1914* (Cth) pt 1B.
20. Information provided by Commonwealth Director of Public Prosecutions (13 June 2014); NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 27. See further discussion in Chapter 8.
21. Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2009) [3.4].
22. See Commonwealth Director of Public Prosecutions, "How We Differ From State DPPs" <http://www.cdpp.gov.au/prosecution-process/how-we-differ-from-state-dpps/>.

Late guilty pleas in the current system

1.30 The right to be presumed innocent and to go to trial when accused of a serious offence is fundamental to our criminal justice system. However, the great majority of criminal cases end with the entry of a guilty plea and a sentence then being imposed. A fundamental conclusion reached in this report, and not assailed by any of the stakeholders, is that securing appropriate guilty pleas early in a criminal matter is desirable and indeed necessary for the effective and efficient operation of the criminal justice system. If a matter is to proceed on a guilty plea, then obtaining that plea early is more efficient, often better for the defendant, and certainly better for victims and witnesses.

1.31 We accept that there will always be a level of late pleading as defendants are reluctant to face up to a plea that they eventually come to see as inevitable. However, we consider that many features of our current system positively encourage late pleas. These features are inefficient, unsustainable, and not in line with community expectations.

1.32 In saying this, we do not minimise the importance of the basic rights of a defendant to a fair trial and to a fair criminal process. The changes we propose are intended to reinforce those rights, and also meet the community's proper expectation of an efficient system that secures the overall objective of achieving justice for all participants.

Defining "late" guilty pleas

1.33 We are concerned with developing an indictable system that encourages the entry of appropriate guilty pleas as early as possible. A guilty plea entered at any time benefits the system. However, that benefit is greater the earlier the plea is entered. For the purposes of understanding the problem, in this report we have drawn a point-in-time distinction between "early" and "late" pleas.

1.34 This report defines "early" guilty pleas as guilty pleas that are entered before the matter is sent for trial in the higher court. This means an early guilty plea is any plea entered in the Local Court. Late pleas are then any plea entered at or after the first appearance in the higher court.

1.35 We recognise that this is not a perfect distinction. There may be occasions when a guilty plea entered at the first appearance in the higher court will mean that the "late" plea was entered only days after the matter exited the Local Court. On the other hand, there may be matters that languish in the Local Court for a long time before a guilty plea is entered and under our distinction these will still be considered "early" pleas. However, for the purposes of clarity and certainty – especially when applying the discount on sentence for the utilitarian value of a guilty plea[23] – it is important to draw a very clear line.

23. For our recommended statutory discount regime see Chapter 9.

1.36 In NSW the line between "early" and "late" guilty pleas has historically been drawn at the point of transfer from the Local Court to the higher courts.[24] We consider that this is still the best place to draw the line. There are three key reasons for this. First, the line between an "early" and "late" guilty plea should not become a moveable target. Plainly this could occur if a guilty plea entered at arraignment were to be treated as an "early" plea. Arraignment does not always occur at the first appearance in the higher court. Secondly, a guilty plea entered in the higher court unnecessarily wastes further criminal justice resources. A plea at arraignment or even first appearance in the higher courts still requires extra time, possible briefings of senior prosecutors and barristers, and uses the higher court's staff and facilities.

1.37 Finally, our reforms aim to strengthen Local Court processes and case management which will maximise the opportunity for appropriate early guilty pleas. These reforms include introducing ODPP early charge advice and the early intervention of Crown Prosecutors or senior prosecutors, and bringing back criminal case conferencing.

The incidence of late guilty pleas

1.38 In Chapter 2 we present statistics relevant to guilty pleas and court efficiencies in NSW. The statistical evidence from BOCSAR is stark and paints a compelling picture. In 2013, 83% of all criminal matters proved in the District Court were resolved by a guilty plea. 35% (915) of all proven guilty pleas occurred after the matter had been committed for trial. In the 2012/13 financial year, the ODPP reported that 66% of all late guilty pleas occurred on the day of trial.

1.39 In practical terms this means that over 900 matters in 2013 resolved in a guilty plea after arraignment. A large proportion of these pleas were entered on the day of trial. The consequential waste is obvious when it is realised that each matter, more than likely, will have been already mentioned at least twice in the Local Court prior to committal, have undergone committal procedures in the Local Court, and have been the subject of an arraignment in the District Court before being listed for trial.

1.40 A further telling statistic, one which underscores why it is that early guilty pleas are not presently occurring, is that, in 2012, the majority of guilty pleas entered on the first day of trial were not to the original charge (63%). There are various reasons for this which we address in this report. Primarily we focus on the process of charging, and the content and disclosure of the brief of evidence. All stakeholders agree that these are pivotal to getting the system right.

1.41 We note as well that the problems evidenced by the statistics have in recent times been compounded by a serious escalation in the number of matters listed for trial in the District Court.[25] The situation is now one that must be addressed before these problems become impossible to resolve.

1.42 There are other symptoms of problems in the system. Many matters that commence in the indictable jurisdiction are ultimately withdrawn or resolved in the Local Court.

24. See previous case conferencing programs in Chapter 7.
25. See Figure 2.16.

In 2012/13, 41% of indictable matters did not proceed to the higher courts mostly because they were dropped by the prosecution or the charge was downgraded and then resolved in the Local Court. Further statistics on Local Court disposition of indictable matters are presented at para 2.6. These statistics reinforce the need for earlier identification of matters unlikely to proceed to the higher courts.

The consequences of late guilty pleas

1.43 The present system encourages unnecessary delay in the securing of guilty pleas. It entails a host of unnecessary expense and cost to the parties and the State:

- The prosecution and the defence's preparation for trial will have been effectively wasted, since in the majority of cases a trial will never be held. The valuable resources of the ODPP, the NSWPF and Legal Aid NSW are unnecessarily depleted in preparation for a trial that will never take place. This means that in many instances the financial resources of the State are needlessly thrown away.
- The resources of the NSWPF are diverted from other necessary work and police witnesses are inconvenienced.
- Most importantly, the victims of crime and those close to them may have to endure many months, if not years, of prolonged distress and uncertainty awaiting the commencement of the trial. This is compounded when guilty pleas are submitted on the steps of the court. Day-of-trial guilty pleas are anathema to the efficient and humane operation of a criminal justice system.

Why late guilty pleas happen: 10 obstacles in a self-reinforcing system

1.44 We have identified ten principal factors that tend to obstruct early appropriate guilty pleas. These factors are gathered from the literature and the experience of practitioners. We identified these in our consultation paper and stakeholders confirmed their reality. Although there is a degree of overlap between some of the factors, it is useful to set them out because they reflect the practical reality of our current system and are in many respects self-reinforcing.

1.45 The factors are:

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 prosecution to overcharge early, and that the charges will be reduced as the proceedings advance.
4. The prosecution accepts a plea to a lesser charge late in the proceedings.
5. Crown Prosecutors with the authority to negotiate are not briefed until 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 Discontinuity of legal representation means that advice and negotiations are inconsistent.

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; and/or is hopeful that the case will fall over due to lack of witnesses or evidence.

1.46 These factors reinforce one another in complex ways, for example:

- Late service of the brief drives defendants' expectations that the nature of the case will change.
- Late briefing of prosecutors leads to late reassessment of the charge, late negotiations, late change to the charge, and a greater likelihood that a sentencing discount will be available even to the courtroom door plea. The power and purpose of sentence discounts for the utilitarian value of a plea is thereby diluted.

1.47 To these factors may be added the present system of listing and hearing criminal trials in the District Court. The court allocates a trial date within six months of indictment. On that date the court extensively over-lists to accommodate the large portion of matters that will be resolved on the day of trial. The court is then able to proceed with those trials that do go forward, though some of those may be required to wait until later in the week to proceed.

1.48 This means that multiple cases must be prepared and ready to proceed. This must result in defence and prosecution waste. Witnesses are prepared who are never needed because the defendant pleads or the matter is not reached. Crown Prosecutors are reassigned, and have to prepare at the last minute for other cases. The reassignment can result in a different view of the case, and a changed attitude to the proper charge. Defendants are not encouraged to plead earlier, because they know they may face a late downgraded charge. And because the charge may change, they may argue this is their first opportunity to plead and they should have access to a better discount, notwithstanding the lateness of the plea.

1.49 This also has a self-reinforcing aspect. The listing method relies on the likelihood of last minute pleas, and, as a result, encourages last minute pleas. While, from the court's perspective, it can be an efficient method to manage the caseload pressures, over-listing does nothing to encourage an early plea decision.

Broad and systemic change is required

1.50 All the submissions have outlined significant concerns with the current system for cases dealt with on indictment. The stakeholders with the most involvement in the system - the ODPP and Legal Aid NSW - have urged us to consider fundamental

reforms. From the evidence we believe that it is not an overstatement to say our system has major systemic issues and is presently in, or approaching, a state of crisis.

1.51 It is imperative that a range of changes and structural reforms be considered and introduced to repair and revitalise what is effectively a broken system. What is also apparent is that any system (or combination of systems) that seeks to encourage guilty pleas will simply fail at the outset if it is superimposed on a system that effectively promotes late guilty pleas. We need to look more deeply, and consider the system as a whole.

Directions of reform

1.52 In general terms the broad direction for reform is clear. Though not all the stakeholders agree on all aspects of our proposals, there is considerable agreement about some of the themes that need to be pursued:

(1) The charge must be accurately determined as early as possible, rather than during or at the end of the process as presently occurs. This relies on a full and early assessment of the charge by the ODPP, based on a sufficient brief of evidence.

(2) A framework for disclosure must be established. The police must be clear on what the ODPP requires to assess the charge, and the defence must be clear on what it will receive from the prosecution at the earliest possible opportunity. We recognise that the brief must be adequate to support the charge determination and defence assessment, and that this level of disclosure will not necessarily be to the same level as would be needed for a trial.

(3) A representative of the prosecuting authority, with full authority to negotiate, must be put into direct and early negotiation with a defence representative who is equally authorised to enter a guilty plea on the defendant's behalf. To these ends, resources should be switched away from the end process – where they are mostly wasted – and deployed in a "front-ended" system.

(4) A framework for case management in the courts, and a formal requirement for case discussion is an important aspect of the proposal. The parties must have clear expectations as to how the case will proceed.

(5) There should be a restructured plea discount system that recognises the utilitarian benefit of the plea and works to provide clear incentives to enter a plea early. It should not reward late pleas.

1.53 We recognise that the system for cases dealt with on indictment is resource constrained. Limited public resources are available for the courts, Legal Aid NSW, the ODPP and the NSWPF. The expectation of government is that those resources will be deployed in the most cost effective way possible. We have conducted this inquiry with this in mind. We have looked critically at processes, such as the committal decision, to consider whether they add value to the progress of cases,

and whether they do in fact provide value in protecting rights or moving cases toward resolution.

New thinking and new ways of working are needed

1.54 We conclude these introductory comments by stressing that what is essential is a complete change in thinking about indictable proceedings. This will impact on both the prosecution and defence in all serious criminal matters. It will require the police to adjust their practice, procedure and protocols. It will require judges to enter more vigorously upon case management and to deny sentencing discounts where none are warranted.

1.55 The criminal justice system framework we propose in our blueprint for indictable proceedings takes a multifaceted approach to address the late entry of guilty pleas. The successful encouragement of appropriate early guilty pleas requires a holistic, inter-agency and cross-disciplinary response. For this reason, we do not recommend adopting a simple stand-alone procedure to bolt on to the existing process. Instead we present a blueprint for whole-of-system reform. We have listened to the stakeholders and looked at the evidence. Some of the recommendations we make are contentious and not all the stakeholders agree. We recognise the strength of views in this area, but we are driven to these recommendations by the nature of the problems in the current system. These recommendations should be seen as a package. Cherry-picking recommendations would be, in our view, a recipe for failure to meet the key goals of the reference.

1.56 As outlined above, the systemic issues are self-reinforcing. Piecemeal change in this situation is not likely to be successful. We have considered carefully whether we could make more evolutionary recommendations. We have concluded against this course because we do not see how such an approach could break the cycle that presently leads to late guilty pleas.

1.57 Our proposed model relies on a range of measures that fundamentally switch resources to the front of the process rather than continue the "end-loading" that is a negative feature of the present system. We have not hesitated to recommend changes to our present system where earlier procedures have seemed outmoded or in need of updating and change.

The structure of this report

1.58 This report presents an outline of our blueprint for change and then details each element in the following chapters.

1.59 There are 13 chapters in this report:

- **Chapter 2** looks at recent research and data in the area.
- **Chapter 3** presents an overview of the current criminal justice system, highlights the existing obstacles to early appropriate guilty pleas and outlines our blueprint for reform to the criminal justice system, which is then broken up and detailed in the following chapters**.**

- **Chapter 4** recommends a model for early charge advice.
- **Chapter 5** presents a statutory disclosure regime for indictable proceedings in the Local Court.
- **Chapter 6** overviews our proposal for Local Court case management.
- **Chapter 7** recommends the reintroduction of criminal case conferencing in the Local Court.
- **Chapter 8** puts forward our rationale for abolishing committals.
- **Chapter 9** recommends a staggered statutory sentencing discount regime that reflects the utilitarian value of the plea.
- **Chapter 10** looks to case management in the higher courts.
- **Chapter 11** reviews the blueprint from the perspective of victims of crime.
- **Chapter 12** overviews the institutional restructure and administrative reform required to implement the blueprint successfully. It also presents a program of evaluation.
- **Chapter 13** looks at ways to mitigate inappropriate guilty pleas.

2. Guilty pleas in NSW: current status of indictable District Court matters

In brief

Many matters that start on the indictable track ultimately resolve as a summary matter in the Local Court. Most matters that remain in the indictable jurisdiction resolve through a guilty plea. A majority of these guilty pleas are entered while the matter is still in the Local Court.

Once matters enter the District Court, most guilty pleas occur on the day of trial, and are often to a changed charge. The District Court continues to be under pressure, with rising criminal caseloads and rising delay. There is a need for reforms that move guilty pleas earlier in the process, preferably to the Local Court.

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

2.2 We also include current case information for the District Court. This shows a court under increasing pressure, with growing delays for both trial and sentence matters.

What happens in the Local Court?

2.3 As a preliminary part of the picture, we need to look at what happens to cases that are destined for the indictable jurisdiction while they are in the Local Court.

2.4 Unfortunately there is a lack of data about Local Court processes leading up to committal. In part this is because it is only possible to identify those cases that will potentially go to trial on indictment after the Director of Public Prosecutions (DPP) has elected to proceed (where election is required) and cases have been lodged in the court.

2.5 Internal data kept for the NSW Office of the Director of Public Prosecutions (ODPP) internal record keeping purposes is the best available data on Local Court disposals of indictable matters.

Outcomes of indictable matters in the Local Court 2012/13

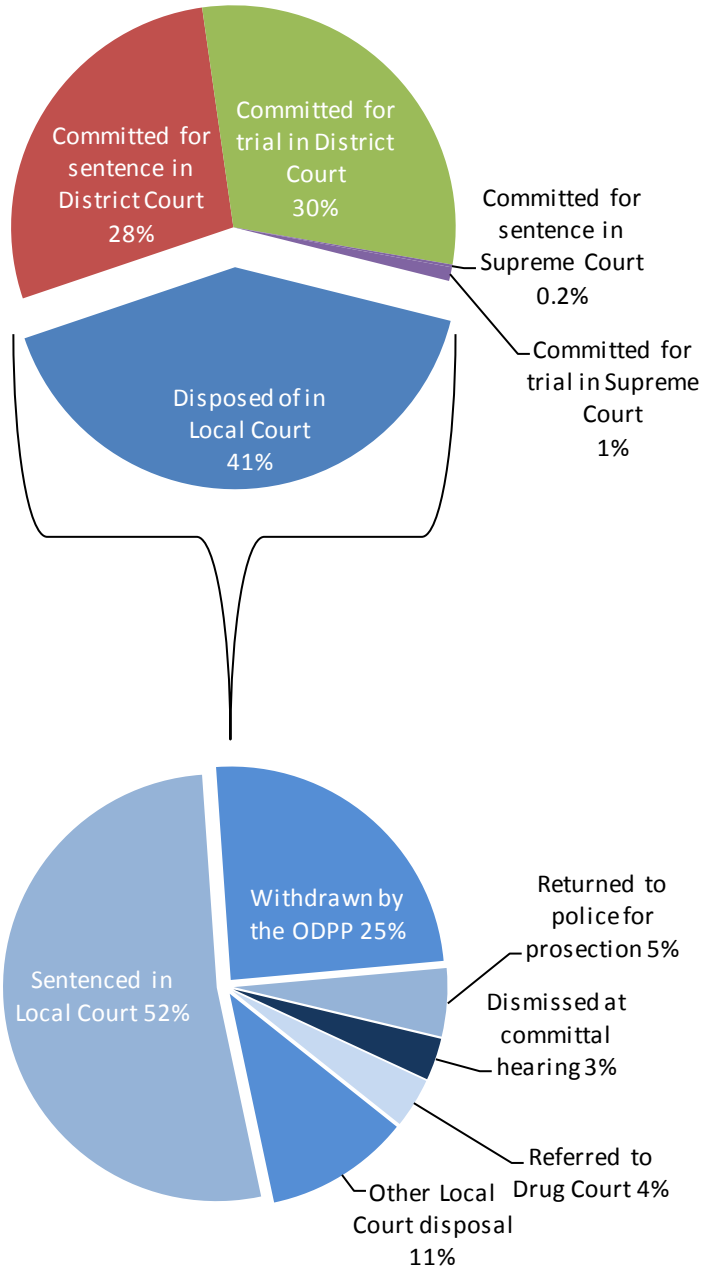
2.6 On the ODPP's figures, there were 5947 "completed committal matters" in 2012/13 (that is, indictable matters that were dealt with by the ODPP in the Local Court that had an outcome). Of these:

- 41% were disposed of in the Local Court (did not proceed to a higher court)
- 30% were committed for trial in the District Court (with 1% committed for trial in the Supreme Court), and
- 28% were committed for sentence in the District Court (with 0.2% committed for sentence in the Supreme Court).[1]

2.7 Of the matters disposed of in the Local Court (41% of all matters dealt with by the ODPP), 25% were withdrawn by the DPP; 52% were sentenced for an offence that could be dealt with in the Local Court (either a summary offence or an indictable offence dealt with summarily); and 3% were discharged by the magistrate at committal (which is less than 1% overall). This is shown in Figure 2.2.

1. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 27.

Figure 2.1 and 2.2: Outcomes of indictable matters in the Local Court 2012/13



Source: Figure 2.1: NSW, Office of the Director of Public Prosecutions, Annual Report 2012/2013 (2013) 28; Figure 2.2: Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2014)[2]

2. "Other Local Court disposal" includes matters downgraded and dismissed at a summary hearing, dismissed because the ODPP offered no evidence to the charge, dismissed under the *Mental Health (Forensic Provisions) Act 1990* (NSW), placed on a Form 1, merged with other matters, or the defendant died or could not be located.

Late guilty pleas in the District Court

Snapshot

In recent years just over half of matters committed for trial in the District Court resolved in a late guilty plea. This constituted 35% of all guilty pleas entered in NSW in 2012 and 2013.

In 2012, approximately 61% of late guilty pleas were entered on the first day of trial. The majority of pleas (63%) were not to the original charge.

2.8 Matters that are to be heard on indictment are generally committed from the Local Court to a higher court. Matters that are committed for sentence are ones in which an "early" guilty plea has been entered. 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.

2.9 Data from the NSW Bureau of Crime Statistics and Research (BOCSAR) shows that, of indictable matters finalised in 2013, 50.17% (1756) were committed for sentence and 49.82% (1744) were initially committed for trial,[3] of which 52.76% (915) eventually entered a plea of guilty.[4]

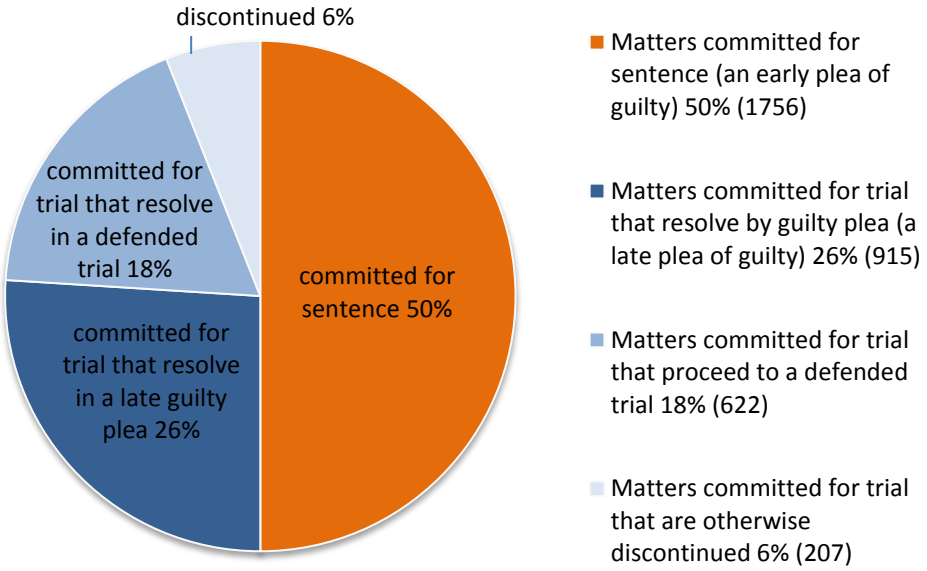
How many matters resolve by a plea of guilty?

2.10 In 2013, 83% (2695) of all matters proved in the District Court resolved by a guilty plea.[5] Generally, of these guilty pleas:

- **65% were entered at or before committal**: these are pleas of guilty entered while a matter is in the Local Court, 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 at or before the trial began in the District Court.

3. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2013* (2014) Table 3.2.
4. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2013* (2014) Table 3.6. This excludes 46 cases where a person pleaded guilty to one charge but was acquitted of others.
5. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2013* (2014) Table 3.6. A total of 3255 matters were proved. This excludes findings of not guilty due to mental illness (16) and matters not proved, ie where charges were not proceeded with or otherwise disposed (229). There were 1734 early guilty pleas, 915 late guilty pleas and 46 cases where a person pleaded guilty to one charge but was acquitted of others.

Figure 2.3: A snapshot of all indictable matters resolved in the District Court of NSW 2013



Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics 2013 (2014) Table 3.2[6]

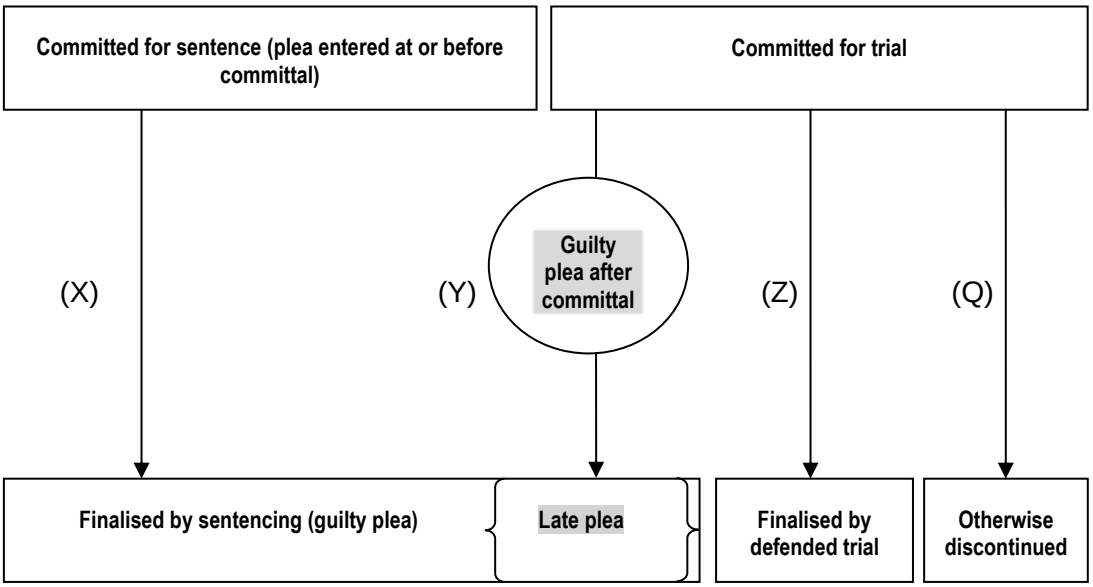
2.11 Further analysis of this breakdown is supplied below.

How many matters resolve by a late guilty plea?

2.12 A "late" plea is generally defined as any guilty plea entered after a person has been committed for trial in the District Court, as illustrated by Y in the diagram below.

6. "Matters committed for sentence" includes 22 matters committed for sentence that were then otherwise discontinued.

Figure 2.4: Data measures for late guilty pleas



2.13 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 2.5 we calculate Y/(Y+Z+Q).[7] 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.

2.14 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)[8] shown in Figure 2.6. This measure attempts to ascertain the true extent of the problem by asking what proportion of all guilty pleas are "late" pleas.

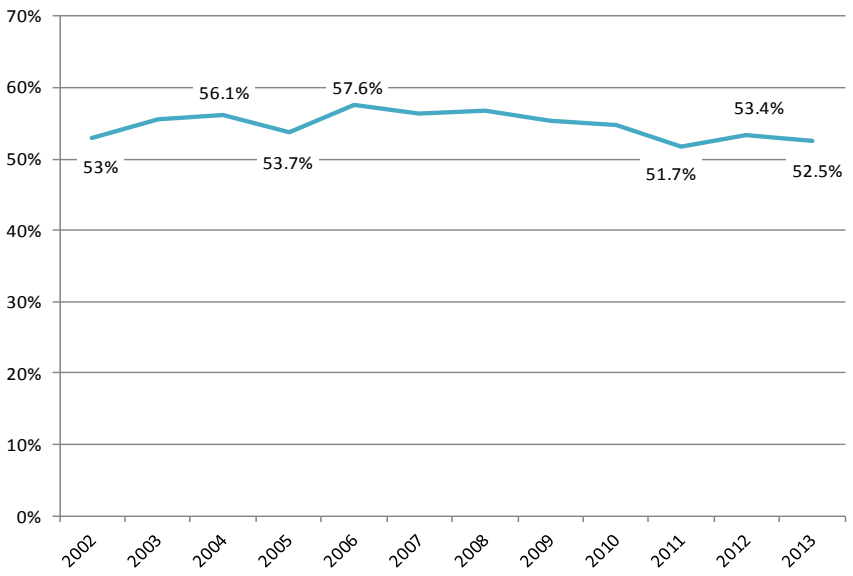
Late pleas measured by matters committed for trial that resolve in a guilty plea

2.15 Figure 2.5 shows the percentage of cases initially committed for trial that were finalised through a guilty plea (rather than trial or otherwise). Figure 2.5 shows that, since 2002, more than half of the matters committed for trial in NSW actually resolved in a late guilty plea.

7. The number of late guilty pleas divided by (the number of late guilty pleas + matters that resolve by trial + matters that are otherwise discontinued).

8. The number of late guilty pleas divided by (the number of early guilty pleas + late guilty pleas).

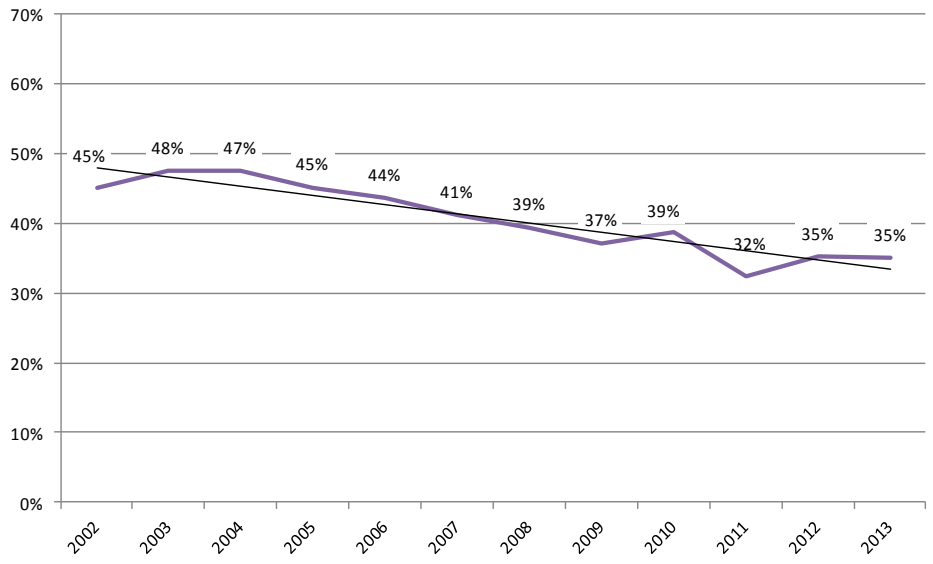
Figure 2.5: Percentage of cases initially committed to trial actually finalised by sentencing (a late guilty plea after committal) 2002-2013



Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics (2002-2013)

Late pleas measured by guilty pleas entered after committal

Figure 2.6: Percentage of cases finalised by a guilty plea in the District Court of NSW, where a guilty plea was entered late 2002-2013



Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics (2002-2013)

2.16 This measure shows an increase in late guilty pleas in 2012 and 2013 only when compared to 2011. In 2011, 32% of all guilty pleas were received “late”. In 2012, it was slightly higher at 35%, where it remained for 2013.

2.17 The slight increase in 2012 and 2013 needs to be contextualised against a backdrop of gradual and steady improvement in reducing late guilty pleas. When measured as a proportion of all guilty pleas, the number of late guilty pleas have been steadily falling. The black trend-line in Figure 2.6 indicates that the 2011 figures could be an aberration, rather than the 2012 and 2013 figures.

How many late guilty pleas occur on the day of trial?

2.18 Day-of-trial guilty pleas – commonly referred to as pleas that occur "on the steps of the court" – epitomise the issues that late guilty pleas cause to the criminal justice system. Pleas that are submitted on the steps of the court are particularly resource intensive, especially if the court is sitting and a jury has been empanelled. Day-of-trial pleas impact upon victims and witnesses who have spent months or even years preparing for the trial. We discuss the problems caused by of day-of-trial pleas in para 1.43. Below we outline the extent of day-of-trial pleas in NSW.

Timing of late pleas

2.19 BOCSAR does not report precisely 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 ODPP.[9]

2.20 Figure 2.7 shows the outcomes of matters that the ODPP recorded as committed for trial in 2011/12, including whether a late plea was entered at arraignment or between arraignment and the trial date. 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 and disclosure as discussed in Chapters 4 and 5.

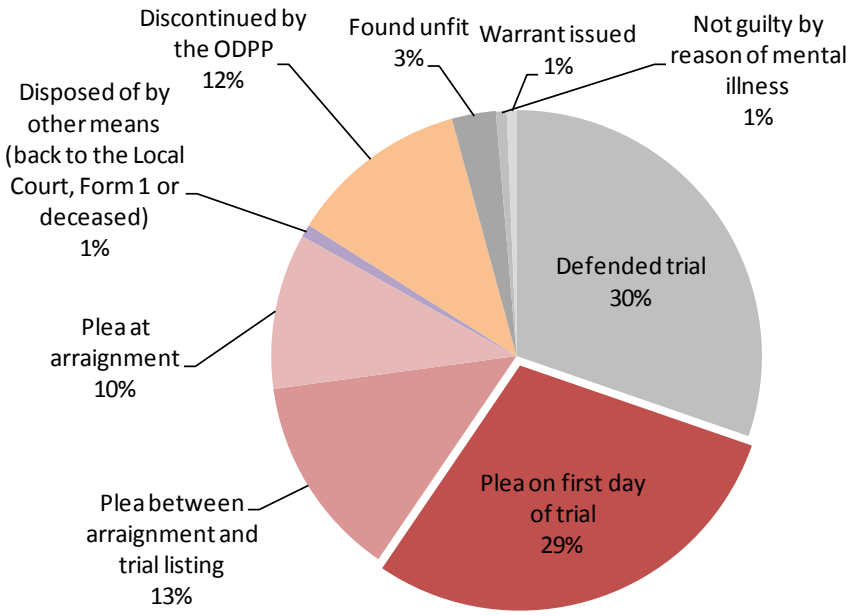
2.21 According to the ODPP data, just over half the matters committed for trial were actually finalised by a plea in 2011/12. This aligns with the proportion reported by BOCSAR.

2.22 The ODPP data also shows that of all matters committed for trial:

- 30% resolved by defended trial
- 29% resolved in a guilty plea on the first day of trial
- 23% resolved in a guilty plea between arraignment and the first day of trial
- 12% were discontinued by the prosecution, and
- 6% were disposed due to mental illness, issuing of a warrant or by other means.

9. We note that the numbers from the ODPP vary from those supplied by BOCSAR due to, among other things, differences in counting rules and the exclusion of Commonwealth matters.

Figure 2.7: Outcome of matters committed for trial 2011/12

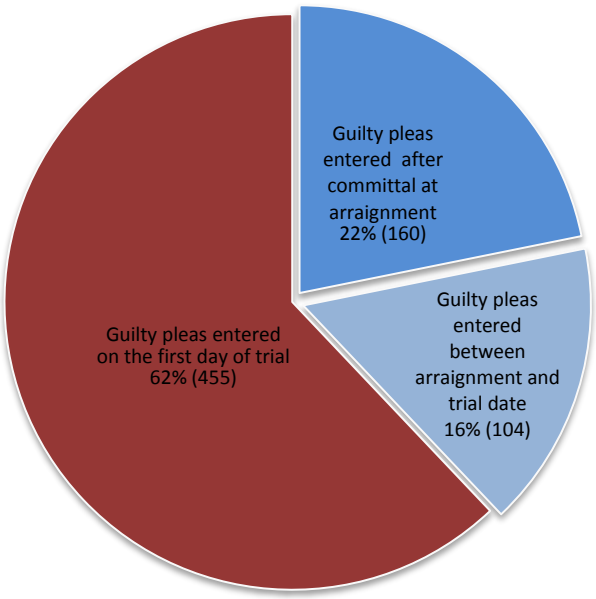


Source: NSW, Office of the Director of Public Prosecutions, Annual Report 2011-2012 (2012) 38; Information provided by NSW, Office of the Director of Public Prosecutions (3 July 2013)

2.23 Figure 2.7 shows the proportion of day-of-trial pleas received to the outcome of all matters committed for trial. 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.

2.24 Figure 2.8 shows that of the 719 late guilty pleas in 2011/12, 62% (455) were received on the day of the trial, 22% (160) were received at arraignment and 16% (104) were received between arraignment and the trial date.

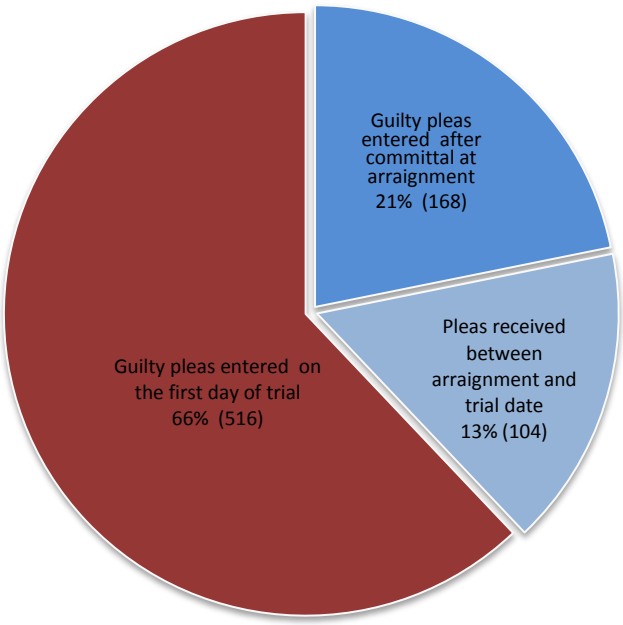
Figure 2.8: Precise timing of late guilty pleas in the District Court 2011/12



Source: Information provided by NSW, Office of the Director of Public Prosecutions (3 July 2013)

2.25 The 2012/13 ODPP data in Figure 2.9 shows a slight increase in day-of-trial guilty pleas, at 66% (516) of all late guilty pleas. Pleas entered at arraignment were stable at 21% (168) and pleas entered between arraignment and trial slightly decreased at 13% (104).

Figure 2.9: Precise timing of late guilty pleas in the District Court 2012/13



Source: Information provided by NSW, Office of the Director of Public Prosecutions (3 July 2013)

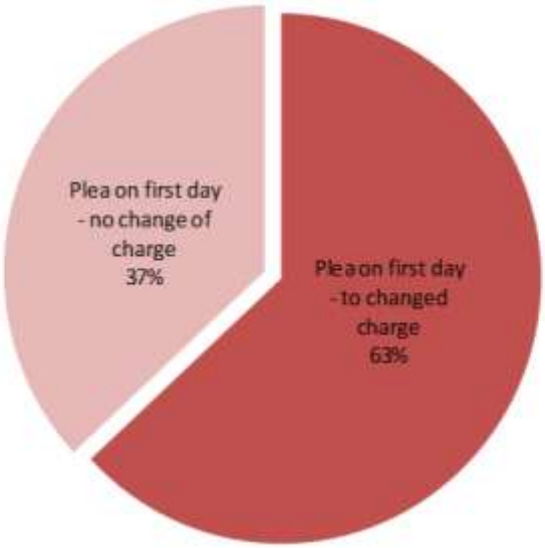
2.26 Day-of-trial pleas equate to 15% (516) of *all matters* committed for trial or sentence to the District Court (3464) in the same period.[10]

The constitution of day-of-trial pleas

2.27 Figure 2.10 was generated from data supplied by the District Court. It shows that the majority of pleas received on the first day of trial in 2012 were entered to an amended charge (63%).

10. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 26-27.

Figure 2.10: Of all day-of-trial pleas in the District Court, the proportion that are to a changed charge 2012



Source: Information provided by District Court of NSW (10 September 2013)

Comparison with Victoria and England and Wales

Snapshot

Using available data, we have compared NSW day-of-trial pleas with relevant jurisdictions over time.

In 2009 day-of-trial pleas represented 22% of all guilty pleas in NSW, compared with 17% in Victoria.

In 2011 day-of-trial pleas represented 18% in NSW, compared with fewer than 6% in England and Wales.

Day-of-trial pleas currently constitute around 19% (516) of all guilty pleas entered in NSW.

2.28 The charts below compare the status of guilty pleas in NSW with those in Victoria and England and Wales. 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.

2.29 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. Day-of-trial pleas were, however, more likely in NSW than in Victoria and England and Wales, and – as is apparent in the above charts – are a continuing problem.

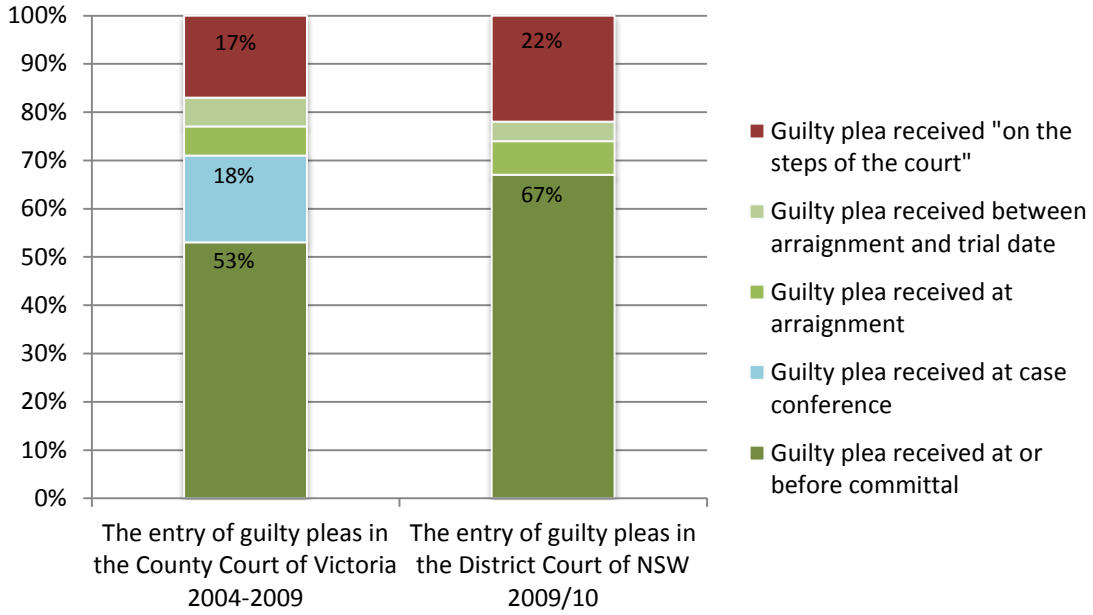
Victoria: occurrence of late guilty pleas in 2009

2.30 The data for Victoria is drawn from a 2010 Victorian Sentencing Advisory Council report, which presented an overview of guilty plea rates in Victoria using consolidated data from 2004-2009.[11] The report contains the only available relevant comparable dataset for Victoria.

2.31 Victorian criminal case management at that time included a criminal case conference that occurred before arraignment and about 10 weeks after committal.[12] Figures 2.11 uses the 2004–2009 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 ODPP information, which covers the financial year of 2009/10.

2.32 The data is not directly comparable, but it does form a picture of the landscape at that time in NSW and Victoria. Primarily it shows that about 17% of all guilty pleas entered in Victoria in the study period occurred on the day of trial compared with 22% in NSW.

Figure 2.11: Times of entry of guilty pleas in NSW and Victoria



Source: Information provided by NSW, Office of the Director of Public Prosecutions (3 July 2013); Victoria, Sentencing Advisory Council, Sentence Indication: A Report on the Pilot Scheme (2010) 3

11. Victoria, Sentencing Advisory Council, *Sentence Indication: A Report on the Pilot Scheme* (2010).
12. See NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) Ch 5.

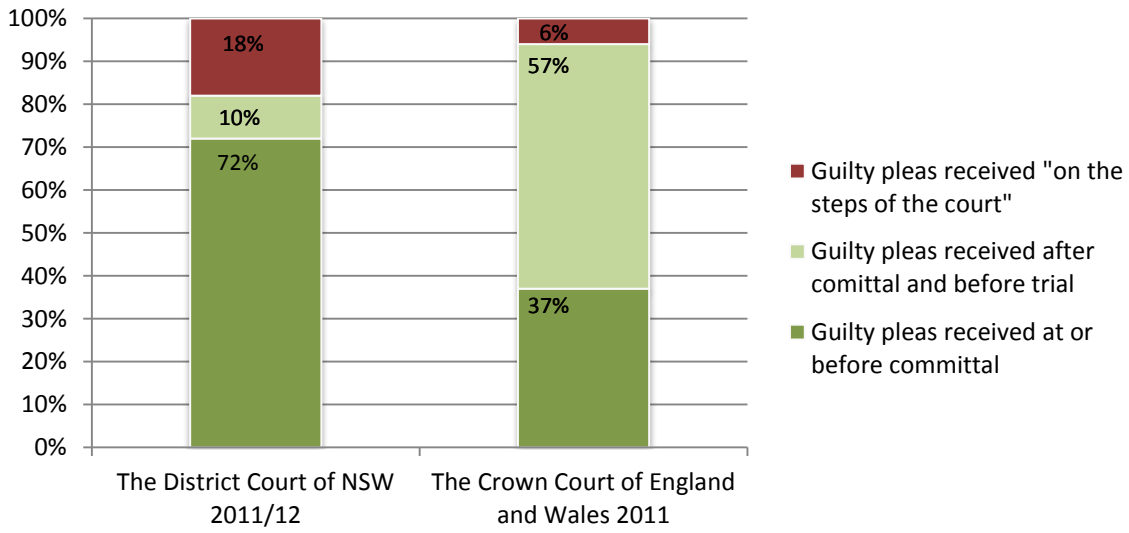
England and Wales: occurrence of late guilty pleas in 2011

2.33 England and Wales collects data on "cracked trials"; these are trials that do not proceed past the first day, usually due to the entry of a guilty plea. Comparison with NSW is problematic because:

- since 2001 committal proceedings for strictly indictable matters have been replaced with a transfer procedure that sees matters promptly transferred to the Crown Court
- England and Wales 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.

2.34 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' Courts (whether committed, allocated or sent to trial in the Crown Court). We compare this with NSW ODPP data from the 2010/11 financial year. The proportion of guilty pleas that occurred on the first day of trial in England and Wales was considerably less than in NSW (6% compared with 18% in NSW). However, in England and Wales late guilty pleas made up 63% of all guilty pleas,[13] compared with 28% in NSW.[14] This could be attributed to different case management practices in England and Wales, specifically the rapid progression of indictable offences from the Magistrates' Courts to the Crown Court.

Figure 2.12: Times of entry of guilty pleas in NSW and England and Wales 2011



Source: Information provided by NSW, Office of the Director of Public Prosecutions (3 July 2013); UK, Ministry of Justice, Judicial and Court Statistics 2011 (2012) 41-53

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

14. On the statistics provided by the ODPP, rather than BOCSAR.

Who pleads guilty late in NSW?

2.35 To understand a bit more about the characteristics of the people who were pleading late, BOCSAR collaborated with us and undertook a study of the correlates of early and later guilty pleas.[15] The study looked at a range of demographic and offence history factors. The study's findings were published in September 2014, and can be found on the BOCSAR website.

2.36 Table 4 of the BOCSAR study, which we reproduce below (Table 2.1), shows the key relationships between the factors studied and whether:

- a not guilty plea was more likely than a guilty plea at any stage (plus (+) for more likely, minus (-) for less, zero (0) for no significant effect observed)
- a late guilty plea was more likely than an early guilty plea, and
- a not guilty plea was more likely than a late guilty plea.

2.37 As BOCSAR observes, generally speaking, factors correlated with late rather than early guilty pleas were also associated with a not guilty plea rather than a guilty plea. This tends to suggest that measures to move guilty pleas earlier will not be specifically associated with demographic or offence history. The relationships noted in the BOCSAR research, including in relation to offence type, may well be useful for prosecuting agencies in considering whether a case could result in an early guilty plea - when put alongside the prosecutor's experience and common sense. The research may also assist in informing case management.

2.38 There are some relationships where defendants were less likely to plead not guilty, but more likely to plead guilty late:

- **Those with a prior offence history**. This may suggest that those with a prior offence history, and therefore more knowledge of the system, consider that the benefits of pleading early are not worth the advantages they can get from pleading late in terms of potential charge negotiation without losing access to the sentencing discount.
- **Defendants with more charges.** This suggests that complex cases may require earlier focus if guilty pleas are to be entered earlier.

2.39 Finally we note that late guilty pleas were more likely in 2012 and 2013 than in 2011.

15. C Ringland and L Snowball, *Predictors of Guilty Pleas in the NSW District Court*, Bureau Brief No 96 (NSW Bureau of Crime Statistics and Research, 2014).

Table 2.1: Summary of factors related to plea (Table 4)

Explanatory variables	Not guilty vs. guilty plea	Late vs. early guilty plea	Not guilty vs. late guilty plea
Year index case was finalised	0	+	0
Age of the defendant at court finalisation (years)	+	+	+
At least one conviction in the 10 years prior to the index case	–	+	–
Higher court appearance in the 10 years prior to the index case	+	0	+
Court appearance in the 10 years prior to the index case where "not guilty of any offence"	+	+	0
Prison sentence in the 10 years prior to the index case	–	0	–
Time between the earliest offence date and committal date relating to the index case	+	+	+
Number of charges/concurrent offences at the index case	–	+	–
Offence type/s in the index case			
• Aggravated sexual assault, with no child sex offence	+	+	+
• Aggravated sexual assault, with child sex offence	+	0	+
• Child sex offence, with no aggravated sexual assault	–	–	–
• Serious assault resulting in injury	+	+	0
• Robbery	–	–	0
• Break and enter	–	–	–
• Theft and related offences	-	0	-
• Illicit drug offence	–	–	–
• Domestic violence related offence	–	0	–
• Strictly indictable	+	0	+

Source: C Ringland and L Snowball, Predictors of Guilty Pleas in the NSW District Court, Bureau Brief No 96 (NSW Bureau of Crime Statistics and Research, 2014)

The District Court of NSW: case flows

Snapshot

2012 saw an increase of incoming cases to the District Court of NSW, with a corresponding decrease in matters that were finalised. 2013 statistics show an increase in matters finalised, so that the gap between incoming and outgoing matters has reduced. The length of delay in the court continues to rise.

Inflows and outflows: the District Court of NSW

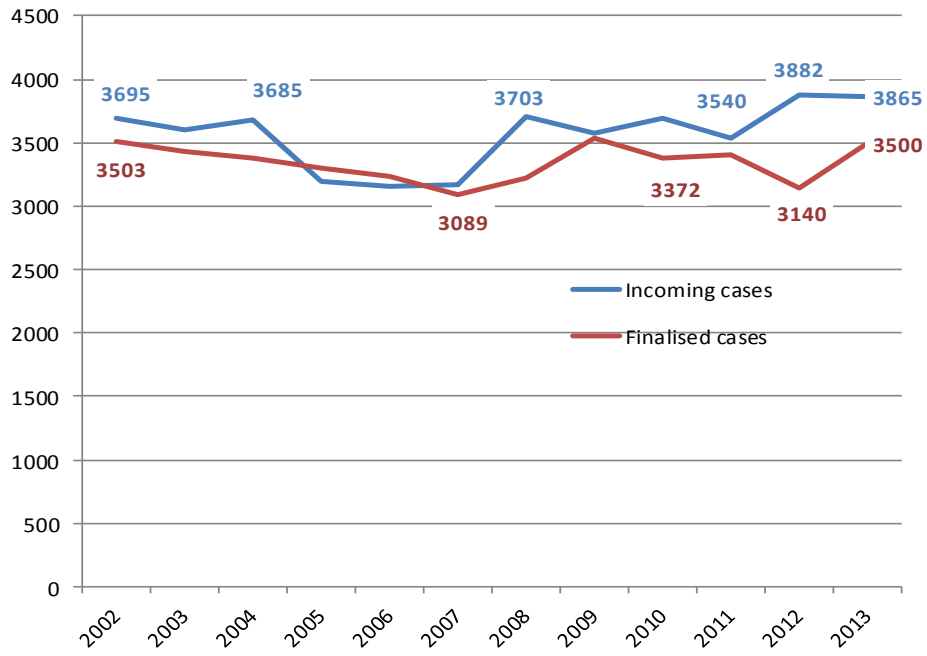
2.40 Stakeholders have expressed concern over a recent spike in the District Court's indictable caseload. It is reported that in the past two years there has been an increase in the number of matters listed for trial in the court. Stakeholders have attributed this spike to, among other things, increased trial committals, and suspect that this means there has also been an increase in late guilty pleas.

2.41 Figure 2.12 shows the number of cases coming into the District Court each year between 2002 and 2013. 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 after a plea of guilty, trial, "no charges proceeded with" or "all charges otherwise disposed of".

2.42 The figures below show that the number of cases coming into the District Court each year has fluctuated. The number of incoming cases in 2012 (3882) was 9.7% higher than it was in 2011 (3540 cases). This has since decreased to 3865 incoming cases in 2013.

2.43 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. 2013 statistics show a tightening of the gap (inflow 3865, outflow 3500).

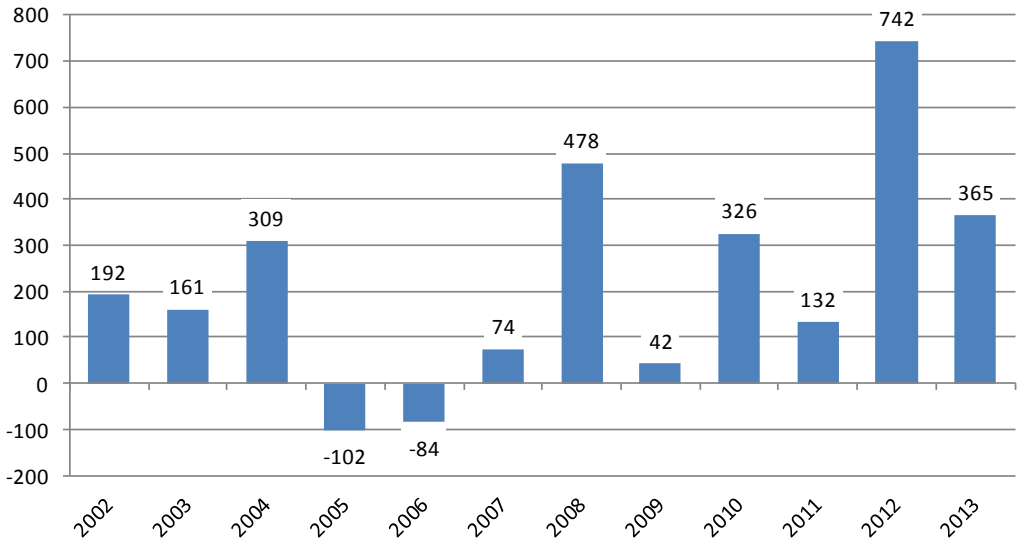
Figure 2.12: Incoming cases and finalised cases in the District Court of NSW 2002-2013



Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics (2002-2013)

2.44 Figure 2.12 focuses on the difference between the incoming cases and the finalised cases since 2002. In 2005 and 2006, the District Court was able to finalise more cases than were coming in from committals. However, from 2007 onwards, this 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. This has since steadied to 365 in 2013.

Figure 2.13: Difference between number of incoming cases and number of finalised cases in the District Court of NSW 2002-2013



Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics (2002-2013)

Delay for District Court finalisations

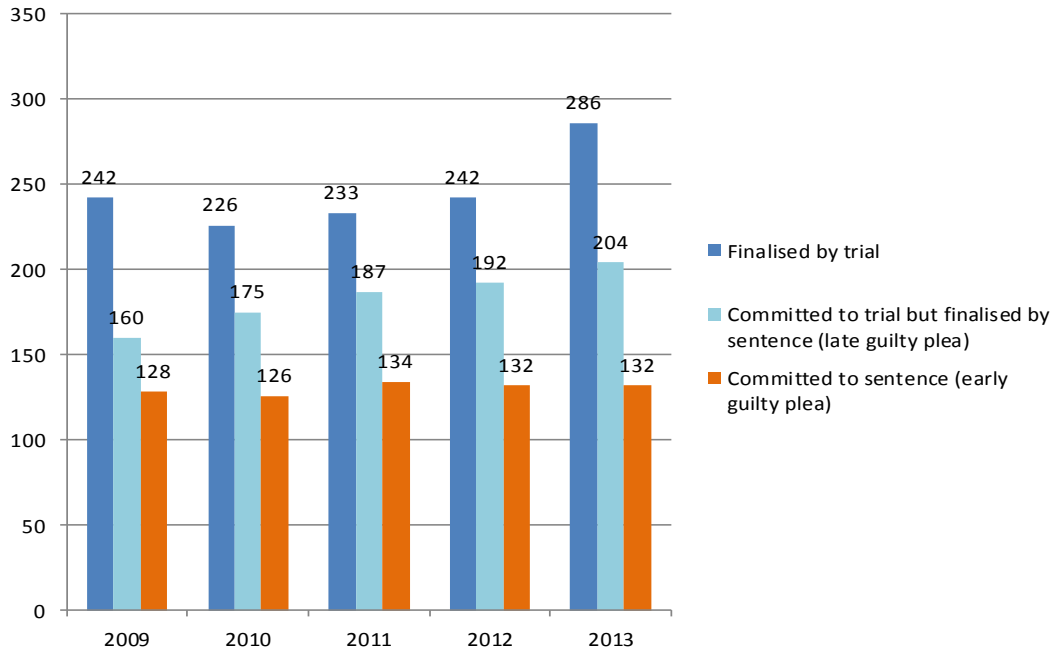
2.45 BOCSAR tracks delay for all matters finalised in the District Court. It records the median number of days between the recorded date of arrest and the committal hearing in the Local Court, and also the median number of days between the committal hearing and the outcome. The "outcome" varies depending on whether the matter was committed for trial or sentence. Matters committed for trial are recorded as having an "outcome" where a guilty plea is entered or a verdict is reached. Matters committed for sentence are recorded as having an "outcome" on the day the matter is sentenced.

2.46 Figure 2.14 shows this information according to whether the matter was committed for trial and finalised by a trial (the dark blue column); committed for trial but finalised by sentence (the light blue column) or committed for sentence and finalised by sentence (the orange column). Accordingly, the light blue column indicates the median number of days for a late guilty plea, and the orange column indicates the median number of days for an early guilty plea. In 2009, the median number of days from committal to outcome (entry of a guilty plea) for late guilty pleas was 160 days. This has been steadily increasing. In 2011 it was 187 days, and in 2013 it was 204 days.

2.47 The median number of days from committal until sentence for early guilty plea matters remained relatively steady. In 2009 the median delay was 128 days. In 2011 this increased to 134 days, and in 2012 and 2013 this steadied at 132 days.

2.48 Delay has dramatically increased for matters finalised by trial. In 2010 the median number of days from committal to trial verdict was 226 days. In 2012 this was 242, which jumped to 286 days in 2013.

Figure 2.14: Median number of days from committal to outcome in the District Court of NSW 2009-2013

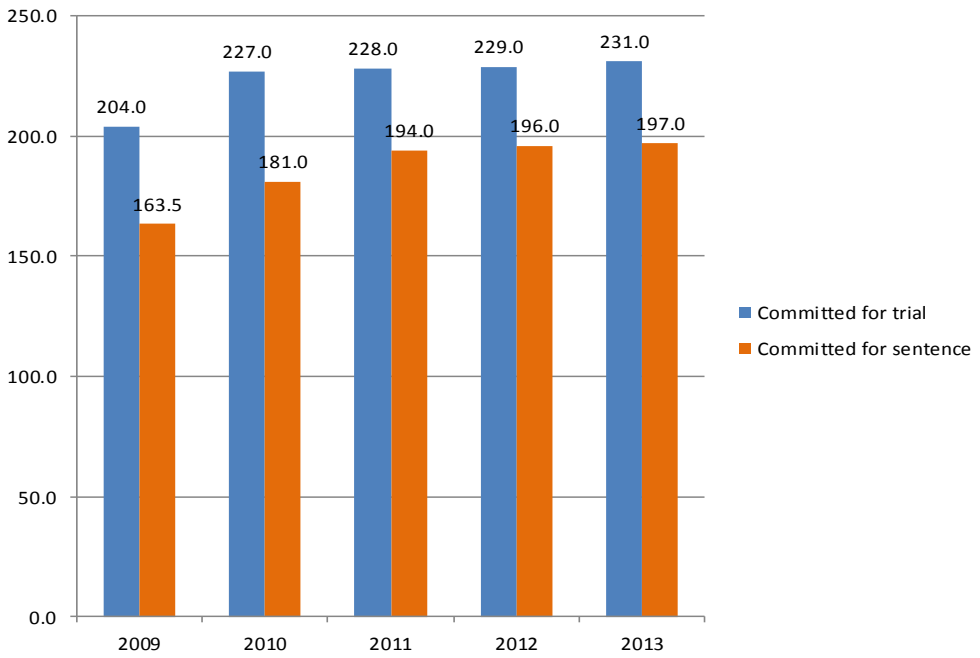


Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics (2008-2013)

2.49 The days from arrest to committal indicate the median amount of time that the matter is in the Local Court. We show this below in Figure 2.15 to try to get a sense of how long a matter spends in indictable proceedings from arrest to outcome. However, Figure 2.14 and Figure 2.15 show median figures that cannot be added together to form a meaningful total.

2.50 Figure 2.15 shows that since 2010, matters that are committed for trial spend around 230 days in the Local Court before committal is complete. In 2009 the median number of days from arrest to committal for matters that were committed for trial was 204. This increased in 2010 to 227 days. In 2012 it was 229 days, and 231 days in 2013. The median delay for early guilty pleas in the Local Court (where the matter is committed for sentence) has been steadily rising from 163 days in 2009 to 194 days in 2011 and 197 days in 2013.

Figure 2.15: Median number of days from arrest to committal in the Local Court of NSW 2009-2013

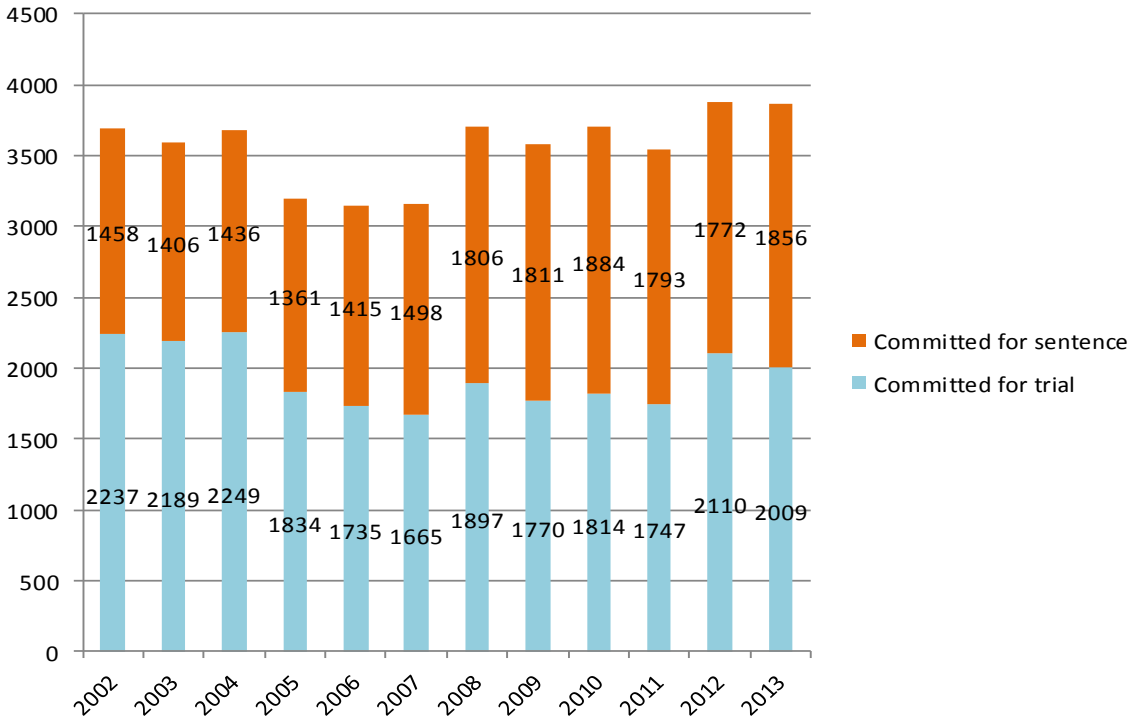


Source: NSW Bureau of Crime Statistics and Research, NSW Local Courts from 2009 to 2013; Number of Persons and Median Delay from Arrest to Committal (Days) in Finalised Local Court Appearances by Grouped Committal Outcome (Committed for Trial or Sentence) (14/12269hclc)

Nature of inflows: initially trial or sentence?

2.51 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 2.16). In 2006, 1735 matters were committed for trial in the District Court. This remained steady with 1747 matters being committed for trial in 2011. In 2012 this sharply increased to 2110. This has since marginally decreased with 2009 matters committed for trial in 2013.

Figure 2.16: Number of cases committed for trial or sentence in the District Court of NSW 2002-2013

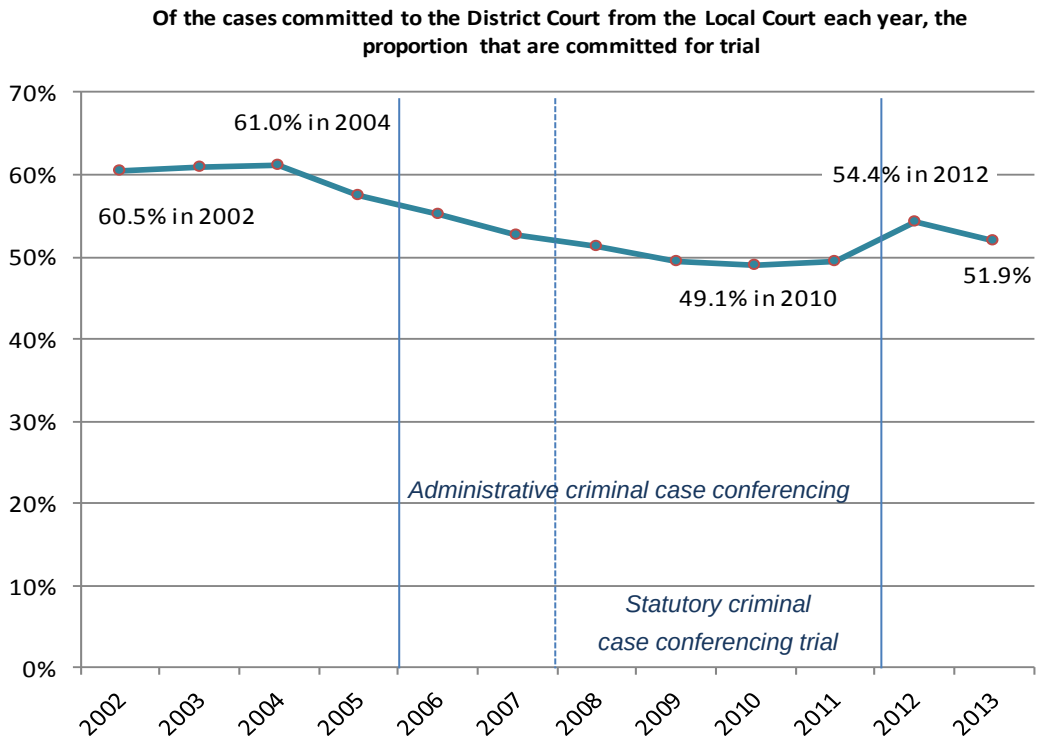


Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics (2002-2013)

2.52 Figure 2.17 looks at this increase in terms of the proportion of all incoming cases that were initially committed for trial not sentence in the District Court from 2002 to 2013.

2.53 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. NSW experienced a small decline in matters committed for trial in 2013 (51.9%).

Figure 2.17: Type of incoming cases in the District Court of NSW 2002-2013



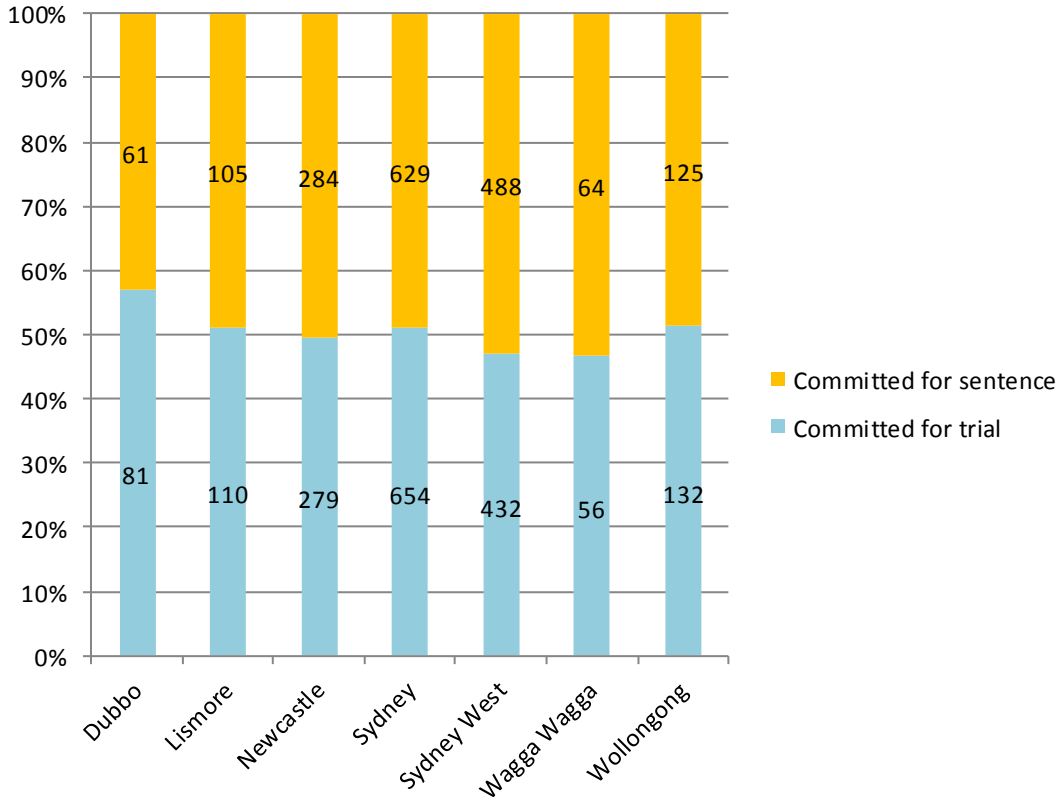
Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics (2002-2013)

2.54 Criminal case conferencing is discussed in Chapter 7.

Regional variation

2.55 In 2013, 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. Dubbo had the highest proportion of matters committed for trial at 57% (81) and Wagga Wagga had the lowest at 27% (56).

Figure 2.18: Type of incoming cases to different District Court of NSW registries 2013

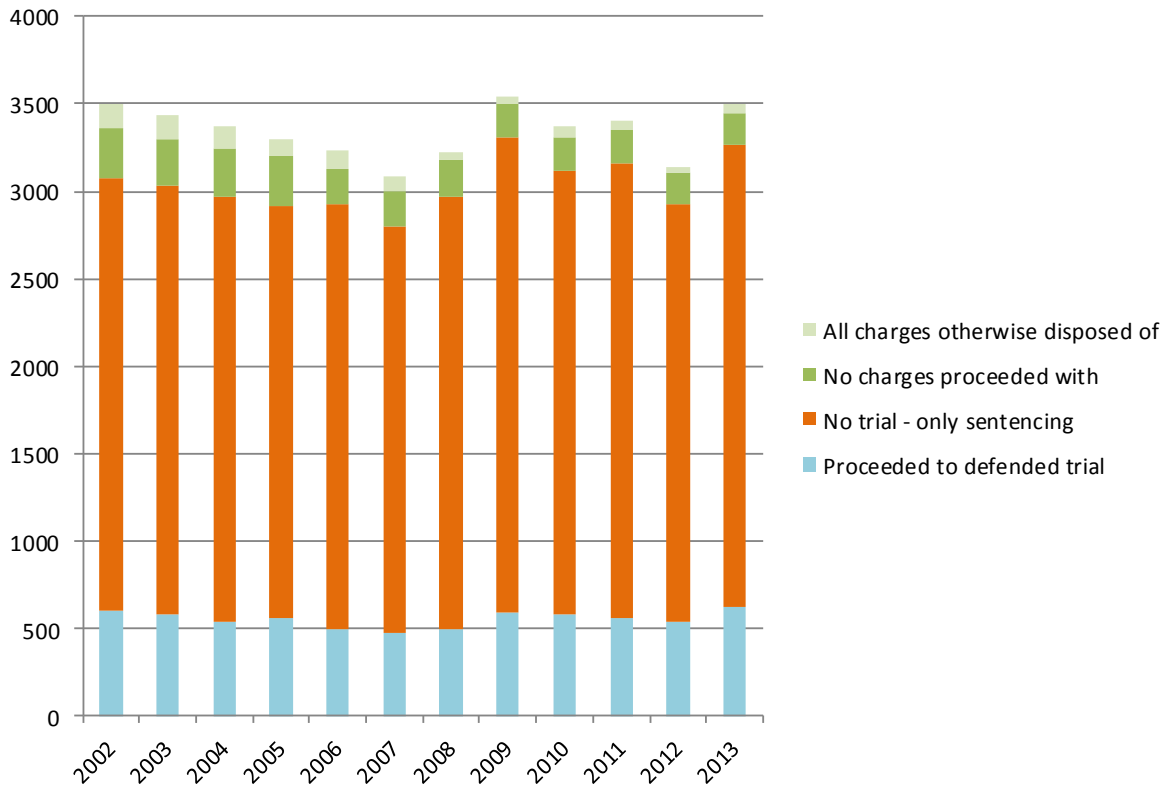


Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics 2013 (2014) Table 3.2

Outflows (finalisations)

2.56 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 2.19 shows District Court finalisations each year between 2002 and 2013. The large majority of matters are resolved by a guilty plea and sentencing.

Figure 2.19: Method of finalisation of cases in the District Court of NSW 2002-2013



Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics (2002-2013)[16]

2.57 Note that the finalisation (outflow) data for 2013 does not relate to the same cases or mix of cases as the inflow data.

Lessons from the data

2.58 The picture this data provides shows some clear opportunities for improvement.

2.59 The first point to note is that NSW performs reasonably well in obtaining guilty pleas while the case remains in the Local Court. The proportion of guilty pleas at this point is better than both Victoria and England and Wales. Though in England and Wales, the case remains in the Magistrates' Courts for a very short time and no case management occurs at this point.

2.60 Secondly, once cases get to the District Court, more than half resolve with a guilty plea, and two thirds of those pleas occur on the day of trial, most to changed charges. The most troubling aspect of this data is the incidence of very late pleas. NSW performs very poorly compared with England and Wales and Victoria.

16. "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".

2.61 A day-of-trial plea indicates that the case has been fully prepared by the defence and prosecution, which is then a largely wasted effort. Victims and witnesses are prepared and on notice. This costs them in time and money, and causes distress. A change of charge at this stage is highly undesirable. There is a clear opportunity to deal with these cases and obtain these pleas earlier. Other jurisdictions do this.

2.62 The data for the District Court shows a court increasingly under pressure. There is a growing deficit between cases coming in, and those being disposed of. This results in increasing delay both for trials and for sentences. Looking at the process overall, the delay is building in the District Court part of the process; the Local Court has stabilised its processing time. Delay has a human face as well. Slow resolution has a significant effect on victims and witnesses. Slow resolution combined with courtroom door pleas adds up to a longer period of distress.

2.63 We think there are some solutions to be found in the District Court processes (see Chapter 10). However, for the most part, we think the solution lies earlier. NSW does comparatively well at the Local Court stage in disposing of cases, though there are a significant number of cases that originate in the indictable stream only to be resolved summarily or withdrawn. This report reviews the indictable process from arrest through to resolution, and identifies critical points for reform. We consider that there is much more that can be achieved at the Local Court stage to curb delay and encourage appropriate guilty pleas – both of which are necessary to reversing recent District Court trends.

3. Overcoming the obstacles to early guilty pleas: a blueprint for change

In brief

The inefficiencies of the current system hinder the entry of appropriate early guilty pleas. This review is an opportunity to undertake a holistic consideration of criminal procedure in indictable cases with a view to systemic change. This chapter presents the key elements that form our blueprint and shows how they fit together. These include:

- early charge advice
- early disclosure of sufficient evidence
- Local Court case management
- criminal case conferencing, and
- a statutory sentencing discount regime.

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3.1 Our response to the terms of reference plainly demands both a stage by stage examination of the process for dealing with indictable proceedings and, importantly, a holistic overview of that process. The evidence which we have referred to drives us to conclude that overall systemic change is essential.

3.2 It would be simply ineffectual to introduce piecemeal changes to the present system without looking at the system as a whole. Obstacles to early guilty pleas are presently locked in at many stages of the current system. Without overall reform, those obstacles would remain and continue to limit the success of any discrete program. Our blueprint for reform of indictable proceedings in NSW seeks to break down the entrenched systemic barriers to appropriate early guilty pleas.

3.3 This chapter presents a summary of current indictable procedures. It examines the process from charge to sentence and presents a high-level overview of our proposed blueprint for change. Each element is then detailed in the following chapters.

Current criminal procedure for indictable matters in NSW

3.4 Below we provide a brief summary and flowchart of criminal procedure for indictable matters as it currently operates for matters tried in the District Court of NSW, although it equally applies to matters tried in the Supreme Court.

3.5 **Arrest**: Where an offence has occurred, or is occurring, police have the power to arrest a suspect under Part 8 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA). Once arrested, the person may be detained for up to eight hours for the purposes of investigation.[1] After this period a person must be charged or released.[2]

3.6 **Charge**: A person can be charged through a Court Attendance Notice (CAN),[3] with or without arrest. The CAN will describe the offence and state the date and court where the person must appear.[4]

3.7 **Police bail:** An arrested person who is charged can be released on police bail under the *Bail Act 2013* (NSW).[5]

3.8 **Court bail**: If the police refuse bail,[6] the person must be brought before a court as soon as practicable after charge for a bail consideration.[7] The court determines whether to grant bail and whether to impose any conditions. A person not bailed may be remanded in custody, and bail may be applied for again at any future court appearance.

3.9 **Local Court of NSW, first appearance:** Bail may be applied for and the court will make an order for service of the brief on the defence to occur within six weeks.[8]

3.10 **Local Court of NSW, second appearance**: If not already done, the matter transfers to the NSW Office of the Director of Public Prosecutions (ODPP). The court may adjourn the matter for a further six weeks so that the parties may negotiate.[9] The court strictly enforces the six week deadline. By third appearance, the defence should indicate whether a s 91/s 93 application to cross-examine a witness will be made.[10]

3.11 **Local Court of NSW, committal proceedings:** A successful s 91/s 93 application will allow the defence to cross-examine a prosecution witness whose evidence is to

1. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 118(3).
2. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 114(4).
3. *Criminal Procedure Act 1986* (NSW) s 47.
4. *Criminal Procedure Act 1986* (NSW) s 50.
5. *Bail Act 2013* (NSW) s 4 (definition of "bail authority"), s 20.
6. *Bail Act 2013* (NSW) s 4 (definition of "bail authority"), s 19.
7. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 114(4)(b).
8. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [5.1(a)].
9. Local Court of NSW, *Practice Note Comm 1– Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [6].
10. *Criminal Procedure Act 1986* (NSW) s 91, s 93; Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [6].

be relied upon at committal. Victims of serious personal violence may be examined in certain circumstances.[11] There may be repeated adjournments of the proceeding as matters progress to hear any s 91/s 93 applications or to accommodate delays. More usually, defendants will waive their right to committal or the committal will occur "on the papers",[12] without oral evidence.

3.12 **Committed for sentence:** Where a guilty plea is entered, the matter will be committed for sentence in the District Court. These defendants are generally considered to have entered an "early" guilty plea and may be able to access the discount on sentence applied for the utilitarian value of the plea.[13]

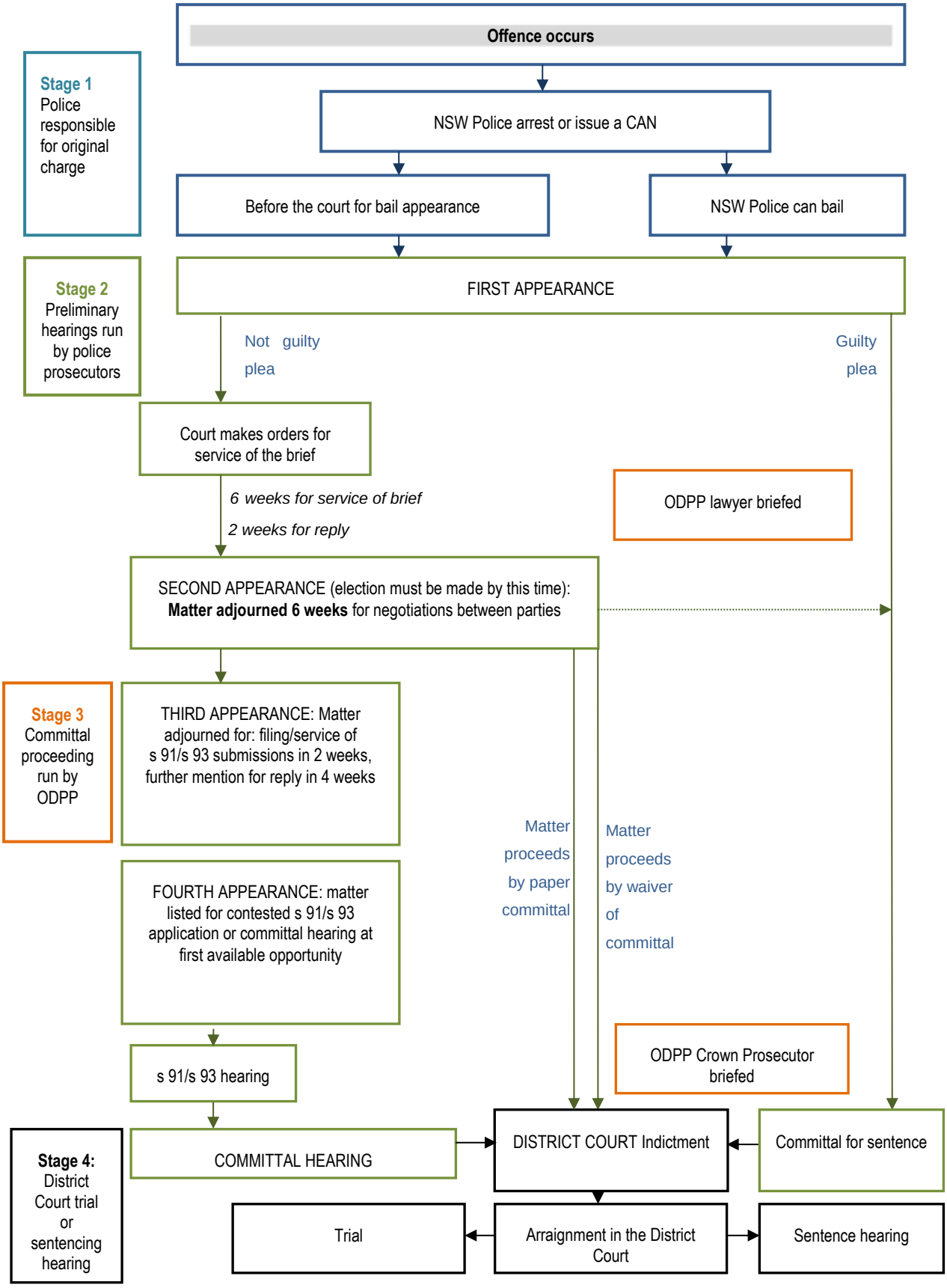
3.13 **Committed for trial:** Where a not guilty or no plea has been entered, and the magistrate is satisfied that the tests for committal have been made out (in matters where committal has not been waived), the matter is committed to the District Court for trial.

3.14 **District Court of NSW, arraignment**: The ODPP will file an indictment in the District Court, where the defendant will be arraigned. At this time a date for trial or sentence may be set, and pre sentence reports may be ordered.

3.15 **District Court of NSW, trial matters:** Where a matter proceeds to trial, any necessary preliminary hearing/s occur, mandatory disclosure as per the *Criminal Procedure Act 1986* (NSW)[14] (CPA) between the parties is overseen by the court, and the trial begins.

11. *Criminal Procedure Act 1986* (NSW) s 93.
12. See Chapter 8.
13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22; *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383. For further discussion see Chapter 9.
14. *Criminal Procedure Act 1986* (NSW) s 141-143.

Figure 3.1: Current criminal procedure for indictable matters in NSW



What are the key obstacles to early guilty pleas in the current system?

3.16 In Chapter 1 we outline 10 obstacles to early guilty pleas. Stakeholders have considered them and they have wide support as a diagnosis of the problem. In this section we analyse how these obstacles play out at the various stages of the indictable process.

3.17 The obstacles to early guilty pleas begin with the charging process. This frequently allows matters to be commenced on a charge that, on review of the evidence, may not be the most appropriate charge. This problem is compounded by a belated review of the evidence by the ODPP; late prosecution disclosure; no mandatory requirement for lawyers with negotiating authority to meet to resolve any issues; and inconsistent application of the discount on sentence for guilty pleas.

3.18 The end result is that, under the present system, it may be premature and, indeed, ill advised to enter a plea of guilty prior to committal. In some cases, it may remain premature to enter a plea of guilty up to the day of trial.

Stage 1: the charge

3.19 The police system of charging under LEPRA can result in criminal proceedings that are ultimately resolved on a different charge. This may be especially pronounced where there is a need to arrest a person, and the police are required to charge or release a person within eight hours of arrest.[15] Police also formulate the charge in matters where a CAN is issued without arrest, and in both cases the police charge on the available evidence. The available evidence at this time may be ambiguous or incomplete. This can result in the charges being maximised in the knowledge that they can be varied on review of the relevant evidence.

3.20 The current system of charging is problematic because the ODPP frequently varies the charge based on an assessment of reasonable prospects of conviction on review of the evidence.[16] This can occur prior to committal or later where the evidence may not be readily available until well into the proceedings – sometimes not until the District Court trial date. Historically this has generated an expectation that charges are likely to be changed, which in turn adversely affects the likelihood of an early guilty plea.

3.21 The problem is exacerbated by changes in the decision maker, as different people assess the matter is different ways. The initial police assessment may be different from that of the ODPP senior solicitor. It may differ from the assessment of one or more Crown Prosecutors, who throughout the process are called upon to consider the evidence. On the prosecution side, changes in personnel are brought about because of the staged nature of the current ODPP process – with limited involvement of Crown Prosecutors before committal, but more involvement later. Sometimes the prosecutor must change because the court has over-listed, and last minute roster changes are required.

15. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 114(4).
16. Other charges may be delegated to a Form 1.

3.22 Some submissions have suggested that the police overcharge or, conversely, that ODPP prosecutors make expedient plea deals reflecting limited resources. We do not doubt that both of these things may on occasion occur and to some extent might be expected as a natural response to roles played by these participants and the pressures placed upon them. But we do not think that either criticism is fair. Lack of certainty of charge is inevitable in a system where:

- the person responsible for the initial charge is not the person responsible for the ultimate charge
- the person responsible for the ultimate charge changes during the course of proceedings, and the view of the appropriate charge may therefore change, and
- the brief of evidence is not settled until late, meaning the charge might appropriately alter.

3.23 It is fair to say that the system as currently set up works on the assumption that charges will change. The statistics referred to earlier highlight the problem. In 2011/12, 45% of indictable matters charged by police as suitable for the higher courts were resolved instead in the Local Court after ODPP review.[17] This means that nearly half of the matters charged and proceeded against in the indictable jurisdiction were in fact resolved in the summary jurisdiction. This position, however, was not settled until the ODPP reviewed the charges. In the same period, 49% of matters that proceeded to the first day of trial resolved instead in a day-of-trial guilty plea.[18] Approximately 63% of the day-of-trial pleas were to an altered charge.[19]

3.24 The practice of changing the charge on review of the evidence is associated with four of the ten obstacles to early guilty pleas identified in para 1.45:

- **Obstacle 1:** The prosecution serves part of the brief of evidence late**.**
- **Obstacle 2:** The defence expects further evidence will be disclosed closer to the trial.
- **Obstacle 3:** The defence believes that it is common practice for the prosecution to overcharge early, and that the charges may well be reduced as the proceedings advance.
- **Obstacle 4:** The prosecution accepts a plea to a lesser charge late in the proceedings.

Stage 2: Local Court appearances

3.25 Local Court appearances take up time and consume police resources. They do not, in the current framework, provide a systemic opportunity for the defendant to enter a guilty plea.

17. NSW, Office of the Director of Public Prosecutions, *Annual Report 2011-2012* (2012) 40. In 2012/13, this was 41% of indictable matters: NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 26-27.
18. See Figure 2.7.
19. See Figure 2.10.

3.26 The Local Court practice note allows for a period of 12 weeks from commencement to the committal hearing, but we have been told that this preliminary stage can extend beyond the allocated time. The NSW Bureau of Crime Statistics and Research (BOCSAR) reports that in 2013, the median delay from arrest/charge until a matter was committed for trial was 231 days (over 7.5 months). The median delay for matters committed for sentence was 197 days (over 6 months).[20]

3.27 The preliminary appearances in the Local Court prior to committal proceedings take up an extended period of time but, in many instances, may not bring matters closer to resolution. At the first and second appearance the police may still have carriage of the matter, and ODPP lawyers may not yet be involved (although ODPP lawyers are commonly briefed by the second appearance). The absence of a Crown Prosecutor in preliminary hearings means that - despite the allocated six week period for negotiations - meaningful negotiations generally do not occur between the parties until the matter is at or beyond committal.

3.28 In our view, case management from the start of the proceeding should focus on ensuring that adequate disclosure has occurred and that the parties (through their authorised representatives) can sensibly discuss the charge. The aim should be for a prosecutor and a defence lawyer to be across the issues, and to be able to make informed decisions about how to proceed. Court appearances should be limited, focused and meaningful.

3.29 Current preliminary criminal procedure in the Local Court relates to the following identified obstacles:

- **Obstacle 5:** Crown Prosecutors with the authority to negotiate are not briefed until late in the proceedings.
- **Obstacle 8:** The defence believes that they will obtain better results in negotiations that occur prior to trial.
- **Obstacle 9:** Discontinuity of legal representation (on both sides) means that advice and negotiations are inconsistent.

Stage 3: committal proceedings

3.30 These days, full committal hearings are a rarity. In Chapter 8, we note that the defence successfully applied to cross-examine a prosecution witness under s 91 or s 93 of the CPA in less than 6% of matters that commenced on indictment. Of these we do not know how many matters progressed to cross-examination. In the vast majority of matters the committal proceeding is decided “on the papers” or the defendant waives his or her right to a committal. Currently then the procedural framework that supports the progression of indictable matters in the Local Court is structurally founded upon a committal hearing in which, at most, 365 of 5947 matters participated in 2012/13.[21]

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20. NSW Bureau of Crime Statistics and Research, *NSW Local Courts from 2009 to 2013: Number of Persons and Median Delay from Arrest to Committal (Days) in Finalised Local Court Appearances by Grouped Committal Outcome (Committed for Trial or Sentence)* (14/12269hclc).

21. For a detailed review of these statistics see Chapter 8.

3.31 It must be conceded that guilty pleas do occur in the period surrounding the committal procedure. However, this is likely to be because it coincides with the time that the ODPP is adequately briefed in matters. As full committal hearings are uncommon, it is more likely to be the participation of the prosecuting agency which causes an increase in negotiation and plea activity than the actual process of committal itself.

Stage 4: applying the sentence discount in the higher courts

3.32 There is currently little to differentiate a guilty plea entered at the first available opportunity from a late plea. Matters that are committed for sentence are eligible for a discount on sentence that reflects the utilitarian value of the early guilty plea. This should mean that these matters receive up to the maximum available discount of 25%, and that the earlier a plea is entered the greater the available discount on sentence. However, under the current system late pleas can still generate a generous discount on sentence (and there is little guarantee that the maximum discount will be applied even where an early plea is given). The maximum discount on sentence may be applied to a late plea because, even though the utilitarian value of the late plea is lessened, the plea was entered at the first available opportunity due to a late change in charge, new evidence, or other changed circumstance.[22]

3.33 The current inconsistent application of the discount that is applied for the utilitarian value of a guilty plea has generated the following obstacles:

- **Obstacle 6:** The defence perceives the sentencing court to be flexible in the way it applies a sentence discount for the utilitarian benefit of an early guilty plea that has occurred later in the proceedings.
- **Obstacle 7:** The defence is sceptical that sentencing discounts will be conferred on their client.

A blueprint for change

3.34 The current process has a number of entrenched elements that self-reinforce incentives for late guilty pleas. Put simply, the system changes we propose seek to promote and entrench the opportunity for early pleas. As outlined in our introduction, we consider the case for change requires:

- a holistic consideration of the system for dealing with indictable cases
- a stronger focus on charge formulation, including early consideration by the ODPP
- front-ending processes for disclosure and case consideration
- ensuring every court appearance should take the matter closer to a possible resolution, and

22. For a discussion on the current application of the discount see Chapter 9.

- a clear focus on opportunities and incentives for early guilty pleas.

3.35 Front-ending will come at a cost. We have recognised this and have sought ways to simplify procedures, focusing on those court procedures that actually move cases towards resolution.

3.36 Our proposed blueprint for the indictable criminal justice system aims to alleviate or remove obstacles from the criminal justice system. The blueprint is envisaged as a single criminal process in three stages:

- Stage one "front-ends" the system and includes a determination of the correct charge. The ODPP does this prior to the matter progressing in the Local Court.
- Stage two involves early prosecution disclosure and a mandatory program of criminal case conferencing, both of which are central to encouraging appropriate early guilty pleas.
- Stage three occurs in the higher courts and incorporates a statutory framework for applying the sentence discount and trial case management.

3.37 The single process is important. At para 3.61 we recommend that a joint practice note brings this into effect. At present, legislation and practice notes separate proceedings into a committal stage and a trial stage which are managed as distinct processes. Legal Aid NSW and the ODPP have organised their resources around these distinctions. We have considered the system from the point of arrest to the point of sentencing as a single process, with the aim, wherever possible, of resolving the matter fairly and quickly.

An overview of the proposed changes

3.38 Below we provide an outline and flowchart of criminal procedure under our blueprint. This is a snapshot, and each element is further described and analysed in the following chapters. We present it here to assist readers in understanding how the elements fit together and how our blueprint will help resolve the obstacles to early guilty pleas.

3.39 **Arrest:** We do not propose any changes to police powers of arrest. Police will investigate and arrest, where required, and issue a CAN in accordance with the framework in LEPRA and the CPA.

3.40 **Early charge advice:** Getting the charge right early is pivotal to reforming the system. Early charge advice would entail the charge being reviewed and certified by the ODPP before case management hearings begin in the Local Court.

3.41 **Local Court of NSW, case management:** The ODPP will take over carriage as soon as an adequate brief of evidence is available and the ODPP determines the charge that should proceed. Appearances should occur in a centralised court, where Legal Aid NSW and the ODPP are represented. The ODPP will advise the defence and the court whether they consider the matter appropriate for an "early resolution with discount" (ERD) stream – that is, particular features of the case suggest that a guilty plea may be entered. Where it has not already happened, the ODPP will disclose the initial brief of evidence upon which the charge was formed.

A guilty plea can be entered or a timetable for a mandatory case conference will be set.

3.42 **Local Court of NSW, criminal case conference:** The mandatory case conference seeks to resolve any issues in dispute. The content of the case conference will be influenced by whether the matter has been identified as appropriate for the ERD stream. These matters will focus on resolving the matter. The content and outcome of the criminal case conference will be documented and filed with the court.

3.43 **Local Court of NSW, oral evidence:** The defence may apply to the court to direct a prosecution witness to attend court to be cross-examined. It is envisaged that, as at present, this will be permitted only where it is truly necessary – where there are substantial or special reasons in the interests of justice.

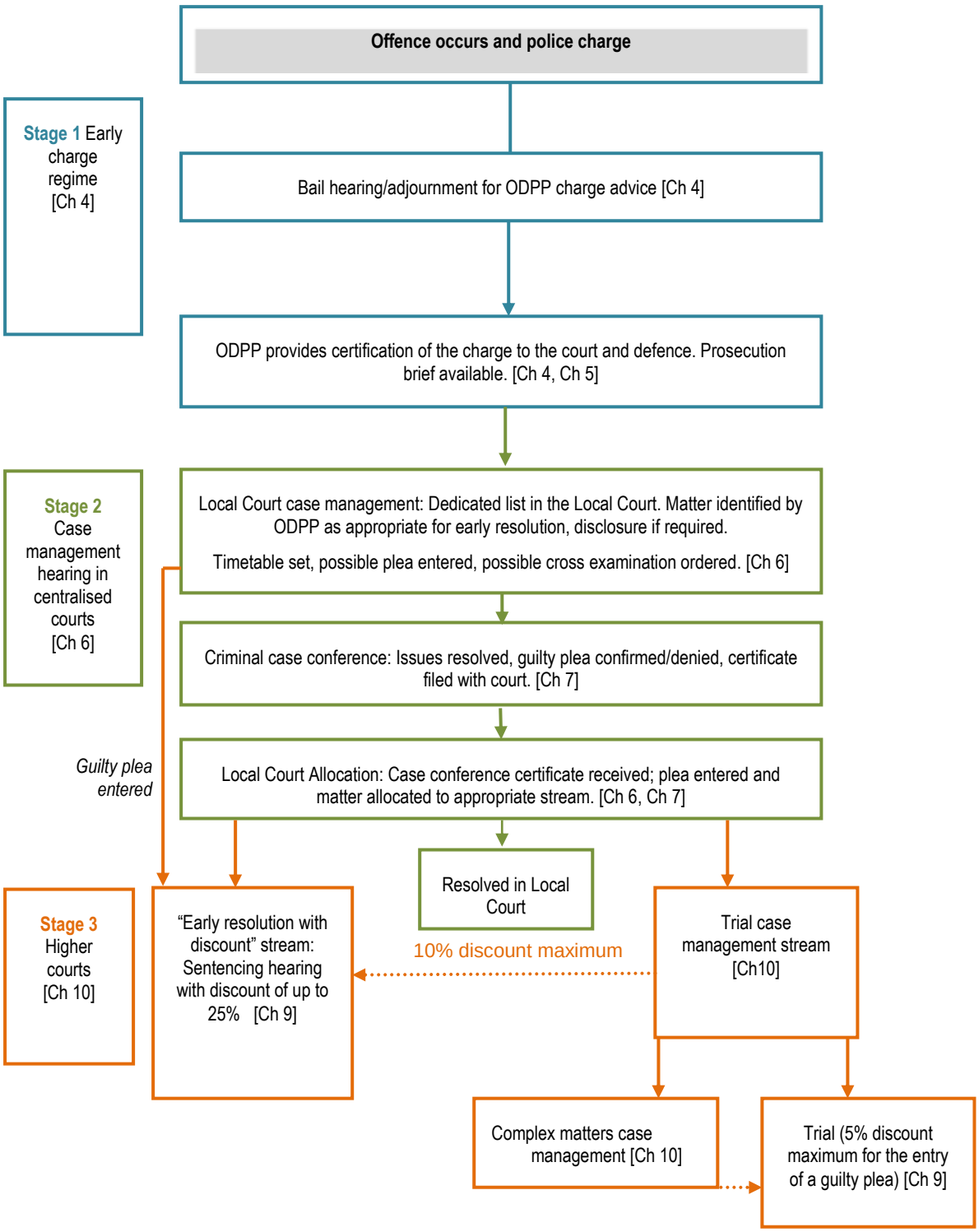
3.44 **Local Court of NSW, transfer to trial or sentence:** Here the court confirms the plea and transfers the matter to the District Court or Supreme Court for trial or sentence. If the matter is to be determined in the Local Court, it is scheduled for sentence or hearing. Under our proposed blueprint the charge would continue and no further documentation (such as an indictment) need be filed.

3.45 **District or Supreme Court of NSW, arraignment and sentence (with discount):** A matter progressed to sentence from the Local Court will be generally understood as being directed from the ERD stream, and the sentencing court will, as a rule, apply the relevant maximum discount (25%) or record its reasons for not applying the maximum discount.

3.46 **District or Supreme Court of NSW, trial case management:** A matter progressed to the District or Supreme Court for trial loses access to the maximum discount for a guilty plea, and is case managed according to the level of complexity of the matter. A plea entered before trial will result in a maximum sentence discount for the utilitarian value of the plea of up to 10%, and a plea on the day of trial may receive a maximum sentence discount of up to 5% for the utilitarian value of the plea.

3.47 Where a matter proceeds to trial, any necessary preliminary hearing/s are arranged, mandatory disclosure as per the CPA between the parties is overseen by the court, and the trial begins.

Figure 3.2: Flowchart of the proposed blueprint for NSW indictable proceedings



How does the proposed blueprint address the obstacles to early guilty pleas?

3.48 Our blueprint redesigns indictable proceedings so that before Local Court case management begins the charge has been settled and disclosure of the evidence can occur promptly.

3.49 The blueprint operates to encourage the entry of appropriate early guilty pleas by:

- introducing charge certainty
- involving ODPP lawyers from the beginning of proceedings
- creating valuable forums for authorised defence and prosecution discussions, and
- providing a statutory scheme that fairly regulates the application of the discount on sentence for the utilitarian value of the plea.

Stage 1: early charge advice

3.50 **What does Stage 1 entail?** Early charge advice seeks to delay court proceedings until there is sufficient evidence on which the ODPP can confirm and certify the most appropriate charge. Early charge advice occurs after a person has been charged by the police and appeared before the court for the first time. The police then forward all the key available evidence to the ODPP to review. On review the ODPP may confirm the police charge; amend the police charge; withdraw the matter; or request further evidence from the police. Once a charge has been confirmed or amended, the ODPP must submit a certification of the charge to the court and defence. This must occur within six months from the first bail/adjournment appearance, although in the majority of instances charge certification would be finalised earlier.

3.51 **How does Stage 1 aim to encourage early appropriate guilty pleas?** By changing charging practices we aim to reverse the expectation commonly held by defence lawyers that the charge in the Local Court will not be the final charge.

Early charge advice is detailed in Chapter 4.

Stage 2: Local Court case management and the criminal case conference

3.52 **What does Stage 2 entail?** Case management hearings aim to progress matters towards the appropriate resolution. All preliminary appearances are to be prosecuted by the ODPP. Legal Aid NSW will provide representation throughout this stage or the defendant may have private representation. The Local Court brings the parties together, provides a forum for disclosure and sets the timetable. Disclosure at this stage will include the key elements of the prosecution brief on which the charge was formed. The Local Court confirms attendance at the criminal case conference, which will be mandatory for all parties where a guilty plea has not yet been entered and must be attended by a prosecutor and defence lawyers with authority to negotiate (unless the person is self-represented). In limited cases in this period, applications to cross-examine witnesses may be made.

3.53 Following the case conference, the Local Court confirms whether the matter is proceeding to sentence under the ERD stream or whether it will enter the trial case management stream.

3.54 Committal hearings and proceedings, in the opinion of the majority of the Commission, should be removed from the blueprint. We recognise the need to retain procedures for cross-examination in some cases (see Chapter 8). Committal hearings do not *per se* generate a distinct obstacle to guilty pleas. However, the majority of the Commission questions the efficacy, resource benefits and utility of orienting current preliminary hearings towards a hearing that rarely occurs. We suggest that Local Court case management can be better structured to progress matters, resolve outstanding issues and encourage appropriate guilty pleas.

3.55 **How does Stage 2 aim to encourage early appropriate guilty pleas?** Preliminary appearances aim to facilitate early disclosure and early communication between parties, and to progress cases appropriately depending upon the likely resolution of the matter.

Disclosure is outlined in Chapter 5. Local Court case management is detailed in Chapter 6. Criminal case conferencing is detailed in Chapter 7. The proposal to abolish committals is discussed in Chapter 8.

Stage 3: certainty of discount

3.56 **What does Stage 3 entail?** Matters that enter the ERD stream are those matters where a guilty plea has been entered in the Local Court. A matter will be able to join the ERD stream any time up to and including the final appearance in the Local Court. The matter will be progressed directly to the District Court or Supreme Court for sentencing. As a general rule, the maximum discount on sentence (25%) is only to apply to matters in the ERD stream.

3.57 Matters that enter the trial case management stream are considered likely to go to trial. Straightforward matters will go directly to trial in the District or Supreme Court, whereas more complex matters may need to be heavily case managed. The current provisions that deal with defence and prosecution disclosure would continue to apply to this stream, although we recommend that they apply earlier than is currently the case. Guilty pleas entered after a matter has left the Local Court will not attract the maximum sentencing discount (unless the defendant offered to plead guilty to the charge that was ultimately the outcome), and day-of-trial pleas will receive only a nominal discount on sentence.

3.58 **How does Stage 3 aim to encourage early appropriate guilty pleas?** The creation of an early guilty plea stream aims to generate court efficiencies and create certainty around the application of the sentence discount. Critically, this should reduce the present preponderance of day-of-trial pleas.

Application of the discount is discussed in Chapter 9.

Table 3.1: a snapshot of how our blueprint addresses the obstacles to early guilty pleas

Obstacle	Addressed by	Element and chapter
1 The prosecution serves parts of the brief of evidence late.	Early charge advice based on an adequate brief of evidence (the "initial brief of evidence") that can then be served on the defence. A clear framework for briefs of evidence is needed.	Early charge advice, Ch 4 Disclosure, Ch 5
2 The defence expects further evidence will be disclosed closer to the trial.	The initial brief should be enough to consider a plea. Further evidence, or refinements of the evidence, may be disclosed closer to trial. While more material will be disclosed in the trial case management stream in the higher courts, further disclosure will not give a basis for giving a full discount.	Disclosure, Ch 5 Application of the discount, Ch 9
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.	Early charge consideration and certification by the ODPP based on a brief, and continuity of ODPP personnel. This means that charges are settled early and firmly.	Early charge advice, Ch 4
4 The prosecution accepts a plea to a lesser charge late in the proceedings.	ODPP must consider and settle the charge early based on a good brief of evidence. Any prospect of a lesser charge should be discussed and confirmed by the parties at the case conference.	Early charge advice, Ch 4 Local Court case management, Ch 6 Criminal case conferencing, Ch 7
5 Senior Crown Prosecutors with the authority to negotiate are not briefed until late in the proceedings.	Senior prosecutors will be allocated to determine charges, and in sensitive and complex cases a Crown Prosecutor will be attached to a case early. ODPP resources are freed up from committals and other simplifications of the system are made to focus on charge advice early.	Local Court case management, Ch 6 Early charge advice, Ch 4 Institutional reform, Ch 12
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.	Sentence discounts will be established under statute with clear maximums. The exceptions allowing the maximum discount for later pleas will be specified.	Applying the discount, Ch 9
7 The defence is sceptical that sentencing discounts will be conferred to their client.	The discount regime will be statutory.	Applying the discount, Ch 9

Obstacle	Addressed by	Element and chapter
8 The defence believes that they will obtain better results in negotiations that occur just prior to trial.	The involvement of senior ODPP officers early and the requirement for case conferencing will encourage early discussions. Active case management should continue in the District Court to ensure that issues are narrowed and prospects of further guilty pleas are identified. More charge certainty earlier in the process should result in more certainty that trials will proceed, less over-listing, and therefore much less pressure on the participant to negotiate late. Clear limits on availability of the "full" discount will apply.	Early charge advice, Ch 4 Local Court case management, Ch 6 Criminal case conferencing, Ch 7 Applying the discount, Ch 9
9 Discontinuity of legal representation means that advice and negotiations are inconsistent.	ODPP will provide continuity of approach to charge determination and greater continuity of representation and consistency of decision making.	Early charge advice, Ch 4 Local Court case management, Ch 6 Institutional reform, Ch 12
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; and/or is hopeful that the case will fall over due to lack of witnesses or evidence.	While this will always remain in some form, clear disclosure, early case conferencing, and clear discounts with limited exceptions should minimise the effect.	Disclosure, Ch 5 Criminal case conferencing, Ch 7 Applying the discount, Ch 9

A joint practice note

3.59 Indictable proceedings begin with the police, are commenced in the Local Court and are resolved ultimately in the higher courts. A criminal proceeding should be thought of as a single process, not two distinct processes: one in the lower court and the other in a higher court. The courts, however, do not have a coordinated approach or a single view of the cases.

3.60 We see the need for a common pathway. It would be valuable to have a single practice note outlining the process from beginning to end that allocates roles to police, prosecution, defence, and the magistrates and judges. Case management standards could be developed against the stages in this practice note and measured accordingly. All courts could have a clear view of the case, where it currently sits, and how close it is to resolution.

3.61 The Chief Justice, the Chief Judge of the District Court and the Chief Magistrate should jointly issue the practice note.

Recommendation 3.1: single practice note

The Chief Justice, the Chief Judge of the District Court and the Chief Magistrate should develop a single joint practice note to support the operation of reforms in the management of indictable matters.

Excluded models

3.62 The report does not deal with two models that were presented in our consultation paper: sentence indication schemes and plea negotiations.[23]

Why we have excluded sentence indication

3.63 We are not recommending any models that include an advance indication of sentence by the courts. Stakeholder support for sentence indications in the indictable jurisdiction has been mixed. The Police Association of NSW and the ODPP supported the return of a carefully constructed sentence indication program.[24] The Public Defenders suggested that sentence indication should only be available for certain serious offence types, such as fraud or child sexual assault, to discourage a long trial.[25] Legal Aid NSW could see both advantages and disadvantages to instituting a sentence indication scheme,[26] and the NSW Bar Association suggested that sentence indications could be used to encourage guilty pleas, but that sentence indications would do little to affect *early* guilty pleas.[27]

3.64 We are not opposed to sentence indications *per se*. We recognise that adequate and accurate advance indications of sentence require maximum disclosure, and in our proposed system, this is more likely to occur late in the proceedings. We agree with the Bar Association that sentence indications would be of little utility under our blueprint to encourage early pleas. We are further concerned that sentence indications could be employed as part of a strategy to delay the entry of an otherwise appropriate guilty plea. This would seriously undermine the objective of the entire blueprint. Accordingly, we make no recommendations on sentence indications at this time.

Why we do not propose any changes to charge negotiations

3.65 The report is also silent on plea negotiations – known as "charge negotiations" in NSW. Charge negotiation occurs in the course of criminal proceedings, and submissions have not contested its use, although the outcomes of charge negotiations continue to have a negative impact for some victims.[28]

3.66 Charge negotiations will remain relevant regardless of criminal case conferencing, because informal negotiations can be fluid, responsive and flexible, which is sometimes required to meet changing circumstances. Under the proposed blueprint, however, we anticipate that the need for charge negotiations will be reduced by the

23. NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) Ch 8 and Ch 4.
24. Police Association of NSW, *Submission EAEGP2*, 21; NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 11.
25. NSW, Public Defenders, *Submission EAEGP8*, 8.
26. Legal Aid NSW, *Submission EAEGP11*, 19.
27. NSW Bar Association, *Submission EAEGP4*, 7.
28. Homicide Victims' Support Group, *Consultation EAEGP37*. See Chapter 11 for a review of issues from the perspective of victims.

implementation of the ODPP early charge advice regime and criminal case conferencing.

3.67 Recently, the permissibility of the prosecution agreeing in charge negotiations to submit to the court a specific range for the appropriate sentence has been disavowed by the High Court in *Barbaro v R.*[29] Under this decision, the prosecution can no longer submit a recommended sentence range to the court. This does not detract from the prosecution's ability to draw to the attention of the judge the facts to be found, the relevant sentencing principles and comparable sentences.[30] It does mean that any negotiations between the parties cannot involve the Crown agreeing to put to the court a recommended sentencing type or range. As to whether any legislative response is required as a result of this decision, we suggest that the NSW Attorney General ask the NSW Sentencing Council to review.

29. *Barbaro v R* [2014] HCA 2; 88 ALJR 372.

30. *Barbaro v R* [2014] HCA 2; 88 ALJR 372 [39]; *R v Loveridge* [2014] NSWCCA 120 [221]-[223].

4. Early charge advice

In brief

Ensuring that the most appropriate charge is laid before a matter proceeds is necessary to encourage early guilty pleas. Two options are considered: a pre charge and a post charge advice regime. Stakeholders have strong and divergent views about which option will better achieve the aims of early charge advice. We see the advantages of a pre charge regime, but for practical reasons recommend a post charge model as a workable option at this time.

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4.1 "Early charge advice" requires the police to seek advice from the prosecuting agency on the most appropriate charge to be laid during or at the end of a criminal investigation. Advice is generally sought before the matter commences in the courts.

4.2 This chapter explains the imperative for early charge advice in indictable proceedings in NSW. It then provides a brief overview of two options we consider for charge advice: pre and post charge. We compare them with reference to charge certainty and efficient criminal procedure, the key enablers of appropriate early guilty pleas.

4.3 We see advantages in the pre charge model but recognise it would require a substantial program of reform. Accordingly we recommend a statutory post charge advice scheme that is underpinned by an administrative pre charge arrangement.

4.4 Although we do not recommend a statutory pre charge advice regime at this time, we have developed a fully considered pre charge advice model which is presented in Appendix D.

The need for early charge advice

4.5 Currently, many matters that proceed on indictment resolve on a different charge to the one laid when proceedings commenced. This occurs during criminal proceedings as different agencies and people review the evidence and form different views on the most appropriate charge.

4.6 NSW Police formulate and lay criminal charges in matters to be heard on indictment, without any requirement for advice from the Office of the Director of Public Prosecutions (ODPP) as the prosecuting agency. The police charge is formulated at a time when the police consider arrest or issuing a Court Attendance Notice (CAN) is appropriate.[1] The charge can be informed by evidence that may be changing and events that may still be underway. The ODPP must not prosecute a matter on a charge unless it has evidence to support a reasonable prospect of conviction.[2] This means that the police charge – considered necessary and appropriate at the time of arrest and charge – may need to be downgraded to a summary offence, withdrawn or varied on the ODPP review of all the evidence in order for the ODPP to secure a conviction.

4.7 Crown Prosecutors, who may form a different view on the most appropriate charge, will review the matter as it progresses through the system. Due to the listing practices of the District Court, the Crown Prosecutor may change late in the process, and the new prosecutor may take a different view of the charge than his or her predecessor on the case.

1. Arrest without a warrant requires a police officer to suspect on reasonable grounds that an offence has or is being committed and the officer is satisfied that the arrest is reasonably necessary: *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99.
2. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 4.

4.8 The consequent expectation by the defence (based on experience) that the ODPP will eventually change the initial charge has become a key obstacle to attaining appropriate early guilty pleas in NSW.[3]

4.9 Current protocols between police and the ODPP allow the police during the course of an investigation to seek guidance on the appropriateness of the charge or the sufficiency of the evidence. This usually occurs where the matter contains complex legal or factual issues. The police sought the ODPP's advice in 201 instances in 2012/13.[4] There were 5947 matters commenced on indictment in the same period.[5] While this is undoubtedly a useful mechanism for these cases, it is not the kind of comprehensive review that would lead to charge certainty across the board.

The mechanism and extent of changes to the charge

4.10 Currently, the case file is usually passed on to the ODPP once a person is charged and proceedings have begun in the Local Court. An ODPP lawyer generally reviews the matter at committal and a Crown Prosecutor reviews it before trial. At both of these ODPP "touch points" there is a review of the material with a view to prosecuting the charge, often resulting in a variation of the charge.

4.11 Among other reasons, changes to the charge on ODPP review occur when:

- the review unveils an issue with the original evidence and charge
- evidence becomes available late in the proceedings, so that the original police charge no longer reflects the evidence, or
- the prosecution sees an opportunity for a guilty plea by agreeing to place some charges on a Form 1 and/or making changes to the charge.[6]

Touch point 1: matter is listed for committal

4.12 Police hand indictable matters over to the ODPP to prosecute usually sometime after the first appearance in the Local Court.[7] This is generally the first time an ODPP lawyer reviews the file. Historically at this juncture up to 45% of matters listed for committal are instead resolved summarily in the Local Court.[8]

4.13 In 2012/13, 41% of matters (2441 out of 5947 matters) that were listed for committal were resolved in the Local Court.[9] 52% of matters that resolved were sentenced in

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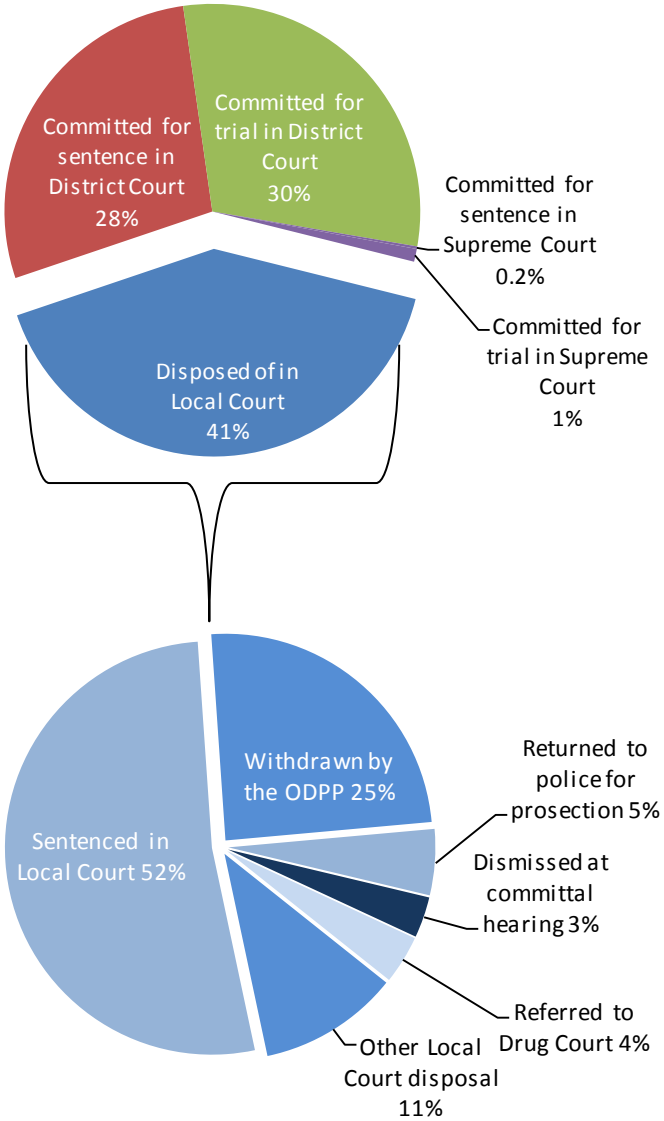
3. Public Interest Advocacy Centre, *Submission EAEGP1,* 8; NSW Bar Association, *Submission EAEGP4,* 2; Chief Magistrate of the Local Court of NSW, *Submission EAEGP6,* 1; Mersal & Associates, *Submission EAEGP7,* 1; NSW, Public Defenders, *Submission EAEGP8,* 2; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission EAEGP9,* 3; NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10,* 4-5; Legal Aid NSW, *Submission EAEGP11,* 8; NSW Young Lawyers, Criminal Law Committee, *Submission EAEGP12,* 6.
4. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 28.
5. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 26.
6. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 20.
7. Or when referred by police prosecutors to the ODPP for a decision on election.
8. See NSW, Office of the Director of Public Prosecutions, *Annual Report 2011-2012* (2012) 40.
9. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 27.

the Local Court, 25% were withdrawn by the ODPP, 5% were returned to police to prosecute, and 3% were dismissed by the court.[10] These figures indicate that nearly half of the matters that commence on indictment were considered to be better suited to other forms of disposal. Largely, these matters can be appropriately charged so as to be sentenced by the Local Court.

4.14 Figures 4.1 and 4.2 below illustrate these outcomes. It shows that the ODPP withdrew or downgraded a large proportion of matters on initial review and that the majority of those matters were resolved by sentencing in the Local Court.

Figure 4.1 and 4.2: Outcomes of indictable matters in the Local Court 2012/13



Source: Figure 4.1: NSW, Office of the Director of Public Prosecutions, Annual Report 2012/2013 (2013) 28; Figure 4.2: Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2014)

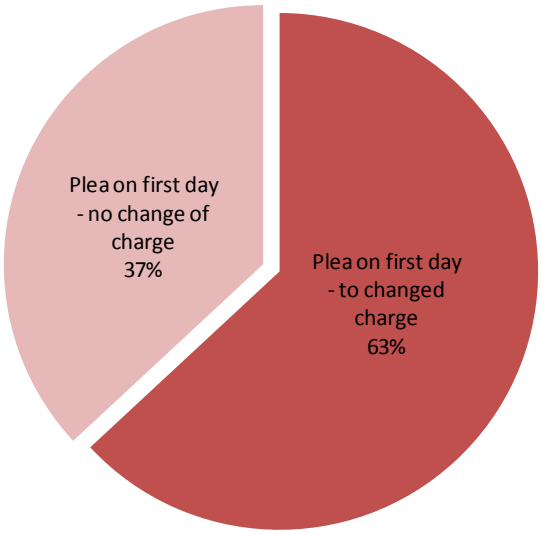
10. Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2014).

Touch point 2: matter is committed for trial

4.15 Matters that have been committed for trial frequently undergo a variation in charge. A matter that has been committed for trial in the District Court or Supreme Court is usually briefed to a Crown Prosecutor. The Crown Prosecutor further reviews the case file and is authorised to negotiate a guilty plea to a change in the indictment - where to do so would reflect the evidence and the criminality of the conduct.[11] In 2012, only 34% (540) of matters committed for trial to the District Court actually proceeded to a defended trial. The prosecution discontinued 13% and 53% (840) resolved in a late guilty plea.[12] Up to 66% of late guilty pleas received after committal to the District Court occurred on the first day of trial,[13] and of these, 63% were entered to a changed charge.[14] This may occur because the Crown Prosecutor has changed at this later stage, or because this is the first point at which the Crown Prosecutor has been able to assess the charge and the evidence fully.

4.16 Figure 4.3 below was generated from District Court data. It shows that in 2012 the majority of pleas received on the first day of trial were entered to an amended charge.

Figure 4.3: Proportion of all day-of-trial pleas in the District Court to a changed charge 2012



Source: Information provided by District Court of NSW (10 September 2013)

4.17 These statistics reflect the considerable amount of activity and negotiation that currently occurs once a matter has reached the District Court. In particular, once a

11. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 20: The views of the police officer in charge and the victim/s on the change of charge must be sought.
12. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2012* (2013); NSW Law Reform Commission, *Encouraging Early Appropriate Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) Figure 2.0.
13. Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2013); see Figure 2.8 and 2.9.
14. Information provided by the District Court of NSW (17 June 2013). We do not know the proportion of late guilty pleas entered before day of trial that were to a changed charge.

matter is briefed to the Crown Prosecutor with carriage, guilty pleas are commonly entered to a late change of charge.

Charge variations encourage late guilty pleas

4.18 A defendant is not likely to be advised to enter a guilty plea to a charge that might not be proved on the available evidence, and is likely to be changed. This set of circumstances – where the original charge laid by police is not treated by either party as the final charge – is part of a systemic problem, whereby delaying a guilty plea in anticipation of new evidence and/or charge bargaining is considered a reasonable or even necessary defence strategy.

4.19 Lord Justice Auld's landmark review of the criminal justice system of England and Wales (2001) observed that the practice of early charging by the police, and the prosecution's failure to remedy the charge at an early stage, was a "significant contributor to delays in the entering of pleas of guilty".[15] The review concluded that to rectify the problem a system of early charge advice should be implemented. Observers and participants in the NSW criminal justice system have frequently repeated the sentiment that the first step to improving fairness, bolstering efficiencies and encouraging appropriate guilty pleas in the NSW criminal justice system is to develop a strategy that prevents matters proceeding to court on inappropriate charges.[16] The majority of stakeholders to this reference share the same view.[17]

4.20 In the NSW context, the reasons for changes to charges are contentious. As we note at para 3.22, some criticise police for overcharging, others criticise the ODPP for taking an overly expedient view and being willing to negotiate for a guilty plea. While both practices undoubtedly take place, we do not think either criticism is fair. We recognise that police and prosecutors face different pressures. It is almost inevitable that, if assessments are made by different people at different stages based on a brief that remains emerging until the last stages, views on the appropriate charge will change.

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15. RE Auld, *Review of the Criminal Courts of England and Wales* (2001) 408.

16. S Beckett, *Criminal Case Conferencing Trial Act 2008* (NSW Bar Association, 2008); NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.6]; W Yin Wan and others, *The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court*, Bureau Brief No 44 (NSW Bureau of Crime Statistics and Research, 2010) 1; K Mack and S Roach Anleu, "Reform of Pre-Trial Criminal Procedure: Guilty Pleas" (1998) 22 *Criminal Law Journal* 263, 264-269; NSW, Public Defenders, *Preliminary Submission PEAEGP2*, 1; Legal Aid NSW, *Preliminary Submission PEAEGP4*, 3.

17. Public Interest Advocacy Centre, *Submission EAEGP1,* 8*;* NSW Bar Association*, Submission EAEGP4, 2;* Chief Magistrate of the Local Court of NSW*, Submission EAEGP6,* 1; Mersal & Associates*, Submission EAEGP7,* 1*;* NSW, Public Defenders*, Submission EAEGP8,* 2*;* Law Society of NSW*,* Criminal Law and Juvenile Justice Committees, *Submission EAEGP9,* 3*;* NSW, Office of the Director of Public Prosecutions*, Submission EAEGP10,* 4*;* Legal Aid NSW*, Submission EAEGP11,* 8; NSW Young Lawyers, Criminal Law Committee*, Submission EAEGP12,* 6*.*

Stakeholders support early charge advice but differ on approach

4.21 Stakeholders agree that charge certainty is essential to a fair and efficient criminal justice system. There is consensus that the system will benefit from creating a process where defendants are confident that the charge has been firmly established at the outset and will not delay a guilty plea on the expectation that the charge will change on review.[18] There is further agreement that the best way to achieve charge certainty is to involve the ODPP in the charging decision early in the process. There is, however, disagreement among stakeholders as to the best model. We develop this below.

Two models for early charge advice: pre charge and post charge

4.22 Early charge advice from the prosecuting agency to the police is a feature of criminal procedure in many overseas jurisdictions. Early charge advice may be received before or after the police charge a suspect. Systems of pre charge advice run in England and Wales,[19] where a pre charge advice scheme between the Crown Prosecution Service (CPS) and police (called "statutory charging") commenced in 2003.[20] Pre charge bail also operates in England and Wales and is accepted as a key part of the scheme. The Canadian provinces of British Columbia, Quebec and New Brunswick have systems of pre charge advice. The Australian Federal Police also seek advice on the correct charge from the Commonwealth Director of Public Prosecutions prior to charging in the majority of Commonwealth matters.[21]

4.23 Other jurisdictions, including the majority of Canadian provinces, have opted for post charge advice regimes. In these schemes, the prosecuting agent screens the charge as soon as possible after police have charged the suspect.

4.24 For NSW, the NSW Police Force (NSWPF) and private practitioners prefer a model of post charge advice, where the police remain responsible for the initial charge but seek charge advice from the ODPP before Local Court case management commences.[22] The ODPP, Legal Aid NSW and the Chief Magistrate of the Local

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18. Public Interest Advocacy Centre, *Submission EAEGP1,* 8*;* NSW Bar Association*, Submission EAEGP4,* 2*;* Chief Magistrate of the Local Court of NSW*, Submission EAEGP6,* 1; Mersal & Associates*, Submission EAEGP7,* 2*;* NSW*,* Public Defenders, *Submission EAEGP8,* 2*;* Law Society of NSW*,* Criminal Law and Juvenile Justice Committees, *Submission EAEGP9,* 3*;* NSW, Office of the Director of Public Prosecutions*, Submission EAEGP10,* 4-5*;* Legal Aid NSW*, Submission EAEGP11,* 8; NSW Young Lawyers, Criminal Law Committee*, Submission EAEGP12,* 6.
19. *Police and Criminal Evidence Act 1984* (UK) s 37A; UK, Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013). For further information on pre charge advice in England and Wales see NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) Ch 3.
20. Following the Auld report: RE Auld, *Review of the Criminal Courts of England and Wales* (2001) 412.
21. Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2009) [3.4]-[3.8]. For further information on the Commonwealth process see paras 4.87-4.89.
22. NSW Police Force, *Submission EAEGP14*, 16-18.

Court support a pre charge advice regime, which includes a thorough review of the evidence prior to charge by the ODPP on most matters to be heard on indictment.[23]

4.25 The arguments in support of pre and post charge advice regimes were passionate and necessitated a thorough discussion of the issues. Below we briefly summarise how a pre charge and post charge advice regime could be constituted in NSW. We put the two models side by side and provide some analysis regarding which option best meets the objective of encouraging appropriate early guilty pleas at this time.

Model 1: pre charge advice for NSW

4.26 Under a pre charge advice model, the ODPP would be required to provide a direction to police on the most appropriate charge/s to be laid against a suspect *before* a suspect can be charged and court proceedings commence. Except in some cases where police bail is not granted after arrest, charge advice would be given on evidence sufficient to provide a reasonable prospect of conviction. Police would be required to accept the advice of the prosecuting authority,[24] and as such "pre charge advice" in this model could more appropriately be referred as "charge determinations" or "charge directions".

4.27 Appendix D sets out more detail of our proposed model for pre charge advice. In outline, police would recommend a charge to the ODPP and provide a brief of sufficient evidence on which the charge decision would be made. Pre charge advice could be sought:

- as part of the investigative phase
- after arrest during a period of police bail given for the purpose of seeking charge advice (termed "charge decision bail" in this report), or
- after arrest when police bail had not been granted ("presumptive charge advice").

Charge decision bail

4.28 Charge decision bail is a system of police bail that allows police to release a person on bail after arrest while seeking a determination on the charge. In the model presented in Appendix D, a person may be subject to charge decision bail for a period not exceeding six months. The decision-making framework set out in the *Bail Act 2013* (NSW) would apply (minimal amendments would be required).

23. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, Annexure A; Legal Aid NSW, *Submission EAEGP11*, 6, 8-9; Chief Magistrate of the Local Court, *Submission EAEGP6*, 1-2.

24. Although in other jurisdictions there are processes in place for police to lodge an appeal regarding the charge determined by the prosecuting agency: British Columbia, Criminal Justice Branch, Ministry of Attorney General, *Crown Counsel Policy Manual, "*Charge Assessment Decision – Police Appeal" (18 November 2005).

Presumptive charge advice

4.29 In circumstances where a person has been arrested for an offence and, in the police view, bail is not appropriate, the prosecuting agency may give advice on the best presumptive charge before the person is brought to court. In the proposed model, the police and the ODPP would continue to work together to settle the final charge as soon as possible. Pre charge advice, charge decision bail and presumptive charging are detailed in Appendix D.

Model 2: post charge advice for NSW

4.30 The objectives of a post charge advice model align with those of the pre charge model – to settle the charge early in proceedings, to create efficiencies and encourage early guilty pleas. The key difference in a post charge advice scheme is the time that the advice is sought.

4.31 Under our post charge model, the police would retain an initial charging decision. Police would charge a defendant and seek an adjournment from the court to facilitate ODPP charge advice, which must be returned within six months. During this time the police would remain responsible for the matter. This regime of post charge advice would include a protocol for seeking pre charge advice, which would build upon and extend the current situations where advice could be sought.

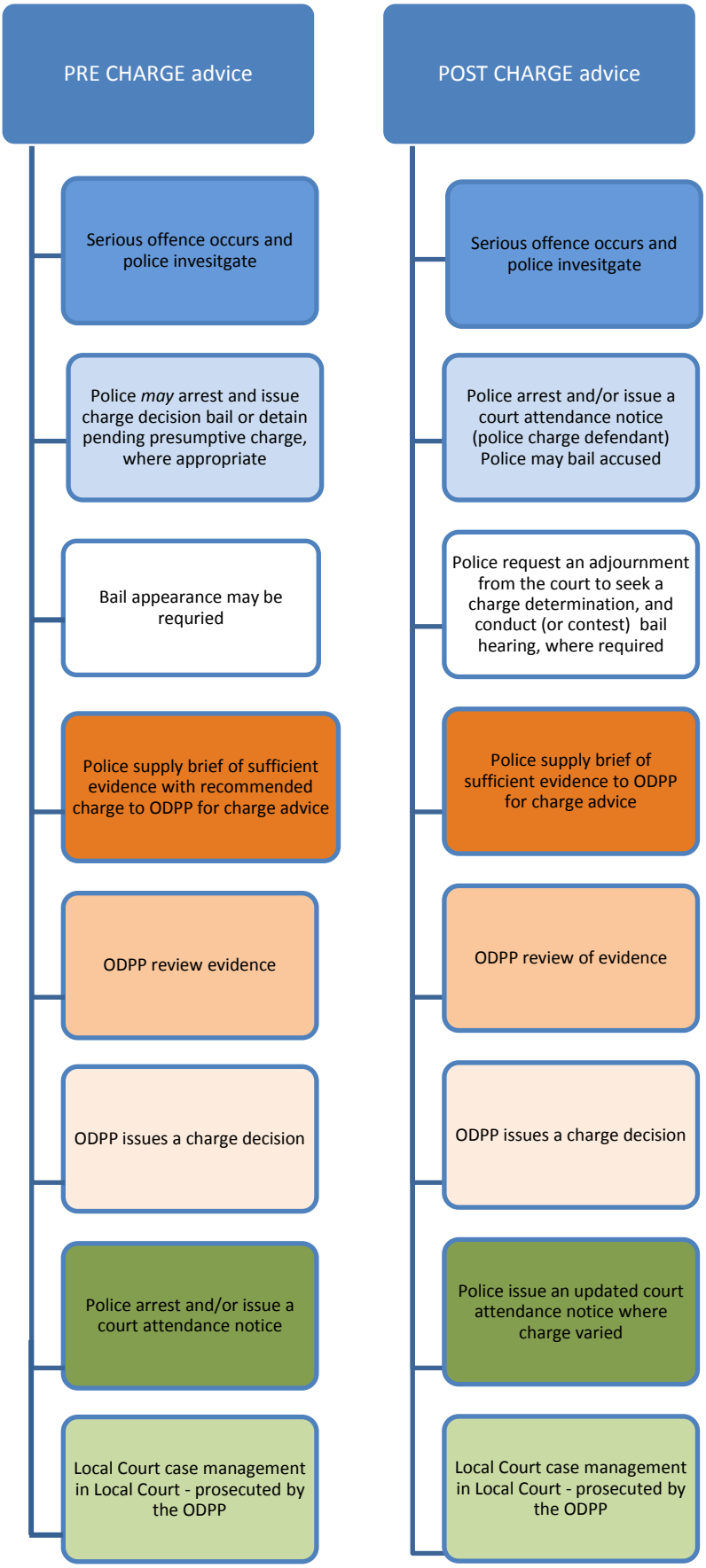
4.32 The majority of Canadian provinces have post charge advice underpinned by a pre charge system for complex matters.[25] In Alberta, for instance, a system of "charge screening" operates, where the Crown Prosecuting Service reviews the majority of matters post charge, but certain matters not requiring immediate arrest also receive pre charge advice. This may include serious or complicated matters, such as large scale frauds.[26] The Canadian system is discussed in para 4.121.

How do the two models look side by side?

4.33 Below we provide a high-level overview of proposed criminal procedure for the pre and post charge advice models for NSW.

25. G McGuaig, "British Columbia Charge Assessment Review" in BC Justice Reform Initiative, *A Criminal Justice System for the 21st Century* (2012) Schedule 11, 27.
26. G McGuaig, "British Columbia Charge Assessment Review" in BC Justice Reform Initiative, *A Criminal Justice System for the 21st Century* (2012) Schedule 11, 27.

Figure 4.4: Flowchart comparing pre and post charge advice



Comparing pre and post charge regimes

4.34 Early charge advice requires ODPP review of the evidence prior to the matter commencing in the Local Court by delaying court proceedings until a final charge is settled. It will impact upon the current operation of indictable proceedings and below we summarise how pre and post charge regimes would affect charge certainty; court efficiencies; police disclosure; defendants; and victims. We also assess the extent of reform and cultural change required to implement each regime.

4.35 In our consultation paper *Encouraging Appropriate Early Guilty Pleas: Models for Discussion* (CP15) we presented a comprehensive overview of the pre charge advice systems in England and Wales, and a brief outline of pre charge advice systems in place in some of the Canadian jurisdictions.[27] Our consultation paper highlighted the relevant history and operations of each jurisdiction, and reproduced the findings of published evaluations relevant to pre charge advice and the criminal justice system.

4.36 We did not present a post charge advice model in the consultation paper, but some stakeholders favoured a model of post charge advice. In some cases stakeholders supported early charge advice, but did not support charge decision bail.

4.37 We have used the submissions we received in response to the consultation paper, and insights given to us in discussions and consultations, to inform a brief discussion on the operational advantages of early charge advice, and how these may be enhanced under the different options. In the following section we assess whether the pre charge and post charge models can:

- achieve charge certainty, including for victims
- achieve court efficiency, and
- promote efficient police/prosecution disclosure.

4.38 We also assess the models from the defendant's perspective and review the issues associated with charge decision bail – a very contentious aspect of a pre charge regime. The degree of reform required for each is considered.

Achieving charge certainty

4.39 Stakeholders overwhelmingly support an early charge advice regime as an antidote to late charge variations in indictable matters. Support came from law enforcement,[28] prosecuting authorities,[29] legally aided defence bodies,[30] private

27. NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) Ch 3.
28. We have received qualified support from the Police Association of NSW and the NSW Police Force: Police Association of NSW, *Submission EAEGP2*, 9; NSW Police Force, *Submission EAEGP14*, 16-18.
29. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10,* 3-5, Annexure A.
30. Legal Aid NSW, *Submission EAEGP11,* 4, 8-9; NSW, Public Defenders, *Submission EAEGP8,* 2-3; Legally Aided Defence Group, *Consultation EAEGP27*.

practitioners,[31] the courts[32] and victim advocate groups.[33] These stakeholders agree that instituting an early charge advice regime would increase charge certainty, enabling defendants to enter an appropriate early guilty plea confidently. The Director of Public Prosecutions (DPP) has said that if the ODPP takes over charge decisions, the practice of accepting a plea to a lesser count would be infrequent.[34] This would clarify the expectations of the participants. Defendants and victims would be aware that the ODPP had formed a view based on the initial brief of evidence and that the charge was justified and likely to be able to be proved in court.

4.40 Pre charge advice is the reform option that addresses most effectively the issue of charge variation. Under the proposed pre charge advice model, a person will not generally be charged until the ODPP has reviewed the relevant evidence, which means a later charge variation is unlikely. This will be further strengthened by increased continuity of carriage and approach within the ODPP. Where possible the prosecutor who made the charge decision should remain attached to the matter.

4.41 This can be contrasted with the proposed post charge regime, which by design accommodates an ODPP post charge review of the evidence and any consequent variation. The period of time between the police charge and the ODPP's determination of the charge would operate to defer the entry of a guilty plea. There could be changes in the charge at this point, so early expectations of defendants, victims and others will not be as clear under this model.

4.42 However, in both options the ODPP determines the charge before the matter proceeds, and in both options this generates the first available opportunity for the defendant to enter an appropriate early guilty plea.

Certainty of charge for victims

4.43 Under the Prosecution Guidelines of the ODPP, victims are to be consulted before the prosecution agrees to a charge variation.[35] In consultation we have been told that victims often are left feeling confused, distressed and disempowered when a defendant enters a plea of guilty on a charge that the victim feels does not accurately represent his or her experience. While this feeling can never fully be allayed, one aim of early charge advice is to set realistic expectations early and to minimise the number of times that charges change and are downgraded. We understand that it is the downgrading of a charge that causes the most distress, and victim advocates have told us that victims would prefer to wait for the correct charge

31. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission EAEGP9,* 3; NSW Young Lawyers, Criminal Law Committee*, Submission EAEGP12,* 6-7*;* NSW Bar Association*, Submission EAEGP4,* 4.
32. Chief Magistrate of the Local Court of NSW*, Submission EAEGP6,* 1; District Court of NSW, *Consultation EAEGP26*.
33. Victims roundtable, *Consultation EAEGP36;* Homicide Victims' Support Group, *Consultation EAEGP37*.
34. NSW, Office of the Director of Public Prosecutions*, Submission EAEGP10,* 5.
35. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 20.

to be laid early than experience the disappointment of having a charge downgraded later in the process.[36]

4.44 Pre charge advice sets up an earlier and more constructive relationship between the ODPP and the victim than the existing system. Under pre charge advice the ODPP would generally consult with the victim (and the police) before the charge is laid. The victim may not always be happy with the assessment of the charges based on whether there was a reasonable prospect of conviction, but early engagement between all parties should reduce the feeling of disempowerment that victims currently experience. Importantly, having the ODPP determine the charge at the outset would help reduce false expectations. It may also cultivate a more positive relationship between police, victims and the ODPP, and improve the way victims experience the process.

4.45 From this perspective, pre charge advice is a better model than a post charge model, which commences on a police charge that may change on ODPP review. Post charge advice does not provide charge certainty from the outset. The only benefit to post charge advice from the perspective of charge certainty is that any variation in charge occurs earlier than the current practice.

Achieving efficiencies for courts and parties

4.46 Stakeholders submit that early charge certainty would provide a necessary foundation to gain efficiencies in indictable proceedings. The ODPP observes that "[c]harge certainty and an end to the practice of overcharging is an important part of the package of reform aimed at streamlining and preparing cases more strategically for trial or plea".[37] Legal Aid NSW also noted that early charge advice may decrease the number of discontinued matters and increase conviction rates. It could also minimise day-of-trial pleas (especially to a changed charge) and the length of criminal matters that go to trial.[38] The Public Defenders suggested that early charge advice would provide a "major break-through in speeding up the criminal trial and sentencing process".[39]

4.47 In both of the early charge models, the ODPP reviews the evidence and the (recommended) charge before the matter can proceed further. As such, in both models the matter does not progress in the courts in any meaningful way until the ODPP has determined the charge. This will ensure charge certainty and the court efficiencies that flow from it.

4.48 Pre charge advice, however, has the greatest potential to introduce court efficiencies, since many matters would not appear in court at all until the ODPP had settled the charge. It prevents matters that would otherwise be in a holding pattern from taking up court time (except in those cases which require court consideration of bail or remand).

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36. Victims' roundtable, *Consultation EAEGP36;* Homicide Victims' Support Group, *Consultation EAEGP37*. See Chapter 11.
37. NSW, Office of the Director of Public Prosecutions*, Submission EAEGP10,* 4.
38. Legal Aid NSW, *Submission EAEGP11*, 10.
39. NSW, Public Defenders, *Submission EAEGP8*, 1.

Risk of greater costs under a post charge advice model

4.49 In a post charge system, the time frame for setting and certifying charge determinations is managed by the Local Court (with the assistance of the police). We discuss this process at para 4.91 below. These court determined timeframes may not always be appropriate, and there is a real risk that police will need to attend court to explain delays in finalising the charge. This will take up police and court resources. The mere process of coming before the court will also consume additional resources: police will need to investigate and report on the delay, and it is likely that they will have to consult with the ODPP on the revised timeframe. This will take up court, police and ODPP time and resources.

4.50 There is a balance to be struck between the legitimate concern of the courts to ensure progress by active case management, and the need to avoid court appearances that achieve nothing because the parties are not ready to proceed and the necessary steps have not been taken because there has not been enough time. There is a risk in the post charge model that the court will over-manage cases and set unrealistic timetables that increase costs and generate churn.

4.51 Except where a person is denied bail, pre charge advice systems do not involve the court prior to the ODPP determining the charge. When the police are ready, the police brief the ODPP, which then forms a charge determination. Excluding bail hearings, the first appearance before the court occurs on a certified charge. The ODPP do not rely upon the court to manage the matter. Instead, in very basic terms, the impetus for the matter to be progressed to a final charge comes from the shared objective of investigative and prosecuting agencies to have the suspect charged and the process begin.

Promoting efficient police and prosecution disclosure

4.52 Charge certainty cannot be attained without first refining the process for police disclosure of evidence. A structured disclosure regime that is effective and easy to understand and comply with is an essential element of early charge advice in both options. In Chapter 5 we recommend that the initial police brief of evidence supplied for the purpose of charge advice contain all the available key evidence on which the prosecution case is based. This might include the fact sheet, key witness statements, criminal antecedents and other relevant material. In a post charge advice model, this would also include the CAN. In Chapter 5, we also support the use of presumptive certificates regarding the constitution of forensic evidence where available, and provision of material in short-hand form.

4.53 Whether charge advice is sought pre or post charge would not impact the requirements of the initial brief. For charge advice to be effective, police must supply sufficient material to support a reasonable likelihood of conviction.

4.54 For those people who are on police bail following arrest in the pre charge model, up to six months would be allowed to obtain charge advice. In most cases this period of time should not be required. Nonetheless, the ODPP advises us that in complex cases up to, and sometimes more than, six months may be required. In other cases - in the pre charge model where the person is remanded, and under the post charge model where the person is before the court - the court would make timetable orders which could not extend past six months.

Charge decision bail: issues of principle and practical problems

4.55 Charge decision bail is an important component of the pre charge model, but is highly contentious with stakeholders. The ODPP submits that charge decision bail would be useful where the police have assembled evidence and are ready to seek charge advice, but for whatever reason consider that an arrest and bail conditions are necessary to ensure the person attends court or does not interfere with evidence or witnesses.[40] Three related key concerns arise.

4.56 First, the NSW Bar Association and the Law Society of NSW argue that subjecting a person to bail who is yet to be charged is fundamentally wrong in principle, and unnecessary to achieve the stated aims of early charge advice. These stakeholders consider that the disadvantages of pre charge bail (now termed "charge decision bail"), such as the unwarranted interference with personal liberty and the high potential for police misuse, outweigh any perceived advantages of a pre charge regime.[41] The Bar Association suggests limiting pre charge advice to serious and complex matters that do not require bail.[42] NSW Young Lawyers also note that successful early charge advice schemes need not be tied to a pre charge bail regime and vehemently oppose pre charge bail, calling any introduction "a seismic shift in our criminal justice system without sufficient utilitarian value".[43]

4.57 These stakeholders also argue that court review of charge decision bail is illusory unless the charge is clear. This is because the court would find it difficult to assess the strength of the case against a more amorphous and only broadly specified reason for arrest.

4.58 Secondly, some have raised the concern that charge decision bail conditions imposed by police have the potential to be unnecessarily and onerously applied – especially in regional or isolated areas.[44] The crux of this argument is that charge decision bail may be overused or misused by some police, and once introduced into the criminal justice system it would be difficult to remove. Stakeholders have responded to this concern by opposing the introduction of charge decision bail or by suggesting charge decision bail should be unconditional or only a limited list of conditions should be allowed.[45]

4.59 Thirdly, defendants may experience uncertainty while they wait for up to six months for charge advice to be finalised. Such defendants may be exposed to adverse publicity without a charge having been laid. This argument could equally be applied to the period between the police charge and the ODPP determination in the post charge model.

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40. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 2.
41. NSW, Bar Association, *Submission EAEGP4*, 3; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission EAEGP9*, 2.
42. NSW Bar Association, *Submission EAEGP4*, 4.
43. NSW Young Lawyers, Criminal Law Committee, *Submission EAEGP12*, 4.
44. NSW Young Lawyers, Criminal Law Committee, *Submission EAEGP12*, 5.
45. Chief Magistrate of the Local Court of NSW, *Submission EAEGP6*, 2; NSW Bar Association and Law Society of NSW, *Consultation EAEGP28*.

4.60 In England and Wales, where pre charge bail has been operating since 2004, police have been criticised for overusing pre charge bail and subjecting people to pre charge bail for extended periods of time.[46] This perception may be aided by criminal procedure that permits a person to be bailed pre charge for the purposes of facilitating charge advice (for certain offence types) or for the purposes of furthering an investigation.[47] We have been told that the majority of people are bailed pre charge pending further investigations.[48]

4.61 The NSWPF also oppose charge decision bail on the basis that this type of bail may mean that some alleged offenders who are to be charged with serious offences may be released on bail when the risks they pose are at such a level that they ought to be detained.[49]

4.62 On the other hand, stakeholders who support charge decision bail do so on the basis that this type of bail gives the ODPP time to finalise the charge in as many cases as possible before coming to court. Charge certainty in their view provides advantages – including advantages for defendants - that outweigh the concerns raised above.

4.63 There would be safeguards. Under the proposed framework for pre charge advice set out in Appendix D, charge decision bail would only be used for the purpose of seeking charge advice and would be subject to court review on application of the defendant. The person would need to be considered appropriate for police bail. Charge decision bail would be limited to six months, with the majority of matters likely to be settled before this time. This regime is far more limited than that applying in England and Wales, where bail is allowed before charge in a much wider range of cases.

4.64 People charged on a matter to be heard on indictment under the post charge model could also be subject to either (post charge) bail or remand pending a charge decision. The only difference is that this person would have already been charged – albeit with a charge that has the potential to change, and considered interim by all parties. It is arguable that the principle of no bail without charge, which some stakeholders strongly advocate, is in practice not as effective a safeguard of defendants' rights as it might seem at first sight. In the current system charges are often downgraded after they are laid, and the brief of evidence may be a good deal of time coming. A court reviewing bail may find it difficult to assess a case, and it would be easy to overestimate the seriousness of the case if the charge laid is more serious than the one that is finally settled.

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46. 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. For a full discussion see NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) [3.14]-[3.18].
47. *Police and Criminal Evidence Act 1984* (UK) s 37.
48. This often occurs so that police can keep open the option of interviewing the suspect: A Hucklesby, *Consultation EAEGP20*.
49. NSW Police Force, *Submission EAEGP14*, 2.

The extent of reform required

4.65 We do not underestimate the changes required to bring about charge certainty. Reform is not limited to changing instruments and procedures, but extends into the need for cultural reform within institutions.

4.66 Pre charge advice would require a detailed program of reform. Reform would directly affect police, the ODPP and the courts, and impact upon the defence, victims and other participants in the criminal justice system. A system of pre charge advice would require a collaborative approach between police and the ODPP in identifying the charge.

4.67 The NSWPF views the changes required to institute a pre charge regime, and the complexities of its implementation and operation, as prohibitively problematic.[50] The NSWPF is also concerned about the resource implications of such major systemic reform,[51] and instead supports implementing a lower impact program of post charge ODPP advice:

> the NSWPF is opposed to any statutory scheme that requires the NSWPF to seek permission from the ODPP to charge an offender with an offence … the advantages sought to be gained … can occur without introducing a complex new statutory scheme.[52]

4.68 The ODPP and Legal Aid NSW say that they can implement the reform required for a pre charge regime. The ODPP notes that resources currently used for the committal process would be reallocated to generating charge advice and prosecuting case management hearings in the Local Court.[53] There is legitimate concern that a post charge advice model would result in ongoing adjournments in the Local Court, offering little opportunity to reallocate resources.

4.69 We do not view the requirements of reform to be prohibitive for either option, but we do recognise that pre charge advice, incorporating charge decision bail and preliminary charging, would require a more significant program of reform.

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50. NSW Police Force, *Submission EAEGP14*, 15.
51. NSW Police Force, *Submission EAEGP14*, 16.
52. NSW Police Force, *Submission EAEGP14*, 13.
53. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 6.

Table 4.1 Summary chart between pre and post charge advice regimes

Issues impacted by early charge advice	Problems within the current criminal justice system	**Under pre charge advice:** The charge is finalised *before* the person is charged.	**Under post charge advice:** The charge is finalised *after* the person is charged.	Observations
CHARGE CERTAINTY	Charges are frequently varied on ODPP review, which can result in the defence delaying the entry of a guilty plea.	The charge is determined by the ODPP from the outset.	The initial charge remains substantially open to change until ODPP completes a charge determination.	Pre charge advice provides charge certainty sooner than post charge.
POLICE DISCLOSURE	The police brief of evidence can be received over the course of proceedings, which can delay the finalisation of the charge and the entry of a guilty plea.	Police are required to provide the initial brief of evidence and fill any gaps identified by the ODPP before the person is charged.	Police are required to provide the initial brief of evidence and fill any gaps identified by the ODPP between the initial appearance and the ODPP finalising the charge.	Police are required to provide the same level of initial disclosure within a similar timeframe in both regimes.
COURT EFFICIENCY	Staggered disclosure negatively affects the efficient operation of the criminal justice system, and can cause multiple adjournments in the Local Court and higher courts.	May include a charge decision bail hearing, but the charge is finalised before proceedings commence in the court, which means fewer adjournments will be required to accommodate late disclosure.	Requires a mandatory additional mention in the Local Court on the interim charge, which is then finalised before proceedings commence in the court. Will require minimal adjournments to accommodate late disclosure.	Post charge advice involves an extra appearance at the Local Court. Both regimes require a settled charge before the case proceeds, which should minimise court delay.
VICTIMS	Victims can feel alienated by late charge variations that result in a guilty plea. This is especially pronounced where the charge is downgraded on review.	A person may be released on charge decision bail pending a charge decision from the ODPP; this may leave victims uncertain about the future of the proceedings. However, once proceedings commence, victims can have greater confidence that the charge will not be varied in negotiations.	A defendant may be released on post charge bail pending a charge decision from the ODPP; this may leave victims uncertain about the future of the proceedings. A variation in charge from the initial police charge to the ODPP revised charge can cause confusion and trauma to witnesses and victims, especially where the ODPP downgrades a charge on review. However, once proceedings commence, victims can have greater confidence in the charge.	The delay in finalising the charge featured in both regimes has the potential to disconcert victims and other people associated with the offence. However, both regimes operate to secure greater charge certainty, which should minimise late charge variation.

Issues impacted by early charge advice	Problems within the current criminal justice system	**Under pre charge advice:** The charge is finalised *before* the person is charged.	**Under post charge advice:** The charge is finalised *after* the person is charged.	Observations
DEFENDANTS	Defendants experience long delays in the criminal justice system. This is particularly problematic when the defendant is on remand.	Defendants may be subject to restrictions on their liberty without charge pending a charge decision from the ODPP under charge decision bail. If defendants are on remand, the situation will be little changed from the current situation.	Defendants will be subject to a period of time while on bail or remand pending a charge decision from the ODPP. This could be longer than the period between appearances in the current system.	Under both regimes court proceedings halt (or do not begin) while a charge is determined, during which the defendant may have his or her liberty curtailed.
REFORM REQUIREMENTS	N/A	Reform to affect: ▪ the operation of the Criminal Procedure Act ▪ Local Court practice notes ▪ protocols between police and ODPP ▪ the Bail Act/ LEPRA.	Reform to affect: ▪ the operation of the Criminal Procedure Act ▪ Local Court practice notes ▪ protocols between police and ODPP.	Reform requirements are more complex for a pre charge regime.
CULTURAL CHANGE	Police charging is part of the professional and cultural practice of senior police. The ODPP senior prosecutors are actively involved in plea negotiations that result in guilty pleas on lesser charges.	The police charging and disclosure practices will be significantly affected. Early intervention from experienced prosecutors in the ODPP. Continuity of carriage required.	The police disclosure practices will be affected. Early intervention from experienced prosecutors in the ODPP. Continuity of carriage required.	In both models, police and the ODPP will need to work closely to finalise charge decisions, although the greatest cultural change will need to occur under a pre charge advice model.

Our view: pre charge advice is ideal but not recommended at this time

4.70 We do not support the status quo. The advantages of moving to a new system of early charge advice should assist significantly in facilitating appropriate guilty pleas at an early stage. Without early charge certainty, there is very little likelihood of achieving more early guilty pleas.

4.71 Under our system, the ODPP is recognised as the agency that prosecutes state matters to be heard on indictment. The ODPP must only prosecute on a charge that, in the view of the ODPP, has a reasonable likelihood of conviction. Currently, the ODPP is making the decision to vary a charge at committal or even after a matter has been committed for trial in the District or Supreme Court. Early charge advice regimes operate to move that decision-making process to the beginning of proceedings, where it can be the most effective, and, in criminal justice terms, the most efficient.

4.72 We have considered two models for early charge advice. Pre and post charge advice share a central objective: avoiding charge variation and the expectation that this gives rise to within the criminal justice system. To us, the two models have significant similarities, with the key point of departure being the time when the ODPP assess the evidence. In either option, however, police will be required to provide the same amount of evidence to enable the ODPP to reach a charge decision. Similarly, the ODPP will be required to advance a settled charge prior to the matter moving forward in the Local Court. The ODPP will only enter the matter once it has settled a charge.

4.73 We see significant advantages in a pre charge model. It can deliver better charge certainty and court efficiency. While charge decision bail is contentious, with proper safeguards it could promote charge advice without unduly affecting defendants' rights. The detail of a pre charge model is set out in Appendix D and we suggest it merits future consideration – this would be especially so where the post charge regime produces the expected positive results.

4.74 Having considered both options, we recommend a post charge model at this time. This is because:

- Stakeholders including the NSWPF and the legal profession do not support pre charge advice with charge decision bail. It would be difficult to implement a regime against significant stakeholder opposition.
- While pre charge advice has the greatest potential for benefits, it is also more complex to implement legislatively and operationally. In particular, it may not be desirable to introduce further changes to bail law at this time. Efficient operation of bail law is pivotal to a well-functioning criminal justice system, and this is an area that has been in flux and needs time to settle.
- Many of the advantages of a pre charge advice model can be achieved with a well-designed post charge model. However, because it has less potential for efficiency, a post charge model may have more cost associated with it.

4.75 The operational changes required to implement post charge advice are still significant, and should not be underestimated. In the next section we address the detail of the proposed regime.

Recommendation 4.1: implement early charge advice based on a post charge model
Early charge advice should be implemented based on the post charge model in Recommendations 4.2-4.6.

The recommended operation of early charge advice in NSW

4.76 Below we describe the envisaged operation of our early charge advice regime for NSW, and explain why we propose certain processes and restrictions. This model

was developed during consultation[54] and adopts some of the features of Canadian jurisdictions that have implemented a pre/post charge advice hybrid.

Features of early charge advice for NSW

4.77 An early charge advice regime would change current criminal procedure by allocating a specific time period for ODPP review *before* a matter progresses in the Local Court. In this system a police charge is laid and the matter comes before the Local Court where any questions of bail or remand are dealt with. This appearance would then be adjourned for charge advice to be sought. In order to proceed further, the ODPP must confirm or amend, and certify the charge. The police retain carriage of the matter until a certified charge is received. Once a charge is certified, the ODPP would run the prosecution.

Key steps

4.78 The post charge advice model would have the following key steps:

- **Arrest.** The practice and procedure that the police employ in arresting a person would be unchanged under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA). Police would charge a person and may bail the person or bring them before the court for a bail hearing following the current procedures under LEPRA and the *Bail Act 2013* (NSW). (Referral to the ODPP from the police for an election decision can still occur at any time.)

- **Bail and initial appearance.** The initial appearance will include a bail hearing (where required) and an adjournment so that the police may seek a charge determination from the ODPP.

- **Police disclosure to ODPP.** The police would provide the ODPP with the police brief of evidence (the "initial brief") as soon as possible after the first appearance. We recommend this requirement to be enshrined in legislation in Chapter 5,[55] where we also discuss the content of the initial brief of evidence.

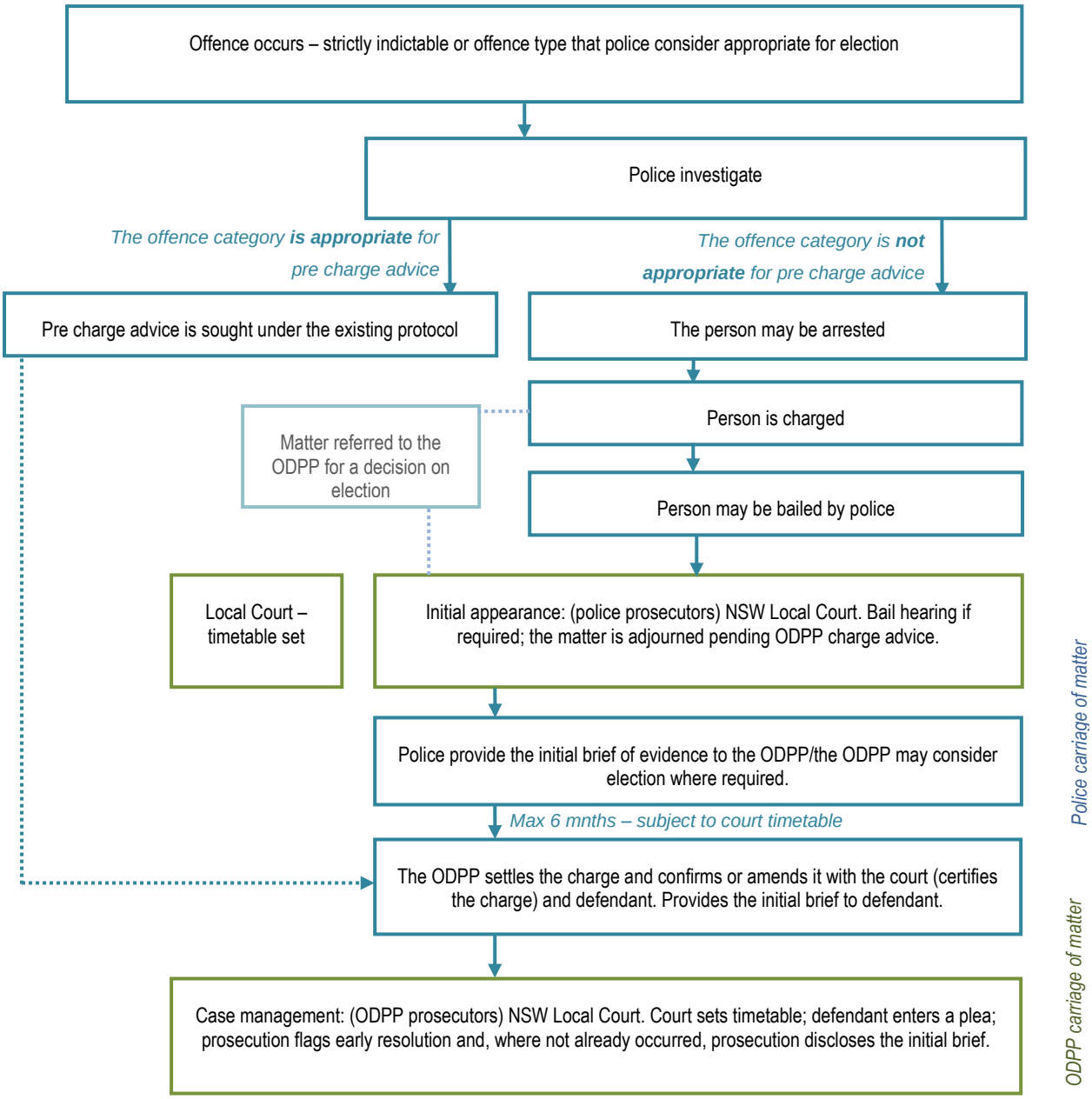
- **The ODPP to make a charge determination.** Where the matter proceeds on indictment the ODPP (or other prosecuting authority) would be required to certify the charge.

- **Local Court case management.** The ODPP takes over the prosecution from the time the charge is certified. This begins the Local Court management phase which is outlined in Chapter 6.

54. NSW Police Force, *Submission EAEGP14*, 16-18; NSW Office of the Director of Public Prosecutions, Legal Aid NSW and NSW Police Force, *Consultation EAEGP31*; NSW Bar Association and Law Society of NSW, *Consultation EAEGP28*.

55. See Recommendation 5.1.

Figure 4.5: Flowchart of proposed early charge advice regime for NSW



4.79 Limited changes to legislation are required to implement the scheme, and these recommendations are discussed below (from para 4.82). We note that, when we recommend changes to the *Criminal Procedure Act 1986* (NSW) (CPA) relevant to the operations of the ODPP, our recommendations refer to the "Office of the Director of Public Prosecutions". We use this term for clarity and simplicity. It is not the same term as currently used in the CPA - which refers to the "prosecutor"[56] or the "Director of Public Prosecutions"[57] – although it is intended to have the same meaning.

56. *Criminal Procedure Act 1986* (NSW) s 4.
57. For example see *Criminal Procedure Act 1986* (NSW) s 113.

4.80 The regime will also require changes to prosecution guidelines, and police operating procedures, as well as a detailed protocol between the ODPP and the NSWPF.

No impact on election procedures

4.81 An early charge advice regime should not impact upon the procedures currently in place between police prosecutors and the ODPP for the ODPP to make an initial decision about election of "Table" matters.[58] This means that police prosecutors should still be able to seek an adjournment from the court for an initial election decision from the ODPP, which can be made on the statement of facts (and any other relevant material), before a charge determination is sought. Currently only around 30% of matters forwarded to the ODPP for an election decision are accepted at this initial stage. The majority are quickly returned by the ODPP to the police to prosecute summarily.[59] This process provides a good initial filter, and it is desirable that this early review of possible election matters continues. Under our process, once the brief is received, the ODPP may still decline to elect at a later stage. But the initial filter avoids unnecessary work on matters that are never going to be elected. We suggest that the election process be retained in the protocol between the ODPP and the NSWPF.

Charge determinations from the ODPP

4.82 The ODPP would consider the charge based on the initial brief of evidence within the period of time set by the court, or in any case within six months. The ODPP could:

(1) **Confirm or amend the charge:** The ODPP would consider the brief and determine the charge that should proceed. The ODPP could confirm the charge or amend it. The defendant, the police and the court would be informed, and the charge before the court would be amended if necessary.

(2) **Request further evidence:** The ODPP may require further evidence, and can requisition the police to collect this evidence for the purpose of considering the appropriate charge.

(3) **Decline to proceed on the charge or decline to elect:** If the ODPP considers that the charge should not proceed on indictment it could decline to elect (if a Table matter) or amend the charge to a non-strictly indictable matter. In such case the ODPP would decline to prosecute, and the police should decide whether to proceed in the summary jurisdiction.

58. Table offences are offence types that will be heard summarily unless an election is made to hear the matter on indictment. Elections may be made where the jurisdiction of the Local Court is insufficient to appropriately deal with the matter. The lists of indictable offences in respect of which an election may be made are contained in Table 1 and Table 2 of Schedule 1 of the *Criminal Procedure Act 1986* (NSW).

59. See Appendix D.

(4) **Withdraw the charge:** The ODPP may consider that there is not enough evidence or that it is in the public interest that proceedings end, in which case the charge should be withdrawn.

4.83 The initial brief of evidence supplied to the ODPP from police would constitute all material relevant to the alleged offence on which the ODPP will determine the most appropriate charge. Charge certainty depends upon the ODPP forming the charge on sufficient evidence, and the role that the initial brief of evidence will play in developing a successful outcome cannot be underestimated. We discuss further the content and nature of the initial brief in Chapter 5.

4.84 The DPP recognises that experienced ODPP prosecutors, adept at identifying key evidential and procedural issues, will be required to provide charge advice. The DPP has indicated that complex or sensitive matters would, where possible, be allocated early to a Crown Prosecutor who would retain carriage of the matter.[60]

Certification of the charge

4.85 Where the ODPP confirms or amends the charge, we recommend that legislation require the ODPP to certify the confirmed or amended charge with the court and notify the defendant. A matter should not be able to proceed further to Local Court case management until certification has occurred.

4.86 Certification should not, however, preclude a reduced charge being laid later in proceedings or a defendant receiving a full discount if a guilty plea is ultimately accepted to a charge that was not the certified one.

Commonwealth and other prosecuting authorities

4.87 In our proposed blueprint, the ODPP will provide charge advice only on matters that the ODPP is to prosecute. This includes "Table" matters that the police consider appropriate for the indictable jurisdiction. Matters that are to be heard summarily and prosecuted by the NSW Police or other agencies are not included in the scheme.

4.88 The Commonwealth DPP (CDPP) already has an established system of pre charge advice,[61] and is not included in the proposal for early charge advice. The proposed charge certification process, however, is a criminal procedure we have recommended for inclusion in the CPA. Certification under the CPA would encompass all indictable prosecuting authorities to which the CPA applies, including the ODPP, the CDPP and any other relevant prosecuting agency. It also may encompass the Australian Federal Police (AFP) as well as the NSWPF. Our recommendations regarding practices and protocols between agencies only apply to NSW agency groups.

60. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, Annexure A, 4.

61. Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2009) [3.4].

4.89 We do not make any further recommendations about other prosecuting authorities in NSW, such as the Environmental Protection Authority, the NSW Office of Environment & Heritage, and the WorkCover Authority of NSW. Indictable prosecutions conducted by these agencies are rare. They prosecute matters investigated by their investigative arm, and generally determine the charge to be laid from the outset. Certification should not affect their processes.

Recommendation 4.2: legislate for charge determinations and certification

The *Criminal Procedure Act 1986* (NSW) should be amended to require the Office of the Director of Public Prosecutions and other relevant prosecuting authorities to:

(a) confirm, amend or withdraw the charge, and

(b) certify the confirmed or amended charge

before an indictable matter proceeds to case management in the Local Court.

Cases must proceed promptly

4.90 Early charge advice under our blueprint requires that the police charge a person before the ODPP reviews the initial brief of evidence and makes a charge determination. A defendant will come before the court on a charge for the purposes of bail and/or for first appearance, and an adjournment for charge advice will be sought by the police. The system is designed to halt court procedures until a charge determination is formed by the ODPP (or, in some cases, the CDPP). We are however cognisant of the concern expressed by stakeholders that the defendant not be left with the uncertainty of a pending charge determination for long periods of time. This is particularly acute where the defendant is on remand.

4.91 We are proposing that the court sets a timetable in which the ODPP (or the CDPP or other prosecuting authority) must certify the charge. The timetable is to be capped at six months from the first appearance. We suggest that the police aid the court and propose a timetable by referring to the matter's likely complexity. Clearly this would have an impact on ODPP workload, so police and the ODPP should develop arrangements to build in standard timeframes for ODPP determinations and consultation processes for complex cases.

4.92 We anticipate that it would be rare for the police to consider a matter would take six months to certify. However, we also acknowledge that unforseen issues may impede the ODPP or prosecuting agency making a charge determination within a set time. This may occur where requisitions for further evidence have taken place, where there are multiple defendants or where further evidence is discovered. The ODPP tells us that in some instances, although infrequent, the development of a fully formed charge decision may require more than six months. Where this occurs the court would need to be advised in advance (where possible). This would not negate the requirement for the police to report to the court within six months, outlined below.

NSW police to supply brief of evidence to the ODPP in reasonable time

4.93 The NSWPF are responsible for preparing the initial brief of evidence. Gathering the information for a brief of evidence can be a complex task. Evidence evolves as a matter progresses, and a definitive brief at the early stages can be elusive. However, for an early charge advice regime to operate successfully, police must be prepared to supply as much information as possible to the ODPP as soon as possible so that the ODPP can make a prompt charge determination. The ODPP has no investigative power or resources to conduct its own investigations. Under our blueprint the ODPP will be unable to confirm the charge until the initial brief of evidence is received. It is therefore imperative that police disclosure to the ODPP be provided for in legislation[62] and happens in a timely manner.

4.94 In many cases late disclosure is attributed to delays in receiving forensic evidence, such as drug tests. In Chapter 5 we have suggested that presumptive certificates be used in the initial brief of evidence, and that the agencies agree on the baseline content to form the brief. We expect this will significantly improve the timeliness of disclosure. Nevertheless, it is important that the NSWPF have processes in place to ensure that its officers are complying with disclosure timeframes as far as is practicable.

4.95 We are strongly of the view that the six month maximum for the turnaround of advice by the ODPP should be sufficient, but this is contingent upon the expediency and sufficiency of the brief supplied by police. To this end, we recommend that the NSWPF develop an internal management framework that focuses on providing disclosure within the required time. The NSWPF and the ODPP should also develop a protocol that outlines the process to be followed if a brief of evidence is not delivered within the required time. This may include escalating the request to the relevant police officer's supervisor or head of the Local Area Command.

Recommendation 4.3: implement professional practices to ensure the timeframe is met

The time for the NSW Police Force to provide the initial brief of evidence to the Office of the Director of Public Prosecutions (ODPP) should be set out in:

(a) a protocol between the NSW Police Force and the ODPP

(b) the Prosecution Guidelines of the Office of the Director of Public Prosecutions NSW, and

(c) any NSW Police Force operating procedures.

Procedure for setting and meeting a timetable for charge certification

4.96 It is vital that matters pending a charge determination and certification from the ODPP are not left to languish. It is also important that the ODPP have the time it needs to receive all the relevant evidence and provide a rigorous charge determination. The crux of early charge advice is that the charge issued from the

62. See Recommendation 5.1.

ODPP should be unlikely to change. To balance these sometimes competing concerns we suggest the procedure below.

At first appearance in the Local Court police assist the court in setting a timetable

4.97 Under our blueprint, police will appear at the first appearance after charging a person (where bail may also be dealt with). At this first appearance in the Local Court, the police prosecutor should advise the court of the length of time they expect that the ODPP or other prosecuting authority will need to certify the charge. This is the period of time that the NSWPF would need to finalise the initial brief of evidence, and that the ODPP or other prosecuting authority would then need to provide a charge determination. The magistrate would then set a timetable in which the ODPP or other prosecuting authority must determine and certify the charge. Most matters should fall well within the proposed six month maximum.

4.98 In complex matters, police prosecutors may need to consult with the ODPP on an appropriate timeframe for receiving a charge determination. Additionally, a protocol should be put in place that develops standard timeframes for ODPP advice once a brief of sufficient evidence is received.

4.99 Complex matters that rely on particular forensic evidence to form the basis of the prosecution case may require more than the maximum time. This may be caused by a known forensic evidence supplier backlog which is causing delay, or a sudden influx of demand for a certain service. This should be discussed with the court. It may be that these matters are expected to return to the court in six months' time for a status update.

4.100 We understand that the Local Court has time standards which it must meet to maintain its high level of efficiency and productivity. It is crucial, however, that the ODPP be given adequate time to address the evidence and form a charge determination. Repeated adjournments pending a charge determination are not desirable, and will operate to significantly undermine the proposed efficiencies of a post charge advice regime. The joint practice note of Recommendation 3.1 should reflect this.

Recommendation 4.4: joint practice note to allow a reasonable time for charge determinations
The joint practice note in Recommendation 3.1 should allow reasonable time for the NSW Police Force to supply the initial brief of evidence to the Office of the Director of Public Prosecutions (ODPP) and for the ODPP to provide a charge determination.

The ODPP or other prosecuting authority certifies the charge

4.101 Where the ODPP or other prosecuting authority is proceeding with an indictable prosecution, they would be required to certify the charge. Once the charge is certified, the ODPP or other prosecuting authority would lodge the charge with the court; appear before the Local Court for the first case management hearing; and supply the certification along with prosecution disclosure to the defence (where disclosure has not yet occurred).

4.102 The ODPP or other prosecuting authority may also determine the matter to be appropriate for summary prosecution and return the matter to the police, or withdraw the charges where there is no reasonable prospect of conviction or where it is in the public interest not to proceed.

The timetable to provide a charge determination is not met: possible court sanctions

4.103 The timetable set by the Local Court may not be met due to, among other things:

- delay caused by a third party supplier of forensic evidence testing
- the late introduction of new evidence
- a delay in police compiling and supplying the brief of evidence
- a delay in police supplying key evidence that may have been requisitioned by the ODPP or other prosecuting authority
- late review of the brief by the ODPP or other prosecuting authority, or
- inadequate professional practice.

4.104 Where the timetable is not met, the responsible agency would come before the Local Court to explain why the timetable was not met, and request a new charge determination date. The explanation may, if required by the court, be in the form of a written report or, where there is a contentious issue, an affidavit. The court would then make appropriate orders (which we detail below).

4.105 In our view, the police should retain carriage of the matter until the ODPP has finalised the charge determination, which would mean that the responsible agency would be the police. At this stage of proceedings, the ODPP has not made a charge determination and may not have received enough information to do so. There is a strong possibility that the ODPP will return the matter to police to prosecute summarily (currently 41% of matters charged on indictment resolve instead in the Local Court).

4.106 The NSWPF have suggested that police and the ODPP form an early charge advice working group to decide upon the best process for inter-agency cooperation, including protocols for handover of prosecution responsibility, and to formulate appropriate accountability measures.[63] The working group would also consider when matters should be handed over between prosecuting agencies. We support this idea – we recognise that a working group will be required to finalise many elements of our blueprint.

4.107 Where the court is satisfied with the reasons provided by the police prosecutor the court should have the power to adjourn and extend the appearance date. That is, the court should set a new timetable and adjourn the matter to a new date for certification. Where the court is not satisfied with the reasons, the court may:

63. NSW Police Force, *Consultation EAEGP41*.

- adjourn the matter to a new date for certification, or
- dismiss the matter in cases where the delay in certifying is such that dismissal is warranted. (This would not prevent the prosecuting agency from laying the charge again.)

4.108 The Local Court has an existing power to order costs against a party where there has been an adjournment and that party's unreasonable conduct or delay incurred costs for the other. This statutory power currently applies to committal proceedings,[64] but we envisage that the court could call upon this or a similar power where there has been an unreasonable and unexplained delay in certification. Given the close cooperation between the ODPP and the NSWPF we expect that this situation would rarely occur.

4.109 In some matters, a delay in charge determination may give the court a basis for questioning the strength of the prosecution case. It may well be that the court could also appropriately consider review of bail and bail conditions

4.110 The procedures for setting and complying with the timetable itemised above are drawn from recently introduced disclosure procedures in Queensland. In that jurisdiction the defence may apply to the court for a "disclosure obligation direction" that the prosecution comply with its disclosure obligations. If a person fails to comply with a disclosure obligation direction, the court may require that person to file an affidavit, or give evidence in court, explaining and justifying the reasons for non-compliance. If the court is not satisfied with the explanation, it may adjourn the proceedings to allow the person to comply with the disclosure direction, and order the person to pay costs if satisfied the noncompliance was unjustified, unreasonable or deliberate.[65]

Recommendation 4.5: timing of charge determination and certification

(1) The *Criminal Procedure Act 1986* (NSW) (CPA) should require the Office of the Director of Public Prosecutions (ODPP) or other relevant prosecuting authority to certify or withdraw the charge within a timeframe ordered by the Local Court. This must be within six months from the first adjournment.

(2) The NSW Police Force or other relevant investigating authority should retain carriage of the matter until the ODPP or other relevant prosecuting authority makes a charge determination.

(3) Where the ODPP or other relevant prosecuting authority has not provided a charge determination, the NSW Police Force or other relevant investigating authority must inform the Local Court of the reasons for non-compliance with the timeframe.

(4) Where the ODPP or other relevant prosecuting authority has not made a charge determination within the timeframe, the CPA should provide that the Local Court may:

(a) adjourn the matter, or

64. *Criminal Procedure Act 1986* (NSW) s 118.

65. *Justices Act 1886* (Qld) s 83B(1), (4)(b).

(b) dismiss the matter.

Dismissal should not prevent police laying the charge again at a later date.

(5) Section 118 of the CPA should be amended so that the Local Court's power to award costs applies where there has been unreasonable conduct or unreasonable delay before the charge is certified.

Pre charge advice should be sought in appropriate cases

4.111 The adoption of a post charge regime should not preclude the operation of a concurrent pre charge advice scheme where appropriate. Many Canadian jurisdictions operate a pre/post charge hybrid system, and NSW currently has a protocol that permits pre charge advice in some circumstances.

4.112 We note that the NSWPF submission also suggests that the police and ODPP have an arrangement where the police can request the ODPP to assign a senior prosecutor or a Crown Prosecutor to provide legal advice during a complex and sensitive investigation.[66]

The existing pre charge advice protocol in NSW

4.113 Currently in NSW a protocol between the NSWPF and the ODPP enables pre charge advice on the sufficiency of evidence and appropriateness of the charge in some instances. It also permits advice on evidence collection during the course of an investigation.[67] This protocol accompanies the ODPP Prosecution Guidelines, which detail the role and responsibilities of the ODPP in giving advice.[68]

4.114 **Matters that may receive advice:** The protocol enables police to seek advice in:

- strictly indictable matters
- Table matters where the ODPP has elected an indictable trial, and
- in cases of child sexual assault.

4.115 In effect, advice may be sought in any matter in which the ODPP would be the likely prosecuting agent.

4.116 **Time**: The protocol and Guidelines set time standards for the turnaround of advice of about four weeks, with concessions for urgently required advice.

4.117 **The substance of ODPP advice**: According to the protocol, advice from the ODPP can include:

- reasons why charges are not recommended

66. NSW Police Force, *Submission EAEGP14*, 18.
67. *Protocol for Advice between NSW Police and the NSW Office of the Director of Public Prosecutions (NSW)* (October 2005).
68. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 14.

- the draft words of recommended charges, and
- the request for further requisitions.

4.118 The Prosecution Guidelines supplement this directive to add, among other things, that the ODPP can also include advice on the merits of dealing with a matter summarily (by way of a less serious charge) rather than on indictment. Accordingly, the ODPP can advise the police in the same way as we are suggesting for early charge advice.[69]

4.119 **Participation**: Under the current protocol/guideline system, it is not mandatory for the police to seek or adopt the advice received from the ODPP.

4.120 In 2012/13, the police sought pre charge advice in just 3% (201) of all matters that commenced on indictment (5947).[70] These matters were often complex, and only 28% were completed within four weeks. 52% were completed in 90 days.[71] The rate of police compliance with the advice is not known.

Alberta: a hybrid pre and post charge advice arrangement

4.121 All provinces of Canada, except British Columbia, New Brunswick and Quebec, operate post charge advice regimes. By way of representative example, we outline the procedure in Alberta, where a post charge advice regime is underpinned by an administrative pre charge advice regime, applicable to certain offences.

4.122 In Alberta, police are responsible for the initial charge decision. The Crown Prosecutors' Manual states: "Crown prosecutors generally do not become involved in cases prior to the initiation of the prosecution by the informant, usually a peace officer".[72] The Manual also emphasises that "it is the belief of the investigator and not the prosecutor that is crucial to the laying of Information" and that "it would be prudent for the Crown prosecutor to refrain from expressing an opinion as to the existence of grounds to lay an information".[73]

4.123 The decision to lay charges ultimately rests with the police, yet investigators are able, and often encouraged, to seek advice from Crown prosecutors before laying charges. This practice is guided by a "Pre-Charge Consultation by the Police" practice memorandum and a protocol developed between police and the Crown Prosecution Service (CPS).[74] The protocol between police and the CPS agrees that

69. See para 4.82.
70. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 26, 28. This includes Table matters where the ODPP elected to proceed on indictment.
71. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 28.
72. Alberta Justice and Solicitor General, "Crown Prosecutors' Manual: Decision to Prosecute" (20 May 2008) <http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/decision_to_prosecute.aspx>.
73. Alberta Justice and Solicitor General, "Crown Prosecutors' Manual: Decision to Prosecute" (20 May 2008) <http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/decision_to_prosecute.aspx>.
74. Alberta Justice and Solicitor General, "Crown Prosecutors' Manual: Decision to Prosecute" (20 May 2008)

an "informal" pre-charge consultation should take place in the following cases and circumstances:

> All homicide cases where immediate arrest is not necessary and/or investigation has been prolonged and prosecution will, therefore, be protracted.
>
> Other major crimes where immediate arrest is not necessary and/or investigation has been prolonged and prosecution will, therefore, be protracted.
>
> Complex cases where investigation has been prolonged and prosecution will, therefore, be protracted.
>
> Cases where police are uncertain of the appropriate charge to lay.
>
> Cases where police are of the view it is questionable whether the evidence supports a charge.[75]

4.124 Pre charge advice is a voluntary police procedure. However, a recent report on the efficacy and efficiency of the criminal justice system in Alberta recommended moving towards a framework of mandatory pre charge consultation in certain circumstances. It is now considered "best practice" that police encountering cases of historical sexual assault seek legal advice from a Crown prosecutor before charging.[76]

4.125 In all matters, the Crown prosecutor "screens" the charges after the information has been laid.[77] This is a mandatory procedure that occurs after the accused's first appearance.[78]

4.126 The Crown Prosecutors' Manual notes that this charge screening may involve assessing what charging provisions to employ, and the Crown prosecutor may decide to:

- continue with the original charges in the information and indictment
- change the charges, or
- stop the prosecution entirely.[79]

<http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/decision_to_prosecute.aspx>. Crown officers are also empowered to establish their own pre-charge advice protocols with local police agencies.

75. G Lepp, *Injecting a Sense of Urgency: A New Approach to Delivering Justice in Serious and Violent Criminal Cases* (2013) 18-19.
76. G Lepp, *Injecting a Sense of Urgency: A New Approach to Delivering Justice in Serious and Violent Criminal Cases* (2013) 18.
77. Alberta Justice and Solicitor General, "Crown Prosecutors' Manual: Decision to Prosecute" (20 May 2008) <http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/decision_to_prosecute.aspx>.
78. Within 30 days for complex or serious matters: G Lepp, *Injecting a Sense of Urgency: A New Approach to Delivering Justice in Serious and Violent Criminal Cases* (2013) 24.
79. Alberta Justice and Solicitor General, "Crown Prosecutors' Manual: Decision to Prosecute" (20 May 2008)

4.127 2011/12 statistics from one Provincial Court in Alberta indicate that 85% of all guilty pleas are received "early" – that is, before a matter is set for a preliminary trial or full trial. In NSW 65% of guilty pleas are entered early.[80] Of matters withdrawn by the prosecution in Alberta, 76% of withdrawals occur in the same "early" period.[81] These figures may indicate that post charge advice (along with other early resolution programs, such as case conferencing)[82] is operating to screen out the majority of matters where there is not enough evidence for a reasonable prospect of conviction, and where there is a reasonable prospect, guilty pleas are being entered.

Pre charge advice in the Commonwealth jurisdiction

4.128 Our proposal for seeking pre charge advice in appropriate matters mirrors current Commonwealth charging procedures. The *Prosecution Policy of the Commonwealth* encourages pre charge advice in the majority of matters that the CDPP would prosecute:[83]

> 3.4 If as a result of the investigation an offence appears to have been committed the established practice (subject to the exceptions referred to in paragraphs 3.5 and 3.6 below) is for a brief of evidence to be forwarded to the DPP where it will be examined to determine whether a prosecution should be instituted and, if so, on what charge or charges. Although an AFP or other Commonwealth officer has authority to make the initial decision to prosecute, the Director has the responsibility under the Act to determine whether a prosecution, once commenced, should proceed. It is therefore generally desirable wherever practicable that matters be referred to the DPP prior to the institution of a prosecution.
>
> 3.5 Inevitably cases will arise where it will be necessary and appropriate that a prosecution be instituted by way of arrest and charge without an opportunity for consultation with the DPP. However, in cases where difficult questions of fact or law are likely to arise it is most desirable that there be consultation on those issues before the arrest provided the exigencies of the situation permit. The decision to arrest is a decision of the investigating official.

4.129 Commonwealth offences such as drug importation, fraud or immigration offences generally involve long criminal investigations. It is also noted that the Commonwealth does not have in-house Crown Prosecutors, so matters that commence are generally briefed out to private barristers. This means that there is an impetus to get the charge right at the first instance, as private barristers - while

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<http://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/decision_to_prosecute.aspx>.

80. See Chapter 2.

81. G Lepp, *Injecting a Sense of Urgency: A New Approach to Delivering Justice in Serious and Violent Criminal Cases* (2013) 11 (Table 3), referring to the Airdrie Provincial Court. NSW is comparable at around 75% of withdrawals by the prosecution occurring while the matter is still in the Local Court of NSW.

82. Alberta runs an "Early case resolution" program, which encourages early disclosure and discussions between the parties: Information provided by Alberta Crown Prosecution Service (28 June 2014).

83. Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2009) [3.4].

encouraged to enter into plea negotiations[84]- are less likely to seek to amend the initial charge.[85]

Our view: the existing pre charge advice protocol should be expanded

4.130 The existing protocol between the NSWPF and the ODPP in NSW has laid the foundation for running a system of pre charge advice in conjunction with a predominant post charge advice regime. Alberta and other provinces of Canada have introduced a system in which police are encouraged to seek pre charge advice in all matters that do not require immediate arrest. We see the potential for all matters that have a long investigative period (matters referred to as Scenario 1 in Appendix D) to receive pre charge advice as part of the investigative process. This currently occurs in Commonwealth matters, at least when the AFP are involved.

4.131 Matters appropriate for pre charge advice include criminal offences that are likely to be investigated without the suspect/s knowing that they are under investigation, or where there are long and complex investigations. This may occur in, among other matters, illegal internet use (such as child pornography), historical sexual assault, drug manufacturing or major fraud. In situations like these, we have been told that police often form a detailed brief of evidence, seek advice on the charge from police prosecutors, and may request further review by the ODPP under the protocol.[86]

4.132 We suggest that the current pre charge arrangement should be expanded to include the categories of offence mentioned, and any other appropriate matters. We strongly encourage participation. There are many significant benefits to receiving advice prior to the police charging which should not be lost in a new post charge regime. These include:

- **Early ownership by the ODPP:** Pre charge advice, where taken up, involves the ODPP at the earliest possible opportunity, enabling the prosecutors to take over the matter earlier and more efficiently.
- **An increase in the likelihood of early appropriate guilty pleas:** The matter is fully vetted and charges are settled prior to the person being charged. This means that the defence knows that there is little advantage in waiting for a variation in charge to enter a plea. Matters can therefore be resolved at the earliest stage.
- **Setting accurate expectations:** Where the ODPP has determined the charge prior to the person being charged, the expectations of victims, witnesses and the community as to the charge to be prosecuted are accurately set. Even where charges are laid with the knowledge that the charge is open to review (as will occur in a post charge regime), the initial charge sets an expectation which can be frustrated by a subsequent variation. This is most profoundly felt where the initial charge is downgraded on ODPP review.

84. Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2009) [6.17].
85. Commonwealth Director of Public Prosecutions, *Consultation EAEGP23.*
86. NSW Police Force, *Consultation EAEGP29;* NSW Office of the Director of Public Prosecutions, Legal Aid NSW and NSW Police Force, *Consultation EAEGP31.*

- **An increase in court efficiencies:** Where the ODPP has already reviewed a matter before charging, the police need not seek an adjournment for a charge determination, and the matter can then proceed directly to the first case management hearing (see flowchart in Figure 4.5).

4.133 We recognise that in a post charge advice model the ODPP would need to be able to free up resources to participate in pre charge work. This may be efficient and feasible if it creates benefits. The ODPP may well take the view, for instance, that it should only be involved if the charge advice is taken and the charge laid by police reflects the ODPP's advice. There is little value in involving the ODPP in an early stage and not taking the advice, especially since the charge is almost inevitably going to be amended later.

Recommendation 4.6: expand pre charge advice

The current protocol between the Office of the Director of Public Prosecutions and the NSW Police Force on pre charge advice should be reviewed with a view to promoting and increasing its use.

How would early charge advice be implemented?

4.134 Below we list the changes to relevant NSW legislation and guidelines that need to occur to authorise the early charge advice regime. This list is not exhaustive; there may be other residual statutes or protocols that also require amendment.

Table 4.2: Necessary authorisation for early charge advice

Instrument	Applicable model	Amendments
Criminal Procedure Act 1986 (NSW)	Post charge advice	Include the requirement for the prosecuting agency to certify the charge within a specified time period. Enable the court to order further adjournments and/or dismiss. Enable cost orders to be made.
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)	Post charge advice	Procedural amendments
Director of Public Prosecutions Act 1986 (NSW)	Post charge advice	Part 3, s 7: Principal functions to include providing charge advice to NSW Police Force on all indictable matters. Also revise s 14-15.
Prosecution Guidelines of the Office of the Director of Public Prosecutions	Post charge advice	Guideline 14: Advice to Police to be updated to include procedures relevant to post charge advice.
Police operational guidelines	Post charge advice	Protocol and practices to be outlined in NSW Police Force handbook/guidelines.
Protocol between ODPP and NSW Police Force	Post charge advice	The creation of a post charge advice protocol outlining responsibilities and obligations of each party, including on election matters.
Joint practice note	Post charge advice	Incorporating the adjournment and time standards into the proposed joint practice note.

Instrument	Applicable model	Amendments
Protocol between ODPP and NSW Police Force	Pre charge advice	Extending upon current pre charge advice arrangements

5. Disclosure in the Local Court

In brief

Service of a brief of evidence in the Local Court is currently designed to facilitate the committal hearing rather than an eventual trial or guilty plea. The brief of evidence is often served late or incomplete, and the prosecution and defence may disagree about when a sufficient brief has been served to allow the matter to progress to the committal hearing. We recommend that there be an early disclosure regime that requires service of an initial brief of key evidence on which the prosecution case relies, at the outset of case management in the Local Court. Full disclosure should only be required if the defendant pleads not guilty and the matter proceeds to trial in the Supreme or District Court.

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5.1 Proper and timely disclosure of evidence has been described as "the lynchpin of our criminal justice process".[1] It minimises delay and supports the effective use of public resources. It also serves to balance the inequality of power and resources between the prosecution and the defendant.[2] Disclosure therefore promotes fairness and efficiency in the criminal justice system.[3]

5.2 Early disclosure benefits everyone. The prosecutor can identify the best charge on the evidence from the outset; the defence can assess the strength of the prosecution case at an early stage; and the police can marshal the evidence during the investigation stage, when the greatest police resources are available.

5.3 Two of the ten obstacles to early guilty pleas that we have identified are directly attributable to aspects of the current disclosure regime: the prosecution serves part of the brief of evidence late, and (as a corollary) the defence expects (correctly) that further evidence will be disclosed closer to the trial.

5.4 Under the *Criminal Procedure Act 1986* (NSW) (CPA) and a Local Court practice note, a brief of evidence must be served prior to the committal hearing. However, the brief of evidence is intended to facilitate the committal hearing rather than a guilty plea, and service of the brief can be late or incomplete. This problem is compounded by delays in obtaining forensic analysis and by a lack of published guidance around the nature of the evidence required for a brief of evidence for committal.

5.5 Until all of the relevant evidence is available, neither the prosecutor nor the defence can make properly informed decisions about the charge. It is clear that there needs to be structured and early disclosure if the rate of appropriate early guilty pleas is to improve.

5.6 This chapter considers what changes should be made to disclosure of evidence in the Local Court for offences dealt with on indictment, to improve efficiency in the criminal justice system and encourage earlier guilty pleas.

Current process for disclosure

5.7 There are three critical junctures at which disclosure occurs in indictable matters prosecuted by the NSW Office of the Director of Public Prosecutions (ODPP):

- from the NSW Police Force (NSWPF) to the ODPP once the ODPP assumes carriage of the matter (or at the time pre charge advice is sought, if this occurs)

1. M Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (2008) 85.
2. M Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (2008) 86.
3. C Corns, *Public Prosecutions in Australia* (Lawbook Co, 2014) 130.

- from the ODPP to the defence prior to committal in the Local Court, and
- from the ODPP to the defence after the matter has been arraigned in the District Court or Supreme Court.

5.8 We use the term "disclosure" in this chapter to describe the provision of evidence from the NSWPF to the ODPP and also from the prosecution to the defence, although we recognise that the transfer of evidence in the first scenario does not amount to "disclosure" in the way lawyers normally use that term.

Disclosure from NSWPF to ODPP

Disclosure for pre charge advice

5.9 Currently a protocol between the NSWPF and the ODPP enables pre charge advice to be given on the sufficiency of evidence and appropriateness of the charge. Pre charge advice is available for strictly indictable matters, indictable matters triable summarily where the ODPP has agreed to elect to proceed on indictment, and cases of child sexual assault. Advice may also be given on evidence collection during an investigation.[4] This protocol accompanies the ODPP's Prosecution Guidelines, which detail the ODPP's role and responsibilities in giving advice.[5]

5.10 When the NSWPF seeks pre charge advice, it must provide the ODPP with "sufficient material in admissible form". Where insufficient material is provided to allow a decision to be made, the ODPP may request additional material before advice will be provided.[6] Requests for advice during an investigation must be accompanied by "sufficient information to enable the question to be answered".[7]

5.11 Pre charge advice is rarely sought. In 2012/13, the NSWPF sought pre charge advice in just 3% (201) of all matters that commenced on indictment (5947).[8]

Disclosure following charge

5.12 When a person is charged with an offence to be dealt with on indictment, the NSWPF will forward a brief of evidence to the ODPP. The brief of evidence will usually contain documents such as:

- the Court Attendance Notice
- facts sheet
- criminal history of the defendant
- statements of police officers, witnesses and victims

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4. *Protocol for Advice between NSW Police and the NSW Office of the Director of Public Prosecutions (NSW)* (October 2005).
5. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 14.
6. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 14.
7. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 14.
8. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 26, 28.

- the Electronically Recorded Interview with a Suspected Person (ERISP)
- transcripts of telephone intercepts or surveillance devices
- expert certificates (for example, for drug or forensic testing)
- exhibits such as documents or photographs
- a summary linking the evidence to the elements of the charge, and
- information about bail conditions or the custody record of the defendant.[9]

5.13 All of the relevant evidence may not be available at the time the brief is provided; for example, there may be delay in obtaining expert certificates. In those cases, evidence is provided to the ODPP as it becomes available. In addition to providing the brief of evidence, the NSWPF must notify the ODPP of the existence of all other documentation and information, including that concerning any proposed witness, which might be relevant to either the prosecution or defence. The NSWPF must certify to the ODPP that this has occurred.[10]

5.14 Once the ODPP takes carriage of the matter, it may issue requests to the NSWPF for further information or evidence relating to the case. These are known as "requisitions". We understand that requisitions are commonly issued.

Disclosure at committal

5.15 Evidence for the prosecution at committal is given by way of written statements, which are to be served on the defendant within the time set by the Local Court.[11] The Local Court practice note provides:

- At first mention, unless a plea of guilty is entered, the court will order service of the brief of evidence in 6 weeks.[12]
- The court will not order a brief of evidence for an indictable offence triable summarily unless it is informed that the defendant has entered a not guilty plea.[13]
- The Local Court may only depart from the timetable set in the practice note where it would be in the interests of justice.[14]
- Failure to finalise a brief of evidence within the timeframe set by the court will not, of itself, provide the basis for an adjournment.[15]

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9. Information provided by NSW Police Force (6 August 2014).
10. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 18.
11. *Criminal Procedure Act 1986* (NSW) s 74, s 75.
12. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [5.1].
13. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [4.1].
14. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [4.5].
15. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [9.2].

- If the failure to finalise the brief is due to delays in forensic analysis of material, the court will consider whether to grant an adjournment only if it is informed of the date the material was sent for forensic analysis, and it is satisfied that the results of the forensic analysis are likely to assist in the determination of the committal proceedings.[16]

5.16 Neither the CPA nor the practice note specifies what material should be included in the brief of evidence served prior to committal. In order to comply with the requirements for committal hearings, the prosecution would need to disclose at least the written statements of those witnesses the prosecution intends to rely on at the committal hearing, as well as any exhibits.[17]

Disclosure in the District Court and Supreme Court

5.17 The CPA was recently amended to strengthen case management in the District Court and Supreme Court, including by introducing a scheme of mandatory pre-trial disclosure.

5.18 After the indictment is presented or filed in the District Court or Supreme Court, the prosecution must provide notice of its case to the defence. This includes:

- the indictment
- a statement of facts
- statements of proposed witnesses
- documents it proposes to adduce at the trial
- if the prosecutor proposes to adduce evidence at the trial in the form of a summary, a copy of the summary or an outline of the summary
- proposed exhibits
- charts or explanatory material it proposes to adduce at the trial
- reports of proposed expert witnesses
- any information, document or other thing either in the possession or knowledge of the prosecutor that would reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed, including evidence going to the credibility of the defendant or prosecution witnesses, and
- a list of witnesses it proposes to call at the trial.[18]

5.19 In the Supreme Court the prosecution must also include a statement of the basis upon which it will contend that the defendant is criminally liable.[19]

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16. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [9.3].
17. *Criminal Procedure Act 1986* (NSW) s 60, s 74-75.
18. *Criminal Procedure Act 1986* (NSW) s 142(1).

5.20 The prosecution case must be disclosed no later than three weeks prior to the date set for trial in the District Court,[20] and no later than eight weeks before the date set for trial in the Supreme Court.[21]

5.21 The disclosure obligation is ongoing. Anything discovered after pre-trial disclosure that would have affected the disclosure, had it been known at the time, must be disclosed as soon as practicable.[22]

5.22 The CPA also includes a requirement for defence disclosure following notice of the prosecution case. Defence disclosure includes notice of any particular defences the defendant seeks to rely on, points of law to be raised, and any aspect of the prosecution case that the defence intends to take issue with.[23] Although in our consultation paper we asked when defence disclosure should occur,[24] we do not address defence disclosure in this report. Defence disclosure is comprehensively covered by the CPA.

Problems with the current system of disclosure

5.23 There are a number of problems with the way that disclosure currently occurs prior to committal. These revolve around delays in obtaining evidence, inflexibility of Local Court timeframes to accommodate late evidence and a lack of standardisation as to what must be included in a brief of evidence at the committal stage.

5.24 Disclosure in the Local Court is intended to facilitate the committal hearing. That is, disclosure need only occur to the extent that there is sufficient evidence to meet the threshold for committing a matter for trial. Often a brief of evidence for committal will also be sufficient for the defendant to decide whether to plead guilty, but that is not its primary purpose.

5.25 In the great number of cases where the defendant waives the committal hearing, the matter may be committed for trial without any admissible evidence having been served, if the parties agree. While this creates efficiencies in the committal process, it may slow proceedings in the District Court or Supreme Court, because the evidence will need to be served at this point before the matter can proceed to trial. It also means that the opportunity for a guilty plea in the Local Court is lost.

Brief service is completed late in the Local Court

5.26 Stakeholders identified late service of the brief of evidence in the Local Court as a common problem with the current system. In 2012/13 the median number of days between arrest and service of the brief of evidence for matters prosecuted by the

19. Supreme Court of NSW, *Practice Note SC CL 2 - Supreme Court Common Law Division – Criminal Proceedings,* 29 September 2014 [10(a)].
20. District Court of NSW, *Criminal Practice Note 9 - Standard Case Management*, 19 August 2013.
21. Supreme Court of NSW, *Practice Note SC CL 2 - Supreme Court Common Law Division – Criminal Proceedings,* 29 September 2014 [10(a)].
22. *Criminal Procedure Act 1986* (NSW) s 147.
23. *Criminal Procedure Act 1986* (NSW) s 143(1).
24. NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) Question 7.2.

ODPP was 59 days for matters committed for trial, and 57 days for matters committed for sentence.[25] This is a significant amount of the total time that the matter spends in the Local Court. The median number of days between service of the brief and committal is 110 days for matters committed for trial, and 77 days for matters committed for sentence.[26]

5.27 We understand that the ODPP serves evidence on the defence as it becomes available. This means that some evidence will usually be served within the 6 week timetable set by the Local Court, but it can take much longer for service of the brief of evidence to be completed.

5.28 Late service of evidence at the committal stage is a barrier to early guilty pleas. NSW Young Lawyers submitted that the single most widespread complaint amongst its members is that early guilty pleas are hampered by late evidence.[27] It noted that defence practitioners need to be in possession of all of the necessary prosecution evidence so that they can advise their client adequately. For example, in drug matters forensic testing of the exact quantity of the drug will often determine whether the drug is of a traffickable quantity. NSW Young Lawyers submitted that it would be remiss of a practitioner to advise on a plea of guilty before that evidence had been received.[28]

5.29 The Law Society of NSW suggested that early guilty pleas would be encouraged if offenders were charged at an early stage with all the evidence being made available.[29] Legal Aid NSW suggested that disclosure of the full brief of evidence by the prosecutor while the matter is still in the Local Court, with sanctions imposed for late disclosure, is one of the prerequisites to encouraging appropriate early guilty pleas in indictable matters.[30]

5.30 As our 10 obstacles to early guilty pleas identify,[31] defendants are reluctant to enter a guilty plea in the Local Court if they believe that further evidence will be disclosed closer to the date for trial. The problem of late service is complicated by the fact that, at present, Crown Prosecutors or other senior prosecutors are usually not involved in assessing the evidence until close to the date for trial. It may not be until this stage that deficiencies in the prosecution case are identified and further evidence is sought.

Local Court timetable is inflexible

5.31 A related problem is the inflexibility of the Local Court timetable to accommodate the late service of a brief of evidence. Failure to comply with the timetable for service of the brief does not provide grounds for an adjournment in and of itself

25. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 28.
26. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 28.
27. NSW Young Lawyers, Criminal Law Committee, *Preliminary Submission PEAEGP10,* 10.
28. NSW Young Lawyers, Criminal Law Committee, *Preliminary Submission PEAEGP10,* 8.
29. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission EAEGP9,* 3.
30. Legal Aid NSW, *Preliminary Submission PEAEGP4,* 3.
31. See Chapter 1.

unless the interests of justice so require.[32] This can result in a matter being committed for trial in the District Court or Supreme Court although a complete brief of evidence has not been served.

5.32 Legal Aid NSW submitted that magistrates strictly adhere to the practice note for the prompt management of committal matters.[33] The ODPP observed that, notwithstanding the time spent and legal costs incurred in the Local Court, briefs are still not entirely complete after the committal process and the expectation is that service of the brief will not be complete until the trial commences.[34] In the ODPP's view, forcing the parties to progress matters forward in the Local Court is futile, as neither party has control over the preparation of the brief of evidence.[35] The ODPP relies on the NSWPF for preparation of the brief, and delays can be due to matters outside the NSWPF's control, such as awaiting the results of forensic analysis.

5.33 The Local Court practice note is presumably intended to prevent endless delay and adjournments while pieces of evidence are obtained. Clearly there needs to be a point at which the Local Court will move matters through, despite the fact that not every piece of evidence has been served. However, committing matters for trial before the complete brief of evidence has been served also results in the loss of opportunities for appropriate early guilty pleas.

No clear guidelines around what should be included in brief of evidence

5.34 There is no detailed guidance in legislation or policy as to what should be included in the brief of evidence that is served before committal. As a result of the recently introduced pre-trial disclosure regime in the District Court and Supreme Court, there is now a comprehensive statutory list of what material must be disclosed before the matter proceeds to trial. However, this disclosure scheme happens too late to encourage early guilty pleas. The lack of structured guidance for the preparation of briefs to be served before committal has a number of negative consequences for effective disclosure.

5.35 First, we understand that the ODPP routinely issues requisitions to the NSWPF for further evidence. This can be time consuming for the NSWPF, particularly as the requisition will often be issued some time after the initial investigation. The NSWPF estimates that the amount of time involved in completing each batch of requisitions from the ODPP would be between 10 and 15 hours.[36] This problem is no doubt exacerbated by a lack of any detailed guidance in legislation or policy as to what must be included in a brief of evidence for committal.

5.36 Secondly, the prosecution and defence may disagree on what constitutes a sufficient brief of evidence on which to proceed to committal. We understand that the ODPP will seek to have the matter listed for a committal hearing when it considers that it has sufficient evidence to prove the essential elements of the

32. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [4.5], [9.2].
33. Legal Aid NSW, *Preliminary Submission PEAEGP4*, 12.
34. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PEAEGP6,* 5-6.
35. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PEAEGP6,* 5.
36. Information provided by NSW Police Force (6 August 2014).

charge. However, the defence may disagree with the adequacy of the brief, and consider that further evidence is required before the matter is ready for committal. This creates a disconnect between the prosecution, who are seeking to move the matter forward, and the defence, who are seeking more evidence before the matter proceeds.

5.37 Finally, the requirement for disclosure prior to committal is the same regardless of whether the defendant intends to plead guilty or not. The NSWPF submitted that an early guilty plea "obviates the need to obtain much of the technical, and in many cases very expensive, corroborative evidence that would be required if the charges were contested".[37] The ODPP noted that:

> [i]t is important for the system to strike a balance between minimising the amount of paper work and formal proofs the police are required to prepare in creating the brief and maximising the quality of information the offender, defence and prosecution lawyer have on which to make a decision.[38]

5.38 In practice, where the defendant pleads guilty prior to committal, the police will be saved from gathering technical and corroborative evidence. However, the current disclosure regime is not designed to maximise police efficiency in the preparation of evidence.

Delays in obtaining forensic analysis

5.39 Forensic material is used as evidence in many indictable proceedings. This includes evidence such as drug analysis, DNA testing and blood or fingerprint analysis. Awaiting the results of forensic analysis is currently a source of considerable delay within the criminal justice system. We are told that delays in serving the complete brief of evidence are often attributable to the time taken to conduct forensic analysis, particularly for drug and DNA samples.

5.40 There are two primary organisations that provide forensic analysis for criminal proceedings in NSW. The Forensic and Analytical Science Service (FASS) within NSW Health Pathology provides analysis for the criminal justice sector in areas such as forensic medicine, forensic biology, DNA, drug toxicology and illicit drugs.[39] The NSWPF also has a Forensic Services Group (FSG) that collects DNA swabs and exhibits at crime scenes, both of which are then sent to FASS for analysis.[40] FSG also conducts fingerprint identification.[41]

5.41 In drug matters the production of a certificate signed by an analyst is prima facie evidence of the identity of the plant or substance analysed, the quantity or mass of the plant or substance analysed and of the result of the analysis.[42] The current turnaround time for FASS to complete drug analysis for offences to be dealt with on

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37. NSW Police Force, *Submission EAEGP14*, 5.
38. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10,* 10.
39. NSW Health, "NSW Health Pathology" (2 May 2014) <http://www.health.nsw.gov.au/pathology/pages/default.aspx>.
40. Information provided by NSW Police Force (6 August 2014).
41. NSW Police Force, "Forensic Services Group" (21 November 2013) <http://www.police.nsw.gov.au/about_us/structure/specialist_operations/forensic_services>.
42. *Drug Misuse and Trafficking Act 1985* (NSW) s 43(2).

indictment is up to six months, although the NSWPF and FASS are currently addressing this delay.[43]

5.42 We understand that drug samples can, and often are, presumptively tested, to determine the weight of the sample and identify the type of drug. A full analysis will confirm the precise nature of the drug, an accurate weight and its purity. A presumptive test may be conducted at the time of seizure, although it is not as accurate as a full analysis. Presumptive drug test certificates are also not prepared in a form that is admissible under the *Drug Misuse and Trafficking Act 1985* (NSW).

5.43 We understand that where a presumptive test has been carried out, these results will usually be provided in the brief of evidence served on the defence, with the full analysis certificate being supplied once it is available. A presumptive certificate is useful in allowing the defence to consider the strength of the prosecution case, but if the forensic evidence is to be relied upon at trial a full analysis certificate is required.

5.44 The Chief Magistrate of the Local Court has recently introduced a Presumptive Testing Certificate Trial for summary drug matters, in order to encourage reliance on presumptive testing. The aim of the trial is to encourage matters to be resolved without the delay involved in obtaining a full analysis. Under this trial, the NSWPF supplies the defendant with a presumptive certificate of the drug analysis. Should the defendant request that a full analysis be conducted, which confirms the presumptive test, and the defendant is found to be guilty, the NSWPF may seek a costs order against the defendant for the cost of obtaining the full analysis. This acts as a disincentive for the defendant to delay proceedings to wait for the results of the full drug test.[44] Anecdotal advice is that the trial has been successful in reducing delay and increasing guilty pleas, although no formal evaluation of the trial has been carried out.[45]

5.45 The delay in obtaining the results of forensic analysis is complicated by the fact that the matter is not always adjourned in the Local Court until the forensic analysis is obtained. Under the Local Court practice note, an adjournment will only be granted for the purpose of obtaining forensic analysis if the magistrate is satisfied that the results of the analysis are likely to assist in the determination of the *committal proceedings*. In order to find that there is sufficient evidence to commit the defendant to trial, the magistrate does not need to have regard to all evidence relevant to the case.[46] Thus, if the magistrate considers that there is sufficient evidence to commit the defendant for trial without the need to rely on the results of the forensic analysis, the proceedings will not be adjourned for that purpose. This can mean that the matter is committed for trial even though the full forensic analysis is not yet available.

43. Information provided by NSW Police Force (6 August 2014).
44. NSW Police Force, *Submission EAEGP14*, 12.
45. Information supplied by Local Court of NSW (26 June 2014).
46. See para 5.16.

Delays in obtaining transcripts of telephone intercepts and surveillance devices

5.46 Police may obtain a warrant to collect evidence by way of a telephone intercept[47] or a surveillance device.[48] A warrant for a telephone intercept is available for the investigation of a "serious offence",[49] and information obtained from a telephone intercept may be used in the prosecution of a serious offence.[50] Similarly, a warrant for a surveillance device is available where it is suspected that an indictable offence has been or is to be committed.[51] Information obtained from a surveillance device may be used in the prosecution of an indictable offence.[52]

5.47 A transcript of a sound recording from a telephone intercept or surveillance device is admissible as evidence of what was said.[53] However, the need to transcribe the recordings from telephone intercepts or surveillance devices can delay finalising the brief of evidence. Further delays can also arise when sound recordings need to be translated into English. In these cases the NSWPF outsources the transcription to suitably qualified interpreters.[54]

5.48 The NSWPF has piloted a trial to improve the efficiency of transcription of telecommunication interceptions required for court proceedings. Under this trial, a summary of the information is generated, and key parts of the conversation are transcribed. The ODPP and defence are supplied with this material and the audio disks during the early stages of the court proceeding. The aim is to allow for material that is especially relevant for court purposes to be transcribed in a timely manner. The trial concluded in August 2014 and an evaluation will be undertaken.[55]

Disclosure in the District Court occurs close to trial

5.49 Once the matter has been arraigned in the District Court, disclosure of the prosecution case pursuant to the CPA is not required until three weeks prior to the trial date. As the parties may wait until disclosure has been completed before engaging in charge negotiations, this makes it less likely that guilty pleas will be entered at any earlier point in the process.

Disclosure regimes in other jurisdictions

5.50 Other jurisdictions have updated their disclosure requirements as part of criminal procedure reforms. England and Wales, WA and NZ have two-tiered disclosure

47. Under the *Telecommunications (Interception and Access) Act 1979* (Cth).
48. Under the *Surveillance Devices Act 2007* (NSW).
49. As defined in *Telecommunications (Interception and Access) Act 1979* (Cth) s 5D.
50. *Telecommunications (Interception and Access) Act 1979* (Cth) s 67, s 5 (definition of "permitted purpose" and "prescribed offence"), s 6L.
51. *Surveillance Devices Act 2007* (NSW) s 17, s 4 (definition of "relevant offence").
52. *Surveillance Devices Act 2007* (NSW) s 40(4), s 4 (definition of "relevant proceeding" and "relevant offence").
53. *Evidence Act 1995* (NSW) s 48(1)(c). If the sound recording is unclear, it may be need to be admitted for the jury to decide what was said, in which case any transcript prepared would be an aide memoire only: *Butera v DPP (Vic)* (1987) 164 CLR 180, 187-8 (Mason CJ, Brennan & Deane JJ).
54. Information provided by NSW Police Force (6 August 2014).
55. Information provided by NSW Police Force (6 August 2014).

regimes: an initial brief of evidence for the preliminary hearing in the lower courts, and a full brief of evidence to be provided if the matter proceeds to trial. Queensland has also recently introduced new measures to improve the enforceability of disclosure.

Disclosure regime in England and Wales

5.51 England and Wales has a "proportionate" disclosure regime – that is, at each stage of the proceedings, the disclosure obligations are proportionate to the needs of the parties at that point in the criminal justice process.

5.52 The disclosure regime is separated into three stages:

- **a pre charge report** from the police to the Crown Prosecution Service (CPS), for the purpose of obtaining a charge decision
- the brief of evidence for the first hearing in a Magistrates' Court, known as the "**National File Standard**", and
- an "**upgraded**" file if the case is to be contested in a Magistrates' Court or sent to the Crown Court for trial.[56]

5.53 A "streamlined process" for preparing a brief of evidence was introduced in 2008 for summary and either-way matters to be heard in the Magistrates' Courts. It was designed to reduce unnecessary bureaucracy for police officers by giving them guidance on preparing a brief of evidence that was proportionate to the needs of the case.[57] In 2011, this was expanded to all matters by the introduction of the National File Standard, contained in the CPS guidelines.[58]

5.54 The brief of evidence for the first hearing in a Magistrates' Court must be proportionate to the requirements of that hearing. It must allow the prosecutor to conclude the case if a guilty plea is entered, as well as to conduct an effective case management hearing if a not guilty plea is entered.[59]

5.55 If the matter proceeds to trial, the CPS will request an "upgraded" case file from the police. The CPS will provide the police with information about the "real issues" in the case, as developed in the case management hearing,[60] so that the police need only prepare an upgraded brief of evidence to deal with the issues in dispute.

5.56 For the purpose of disclosure at the stages of pre charge advice and the first hearing in the Magistrates' Courts, a distinction is made between anticipated guilty plea cases and anticipated not guilty plea cases. A slightly less onerous disclosure obligation applies to the former. A guilty plea is considered to be anticipated where:

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56. UK, Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) Annex C.
57. UK, National Audit Office, *The Crown Prosecution Service: The Introduction of the Streamlined Process* (2011) [1.1]-[1.2].
58. UK, National Audit Office, *The Crown Prosecution Service: The Introduction of the Streamlined Process* (2011) 6.
59. UK, Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) [32].
60. UK, Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) Annex C.

- the suspect has made a clear and unambiguous admission to the offence and has said nothing that could be used as a defence, or
- the suspect has made no admission but has not denied the offence or otherwise indicated it will be contested, and the commission of the offence and identification of the offender can be established by reliable evidence or the suspect can be seen clearly committing the offence on a good quality visual recording.[61]

5.57 The content of disclosure at each stage is outlined in Table 5.1.

61. UK, Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) [17].

Table 5.1: Contents of Charging Reports and the National File Standard in England and Wales

Pre charge reports for charging decisions to CPS		Post-charge national file standard for first court hearing		3. Contested and Indictable Only cases: Magistrates' Court trial or sending to Crown Court for trial
1A. Anticipated guilty plea cases	**2A. Anticipated NOT guilty plea cases**	**1B. Anticipated guilty plea cases**	**2B. Anticipated NOT guilty plea cases**	
Required: ▪ Report to Crown Prosecutor (containing summary of evidence, officer's views, confidential information, specific issues requiring consideration). ▪ Police National Computer print of suspect and key prosecution witnesses' previous convictions. ▪ Any material that undermines the prosecution case or assists the defence. **If applicable, include:** ▪ Drink/drive forms. ▪ Other key evidence: CCTV, medical or forensic records, photos, documentary exhibits etc. ▪ Other relevant material: Domestic violence/hate crime incident reports etc. ▪ Key witness statements.	**Required:** ▪ Report to Crown Prosecutor (containing summary of evidence, officer's views, confidential information, specific issues requiring consideration). ▪ Police National Computer print of suspect and key prosecution witnesses' previous convictions. ▪ Any material that undermines the prosecution case or assists the defence. ▪ Key witness statements. **If applicable, include:** ▪ Drink/drive forms. ▪ Other key evidence: CCTV, medical or forensic records, photos, documentary exhibits etc. ▪ Other relevant material: Domestic violence/hate crime incident reports etc.	**Pre charge report, plus:** ▪ Charge sheet. ▪ Police report. ▪ List of witnesses. ▪ Witness non-availability. **If applicable, include:** ▪ Bail sheet. ▪ Remand application. ▪ Breach of bail conditions. ▪ Interview record (in serious or complex cases). ▪ Offences Taken Into Consideration. ▪ All key witness statements. ▪ Compensation documentation.	**Pre charge report, plus:** ▪ Charge sheet. ▪ Police report. ▪ List of witnesses. ▪ Witness non-availability. ▪ Key witness statements. **If applicable, include:** ▪ Bail sheet. ▪ Remand application. ▪ Breach of bail conditions. ▪ Interview record (in serious or complex cases). ▪ Offences Taken Into Consideration. ▪ Special measures assessment. ▪ Case File Evidence and Information (where charge laid by police). ▪ Bad character/ dangerous offender. ▪ Forensic submissions.	If a not guilty plea is entered and/or the case is sent to the Crown Court for trial, the file will be proportionately upgraded according to the "real issues" in the case as identified at the Case Management Hearing. **Post-charge national file standard, plus:** ▪ Schedule of relevant non-sensitive unused material. ▪ Schedule of relevant sensitive material. ▪ Disclosure officer's report. **If applicable, include:** ▪ Special measures assessment. ▪ Police Officer's disciplinary record. ▪ Other relevant key statements. ▪ Exhibits list. ▪ Interview record. ▪ Compensation form and supporting documentation. ▪ Forensic submissions. **For Crown Court trials, include:** ▪ All statements including corroborative, continuity etc. ▪ Interview record.

Source: UK, Crown Prosecution Service, The Director's Guidance on Charging (5th ed, 2013) Annex C

Evaluation of the disclosure regime in England and Wales

5.58 Initial reviews of the proportionate disclosure regime were tentatively positive. A 2011 National Audit Office review of summary and either way matters heard in the Magistrates' Courts concluded that the streamlined process (the precursor to the National File Standard) had not decreased the rate of early guilty pleas nor increased the number of adjournments required.[62] There was some evidence to suggest that the use of proportionate prosecution files supported the delivery of effective and speedy outcomes in the Magistrates' Courts. However, there was insufficient data collected to determine whether the streamlined process was saving time or money in the criminal justice system.[63]

5.59 Although a detailed costing was not possible, an indicative assessment suggested that police officers saved 66 minutes for each brief of evidence by using the streamlined process. If this could be replicated nationally, the National Audit Office estimated it could give a potential cost saving of around £10 million.[64]

5.60 However, there have been problems implementing the proportionate disclosure regime. A 2013 joint review by the Crown Prosecution Service Inspectorate and Inspectorate of Constabulary into the quality of prosecution case files concluded that "neither agency is reaping the full benefits of the work undertaken on building proportionate case files".[65]

5.61 The report found that the initial briefs of evidence supplied by the police to the CPS for charging decisions were adequate in 76% of the cases reviewed, and an upgraded case file was provided to the CPS in a timely fashion in 74% of cases.[66] Furthermore, police officers were able to correctly anticipate a guilty plea in 78% of cases,[67] meaning that in most cases they were only preparing the brief of evidence that was required.

5.62 However, the report also found a number of problems with the proportionate disclosure regime. These included:

- A lack of understanding amongst frontline police officers of the importance and relevance of the information they were providing to the prosecution.[68]
- The National File Standard, which was intended to be an *aide memoire* for the preparation of case files, was instead treated as a checklist.[69]

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62. UK, National Audit Office, *The Crown Prosecution Service: The Introduction of the Streamlined Process* (2011) [1.12]-[1.13].
63. UK, National Audit Office, *The Crown Prosecution Service: The Introduction of the Streamlined Process* (2011) [1.17].
64. UK, National Audit Office, *The Crown Prosecution Service: The Introduction of the Streamlined Process* (2011) [1.19].
65. UK, HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate, *Getting Cases Ready for Court: A Joint Review of the Quality of Prosecution Case Files* (2013) 37.
66. UK, HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate, *Getting Cases Ready for Court: A Joint Review of the Quality of Prosecution Case Files* (2013) 19, 29.
67. UK, HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate, *Stop the Drift 2: A Continuing Focus on 21st Century Criminal Justice* (2013) [4.32].
68. UK, HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate, *Getting Cases Ready for Court: A Joint Review of the Quality of Prosecution Case Files* (2013) 37.

- There was evidence of "overbuilding" case files at the initial stage - that is, including material that was not required at that stage of the proceedings.[70]
- Prosecutors did not communicate consistently with police about whether the defendant was anticipated to enter an early guilty plea, and therefore whether an upgraded case file was required. This led to police officers preparing detailed case files that were later unnecessary.[71]
- Timeliness in providing the upgraded case file was often at the expense of quality.[72] Lack of timeliness or quality of the case file led to an outcome being adversely impacted in 10% of cases.[73]
- The CPS prioritises contested cases according to the next hearing date. Accordingly, where an upgraded case file was provided by the police to the CPS within the required timeframe, often a prosecutor would not look at it until close to the trial date. This caused problems if key evidence was missing or there had been developments that required new evidence. Deficiencies identified in the evidence at that stage were sometimes too late to rectify, leading to the prosecution being discontinued.[74]

5.63 Other problems related to the preparation of the police report that is provided to the CPS. It requires the police officer to summarise the key evidence as it relates to the elements of the offence to be charged and the interview with the suspect, and to provide any additional information the police officer considers relevant. The joint review found that the quality of the police report was generally inadequate. The report was a "cut and paste" rather than a summary; it lacked relevant information and attention to detail was poor.[75]

Disclosure regime in Western Australia

5.64 WA has two stages of prosecution disclosure – initial disclosure prior to the first appearance in the Magistrates Court, and full disclosure prior to a disclosure/committal hearing if the defendant pleads not guilty or does not enter a plea. Table 5.2 shows the two stages of prosecution disclosure in WA.

69. UK, HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate, *Getting Cases Ready for Court: A Joint Review of the Quality of Prosecution Case Files* (2013) 37.
70. UK, HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate, *Getting Cases Ready for Court: A Joint Review of the Quality of Prosecution Case Files* (2013) 17-18.
71. UK, HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate, *Getting Cases Ready for Court: A Joint Review of the Quality of Prosecution Case Files* (2013) 27.
72. UK, HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate, *Getting Cases Ready for Court: A Joint Review of the Quality of Prosecution Case Files* (2013) 29.
73. UK, HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate, *Getting Cases Ready for Court: A Joint Review of the Quality of Prosecution Case Files* (2013) 30.
74. UK, HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate, *Getting Cases Ready for Court: A Joint Review of the Quality of Prosecution Case Files* (2013) 28-29.
75. UK, HM Inspectorate of Constabulary and HM Crown Prosecution Service Inspectorate, *Getting Cases Ready for Court: A Joint Review of the Quality of Prosecution Case Files* (2013) 13.

Table 5.2: Disclosure regime under the *Criminal Procedure Act 2004* (WA)

	Initial disclosure	Full disclosure
When	As soon as possible after a prosecution notice for an indictable charge is served on the defendant, but must be before the first appearance in the Magistrates Court unless it is impractical to do so. [s 35(4), (9)]	If the defendant does not plead guilty at the first appearance, as soon as practicable after the matter is adjourned to a committal/disclosure hearing. [s 42(5)]
Material to be disclosed	▪ A written statement of the material facts of each charge. ▪ A notice of the existence or non-existence, as the case may be, of confessional material relevant to each charge. ▪ The criminal record of the defendant. [s 35(4)] "Confessional material" means a written statement signed by the defendant or a written or electronic record of interview with the defendant. [s 35(1)]	▪ Any confessional material of the defendant that is relevant to the charge and that the defendant has not already received from the prosecutor. ▪ Any evidentiary material that is relevant to the charge. [s 42(5)] "Evidentiary material" means: ▪ every statement of every person who may be able to give evidence relevant to the charge, regardless of whether it assists the prosecutor's case or the defendant's defence ▪ every document or object that the prosecutor intends to tender at the trial, and ▪ every other document or object that may assist the defendant's defence. [s 42(1)]
Consequences of failure to disclose	The court may order the prosecution to serve the material by a specified date, or dismiss the matter for want of prosecution. [s 35(10)]	If the court is not satisfied that the prosecutor has complied with its disclosure obligation, it may adjourn the disclosure/committal hearing and order the prosecution to provide disclosure by a new court date. If this does not occur, the court may adjourn the matter again or dismiss the proceedings for want of prosecution. [s 44(1)]

5.65 If the defendant pleads not guilty or does not enter a plea to an indictable offence at the first hearing, the matter is adjourned to a disclosure/committal hearing.[76] The prosecution must provide full disclosure as soon as practicable after the matter is adjourned.[77] At the disclosure/committal hearing the court must be satisfied that the prosecution has complied with the disclosure requirements.[78] Alternatively, the prosecution and the defendant may consent to an administrative committal, which allows the matter to be committed to the Supreme or District Court without a disclosure/committal hearing.[79]

5.66 Following committal, a certificate must be provided by a person who had knowledge of or involvement in the investigation of the charge, certifying that the disclosure requirements have been complied with, and the grounds for so certifying.[80] Signing a false certificate knowingly or without reasonable diligence is an offence.[81]

76. *Criminal Procedure Act 2004* (WA) s 41(4).
77. *Criminal Procedure Act 2004* (WA) s 42(5).
78. *Criminal Procedure Act 2004* (WA) s 44(1).
79. *Criminal Procedure Act 2004* (WA) s 43.
80. *Criminal Procedure Act 2004* (WA) s 45(5).
81. *Criminal Procedure Act 2004* (WA) s 45(6).

Evaluation of the disclosure regime in WA

5.67 In 2006 the Chief Judge of the WA District Court observed that the new disclosure provisions were very wide and provided for better disclosure than under the old system.[82] However, the requirement for more comprehensive disclosure after the first appearance was more resource intensive on the WA ODPP and the police. She noted that the major reason for late adjournments in the District Court under the new scheme was late disclosure.[83] Trial counsel were not looking at the matter until after it had been committed to the District Court and proper decisions as to the key evidence in issue were not being made until that time.

5.68 In addition, the disclosure certificate, which must be signed by an officer connected with the investigation, does not need to be provided until after committal.[84] This meant that cases can be committed for trial in the District Court without full disclosure having occurred.[85]

Disclosure regime in New Zealand

5.69 The comprehensive *Criminal Disclosure Act 2008* (NZ) governs disclosure in NZ. The disclosure obligations in the Act apply to the "prosecutor" - that is, the person in charge of the file relating to a criminal proceeding.[86]

5.70 The purpose of the Act is to promote fair, effective and efficient disclosure.[87] The Act was introduced as part of a package of reforms that included the removal of preliminary (committal) hearings. The Act was intended to complement the removal of preliminary hearings by creating a single and easily accessible statute to govern disclosure in criminal proceedings.[88]

5.71 The Act provides for a two-stage disclosure process: "initial disclosure" to occur within 21 days after the commencement of proceedings; and "full disclosure" to occur as soon as practicable after the defendant pleads not guilty. In addition, the defendant may request "additional disclosure" of any evidence from the prosecutor after both the initial disclosure and the full disclosure.[89]

5.72 The Act itemises the material to be provided at each stage of disclosure. This is set out in Table 5.3.

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82. A Kennedy, "Getting Serious About the Causes of Delay and Expense in the Criminal Justice System" (Paper presented at 24th AIJA Annual Conference, Adelaide, 16 September 2006) 5.
83. A Kennedy, "Getting Serious About the Causes of Delay and Expense in the Criminal Justice System" (Paper presented at 24th AIJA Annual Conference, Adelaide, 16 September 2006) 6.
84. *Criminal Procedure Act 2004* (WA) s 45(3).
85. A Kennedy, "Getting Serious About the Causes of Delay and Expense in the Criminal Justice System" (Paper presented at 24th AIJA Annual Conference, Adelaide, 16 September 2006) 5.
86. *Criminal Disclosure Act 2008* (NZ) s 6 (definition of "prosecutor"). In the case of Crown prosecutions, the prosecutor will not be the Crown prosecutor but rather the law enforcement officer responsible for the file. In any other prosecution, the prosecutor as well as the officer or employee designated by the relevant government agency as the person responsible for the file is a "prosecutor" under the Act: NZ, Crown Law, *Solicitor-General's Prosecution Guidelines* (2013) [16.1].
87. *Criminal Disclosure Act 2008* (NZ) s 3(1).
88. NZ, *Parliamentary Debates,* House of Representatives, 19 June 2008, 16 770.
89. See *Criminal Disclosure Act 2008* (NZ) s 3(2).

Table 5.3: Disclosure regime under the *Criminal Disclosure Act 2008* (NZ)

Type of disclosure	When	Material to be disclosed
Initial Disclosure	Within 15 working days of the commencement of criminal proceedings, unless the court grants an extension of time. [s 12(1), (4)]	Charging document. Sufficient summary to fairly inform the defendant of the facts on which it is alleged an offence has been committed. Summary of defendant's right to request additional information. Maximum penalty and minimum penalty (if applicable) for the offence. Defendant's previous convictions. [s 12(1)]
Additional Disclosure	As soon as reasonably practicable after being requested by the defendant. [s 12(2)]	Names of witnesses whom the prosecutor intends to call at trial. List of exhibits that the prosecutor proposes to produce at the trial. Records of interviews with the defendant. Records of interviews with prosecution witnesses that contain relevant information. Job sheets and other notes of evidence taken by a law enforcement officer that contain relevant information. Records of evidence produced by a testing device that contain relevant information. Diagrams and photographs made or taken by a law enforcement officer that contain relevant information and are intended to be introduced as evidence. Records about compliance with the *Bill of Rights Act 1990* (NZ). Any statement made by, or record of an interview with, a co-defendant in any case where the defendants are to be proceeded against together for the same offence. List of any information described above that the prosecutor refuses to disclose to the defendant, together with the reasons for the refusal. [s 12(2)]
Full disclosure	As soon as practicable after the defendant pleads not guilty. [s 13(1)]	Statements by prosecution witnesses. Any brief of evidence that has been prepared in relation to a prosecution witness. Name and any record of interview or statement of any person interviewed by the prosecutor who gave relevant information and whom the prosecutor does not intend to call as a witness. Any convictions of a prosecution witness that are known to the prosecutor and that may affect the credibility of that witness. List of all exhibits that the prosecutor proposes to introduce as evidence. List of all relevant exhibits in the possession of the prosecutor that the prosecutor does not propose to introduce as evidence. Any information supplied to the prosecutor in connection with the case by any person whom the prosecutor proposes to call to give evidence as an expert witness. Any relevant information supplied to the prosecutor by any person whom the prosecutor considered calling to give evidence as an expert witness, but elected not to do so. List of any information described above that the prosecutor refuses to disclose to the defendant, together with the reasons for the refusal. [s 13(2)]
Additional disclosure	The defendant may request additional disclosure of particular information at any time after the duty to provide full disclosure has arisen. [s 14(1)]	The prosecutor must disclose the information requested by the defendant unless it is not relevant, it may be withheld under the Act or the request appears to be frivolous or vexatious. [s 14(1)]

5.73 The Solicitor-General's Prosecution Guidelines stipulate that prosecutors should use their best endeavours to make initial disclosure by the time of the defendant's first appearance, to facilitate entry of a plea by the second appearance.[90] This is because the court has a discretion to require a defendant to enter a plea once initial disclosure has been made.[91]

Evaluation of the disclosure regime in NZ

5.74 In *M v R*, the NZ Court of Appeal stated "[w]e were told that disclosure under the [*Criminal Disclosure Act 2008* (NZ)] continues to be haphazard and often tardy".[92] However, this statement seems to have been based on submissions from the bar table rather than any empirical evidence. It does not appear that any other assessment of compliance with the Act has been conducted.

Disclosure regime in Queensland

5.75 The disclosure regime in Queensland was amended in 2010 following the review of the civil and criminal justice system by retired judge Martin Moynihan (Moynihan review).

5.76 The amendments did not change the nature or timing of the prosecution's disclosure obligations. Rather, they allowed the defence to apply for a "disclosure obligation direction" from the Magistrates Court.[93] This includes a direction that a particular thing be disclosed, a direction about how a disclosure obligation is to be complied with in a particular case, or a direction setting a timetable for disclosure.[94] If a person fails to comply with a disclosure obligation direction, the court may require that person to provide an affidavit explaining the reasons for non-compliance. If the court is not satisfied with the explanation, it may order the person to pay costs if the noncompliance was unjustified, unreasonable or deliberate.[95]

5.77 These amendments followed recommendations made in the Moynihan review to "give teeth" to the existing disclosure requirements, in response to concerns that disclosure obligations were not being met.[96]

5.78 The Moynihan review also recommended that there be a staged disclosure regime.[97] This was not implemented in legislation - the *Criminal Code* (Qld) only requires that disclosure for a committal proceeding be made at least 14 days before the date set by the court for the hearing of the evidence.[98] However, a staged disclosure regime was given effect to by an administrative agreement between the

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90. NZ, Crown Law, *Solicitor-General's Prosecution Guidelines* (2013) [16.5].
91. *Criminal Procedure Act 2011* (NZ) s 39(1).
92. *M v R* [2011] NZCA 303 [35].
93. *Justices Act 1886* (Qld) s 83A(5)(aa).
94. *Justices Act 1886* (Qld) s 83E(1).
95 *Justices Act 1886* (Qld) s 83B(1), (4)(b).
96. M Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (2008) 93.
97. M Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (2008) 102.
98. *Criminal Code* (Qld) s 590AI(2)(a).

Queensland Police Service and relevant agencies, and formalised in a practice direction made by the Chief Magistrate.[99] The practice direction requires that:

- Before the first appearance in the Magistrates Court, the defendant is to be supplied with a copy of the QP9 (a form prepared by the arresting police officer detailing the charges and facts alleged).[100]
- If the defence requests certain specified statements or exhibits, the prosecution must make these available within 14 days of the request or such longer time as the court may direct.[101]
- At the committal callover, if the defence informs the court that it will be a committal for sentence, the prosecution will provide a partial brief of evidence to the defence within 14 days or such longer time as directed by the court.[102] The partial brief focuses on the "substantial evidence" in the matter – evidence that would tend to prove an offence, and does not include corroborative or continuity evidence.[103] The partial brief of evidence must include witness statements, exhibits and documentary material that provides the "substantial evidence" in the matter, as well as a copy of each electronically recorded interview including field taped conversations.[104]
- If the matter is to proceed to a committal hearing, the prosecution must supply the full brief of evidence within 35 days of the committal callover.[105] The full brief of evidence must include statements of witnesses and exhibits upon which the prosecution proposes to rely in the proceeding and all things in the possession of the prosecution that would tend to help the case for the defendant, other than things the disclosure of which would be unlawful or contrary to public interest.[106]

Evaluation of the disclosure regime in Queensland

5.79 One year after the reforms were introduced, there was an increase in the number of matters resolving in a guilty plea while matters were still in the Magistrates Court. This was attributed to, amongst other things, earlier disclosure.[107]

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99. B Butler, "Criminal Law Reform – One Year On" (Paper presented at Current Legal Seminar Series 2011, Brisbane, 10 November 2011) 4-5.
100. Magistrates Court of Queensland, *Practice Direction No 13 of 2010 – Disclosure*, 1 November 2010 [4].
101. Magistrates Court of Queensland, *Practice Direction No 13 of 2010 – Disclosure*, 1 November 2010 [6].
102. Magistrates Court of Queensland, *Practice Direction No 13 of 2010 – Disclosure*, 1 November 2010 [7].
103. Magistrates Court of Queensland, *Practice Direction No 13 of 2010 – Disclosure*, 1 November 2010 [3.7].
104. Magistrates Court of Queensland, *Practice Direction No 13 of 2010 – Disclosure*, 1 November 2010 [3.3], [8].
105. Magistrates Court of Queensland, *Practice Direction No 13 of 2010 – Disclosure*, 1 November 2010 [10].
106. Magistrates Court of Queensland, *Practice Direction No 13 of 2010 – Disclosure*, 1 November 2010 [3.1].
107. B Butler, "Criminal Law Reform – One Year On" (Paper presented at Current Legal Seminar Series 2011, Brisbane, 10 November 2011) 6. Other factors included the increased criminal jurisdiction of the Magistrates Court and the ability for the parties to case conference.

Observations of the disclosure regimes in other jurisdictions

5.80 The jurisdictions we have reviewed share a two stage approach to disclosure - full disclosure is only required once it is established that the defendant intends to contest the charge. It seems to be accepted, then, that there are efficiency benefits in providing an initial brief of key evidence to the defence at an early stage, on which the defendant can base his or her decision whether to plead guilty.

5.81 However, there are different justifications behind the different regimes, and these have influenced the approach taken. In England and Wales, the driver behind the proportionate disclosure regime was the need to reduce unnecessary police work. While the proportionate disclosure regime may also have increased the timeliness of prosecution disclosure to the defence, this was not its primary aim. Thus, even where the matter proceeds to trial, disclosure only occurs in a proportionate manner according to the issues in dispute in the trial.

5.82 On the other hand, the disclosure regimes in WA and NZ were part of a broader reform of the criminal justice system, and were no doubt intended to improve efficiency of the system as a whole. Consequently, full disclosure in WA and NZ remains reasonably onerous, and requires disclosure of all material relevant to the charge, regardless of what is actually in dispute between the parties. While the two tiered disclosure regime aims to provide the initial brief of evidence in a timely manner, the obligation for full disclosure remains a time-consuming one. This has been demonstrated in WA, where significant delays have been experienced in the District Court due to disclosure.

5.83 The experience in England and Wales also suggests that proper training of police officers is crucial to an effective disclosure regime. Unless police officers have a comprehensive understanding of what evidence needs to be included at each stage and why, it will be difficult to achieve efficiency savings. Moreover, in England and Wales the police officer is required to complete a report that summarises the key evidence and the interview with the suspect. This is likely to be time consuming, and seems to be an area where there is the greatest risk of error and low satisfactory completion rates.

5.84 Finally, notwithstanding the introduction of an early disclosure regime, the problem remains in England and Wales and WA that prosecuting counsel do not consider the evidence until relatively close to the trial date. Even where the evidence has been marshalled, full disclosure cannot properly occur until prosecuting counsel is involved to assess whether the evidence is sufficient and relevant.

Reforming disclosure in the Local Court

5.85 It has become apparent from our research and stakeholder consultation that the current disclosure process in the Local Court is not working as effectively as it might. Reforming disclosure offers significant benefits, by encouraging early guilty pleas and by improving efficiency within the system. We are therefore strongly of the view that there must be significant reform to the current disclosure regime.

5.86 The brief of evidence at the committal stage is intended to serve the purposes of committal rather than facilitating a decision on plea, although often the same

evidence will be sufficient for both. There is no clear guidance as to what is required for a brief of evidence in the Local Court, and this can lead to different views from the prosecution and defence about whether there has been sufficient disclosure to proceed to committal. The recently introduced pre-trial disclosure regime will apply once the matter has been arraigned in the District Court or Supreme Court, but by this stage the opportunity for an early guilty plea will have been well and truly lost.

5.87 Other jurisdictions have recognised the value in a staged disclosure regime. Some stakeholders also supported this type of approach.

Our view: introduce early disclosure regime in the Local Court

5.88 Effective disclosure requires that the ODPP has sufficient evidence to confirm the charge and the defence has sufficient evidence to assess the strength of the charge. This must be balanced against not expending unnecessary time and resources in producing evidence when the defendant ultimately pleads guilty.

5.89 In our view, encouraging earlier guilty pleas requires early disclosure of a brief of evidence that is sufficient for the defendant to know the case against him or her, and on which he or she can make an informed decision whether to contest the charge. This requires reform to two aspects of disclosure in the Local Court: the timing of disclosure, and the material that must be disclosed.

5.90 We recommend that there be a requirement for early disclosure of an initial brief of key evidence – that is, the key evidence on which the prosecution case is based. The initial brief does not require disclosure of all material that might be required if the matter were to go to trial. Nor does it require necessarily disclosure of evidence in admissible form. It is a practical starting point to give the defence enough information to decide on a course of action, without requiring unnecessary work by the NSWPF and the ODPP.

5.91 The initial brief of evidence should be disclosed to the defence as soon as possible, and in any case before the matter progresses to case management in the Local Court. Comprehensive disclosure should occur under the pre-trial disclosure provisions in the CPA only if the matter proceeds to trial. This is similar to the practical approach the ODPP already takes in serving the brief of evidence prior to committal, but enshrines it in legislation and policy.

5.92 The principles underpinning the early disclosure regime should apply both to disclosure from the NSWPF to the ODPP, and disclosure from the prosecution to the defence. By recommending an early disclosure requirement in the Local Court, we aim to streamline the work required for the police in marshalling the brief of evidence. Clear guidelines around the material that is required for an initial brief of evidence will increase the timeliness of disclosure and minimise unnecessary work for police.

Why we consider early disclosure will encourage early guilty pleas

5.93 Earlier disclosure of the brief of evidence will remove one of the 10 obstacles we have identified to early guilty pleas – the late service of the brief of evidence.

5.94 Some defence lawyers have suggested that early disclosure of only the key evidence may not encourage appropriate early guilty pleas, because lawyers may not advise their client to plead guilty until there had been full disclosure of the prosecution case.[108] The Public Defenders suggested that full disclosure should occur prior to committal so that the defendant is aware of the case against him or her at arraignment.[109] The NSW Bar Association submitted that it is satisfied with the current arrangements for disclosure.[110]

5.95 Our early disclosure regime in the Local Court is a practical recommendation that seeks to provide a sufficient brief of evidence to the defence as early as possible, without the delay or resources involved in undertaking comprehensive disclosure. The initial brief will be the basis of the prosecution case, and is intended to give the defence notice of the essential elements of the case. The requirement for early involvement by Crown Prosecutors or other senior prosecutors to review the charge will assist in ensuring that the key evidence is identified from the outset.

5.96 There may be a small number of cases in which a guilty plea may not be appropriate until there has been full disclosure of the prosecution case. However, we do not see this as being a reason to desist from an early disclosure scheme. Front loading disclosure so as to ensure that the key evidence is provided to the defence at the beginning of case management in the Local Court will go a long way to alleviating the current problems associated with disclosure. Where the defence considers that insufficient evidence has been provided to inform a decision on plea, this could be an issue canvassed at the criminal case conference (see Chapter 7).

Operation of the early disclosure regime in the Local Court

5.97 In this section we discuss how our proposed disclosure regime should operate.

Timing of early disclosure

5.98 The timing of disclosure is important to encouraging appropriate early guilty pleas. Disclosure must occur early enough so that both parties know the basis of the prosecution case from the outset. However, a realistic timeframe for disclosure must also be set to ensure that the relevant parties can comply.

5.99 The material that must be disclosed, which we discuss at paras 5.107-5.108, will impact on the time required for disclosure. Obviously the more onerous the disclosure obligation, the longer it will take to complete.

5.100 Under our blueprint, key points for disclosure of the initial brief of evidence between the various parties occur as follows:

- **disclosure from the NSWPF to the ODPP** - at the time the matter is given to the ODPP to provide early charge advice or to confirm the charge, and

108. NSW Bar Association and Law Society of NSW, *Consultation EAEGP28.*
109. NSW, Public Defenders, *Submission EAEGP8,* 7.
110. NSW Bar Association, *Submission EAEGP4,* 7.

- **disclosure from the ODPP to the defence** - at the time the ODPP files a certificate in the Local Court certifying that it has reviewed the charge.

5.101 Under our blueprint, the NSWPF will provide the key prosecution evidence to the ODPP when seeking a charge determination. The evidence that the ODPP uses to confirm the charge should be the same evidence that the ODPP gives to the defence.

5.102 **The ODPP should not certify the charge until the initial brief of evidence is ready**. The initial brief of evidence is critical to the efficient operation of the remainder of the indictable process in the Local Court. For this reason, the matter should not progress any further until all of the necessary material for the initial brief of evidence has been obtained. Meaningful discussions about guilty pleas cannot occur until sufficient evidence is available.

5.103 In Chapter 6 we recommend that case management in the Local Court be used to facilitate disclosure of the initial brief of evidence to the defence. The prosecution should be able to serve the initial brief at the beginning of case management, because it will have been used to certify the charge.

5.104 Since Legal Aid NSW represents the majority of defendants in indictable matters in the Local Court, the ODPP and Legal Aid NSW may wish to consider entering into a protocol that outlines disclosure procedures. This protocol could address issues such as how the initial brief is to be disclosed, when it should be disclosed (for example, if the defendant already has Legal Aid representation before case management starts), and steps to be followed if the initial brief is not supplied within the time required or Legal Aid considers that it is insufficient.

5.105 Legal Aid has suggested that greater consideration be given to electronic disclosure of briefs of evidence.[111] We agree that electronic disclosure may result in cost savings and efficiency gains, particularly if a system is set up between the ODPP and Legal Aid. However, we do not make a specific recommendation about electronic disclosure, this being a practical matter best left to the relevant agencies to implement.

Recommendation 5.1: statutory early disclosure regime in the Local Court

(1) The *Criminal Procedure Act 1986* (NSW) should provide that:

(a) the NSW Police Force must provide an initial brief of evidence to the Office of the Director of Public Prosecutions (ODPP), for the purpose of making the charge determination, and

(b) the ODPP or other relevant prosecuting authority must provide an initial brief of evidence to the defendant.

(2) The joint practice note in Recommendation 3.1 should provide guidance in setting the timeframe for disclosure to the defendant in paragraph (1)(b).

111. Information provided by Legal Aid NSW (1 September 2014).

Recommendation 5.2: initial brief of evidence to be ready before charge can be certified

The *Criminal Procedure Act 1986* (NSW) should state that the Office of the Director of Public Prosecutions or other relevant prosecuting authority cannot certify the charge until it can provide the defendant with the initial brief of evidence.

Material to be disclosed

5.106 One of the key problems with the current disclosure regime is a lack of clarity around what evidence must be disclosed before the committal hearing. Our early disclosure regime in the Local Court requires clear guidelines as to what should be included in the initial brief of evidence.

Initial brief to contain key available prosecution evidence

5.107 The initial brief of evidence should contain the key available evidence that forms the basis of the prosecution case. That is, there should be sufficient evidence for the defendant to know the case against him or her. Key *available* evidence is evidence that is known to the police and prosecution, even if that evidence may not yet be in a presentable form (such as forensic analysis).

5.108 The initial brief is intended to provide a practical starting point for the defence, to know the prosecution case and to make an informed decision on whether to plead guilty. It is not the function of the initial brief to provide all evidence relevant to the case, or to provide all the technical evidence that may be required should the matter proceed to trial.

5.109 The content of the initial brief of evidence that is supplied from the NSWPF to the ODPP should ordinarily be the same as the initial brief of evidence that is supplied from the ODPP to the defence. There may be some variation; for example, where the ODPP takes a different view of the case than the NSWPF, thereby changing the "key" evidence on which the prosecution case relies. The involvement of Crown Prosecutors or other senior prosecutors in giving early charge advice seeks to avoid the problem experienced in other jurisdictions whereby, despite an early disclosure regime, key evidence is not disclosed until close to trial because this is the first time prosecuting counsel has considered the case.

Recommendation 5.3: content of disclosure

The *Criminal Procedure Act 1986* (NSW) should state that the initial brief of evidence is to include the key available evidence that forms the basis of the prosecution case.

Initial brief to contain evidence in less formal form

5.110 In order to maximise compliance with the disclosure timeframe, the initial brief of evidence should be allowed to contain material in a form that does not necessarily meet formal evidentiary admissibility rules. Currently when the NSWPF seeks advice from the ODPP on the sufficiency of evidence or the appropriate charge,

advice will only be provided on receipt of sufficient material "in admissible form".[112] Preparing material in admissible form can be time consuming, and this can ultimately be unnecessary if the defendant pleads guilty.[113]

5.111 The NSWPF suggested that for the purposes of deciding whether to file an indictment, the ODPP should use presumptive drug testing certificates, video, digital or tape recordings of relevant previous representations made by victims or witnesses contemporaneous to a crime, and short form expert certificates.[114] The ODPP similarly suggested that, for the purpose of giving early charge advice, it would accept handwritten or recorded statements, presumptive forensic testing certificates, summaries and other short forms of evidence.[115]

Suggested material to be included in initial brief

5.112 Consistently with the views of the NSWPF and the ODPP, we suggest that the initial brief of evidence use material such as:

- **Presumptive drug testing certificates**: The NSWPF, ODPP and Legal Aid NSW supported the use of presumptive drug testing certificates at the Local Court stage, on the basis that presumptive certificates are generally accurate and their use would result in a significant improvement in the timeliness of disclosure. The use of presumptive certificates will mean that there need not be a delay in waiting for the results of the full analysis.

- **Handwritten or electronically recorded statements**: The NSWPF and the ODPP both suggested that handwritten or recorded statements of witnesses should be permitted for the purpose of the ODPP confirming the charge. This may not always be practical – for example, it may be resource intensive to listen to a long ERISP - but should be encouraged in appropriate cases.

- **Transcripts of key excerpts from telephone intercepts and surveillance devices**: Only the key excerpts from telephone intercepts or surveillance devices that prove the prosecution's case should be transcribed for inclusion in the initial brief of evidence. Audio recordings of any other recorded conversations could be supplied upon request.

ODPP to determine what material should be in initial brief

5.113 We do not seek to recommend an itemised list of the material that should be included in the initial brief. We consider it best that, for cases prosecuted by the ODPP, guidelines as to the material required for the initial brief be worked out by the NSWPF and the ODPP with the input of members of the legal profession, including Legal Aid NSW, the Aboriginal Legal Service (NSW/ACT) Ltd, the Public Defenders, the Law Society of NSW and the NSW Bar Association. The ODPP's Prosecution Guidelines should set out what should be included in the initial brief.

5.114 Although we do not intend to prescribe a list, we suggest that the initial brief of evidence will likely include items such as:

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112. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 14.
113. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10,* 11.
114. NSW Police Force, *Submission EAEGP14*, 16.
115. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10,* Annexure A, 5-6.

- police statement of facts
- statements from key witnesses
- key photographs or documentary evidence
- any ERISP (or a transcript in appropriate cases)
- criminal antecedents of the defendant
- CCTV footage
- presumptive drug testing certificates, and
- transcripts of key excerpts from telephone intercepts and surveillance devices.

5.115 We would caution against a requirement for the initial brief to include any overly onerous or complicated police reports. In England and Wales, the pre charge report has proved time consuming for police officers and difficult to complete satisfactorily. It adds little to the primary material and may, in some cases, positively mislead. The initial brief of evidence should use police officers' time in the most efficient way possible, while still allowing the ODPP to obtain the key evidence.

5.116 The ODPP may also wish to consider requiring the NSWPF to provide a list of all other relevant material that was not included in the brief, in the same way that is currently required under the ODPP's Prosecution Guidelines. This will allow the ODPP to confirm that no key evidence is missing from the initial brief.

5.117 Other jurisdictions have adopted a model whereby, following disclosure of the initial brief, the defence may request further evidence. This is the case in Queensland and NZ, where the prosecution must provide the requested information within a specified timeframe. We do not make any specific recommendation as to whether such a procedure should be adopted. However, we note that the criminal case conference recommended in Chapter 7 would be an appropriate forum for the defence to raise any issues about gaps in the initial brief.

Recommendation 5.4: Prosecution Guidelines to specify material to be included in initial brief

(1) The Prosecution Guidelines of the Office of the Director of Public Prosecutions NSW should specify the material to be included in the initial brief of evidence.

(2) The disclosure guidelines in paragraph (1) should be developed in consultation with the NSW Police Force and the legal profession, including Legal Aid NSW, the Public Defenders, Aboriginal Legal Service (NSW/ACT) Ltd, the Law Society of NSW and the NSW Bar Association.

(3) The ODPP should consider including in the disclosure guidelines material that is not in admissible or final form, such as presumptive forensic testing certificates, handwritten or electronically recorded statements (where practical) and transcripts of key excerpts from telephone intercepts or surveillance devices.

Application to indictable offences that may be tried summarily

5.118 Currently when a person is charged with an indictable offence that may be tried summarily (known as a "Table offence"), the police prosecutor may seek advice from the ODPP on whether the matter is suitable for election to be heard on indictment. In such cases the police prosecutor will provide the ODPP with all relevant material for the ODPP to make a decision on election.[116] We do not deal specifically with disclosure for election decisions in this chapter, but we expect that the material to be supplied for a decision on election would be largely consistent with the material in the initial brief.

Application to Commonwealth matters

5.119 The Commonwealth Director of Public Prosecutions (CDPP) has noted that evidence in Commonwealth prosecutions can be voluminous, and expressed concern that it may be unable to meet strict disclosure timeframes in complex matters.[117] It submitted that any process intended to replace the current committal process should be flexible in its disclosure requirements so that the Commonwealth may meet the obligations even in the most complex of matters.[118]

5.120 We appreciate that Commonwealth matters, perhaps more so than state matters, may involve large amounts of complex evidence. However, the CDPP's concern can be adequately accommodated within the scheme we propose. The initial brief of evidence would usually contain the same evidence that the CDPP uses to determine the appropriate charge. As the CDPP provides pre charge advice in the majority of matters that it prosecutes,[119] this should mean in most cases that the initial brief of evidence would be ready by the time that the charge is laid.

5.121 The CDPP has confirmed that it does not foresee any practical difficulty with a copy of the brief of evidence that is used to assess the charge being provided to the defence at the time the charge is certified.[120] As with the ODPP, the CDPP should publish guidance about the material that is to be supplied in an initial brief, and encourage the use of material that is not yet in admissible form where appropriate.

Disclosure certificate should accompany initial brief

5.122 The prosecution should provide a disclosure certificate to accompany the initial brief of evidence, in order to facilitate the criminal case conference.

5.123 The certificate is to confirm that:

- all the relevant evidence on which a charge decision was made has been served, and
- disclosure of the initial brief conforms with the requirements of the regime.

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116. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 8.
117. Commonwealth Director of Public Prosecutions, *Submission EAEGP13,* 10. See also Chapter 4.
118. Commonwealth Director of Public Prosecutions, *Submission EAEGP13,* 10.
119. Commonwealth Director of Public Prosecutions, *Submission EAEGP13,* 5.
120. Information provided by Commonwealth Director of Public Prosecutions (12 November 2014).

5.124 That is, the prosecution should certify that all of the key available evidence that forms part of the prosecution case in relation to the present charge has been supplied to the defence. It is not necessary at this stage for the prosecution to certify that *all* material relevant to the charge has been supplied. Likewise, the requirement to certify that all *available* evidence has been provided to the defence means that the prosecution will not be in breach of its disclosure obligations if previously unknown evidence later comes to light (for example, if additional victims or witnesses come forward).

Recommendation 5.5: disclosure certificate to accompany initial brief of evidence

(1) The *Criminal Procedure Act 1986* (NSW) should require that a disclosure certificate accompany the initial brief of evidence.

(2) The certificate should be signed by the prosecuting authority and state that the authority has disclosed all of the key available evidence that forms the basis of the prosecution case for the present charge.

Comprehensive pre-trial disclosure should occur in the Supreme Court and District Court

5.125 Following case management in the Local Court, under the blueprint the matter will either be allocated into the Early Resolution with Discount stream for sentence, or into the trial case management stream to proceed to trial, or be finalised in the Local Court.[121]

5.126 Complete disclosure will be required if the defendant pleads not guilty and the matter enters the trial case management stream. The CPA currently provides that pre-trial disclosure is to take place in accordance with a timetable determined by the court.[122] The prosecution does not need to disclose any material that it has supplied in a previous brief.[123]

5.127 In our view the timetable for pre-trial disclosure should continue to be set by the District Court or Supreme Court as part of their case management functions. We do, however, suggest that pre-trial disclosure occur earlier in the District Court and Supreme Court than is currently the case, to allow identification of any further guilty pleas. We discuss this further in Chapter 10.

Enforcing compliance with disclosure requirements

5.128 Timely disclosure of the brief of evidence is a significant problem within the current indictable system. A disclosure regime that sets specific obligations and timeframes will not be effective unless there are sanctions for noncompliance.

121. See Chapter 6.
122. *Criminal Procedure Act 1986* (NSW) s 141(2).
123. *Criminal Procedure Act 1986* (NSW) s 149D(1).

5.129 The scheme of early charge advice that we propose in Chapter 4 includes a compliance regime (see paras 4.93–4.95). Because charge certification cannot occur until the initial brief of evidence has been supplied from the NSWPF, the compliance regime for early charge advice necessarily involves compliance with the early disclosure regime in the Local Court.

Should there be a different standard of disclosure where a guilty plea is anticipated?

5.130 In England and Wales a different level of disclosure is required if the police anticipate that a guilty plea will be entered. We do not recommend that a distinction be drawn in our blueprint between the disclosure required for anticipated guilty pleas and anticipated not guilty pleas. We consider that, at least initially, it adds an extra burden on the police to consider the category that the case falls within when preparing the initial brief of evidence. Once the scheme has been implemented and the NSWPF and the ODPP are comfortable working within it, then it may be appropriate to reconsider this distinction in the interests of efficiency. However, that would be a matter for the ODPP and the NSWPF to consider, again in consultation with the legal profession.

Implementation

5.131 We set out in Table 5.4 the changes to legislation and policy that need to occur to give effect to our proposed disclosure regime. This list is not exhaustive. There may be other residual statutes or protocols that also need to be amended.

Table 5.4: Required changes to implement early disclosure in the Local Court

Instrument	Amendments
Criminal Procedure Act 1986 (NSW)	Insert provisions about service of the initial brief of evidence: ▪ NSWPF must provide initial brief to ODPP for purpose of making charge determination. ▪ ODPP or other relevant prosecuting authority cannot confirm the charge until it is in a position to provide the defence with the initial brief of evidence. ▪ ODPP or other relevant prosecuting authority must serve initial brief of evidence on the defendant. ▪ Initial brief should include key available evidence that forms the basis of the prosecution case. ▪ Initial brief to be accompanied by a disclosure certificate.
Joint Practice Note	Provide timeframe for service of initial brief of evidence on the defendant.
Prosecution Guidelines of the Office of the Director of Public Prosecutions	**Guideline 14**: Advice to police to be updated to include the disclosure required for advice to be provided. **Guideline 18**: Guidelines on disclosure to be amended to reflect new regime, including what is to be included in the initial brief of evidence.
Protocol between ODPP and Legal Aid NSW (suggested)	Develop a protocol that sets out how and when the brief of evidence may be served in matters where the defendant has Legal Aid NSW representation, and what steps should be taken by both parties if the brief is not served within the required timeframe, or the brief is considered insufficient.

6. Local Court case management for offences dealt with on indictment

In brief

The Local Court currently has a process of case management aimed at facilitating the committal hearing. We recommend that there be a scheme of case management in the Local Court that aims to facilitate prosecution disclosure, the mandatory criminal case conference, possible cross-examination of prosecution witnesses and the entry of a plea.

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6.1 Our blueprint for the indictable criminal justice system includes a process of case management in the Local Court before the matter proceeds to the District Court or Supreme Court for trial or sentence. This is an important aspect of our blueprint. Structured supervision of the matter in the Local Court will ensure that prosecution disclosure occurs and that discussions between the parties happen in a meaningful way.

6.2 Although the Local Court currently has a case management process in place for matters to be heard on indictment, this process is aimed at preparing the matter for a committal hearing rather than specifically encouraging early resolution. Case management under our blueprint is tied to specific events – disclosure and criminal case conferencing chief among them – to ensure that the matter is managed as efficiently as possible.

6.3 This chapter explains our recommended system of Local Court case management, and what it seeks to achieve.

Current case management in the Local Court

Current case management of indictable matters in the Local Court

6.4 A Local Court practice note prescribes the management of cases in the lead up to the committal hearing:

- **First appearance**: unless a guilty plea is entered, the magistrate will order service of the brief of evidence within 6 weeks, and a reply to the brief to be filed within 8 weeks of the first appearance.
- **Second appearance**: unless a guilty plea is entered or there is a waiver of committal, the matter may be adjourned for up to 6 weeks to allow the parties to negotiate.
- **Third appearance**: if it is intended that an application for cross-examination of a prosecution witness under s 91 or s 93 of the *Criminal Procedure Act 1986* (NSW) (CPA) is to be made, orders are made for filing submissions in support of the application within 2 weeks, and filing a reply within 4 weeks.
- **Fourth appearance**: the matter will be listed at the first available opportunity for the hearing of a contested s 91 or s 93 application and/or a committal hearing.[1]

6.5 Committal proceedings must follow this timetable unless the court is satisfied that departure from it is in the interests of justice.[2]

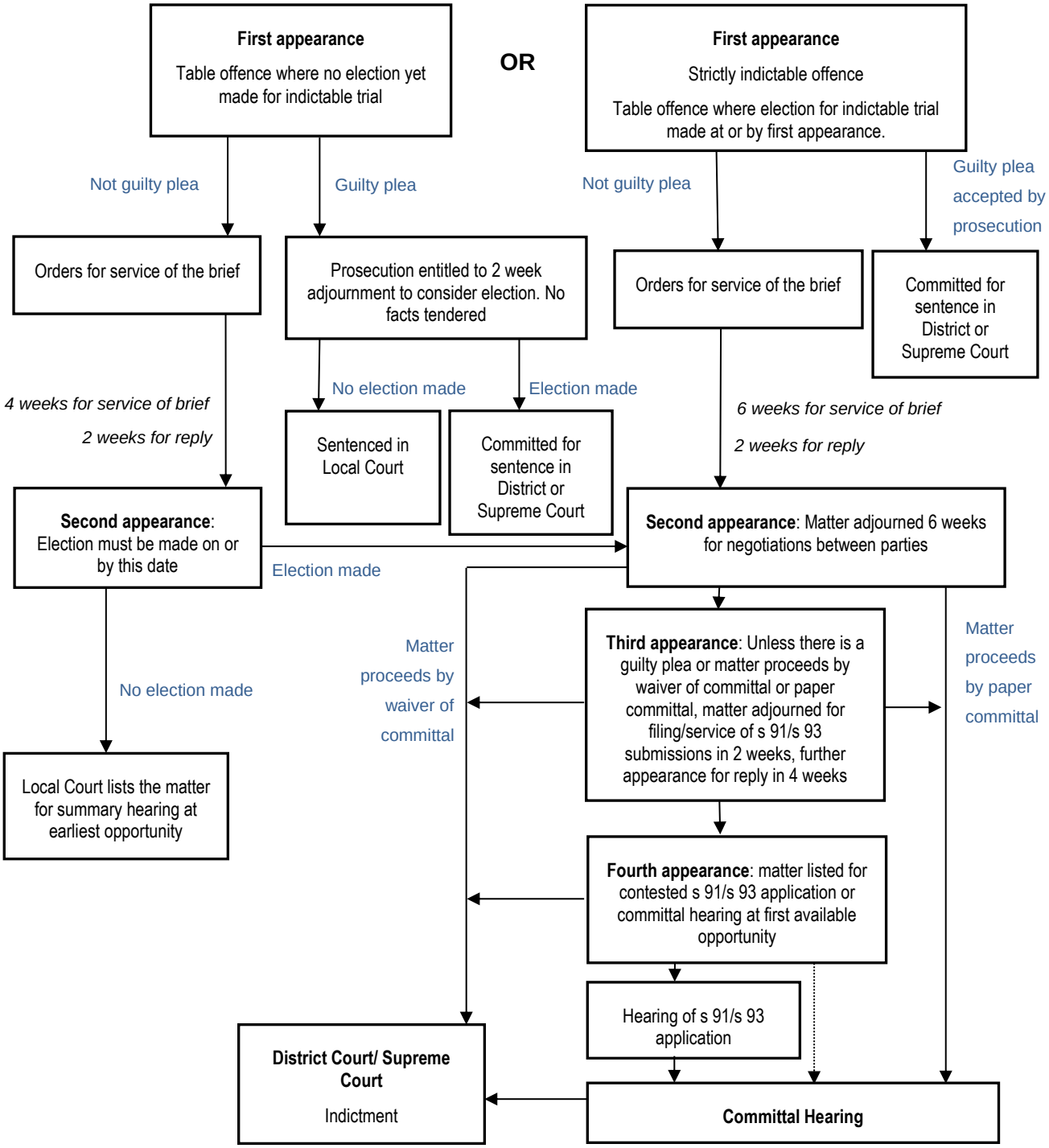
6.6 Failing to finalise a brief of evidence within the specified timeframe will not, of itself, provide the basis for an adjournment. If the failure to finalise the brief is due to delays in receiving forensic analysis, the court will consider whether to grant an adjournment only if:

- the party seeking the forensic analysis informs the court of the date the material was sent for analysis, and
- the court is satisfied that the results of the forensic analysis are likely to assist in determining the committal proceedings.[3]

1. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [5]-[8].
2. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [4.5].

6.7 Figure 6.1 shows the current way in which an indictable matter progresses through the Local Court.

Figure 6.1: Current committal process in NSW



Source: Local Court of NSW, Practice Note Crim 1 – Case management of criminal proceedings in the Local Court, 24 April 2012; Local Court of NSW, Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court, 24 April 2012

3. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [9].

Does the current case management process encourage early guilty pleas?

6.8 Our terms of reference ask us to identify opportunities for reform to encourage appropriate early guilty pleas. The current case management process in the Local Court has a number of features that, in our view, do not maximise such opportunities.

Delay in the completion of the committal process

6.9 The Local Court practice note allows for 12 weeks from first appearance in the Local Court to the committal hearing, but this preliminary stage can extend well beyond this. The NSW Bureau of Crime Statistics and Research (BOCSAR) reports that the median delay in 2013 from arrest/charge until a matter was committed for trial was 231 days (33 weeks). The median delay for matters committed for sentence was 197 days (over 28 weeks).[4] The median time a matter spends in the Local Court is therefore much longer than the time standard, and has been increasing.[5]

6.10 A lengthy period of time in the Local Court is not a cause for concern, provided that meaningful events occur during this period that progress the matter towards resolution. However, the fact that over half of matters committed for trial in the District Court result in a guilty plea[6] suggests that more could be done to resolve these matters while they are still in the Local Court.

6.11 We expect that much of the delay is attributable to delays in serving the brief of evidence. Under the Local Court practice note, failure to comply with the timetable for serving the brief of evidence does not of itself provide grounds for an adjournment, unless it is in the interests of justice.[7] However, we understand that adjournments are often sought and granted for the purpose of serving the brief of evidence. Adjournments of this kind use court, prosecution and defence time unnecessarily, particularly when a hearing is held at which the matter is simply adjourned to a future date.

6.12 In order to resolve some of the current issues experienced with late service of the brief of evidence, we suggest a revised disclosure scheme in Chapter 5. This aims to streamline the evidence required and to require an initial brief of evidence to be served before case management commences in the Local Court.

Appearances in the Local Court are not tied to particular events

6.13 The appearances in the Local Court prescribed under the practice note are not tied to any particular event. This means that the matter can progress even though key events (such as sufficient prosecution disclosure or negotiations between the parties) have not occurred.

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4. NSW Bureau of Crime Statistics and Research, *NSW Local Courts from 2009 to 2013: Number of Persons and Median Delay from Arrest to Committal (Days) in Finalised Local Court Appearances by Grouped Committal Outcome (Committed for Trial or Sentence)* (14/12269hclc).
5. See Figure 2.15.
6. See para 2.21.
7. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [4.5], [9].

6.14 Legal Aid NSW submitted that magistrates strictly adhere to the practice note for the prompt management of committal matters, and that this can inhibit effective negotiations between the parties.[8] Particularly in cases where a sufficient brief of evidence is not served until just prior to the committal hearing, there is little opportunity for the parties to engage in informed negotiations while the matter is still in the Local Court.[9]

6.15 The ODPP similarly observed that, notwithstanding time and legal costs spent in the Local Court, briefs of evidence are still not entirely complete after the committal process and the expectation is that the brief will not be complete until the trial commences.[10] In the ODPP's view, forcing the parties to progress matters forward in the Local Court is currently futile, as at present neither party has control over the preparation of the brief of evidence.

6.16 Although the Local Court practice note contains a six week adjournment to allow the parties time to negotiate, there is no requirement to demonstrate to the court that negotiations have actually occurred. It has been suggested that this time is often taken up waiting for the brief of evidence to be served rather than conducting negotiations.[11]

6.17 The Local Court is in a difficult position. If it grants adjournments for the purpose of exploring guilty plea negotiations, it risks endless delay. If it forces matters through, it risks failure to obtain a potential guilty plea. There can also be a tension between moving cases towards an appropriate resolution and getting through the court's work, particularly in light of statistical reporting requirements and performance indicators.[12]

Case management is designed to facilitate the committal hearing

6.18 At present indictable matters are case managed in the Local Court for the purpose of preparing them for a committal hearing. Stakeholders suggest that case management in the Local Court usefully provides the trigger for prosecution disclosure and encourages early discussions between the parties.

6.19 However, current Local Court case management serves these aims only indirectly. It is not the present purpose of case management in the Local Court to prepare the matter for trial, nor is it its purpose to encourage early resolution of the case, although these are commonly incidental outcomes. This is demonstrated by the following features of the committal process in the Local Court that can hamper early resolution:

- Often matters are committed for trial even though a complete brief of evidence has not been served.

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8. Legal Aid NSW, *Preliminary Submission PEAEGP4*, 12.
9. Legal Aid NSW, *Consultation EAEGP2*.
10. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PEAEGP6,* 5-6.
11. NSW Bar Association and Law Society of NSW, *Consultation EAEGP11.*
12. See K Mack, A Wallace and S Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (Australasian Institute of Judicial Administration, 2012) 66, 129.

- Police prosecutors have initial carriage of the matter and usually hand it over to the ODPP before the second appearance in the Local Court. This means that the committal process is underway before the ODPP sees the brief.
- The absence of a senior prosecutor or Crown Prosecutor and senior defence counsel at the committal stage means that, despite a six week adjournment for negotiations, meaningful negotiations generally do not occur between the parties until the matter is listed for a committal hearing or after arraignment.

6.20 The focus of Local Court case management on the committal hearing also means that matters are not well prepared for trial at this stage. An incomplete brief, absence of counsel who would be running the trial and lack of informed discussions between the parties to refine the issues in dispute also mean that the time currently spent in the Local Court does not prepare matters for trial as effectively as it could.

Committal hearing does not add value to the overall process

6.21 We conclude by majority in Chapter 8 that a magistrate's decision to commit a person for trial no longer offers the same value to the indictable criminal justice system as it once did. Thus, case management that prepares a matter for a committal hearing dedicates time and resources towards a process that does not, in the vast majority of cases, add significant value to the resolution of the case.

6.22 We recognise that stakeholders have strongly held and divergent views on the value of the committal hearing, and we discuss this in more detail in Chapter 8.

Local Court case management under our blueprint

Case management should be based on a small number of meaningful events

6.23 We propose a system of case management in the Local Court that is tied to the occurrence of meaningful events - that is, events that predispose a matter for an early guilty plea, or refine the issues to be disputed at trial. We refer here particularly to prosecution disclosure and mandated case conferencing between the parties. To assist with this, our blueprint requires the early and consistent involvement of senior prosecutors and defence lawyers with full authority to negotiate.

6.24 In our view, having disclosure and case conferencing as the key aims of the case management process will improve efficiency in the Local Court. There will be less time dedicated to low value processes. It will also result in a streamlining of resources for the prosecution and defence, as there will be less need for appearances that do not move the matter forward.

Why should the Local Court be responsible for case management?

6.25 The Local Court is best placed to conduct an initial phase of case management, because:

- it has a broader geographical reach than the District Court and the Supreme Court
- it is the least expensive jurisdiction
- Legal Aid NSW already has an extensive in-house presence in the Local Court that it does not have in the District Court or Supreme Court, and
- case management in the Local Court retains the option of summary resolution where this is deemed appropriate.

6.26 The advantage of allowing negotiations to occur while it is still possible for the matter to be disposed of summarily should not be underestimated. As the Chief Magistrate of the Local Court suggests, this can of itself operate as a "significant incentive" to encourage a guilty plea.[13] While our recommended scheme of early charge advice, including early consideration of election, should reduce the number of charges that are downgraded or withdrawn, the possibility is still helpful.

6.27 Importantly, Local Court supervised case management provides an incentive for the parties to act and a timeframe to work within. The experience of other jurisdictions strongly suggests that there needs to be early supervision of the case in a lower court. Without this, there may be delay in the higher court because the critical events – disclosure and negotiations between the parties – have not yet occurred.

6.28 This was the experience in England and Wales, WA and Tasmania. In all of these jurisdictions the committal hearing was abolished and replaced with a process that either sent the matter up to a higher court automatically (England and Wales, Tasmania) or had a limited hearing process in the lower court (WA). The result of reforms in these jurisdictions, however, was an increase in delay in the higher courts. It has been recognised in these jurisdictions that improvements to disclosure and discussions between the parties while the matter is still in the lower court would minimise the delay being experienced in the higher court.[14]

What does Local Court case management seek to achieve?

6.29 Under our recommended scheme of early charge advice, there will be an initial appearance in the Local Court, either following arrest or the issuing of a Court Attendance Notice (CAN). The initial appearance would deal with bail (where required) and set a timeframe for the ODPP or other prosecuting agency to certify the charge. There may also be appearances for the purpose of seeking an extension of time within which to certify the charge. This process is detailed in Chapter 4. A police prosecutor will represent the prosecution in the Local Court before the charge is certified.

6.30 Case management in the Local Court will begin once the ODPP or other prosecuting agency has certified the charge. In state matters, the ODPP will take carriage of the matter from the police at this point.

13. Chief Magistrate of the Local Court of NSW, *Preliminary Submission PEAEGP5*, 1.
14. See para 8.161.

6.31 The number and timing of case management appearances will be a matter for the Local Court to determine and implement through a practice note. Our proposed Local Court case management scheme seeks to facilitate the following events:

- the prosecution serving the initial brief of evidence on the defence
- putting the defendant into contact with Legal Aid NSW where necessary, through Legal Aid's duty lawyer scheme run out of the Local Court
- mandatory criminal case conferencing
- determining applications to cross-examine a prosecution witness, and conducting the cross-examination for successful applications, and
- entering a plea before the matter leaves the Local Court.

6.32 We intend for this system of case management in the Local Court to, broadly speaking, replace the current committal process. We discuss our recommendation to abolish committal hearings in Chapter 8. The resources of the Local Court, ODPP, Legal Aid NSW and the NSW Police Force that are currently dedicated to committal hearings should be redirected to this process and to providing early charge advice.

Stages of our proposed Local Court case management process

6.33 Although the detail of the case management process is a matter for the Local Court to determine, we consider that it could proceed in a number of stages. These stages could be expanded or truncated as the needs of the individual case require. Indeed, in some cases the parties may be capable of progressing the matter forward without court supervision.

First stage: disclosure and putting the parties in contact

6.34 The first stage of case management in the Local Court will begin once the ODPP or other prosecuting agency has filed a certificate with the Local Court confirming the charge. This stage seeks to achieve:

- connecting the defendant with Legal Aid if necessary
- serving the initial brief of evidence on the defence, and
- the prosecution indicating whether it has identified the matter as potentially being appropriate for the Early Resolution with Discount (ERD) stream – that is, in the prosecutor's opinion a guilty plea is likely.

6.35 Although from the court's perspective the first stage of case management seems to be simply a formality, it is an important stage in the process. This is for three reasons, explained below.

First reason: case management connects the defendant to Legal Aid

6.36 An incidental but important function of the first stage of case management is to put the defendant in contact with Legal Aid. In some cases the defendant may have

already sought Legal Aid representation. This is more likely in those matters where the defendant has been arrested and placed on remand. For example, Aboriginal defendants who have been detained may have already obtained representation through the Aboriginal Legal Service (NSW/ACT) Ltd.[15] However, many people charged via a CAN may not have yet sought legal representation.

6.37 The ability to connect with Legal Aid is important and needs to be specifically factored in to any scheme to encourage appropriate early guilty pleas. This is because the majority of defendants - 60% in committal matters and 72% in matters in the District Court - are legally aided.[16] Many of Legal Aid's clients are vulnerable or disadvantaged,[17] and may require face to face contact with a Legal Aid lawyer in order to apply for representation.

6.38 At present, many clients connect to Legal Aid through the duty lawyer who is at the Local Court when the client appears at the first appearance for their matter. Legal Aid informs us that, if our blueprint is implemented, it intends to have a duty lawyer attend case management appearances in the Local Court. A case management appearance in the Local Court therefore provides a crucial point of interaction between the defendant and Legal Aid, in a way that would not otherwise be possible.

Second reason: forum for prosecution to serve initial brief of evidence

6.39 An early case management appearance in the Local Court will provide the forum for the prosecution to serve the initial brief of evidence on the defence.

6.40 Under our blueprint the initial brief of evidence must be settled before the prosecution can certify the charge.[18] Therefore, the initial brief of evidence should be ready to be served on the defence when the matter comes to the Local Court for case management. We discuss in Chapter 5 what evidence should be included in the initial brief. The initial brief of evidence could be provided in physical form, or it could be transmitted electronically. Electronic transmission of briefs of evidence would further reduce the need for a court appearance.

6.41 If the defendant applies for legal aid through the duty lawyer in attendance at the Local Court, the initial brief of evidence could be provided directly to Legal Aid, either in hard copy or electronically, pending approval of the client's application.[19] If Legal Aid or legal representation takes some time to sort out, the brief could be provided as soon as a lawyer is available.

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15. The custody manager must notify the Aboriginal Legal Service (NSW/ACT) Limited that an Aboriginal person has been detained, unless the person has arranged for other legal representation: *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 33.
16. For the period 2005/06 to 2010/11: Information provided by Legal Aid NSW (7 May 2014). This percentage is derived by comparing the number of legally aided matters with the number of matters recorded by the ODPP, so will be an approximation only.
17. Legal Aid NSW, *Annual Report 2012-2013* (2013) 10.
18. Recommendation 5.2.
19. If this approach is adopted, there are practicalities that would need to be resolved between Legal Aid NSW and the ODPP.

6.42 An appearance in the Local Court may be the first time that the prosecution and defence lawyer are in contact with each other. Once the prosecutor and defence lawyer are known to each other, this paves the way for discussions on evidence and pleas.

6.43 Case management in the Local Court therefore plays a key role in putting the parties in contact. Although this may sometimes occur earlier (for example, where the defendant made an application for bail or obtained early legal representation), the best way to ensure this occurs in every case is through a mandated appearance in the Local Court.

Third reason: possibility of guilty plea can be flagged from the beginning

6.44 The prosecutor should indicate at an early case management appearance whether, in his or her opinion, particular features of the case (such as a recorded admission or CCTV footage of the offence) make it likely that there are prospects of a guilty plea. Although this initial indication is not binding on either party, it has a number of benefits:

- it requires the prosecution to consider at the earliest stage of the proceedings whether the matter is likely to resolve by way of a guilty plea
- it puts the defence on notice of the prosecution's thinking, and may influence the defence's subsequent approach to the brief of evidence and strategy discussions with the defendant, and
- the criminal case conference may proceed on a different basis if both parties are conscious of the possibility that the matter can resolve by way of a guilty plea.

6.45 We discuss early consideration of a guilty plea in further detail at paras 6.63-6.71.

Is the first stage of case management always needed?

6.46 Not all of the steps we have outlined above need occur under court supervision. Some of these steps may occur earlier, for example, if:

- Legal Aid has already made contact with the defendant through an earlier court appearance or because the defendant has made an application for bail, or
- the defendant has already arranged his or her own legal representation.

6.47 This first stage of case management may be avoided if it is unnecessary. Indeed, we would encourage the parties to fulfil the first stage of case management without a court appearance. Where the defendant has already obtained legal representation and his or her lawyer is known to the prosecution, the brief could be served directly without court intervention. In such cases, the Local Court should develop procedures that can expedite the matter straight to the second stage of case management.

Second stage: criminal case conference and cross-examination of prosecution witnesses

6.48 Following the first stage of case management in the Local Court, the defendant will have had the opportunity to obtain legal representation and the defendant's lawyer will have been able to review the initial brief of evidence. We expect that discussions between the defendant and his or her lawyer about the possibility of a guilty plea will occur during this time.

6.49 The second stage of case management, then, involves the following events:

- unless the defendant pleads guilty, the parties will engage in a mandatory criminal case conference, and
- the defendant may make an application to the Local Court to cross-examine a prosecution witness.

6.50 We discuss the detail and purpose of a criminal case conference in Chapter 7. We expect that the Local Court will need to adjourn the matter for a sufficient time to allow the conference to occur.

6.51 As a corollary to our recommendation to abolish committal hearings, we also recommend that it should remain possible for a party to cross-examine a prosecution witness. The grounds in s 91 and s 93 of the CPA should continue to apply – that is, there must be "substantial reasons, why, in the interests of justice" the witness should attend to give oral evidence, or "special reasons" if the witness is the alleged victim of an offence involving violence.[20] We expect that the number of successful s 91/s 93 applications will remain small – currently this is less than 6% of matters listed for committal.[21] Indeed, we would expect the number to decrease as a result of greater charge certainty and earlier disclosure.

6.52 If an application to cross-examine a prosecution witness is made, the Local Court may need to determine whether the application should be heard before or after the criminal case conference. Our view, with which stakeholders agree, is that there is considerable benefit in holding a criminal case conference before determining an application for cross-examination.[22] This will give the parties a chance to discuss whether cross-examination is necessary, or whether the issues identified could be dealt with in another way, such as a further written brief. There may also need to be a case conference after the cross-examination so as to discuss any issues arising out of the cross-examination, and the Local Court should be able to order that a second criminal case conference be held.

6.53 Where the defendant does not personally participate in the criminal case conference, there must be sufficient time following the criminal case conference for the defence lawyer to seek instructions from the client, particularly if the client is in

20. Recommendation 8.2.
21. See para 8.37.
22. Law Society of NSW, *Consultation EAEGP32*; NSW Bar Association, *Consultation EAEGP33*.

custody. We are told that defendants sometimes need time to accept the idea that entering a guilty plea is in their best interests.[23] We accept that this is so.

Third stage: entering a plea

6.54 Following the criminal case conference the parties must file a criminal case conference certificate with the Local Court. The certificate must be signed by both parties and will indicate, amongst other things:

- whether the defendant has agreed to enter a guilty plea, and to what charge/s
- whether any charges will be placed on a Form 1, to be taken into account during sentencing for the principal offence, and
- any agreement on or dispute about the statement of facts.[24]

6.55 Although the defendant may enter a plea at any time while the matter is in the Local Court, the defendant should be required to enter a plea before the matter leaves the Local Court. A guilty plea in the Local Court following the criminal case conference is the final opportunity for the defendant to be allocated to the ERD stream and receive the maximum sentence discount of 25% for a guilty plea.[25]

6.56 Case management in the Local Court will conclude with one of three things happening:

- if the defendant pleads guilty, the matter will be allocated to the ERD stream for sentencing in the District Court or Supreme Court
- if the defendant pleads not guilty, the matter will be allocated to the trial case management stream and progressed to trial in the District Court or Supreme Court, or
- if the prosecution determines that the matter can be dealt with summarily, the matter will be resolved in the Local Court.

6.57 The allocation of a matter to the ERD stream or the trial case management stream by the magistrate will have the effecting of "committing" the defendant to sentence or trial.[26]

6.58 In order to facilitate progression of cases at this stage, the Local Court should be able to set the matter down at the next appropriate date in the District Court or Supreme Court. If the matter is to be set down for sentencing, there may be opportunity to give the Local Court powers to make timetabling orders for pre-sentencing reports that should be available before the first appearance in the District Court or Supreme Court.

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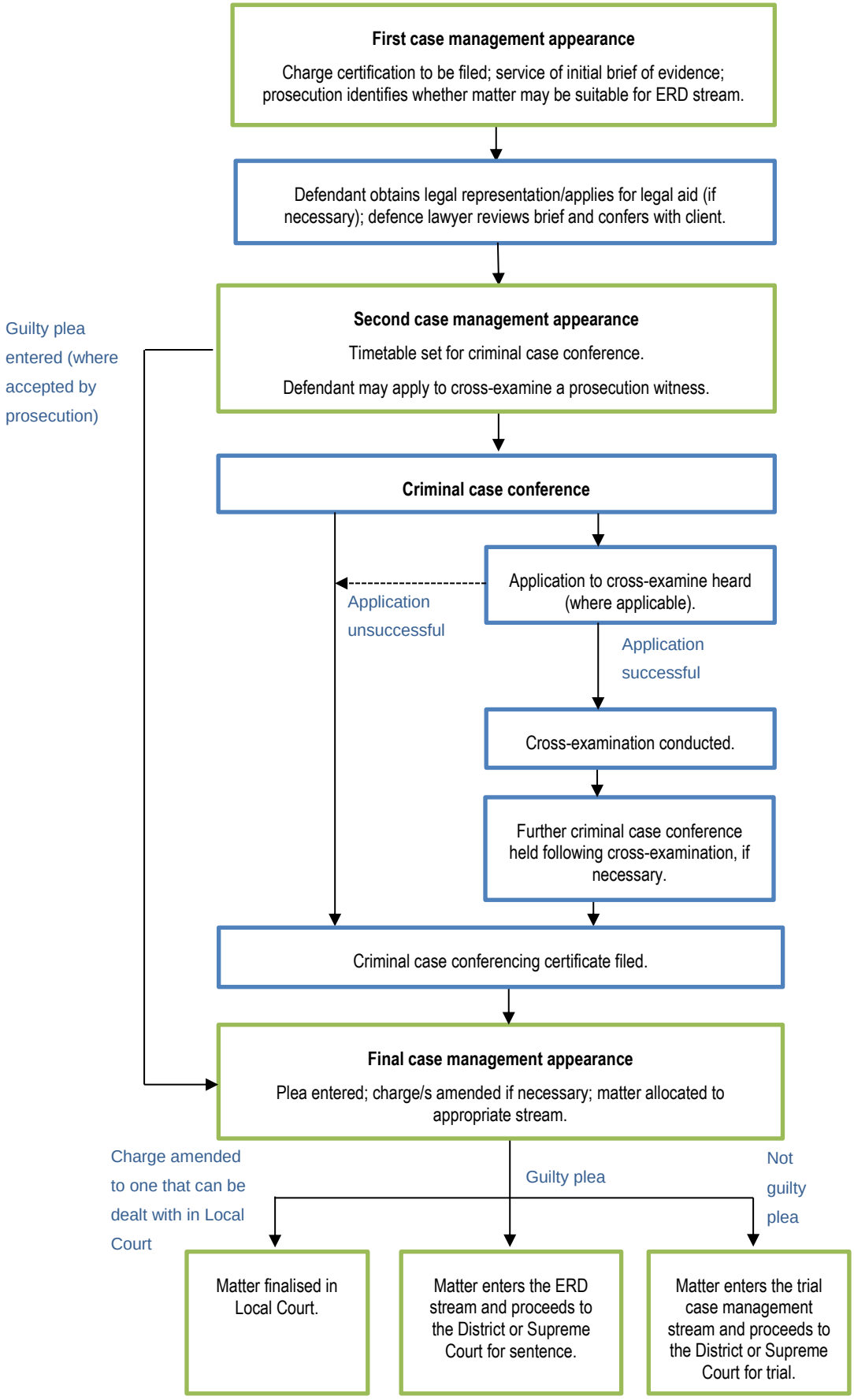
23. Legally Aided Defence Group, *Consultation EAEGP27.*
24. See Chapter 7.
25. Subject to two exceptions: see Chapter 9.
26. For the purpose of legislation that makes specific reference to committal: see, eg, *Judiciary Act 1903* (Cth) s 68; *Director of Public Prosecutions Act 1983* (Cth) s 6(2A)-(2E); *Director of Public Prosecutions Act 1986* (NSW) s 7(2).

6.59 Although the detail of our proposed Local Court case management scheme is best left to the Local Court to determine, Figure 6.2 sets out one possible example of what Local Court case management might look like under our blueprint.

Figure 6.2: Stages of case management in the Local Court under the blueprint: an example



Are the stages of Local Court case management fixed?

6.60 Although we have proposed three stages of case management in the Local Court, this is ultimately a matter for the Local Court to determine. In any event, we suggest that the process be flexible so as to best meet the needs of the individual case.

6.61 For example, where the defendant obtains legal representation early on, there is no bar to serving the initial brief or negotiating the charge earlier than we have suggested. If the prosecution knows who the defence lawyer is before case management commences in the Local Court, the brief of evidence can be provided as soon as possible. Particularly in regional areas where lawyers are more likely to know one another, it may be possible for the defence and prosecution lawyers to hold early informal plea discussions. There is nothing preventing the defendant from pleading guilty at an early case management appearance and then having the matter directly transferred into the ERD stream for sentence in the District or Supreme Court, bypassing the need for a criminal case conference.

6.62 Conversely, in particularly complex cases there may be a need for multiple appearances during the same stage of case management, for example where s 91/s 93 applications are made. However, we expect that the aspects of our blueprint that require the prosecution to confirm the charge and disclose key evidence early will minimise the number of appearances that do not move the matter forward, an inherent problem with the current system.

Recommendation 6.1: statutory case management regime in the Local Court

(1) The *Criminal Procedure Act 1986* (NSW) should:

- (a) provide for case management of proceedings for indictable offences in the Local Court
- (b) provide that this case management in the Local Court is for the purpose of facilitating:
  - (i) disclosure of the initial brief of evidence from the prosecution to the defence
  - (ii) mandatory criminal case conferencing in accordance with Recommendation 7.1
  - (iii) oral evidence of prosecution witnesses (where permitted) in accordance with Recommendation 8.2, and
  - (iv) the entry of a plea in the Local Court
- (c) specify that the defendant must enter a plea while the matter is in the Local Court, but may do so at any time.

(2) The joint practice note should set out the detail of the Local Court case management scheme.

Early consideration should be given to likelihood of a guilty plea

6.63 A guilty plea is the most likely outcome of any case. Our blueprint is intended to ensure that opportunities for appropriate guilty pleas are identified and that they are

entered as early as possible. For this to occur, the possibility of a guilty plea must be front of mind for the parties and for the court. This is not to deprive defendants of their right to a trial. But it does recognise that for most defendants the outcome will be a guilty plea and a sentence hearing, and the terms on which this proceeds are of vital concern to achieving a fair outcome in their case. The active case management described in this chapter is a key aspect of our blueprint. At all stages the court and the parties need to be considering whether a guilty plea will be the likely resolution.

Critical points for identifying matters likely to resolve in a guilty plea

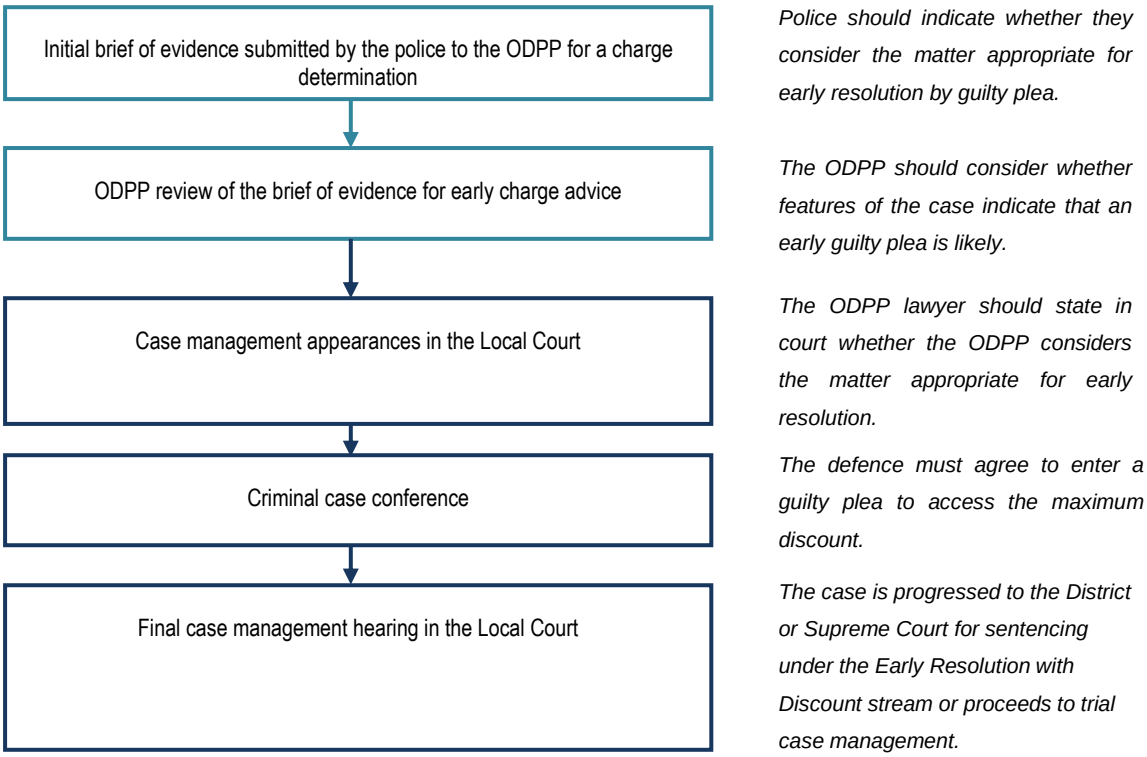
6.64 Parties should consider whether a matter is appropriate for an early guilty plea at the very outset of the process. Under our blueprint, the ODPP should consider whether a matter is likely to resolve in a guilty plea when a prosecutor first reviews the initial brief of evidence for a charge determination.[27] Police may even flag the possibility of a guilty plea in the brief. As we discuss in para 6.44, the prosecutor present in Local Court case management appearances should state whether the matter has been identified as likely to result in a guilty plea.

6.65 Broadly speaking, the parties can identify matters likely to resolve in a guilty plea by way of:

- **The initial brief of evidence from the police:** the police would consider whether it is likely that the matter will resolve in a guilty plea. This can be highlighted on the brief to the ODPP for charge advice.
- **The initial brief of evidence from the ODPP to the defence:** the ODPP would advise the defence if the ODPP has identified the matter as appropriate for early resolution.
- **ODPP advice to the court:** as part of case management in the Local Court, the ODPP would advise the court whether the ODPP has identified a matter as appropriate for early resolution. This puts the court and defence on notice that the ODPP anticipates, based on the strength of the evidence and particular features of the case, that the matter may resolve through a guilty plea at the close of the criminal case conference. The defence need not confirm the entry of a plea at this point.
- **Case conference between ODPP and the defence**: criminal case conferencing gives the defence the opportunity to confirm their intention to enter a guilty plea or to request that the matter be placed in the trial case management stream.

27. See Chapter 4.

Figure 6.3: Critical points for consideration of an early guilty plea



How to identify a matter likely to resolve in a guilty plea

6.66 There are various criteria that may indicate whether a person is likely to enter a guilty plea. The point of early identification is to guide these matters to enter an early guilty plea. Below we refer to two of these criteria: the strength of the available evidence and the particular characteristics of the offence or the offender. Additionally, prosecutors and defence lawyers may expect a certain plea from people who are known to them.

6.67 The ODPP's Prosecution Guidelines and any relevant police guidelines and handbooks should stipulate the criteria used to identify matters appropriate for an early guilty plea, and, as a corollary, those appropriate for the trial case management stream.

Strength of the available evidence

6.68 We expect that the parties will use their experience and judgment to determine whether a guilty plea is likely, based on the available evidence. This would include any admissions or partial admissions, CCTV footage or other relevant evidence. Information or indications from the defence as to plea would also be relevant. Assistance may also be drawn from guidance such as that published by the Crown Prosecution Service in England and Wales. In that jurisdiction, a guilty plea is considered to be anticipated where:

- the suspect has made a clear and unambiguous admission to the offence and has said nothing that could be used as a defence, or

- the suspect has made no admission but has not denied the offence or otherwise indicated it will be contested, and the commission of the offence and identification of the offender can be established by reliable evidence or the suspect can be seen clearly committing the offence on a good quality visual recording.[28]

Characteristics of the offender or the offence

6.69 In Chapter 2 we outline the findings of BOCSAR research conducted on predictors of guilty pleas in the District Court.[29] These findings may help inform prosecutors as to the likelihood of pleas depending on certain characteristics of the offender or the offence type. The information will be particularly helpful in identifying matters where a guilty plea may be entered late in the process, so that a concerted effort can be made to ensure that every opportunity is given to encourage an early plea.

6.70 According to BOCSAR's research, defendants were more likely to enter a late plea (than an early plea) where:

- the defendant was older (over 45 years)
- the defendant had at least one prior conviction
- the defendant had previously been acquitted of any offence
- the defendant was charged with more than one charge
- there was a greater length of time between offence date and committal, and
- the defendant was charged with a domestic violence offence, aggravated sexual assault, or serious assault resulting in injury.

6.71 Defendants were more likely to enter an early plea (than a late plea) where the defendant was charged with a child sex offence not involving aggravated assault, robbery, break and enter or illicit drug offences. It may be that offences that produce strong, reliable evidence against the defendant are more likely to attract an early guilty plea.

Recommendation 6.2: assess likely guilty pleas early

(1) The police, prosecution and defence, drawing on their experience and judgment, should assess every case from the time of charge to determine whether it is likely to resolve in an early guilty plea.

(2) Criteria for assessment should refer to the strength of the evidence and be included in the Prosecution Guidelines of the NSW Office of the Director of Public Prosecutions.

28. UK, Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) [17].
29. C Ringland and L Snowball, *Predictors of Guilty Pleas in the NSW District Court*, Bureau Brief No 96 (NSW Bureau of Crime Statistics and Research, 2014) 5-8.

Fitness to be tried under the blueprint

6.72 The procedures that govern fitness to be tried do not apply to committal proceedings in the Local Court.[30] This means that the defendant's fitness cannot be tested at the committal stage. If fitness is raised in a committal hearing, the effect would seem to be that the magistrate is required to discontinue the proceedings.[31] The prosecution could then file an *ex officio* indictment. Consequently, fitness is rarely raised at committal, possibly because the defence wants to receive the benefit of hearing the prosecution case. Where the defendant's fitness is in issue, the usual course is for the committal process to be completed and the question of fitness to be raised once the defendant has been arraigned in the District Court or Supreme Court.

6.73 The question of fitness to be tried does not arise frequently in indictable proceedings. Only about 40 people are referred to the Mental Health Review Tribunal (MHRT) each year following a finding of unfitness by the District Court or Supreme Court.[32] It is even more uncommon for a fitness hearing to be held and for the defendant to be found fit. In a survey of 30 fitness hearings we conducted for our report *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, only 7 defendants were ultimately found to be fit.[33]

6.74 Because our proposed case management in the Local Court aims to encourage meaningful negotiations between the parties about the charge and the evidence, in our view there is little value in completing this process if there are concerns about the defendant's fitness to be tried. Therefore, if the defendant's fitness is in issue at the Local Court stage, we recommend that the matter proceed directly to the District Court or Supreme Court for a fitness hearing. We expect that it would be unusual for this fitness procedure to be used, but we nonetheless consider it is important to maximise the benefit of our blueprint.

6.75 If the defendant is found at the fitness hearing to be fit to be tried, then the court should have the power in an appropriate case to remit the matter to the Local Court for the case management process to be completed. For the maximum benefit to be derived from our blueprint, it may be desirable for the Local Court case management process, and in particular the criminal case conference, to be completed before the matter proceeds to the District Court or Supreme Court for sentence or trial. In other cases, such as where the defendant is found fit and indicates an intention to plead guilty, there may be little benefit in remitting the matter to the Local Court and it would instead be more efficient to deal with the defendant in the District Court or Supreme Court. In Chapter 9 we discuss how the

30. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 31.

31. See NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Report 138 (2013) [12.48].

32. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Report 138 (2013) [2.18].

33. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Report 138 (2013) [2.17], [2.20].

sentencing discount for a guilty plea would apply where there has been a fitness hearing.

6.76 If the defendant is found to be unfit at a fitness hearing, the usual procedures following a finding of unfitness would apply. Where the defendant is found to be unfit at the hearing but then subsequently found to be fit in a review by the MHRT, the matter should ordinarily recommence at the point at which it left off. This may, if appropriate, require the matter to be remitted to the Local Court.

Recommendation 6.3: issues of fitness in the statutory regime

If the blueprint is implemented, the *Mental Health (Forensic Provisions) Act 1990* (NSW) should be amended to provide that where the question of unfitness is raised in the Local Court in respect of a matter to be dealt with on indictment:

(a) the matter should be removed to the District Court or Supreme Court for a fitness inquiry, and

(b) if the defendant is found to be fit, whether during the hearing or subsequently by the Mental Health Review Tribunal, the matter should, in an appropriate case, be remitted to the Local Court for completion of the case management process.

Operational requirements for Local Court case management

6.77 The success of our proposed scheme of Local Court case management depends on a number of operational requirements being met. We outline these below.

Involvement of senior prosecution and defence lawyers

6.78 As we discuss throughout this report, encouraging appropriate early guilty pleas relies on the early involvement of senior prosecution and defence lawyers with the authority to negotiate. This applies especially to the events that occur during case management in the Local Court. Indeed, it is critical to the success of our model.

6.79 Were our proposed blueprint to be implemented, we understand that the ODPP and Legal Aid both intend to ensure that lawyers from their organisations attend case management appearances in the Local Court. Centralised case management courts, which we discuss below, will help to achieve this. It is crucial that there be early, consistent involvement by ODPP and Legal Aid lawyers at the case management appearances in the Local Court.

6.80 Although it will not be necessary for a Crown Prosecutor or senior prosecutor to attend case management appearances personally, we expect that they would have already been involved in providing early charge advice. They should, at a minimum, participate in the criminal case conference. Likewise, although it may not be necessary for the defence to brief counsel in all matters, the criminal case conference should be attended by a defence lawyer who has the authority to negotiate on behalf of their client.

Centralised case management courts

6.81 In 1999 committal hearings throughout NSW were centralised. Rather than committal hearings being conducted separately in each Local Court, committal hearings were listed at a central Local Court, according to the location of the District Court registries.[34] Currently 25 out of 144 Local Court locations conduct committal hearings.[35]

6.82 The aim of centralisation of committal hearings was to reduce the backlog of criminal cases in the District Court, by encouraging more matters to be finalised in the Local Court or committed to the District Court for sentence only.[36] Centralisation allowed for streamlining of the allocation of prosecution and defence resources, including the provision of legal aid representation at committal hearings.[37] The centralised committal scheme resulted in a significant reduction in the workload of the District Court.[38]

6.83 Legal Aid NSW has advised that it currently provides in-house representation in 75% of committal hearings where the defendant appears in a centralised committal court. Legal Aid in-house representation also more often results in a guilty plea at or before committal than when the defendant is represented through a grant of legal aid to a private practitioner.[39]

6.84 We propose that specific Local Court locations be designated as centralised courts to conduct case management for indictable offences.

6.85 The justification for centralised committals applies equally to centralised case management courts under our blueprint. Having dedicated Local Court locations to preside over the case management will allow for streamlining of prosecution and defence resources, which in turn will allow for a more efficient court process. A Legal Aid in-house presence in the Local Court has proved to be successful in encouraging early guilty pleas, and Legal Aid's ability to continue to provide in-house representation at the case management appearances is central to the success of our scheme.

6.86 Centralised courts will act as the principal point where indictable proceedings will be filtered. A system of centralised courts will allow for:

- dedicated lists within each region, to streamline the case management appearances and allow for consistency of approach

34. A Eyland, N Nheu and T Wright, *Legal Aid for Committals: An Evaluation of the Impact of the Centralised Committals Scheme* (Law and Justice Foundation of NSW, 2001) 1.
35. Local Court of NSW, *Listing and Sitting Arrangements, NSW Local Court 2014* (2014). Local Court locations that conduct committal hearings are marked as dealing with a "DPP List".
36. A Eyland, N Nheu and T Wright, *Legal Aid for Committals: An Evaluation of the Impact of the Centralised Committals Scheme* (Law and Justice Foundation of NSW, 2001) 1-2.
37. A Eyland, N Nheu and T Wright, *Legal Aid for Committals: An Evaluation of the Impact of the Centralised Committals Scheme* (Law and Justice Foundation of NSW, 2001) 1.
38. Y Kuan, *Long-Term Trends in Trial Case Processing in New South Wales*, Contemporary Issues in Criminal Justice No 82 (NSW Bureau of Crime Statistics and Research, 2004) 4. There was, however, a corresponding increase in delay between arrest and committal in the Local Court.
39. Legal Aid NSW, *Preliminary Submission PEAEGP4,* 9.

- efficient use of ODPP and Legal Aid resources, to ensure there is an ODPP and Legal Aid presence at all appearances
- early, face to face communications between ODPP and defence lawyers, encouraging discussion on plea and charge negotiations, and
- transfer of the initial brief of evidence from the ODPP to the defence lawyer at the earliest possible opportunity.

6.87 We do not propose to identify which Local Court locations in NSW should become centralised courts. This is best left to be determined administratively. However, these should be locations that have the capacity to hear a large number of matters, as well as locations where Legal Aid NSW and the ODPP are co-located. The same Local Courts that currently conduct centralised committal hearings could, as a matter of administrative convenience, conduct the case management appearances.

Alignment of ODPP and Legal Aid NSW catchment areas

6.88 The ODPP has 10 offices throughout NSW, and Legal Aid NSW has 21.[40] Each office is allocated a particular catchment area, and is responsible for the carriage of matters that fall within that area. In country areas, the catchment area can be quite large and significant travel can sometimes be required.

6.89 We are told that the ODPP and Legal Aid catchment areas do not necessarily align with one another. This is no doubt because Legal Aid has more than twice as many offices as the ODPP. This may pose problems for implementing our blueprint. It can be difficult for ODPP and Legal Aid lawyers to conduct face to face discussions if they are based in different areas. Accordingly, we recommend that the ODPP and Legal Aid review their catchment areas for indictable offences, with a view to aligning them with each other to the greatest extent practicable.

Increased use of audio-visual link facilities

6.90 We recognise that the geographical breadth of NSW means that it will sometimes be impractical for a defendant to attend at a centralised court. For this reason, we recommend that all centralised Local Court locations be equipped with audio-visual link (AVL) facilities to allow a defendant to be remotely connected to a centralised court. This will allow the defendant to appear without the disadvantage of having to travel long distances. The defendant could be linked in from another Local Court, from a Legal Aid office or from a correctional centre if the defendant is in custody. AVL facilities could also allow the defendant to connect with a Legal Aid duty lawyer during a case management appearance. Our blueprint envisages that there would be a Legal Aid duty solicitor attending the centralised court in person.

6.91 Currently AVL facilities are available at 55 out of 144 Local Court locations in NSW.[41] AVL is already used in the Local Court to connect with defendants in

40. NSW, Office of the Director of Public Prosecutions, "About the ODPP" (2013) <http://www.odpp.nsw.gov.au/about-the-odpp>; Legal Aid NSW, "Legal Aid NSW Offices" (20 January 2014) <http://www.legalaid.nsw.gov.au/contact-us/legal-aid-nsw-offices>.
41. Information provided by Courts and Tribunal Services, NSW Department of Attorney General and Justice (9 April 2014).

detention during bail applications, and to take evidence from remote witnesses. The 2014/15 NSW Budget has allocated funding for a four year "Justice Audio Visual Link Consolidation Project".[42] This project seeks to expand AVL facilities in the Local Court, ODPP offices, Legal Aid offices and correctional centres.[43] Greater availability of AVL facilities within the justice sector in NSW will greatly assist the implementation of our blueprint.

Recommendation 6.4: centralised case management courts

(1) The Chief Magistrate, in consultation with the Office of the Director of Public Prosecutions (ODPP) and Legal Aid NSW, should designate centralised Local Court locations for conducting case management of proceedings for indictable offences in the Local Court.

(2) Centralised courts should:

(a) have audio-visual link facilities available, and

(b) where possible, be located in areas where the ODPP and Legal Aid NSW have an office.

(3) The joint practice note in Recommendation 3.1 should outline the circumstances in which a defendant and his or her legal representative may be able to appear at a Local Court case management appearance by way of audio-visual link.

(4) The ODPP and Legal Aid NSW should review their catchment areas for indictable offences with a view to aligning them with each other as much as possible.

42. B Hazzard, "$81.9 Million Technology Upgrade to Slash Costs and Time in Justice System" (Media Release, 17 June 2014).

43. Information provided by Courts and Tribunal Services, NSW Department of Attorney General and Justice (9 April 2014).

7. Mandatory criminal case conferencing

In brief

Criminal case conferencing aims to bring the prosecution and the defence together early in the criminal process to identify key issues and encourage appropriate early guilty pleas. For this reason it plays an early and pivotal role in our blueprint for indictable proceedings.

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7.1 Criminal case conferencing (CCC) is a formal, structured discussion between the defence and prosecution, which aims to facilitate the prompt resolution of matters. In NSW, CCC has been prescribed by legislation or accommodated in practice notes. It is distinguished from charge negotiations, which tend to be fluid discussions that may occur at any time during the criminal justice process.

7.2 In this chapter we detail our recommendation to reintroduce a modified program of CCC to that previously implemented in NSW. Under our blueprint case conferences will provide a forum for parties to resolve issues about the evidence and charge. It will allow the defence to raise, confirm or contest its participation in the "early resolution with discount" (ERD) stream.

7.3 Below we provide some background information on the operation of CCC in NSW up to 2012, and discuss what form the proposed conferences should take. To fulfil the objectives of efficiency, fairness and early resolution, we conclude that a state

wide CCC program that is mandatory, fixed and unmediated needs to be implemented.

The trial of criminal case conferencing in NSW (2006-2012)

7.4 CCC for indictable proceedings was first introduced in the NSW Local Court in 2006 as a non-legislative trial, implemented through a Local Court practice note.[1] The process was later legislated and refined by the *Criminal Case Conferencing Trial Act 2008* (NSW) (CCCTA). A review of CCC by the NSW Bureau of Crime Statistics and Research (BOCSAR) in 2010 found that the legislative program was having little positive impact, and the CCCTA was repealed in 2012.

How did criminal case conferencing operate in NSW?

7.5 CCC was intended to bring forward plea negotiations and encourage early guilty pleas where appropriate.[2] It operated as discussions between the prosecution and defence before committal. It was held out of court without the assistance of an independent third party.

Two distinct phases

7.6 CCC had two distinct phases. From 2006-2008 it operated as a voluntary administrative model that applied to legally represented adult defendants in matters to be heard on indictment across all Local Courts.[3] After 2008, this program continued to apply to all matters heard on indictment in all Local Courts except the Downing Centre Local Court and Central Local Court in Sydney,[4] where a statutory trial was implemented.

7.7 Under the CCCTA, CCC was mandatory for indictable matters where the adult defendant was legally represented in the Downing Centre and Central Local Courts (unless waived by the magistrate in exceptional circumstances).[5] Criminal case conferencing in both regimes occurred between the prosecution and defendant's legal representative prior to committal proceedings.

1. Local Court of NSW, *Practice Note No 5 of 2005 – Procedures to be adopted for committal hearings in the Local Court for proceedings commenced on or after 1 January 2006,* 5 December 2005 (Local Court of NSW, *Practice Note No 5 of 2005*).
2. Local Court of NSW, *Practice Note No 5 of 2005*, 1.
3. Local Court of NSW, *Practice Note No 5 of 2005*, 1.
4. Local Court of NSW, *Practice Note No 4 of 2008 – Procedures to be adopted for committal hearings in the Local Court for proceedings commenced on or after 1 May 2008,* 29 April 2008, 1 (Local Court of NSW, *Practice Note No 4 of 2008).*
5. *Criminal Case Conferencing Trial Act 2008* (NSW) s 6(1).

Figure 7.1: Comparison of administrative and statutory CCC trials in NSW 2006-2012

ACCUSED IS CHARGED

Local Court determines bail status

Administrative Trial 2006 – 2008 state wide and 2008- 2012 in NSW courts except Sydney city.	**Criminal Case Conferencing** 2008 – 2012 in Sydney city courts.
Local Court *Practice Note No 5 of 2005*, protocols.	*Criminal Case Conferencing Trial Act 2008* (NSW) (CCCTA)
Non-compulsory. Applies to all matters to be heard on indictment. D must be legally represented.	Compulsory. Applies only to all matters to be heard on indictment listed in Downing Centre or Central Local Court. D must be legally represented.

Court orders service of brief and disclosure certificate

Brief and **disclosure certificate (DC)** served by ODPP

DC certifies the sufficiency of the brief.	DC certifies that a full brief has been served.
Reply date: D's legal representation to confirm conference attendance - to be held in 14 days.	Conference to be held within 14 days of serving disclosure certificate.

CONFERENCE HELD

ODPP and D's legal representative attend. D to be accessible in person, by phone or AVL.	ODPP and D's legal representative with written instructions must attend.
ODPP produced a **pro forma letter** to be distributed to the parties outlining the outcome of the conference.	ODPP to tender to court a **compulsory conference certificate.** Certificate details any plea; and any dispute as to the adequacy of the brief of evidence.

COMMITAL FOR SENTENCE (where conference results in a guilty plea)

SENTENCE HEARING

Sentence discount as per *R v Thomson* – up to 25% for utilitarian value of early guilty plea. Timing of the entry of plea to be considered.	Sentence discount as per CCCTA: 25%, up to 12.5% if guilty plea entered after D committed for trial (with exceptions).

The key elements of case conferencing in NSW

7.8 The key elements of CCC were:

- **Service of the brief and disclosure certificates:** Prior to the conference, the Office of the Director of Public Prosecutions (ODPP) was required to serve the brief and disclosure certificate on the defence. Under the statutory regime, disclosure certificates operated to verify to the defendant that the brief of evidence, for the purposes of attending a case conference, had been served. This included all relevant or possibly relevant material related to the offence and any new evidence.
- **Attending the conference:** The conference was attended by a prosecutor and the defendant's legal representative.
- **Resolution of issues at conference:** At the conference, the parties would consider the evidence, the prospects of the case, and any agreed material facts.
- **Confirmation of outcomes in the compulsory conference certificate:** Under the statutory regime, the prosecution would sign and tender to the court a compulsory conference certificate which outlined the outcomes of the conference. Where a guilty plea was indicated, the prosecution could indicate agreement or opposition to the maximum available discount for the utilitarian value of the plea.
- **Discount on sentence:** Where the conference resulted in a guilty plea, a sentence discount applied. Under the statutory regime, any guilty plea entered before committal proceedings was entitled to a 25% reduction of sentence, while a plea received after committal could only result in a discount of up to 12.5% (unless a previous offer to plead to a charge was later found or accepted).

7.9 A conference would not occur where:

- the defendant had already entered a guilty plea
- the offence carried a sentence of life imprisonment
- the defendant had no legal representation
- the prosecution was not conducted by the ODPP
- a magistrate ordered that the CCC process should be dispensed with, or
- the ODPP had certified that no discount should apply given the seriousness of the offence and the strong likelihood of conviction by a jury.[6]

7.10 The operation of the administrative and statutory regimes was strengthened by Local Court practice notes,[7] the ODPP's Prosecution Guidelines, protocols between

6. *Criminal Case Conferencing Trial Act 2008* (NSW) s 6, s 16, s 18.
7. Local Court of NSW, *Practice Note No 5 of 2005*; Local Court of NSW, *Practice Note No 4 of 2008*.

the ODPP and Legal Aid NSW,[8] practice standards for legal practitioners published by Legal Aid NSW, and amendments to the Legal Aid Fee Structure.[9]

How successful was case conferencing in NSW?

BOCSAR 2010 findings: guilty plea rate was unaffected by case conferencing

7.11 In 2010, 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.[10] 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.*

7.12 BOCSAR concluded that any effect the trial had on encouraging early guilty pleas was "very subtle". 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 a plea of guilty may have persisted.[11]

7.13 There are acknowledged caveats to the BOCSAR study. These caveats are highly relevant to reviewing the relative success of the case conferencing trial. The caveats point to issues with the data set and the disordered implementation of the

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8. *Protocol for Case Conferencing Between the Legal Aid Commission (NSW) and the Office of the Director of Public Prosecutions(NSW)* (2005) provided by Legal Aid NSW.
9. Legal Aid NSW, *Fee structures for Committals, District Court Sentence Matters and Counsel to Advise on Defence* (2005) provided by Legal Aid NSW.
10. W Yin Wan and others, *The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court*, Bureau Brief No 44 (NSW Bureau of Crime Statistics and Research, 2010).
11. W Yin Wan and others, *The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court*, Bureau Brief No 44 (NSW Bureau of Crime Statistics and Research, 2010) 8. We discuss this element in further detail in Chapter 9 at paras 9.25-9.28.

trial, which, along with a wary approach to sentence discounts, influenced the soft findings of the report.

7.14 **Control comparison:** The BOCSAR review of criminal case conferencing compared the statutory criminal case conferencing trial to a criminal justice landscape which already included an administrative case conferencing program. The trial was not compared with outcomes generated from a system without case conferencing. As BOCSAR notes, the lack of a true control comparison may have added to the lack-lustre findings.

7.15 **Inconsistent implementation**: The statutory criminal case conferencing trial was run in the Local Court in two Sydney locations. Even in this controlled environment, participation appears to have been erratic.[12] Based on data the ODPP has provided to us, it appears that conferences were waived or avoided in large numbers of cases. One data set collected by the ODPP of 199 matters showed that up to 32% (63) of eligible matters did not undergo a case conference in 2009/10.[13] Haphazard implementation was compounded by the reported attendance at case conferencing of prosecution representatives who did not have adequate authority or seniority to settle matters. Without the full and authorised participation of the parties, the case conferencing trial results were destined to be underwhelming at best.

Repeal of the scheme

7.16 In 2011, NSW Treasury found that the "trial no longer justified the resources that were required to fund the [ODPP's] participation".[14] In 2012 the CCCTA was repealed. Stakeholders have suggested to us that the culture was slowly beginning to change and inroads were being made at the time the trial was abandoned.

7.17 The precise impact of the repeal of the CCC on guilty pleas is unclear. It is noted, however, that the close of the program and the introduction of the 2012 practice note in the Local Court coincided with a sharp rise in matters that were committed for trial. In 2011, 1793 cases were committed for sentence compared to 1747 committed for trial. In 2012, however, 1772 cases were committed for sentence (a decrease of 21 cases from the previous year) and 2110 cases were committed for trial (an increase of 363 cases compared with 2011). The number of matters committed for trial in 2013 was 2009 – a decrease of 110 from the year before, but still markedly higher than 2011 numbers.

7.18 Participants in the criminal justice system have identified other factors that possibly contributed to the increase in matters committed for trial. These include changes in policing policy and the effect of time limits to commit imposed by the 2012 Local Court practice note.[15] It remains unclear whether the abandonment of the CCC trial exacerbated the problem, or removed a mechanism which might have provided the system with a way of managing new pressures. Our ability to disentangle the various influencing factors on the District Court trial rate is limited.

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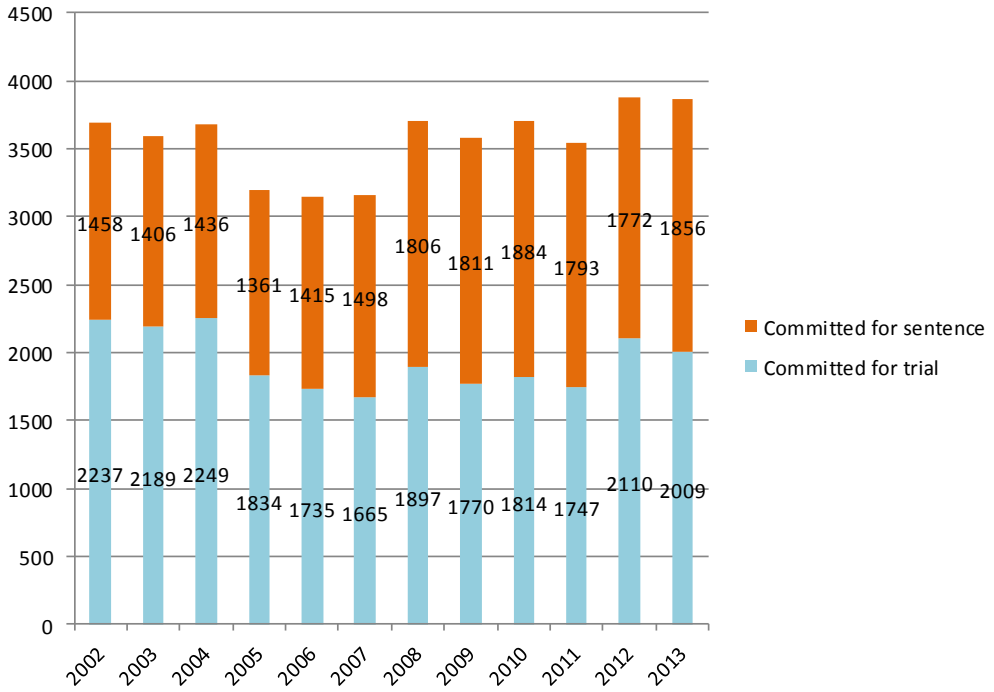
12. NSW, *Parliamentary Debates*, Legislative Council, 16 February 2012, 8401-8402.
13. Information provided by NSW, Office of the Director of Public Prosecutions (4 July 2013).
14. NSW, *Parliamentary Debates*, Legislative Council, 16 February 2012, 8402.
15. This was suggested in consultation with some stakeholders.

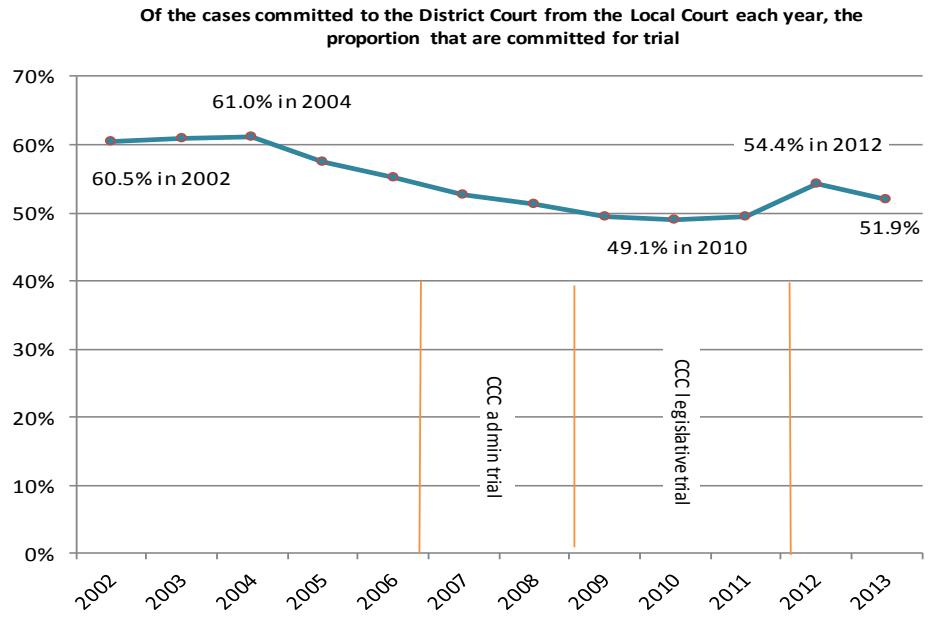
Figure 7.2: Number of cases committed for trial or sentence in the District Court 2002-2013



Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics (2002-2013)

7.19 Figure 7.3 looks at this increase in terms of the percentage of all incoming cases that were initially committed for trial (as opposed to committed for sentence) in the District Court from 2002 to 2013.

Figure 7.3: Percentage of matters entering the District Court that were committed for trial 2002-2013



Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics (2002-2013)

7.20 In 2004, 61% of the incoming cases to the District Court were committed for trial. This means that only 39% were committed to sentence (that is, had entered an early guilty plea). The proportion of incoming cases committed for trial gradually decreased to a low of 49.1% in 2010; that is, by 2010, early guilty pleas had been entered in over half of all incoming cases to the District Court. The proportion of matters committed for trial remained stable between 2010 and 2011 but sharply increased in 2012, where 54.4% of all incoming cases were committed for trial. The court experienced a slight decrease in matters committed for trial in 2013.

The current process for facilitating case conferencing in NSW

7.21 In May 2012, the Local Court practice note referred to above was introduced to replace practice notes that had operated during the case conferencing programs for indictable proceedings. The 2012 practice note states that a matter is to be adjourned for six weeks after second appearance in the Local Court so that any negotiations between the parties can be finalised.[16] The parties are not compelled to attend a criminal case conference and the associated undertakings of the prosecution regarding disclosure of evidence and confirmation of what was agreed to during the course of negotiations are no longer required. The Chief Magistrate of the Local Court has confirmed that the negotiation period aims to facilitate "negotiations between the parties, without imposing any of the formalities entailed by the trial scheme".[17]

Stakeholder views on reintroducing criminal case conferencing

7.22 In our consultation paper *Encouraging Appropriate Early Guilty Pleas: Models For Discussion* (CP15) we asked whether NSW should introduce CCC, and if so, what form it should take.[18]

7.23 In submissions and consultations, the majority of stakeholders expressed continued support for CCC.[19] These stakeholders considered that CCC:

- provides a forum for prosecutors with the authority to negotiate on charges to engage with the defence *early* in proceedings (although the Public Defenders noted that CCC was arguably not early enough)[20]
- facilitates prosecution disclosure of material and encourages the parties to communicate about appropriate pleas and factual issues in dispute,[21] and

16. See Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012, 3, Attachment A.
17. Chief Magistrate of the Local Court of NSW, *Submission EAEGP6*, 3.
18. NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) Question 5.1.
19. Police Association of NSW, *Submission EAEGP2*, 14-15; NSW Bar Association, *Submission EAEGP4*, 6; Intellectual Disability Rights Service, *Submission EAEGP5*, 7; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission EAEGP9*, 4; NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 6; Legal Aid NSW, *Submission EAEGP11*, 14-15; NSW Young Lawyers, Criminal Law Committee, *Submission EAGEP12*, 10.
20. NSW, Public Defenders, *Submission EAEGP8*, 4.

- promotes a shift in culture and legal practice which cultivates early guilty pleas.[22]

7.24 A minority of stakeholders opposed reintroducing CCC. The Chief Magistrate of the Local Court considered formal case conferencing to be unnecessary, and suggested that the six week negotiation period prescribed by the practice note is sufficient to encourage appropriate negotiations. The Chief Magistrate also raised the concern that heavily discounting a guilty plea because the plea was entered in the Local Court encouraged some matters to stay in the Local Court longer than was necessary. This was suggested to run counter to the efficiency objectives of the initial CCC program.[23]

7.25 Another submission suggested that defence lawyers might be unwilling to expose any weakness in their client's case to the prosecution, a factor which could undermine the value of case conferencing early in proceedings.[24]

Mandatory criminal case conferencing in NSW

7.26 We consider CCC to be an important piece of the mosaic in a system that aims to encourage appropriate early guilty pleas. Our recommended blueprint for indictable proceedings would place CCC at the beginning of the process. In our framework, CCC is not only a forum for discussions that aim to review the available evidence and charges. The system we propose will provide a forum for:

- the defence to outline their understanding of the matter and introduce any further matters for consideration (such as possible defences)
- the parties to review the initial brief of evidence and agree on any outstanding matters
- the parties to review and, if possible, agree on a statement of facts
- the parties to discuss, in appropriate cases, the nature of prosecution submissions on sentencing
- the parties to discuss whether there is a need for any cross-examination of witnesses in the Local Court,[25] and
- the defendant to decide to enter a plea of guilty and to be included in the ERD stream.[26]

7.27 Importantly, it will place all of these concerns at the front end of the process, rather than leaving them for discussion at or close to the trial stage. This is fundamental to the model we propose.

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21. Legal Aid NSW, *Submission EAEGP11*, 14
22. NSW Bar Association, *Submission EAEGP4*, 6; NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 6.
23. Chief Magistrate of the Local Court of NSW, *Submission EAEGP6*, 3.
24. Mersal & Associates, *Submission EAEGP7*, 4.
25. See Chapter 8.
26. See Chapter 10.

7.28 As with all aspects of our blueprint, the success of CCC requires:

- **Continuity of carriage:** The prosecution must be represented by a lawyer who is across the brief, experienced and empowered to make decisions on the case. Continuity of representation and/or approach is necessary so the defence can be assured that decisions made at this point will not be revisited later.
- **Early and sufficient disclosure:** The defence need to have the initial brief on which the prosecution case is based, and be able to provide confident advice to the client. We review disclosure in Chapter 5.
- **A strict statutory discount regime:** A system of sentencing discounts that both parties know provides a discount at the early stage that will simply not be available later. See Chapter 9.

7.29 CCC by itself is not the single solution. Successful reform requires fundamental changes in the way prosecutions are conducted. In many ways, if the defence and prosecution are well represented from the outset and are able to negotiate properly, CCC is less important; informal negotiations will take place and our blueprint would encourage these discussions. However, we see CCC as important to achieving a shift in behaviour, and in creating a universal legal imperative to discuss cases which have not yet resolved.

7.30 We recognise that the BOCSAR report suggested that the previous CCC system did not succeed. In our view, this was primarily because of inconsistent participation and implementation. Stakeholders tell us emphatically that the process was only beginning to have an impact at the point where it was abandoned, and that there is widespread support for its reintroduction. We regard this as an encouraging sign for the future.

Alternative models and stakeholder views

7.31 As outlined in our consultation paper, some other jurisdictions have adopted a voluntary approach. A voluntary criminal case conferencing program (VCCC) currently operates in the Supreme Court of Western Australia.[27] VCCC was introduced in WA as part of a package of reforms that were implemented from 2004, including early disclosure requirements[28] and the establishment of the Stirling Gardens Magistrates Court.[29] VCCC is a strictly voluntary procedure, requiring

27. See NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) [5.14]-[5.24].
28. The prosecution and defence must comply with the disclosure requirements contained in the *Criminal Procedure Act 2004* (WA) prior to undertaking VCCC: Supreme Court of Western Australia, "Protocol for Voluntary Criminal Case Conferencing" (29 August 2012) <www.supremecourt.wa.gov.au/P/protocol_for_voluntary_criminal_case_conferencing.aspx>.
29. For further discussion on the Stirling Gardens Magistrates Court see NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) [5.18].

mutual consent.[30] It comprises an informal discussion between the parties that takes place within the Supreme Court and is overseen by a retired judge.[31]

7.32 In Quebec,[32] facilitated case conferences are also voluntary and only occur upon request.[33] Similar to 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.[34]

7.33 The Police Association of NSW supported the introduction of a CCC program akin to the VCCC in WA.[35] Legal Aid NSW was "attracted to aspects" of the program.[36] The Intellectual Disability Rights Service (IDRS) supported a voluntary regime, and emphasised the importance of the previous requirement in NSW that only defendants who have legal representation should be eligible to participate.[37] IDRS also noted that defendants with impaired capacity should be able to attend case conferencing in the company of a support person.[38]

7.34 Some stakeholders supported mandatory programs. The ODPP and the NSW Bar Association advocated a compulsory statutory model,[39] with the ODPP suggesting that a more detailed confirmation of conference outcomes in the form of an advocate's questionnaire be implemented.[40] The Law Society of NSW supported mandatory CCC, but did not believe the structure and content of the conference need be prescribed.[41] NSW Young Lawyers also supported mandatory conferencing and suggested that a compulsory program would address any pre-existing individual unwillingness to negotiate.[42]

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30. Supreme Court of Western Australia, *Protocol for Voluntary Criminal Case Conferencing* (29 August 2012) <www.supremecourt.wa.gov.au/P/protocol_for_voluntary_criminal_case_conferencing.aspx>.
31. VCCC is available for all matters heard in the Supreme Court of WA. It is not supported by legislation, but is enforced in accordance with the Supreme Court of WA's governing Protocol for Voluntary Criminal Case Conferencing: Supreme Court of Western Australia, "Protocol for Voluntary Criminal Case Conferencing" (29 August 2012) <www.supremecourt.wa.gov.au/P/protocol_for_voluntary_criminal_case_conferencing.aspx>.
32. See NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) [5.25]-[5.32].
33. *Rules of the Court of Appeal in Quebec in Criminal Matters*, SI/2006-142, s 61; Court of Quebec, "Settlement Conference: Facilitation Conference in Criminal and Penal Matters" <www.tribunaux.qc.ca/mjq_en/c-quebec/Modes_alternatifs_de_reglement_anglais/fs_depliant_crim_ang.html>.
34. L Otis and E H Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice" (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351, 352, 381.
35. Police Association of NSW, *Submission EAEGP2*, 14-15.
36. Legal Aid NSW, *Submission EAEGP11*, 14.
37. Issues of self representation were also raised by NSW Young Lawyers, Criminal Law Committee, *Submission EAEGP12*, 10.
38. Intellectual Disability Rights Service, *Submission EAEGP5*, 7.
39. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 6; NSW Bar Association, *Submission EAEGP4*, 6.
40. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 6.
41. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission EAEGP9*, 4.
42. NSW Young Lawyers, Criminal Law Committee, *Submission EAEGP12*, 10.

Our view: criminal case conferencing should be mandatory

7.35 We see case conferencing as an essential step to progress matters within our proposed framework. We agree with stakeholders who submitted that attendance at a case conference in NSW should be a compulsory and "natural part of the process".[43] Making it compulsory for defence lawyers and senior prosecutors (with the authority to negotiate) to attend and complete a conference will help embed CCC into the justice system. It will generate an environment where defence and the prosecution can readily and productively communicate.

Experience in England and Wales

7.36 We regard the recently reported experience in England and Wales to be highly instructive. In England and Wales, committals have been abolished[44] and an early guilty plea scheme implemented[45] without a corresponding requirement for parties to attend a case conference. The Office of the Senior Presiding Judge has reported a marked increase in preliminary hearings for all matters sent or allocated to the Crown Court.[46] This increase has recently been attributed to inadequate communication between parties while the matter is awaiting appearance before the Crown Court.[47] Accordingly, a new practice note is under development which sets time standards and clearly articulates that, in the intermediate period between the Magistrates' Court and the Crown Court, parties are expected to meet to resolve any outstanding issues.

7.37 The experience of England and Wales throws into relief the pivotal role that good communication between the parties can have on efficient case management and the effective resolution of matters. In our view this bolsters the argument for mandatory CCC. Anecdotal evidence from consultations with private and public practitioners in NSW provides further support.

Review whether there should be a power to dispense after implementation

7.38 It has been put to us that, in certain cases, the Local Court should retain a power to dispense with CCC. It is suggested that this may be a suitable option for some matters where there is no likelihood of resolution or of the parties defining the issues in dispute for trial. This may occur in strongly contested cases that are not supported by forensic evidence - for example, historical sexual assault. It has been argued that where the defendant strongly denies the charge and a trial is almost certain, a CCC is a waste of time and resources. In these cases the court should have a power to dispense with CCC and be able to allocate the matter directly into the higher court trial case management stream.[48]

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43. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 6.
44. See NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) [7.8]-[7.19].
45. See NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) [6.2]-[6.20]; See also Appendix E of this report.
46. UK, Office of the Senior Presiding Judge, *Consultation EAEGP16*.
47. Information provided by UK, Office of the Senior Presiding Judge (26 November 2013).
48. See Chapter 10.

7.39 There is value in this approach to avoid wasted conferences. However, we do not support the court having the discretion to dispense with CCC at this time for three key interrelated reasons:

- **The need to embed cultural change**: For CCC to be successful, a cultural change affecting professional practice must occur. The prosecution and defence need to accept that CCC is a part of criminal procedure for indictable matters that must occur when a guilty plea is not entered.
- **The need for consistency**: We consider consistency of approach across the Local Court to be important, and a clear simple rule mandating CCC to be the best route to ensure this. Erratic implementation was one of the key reasons why the statutory trial failed.[49]
- **The advantages of early communication between the parties**: We believe that there may be value to attending a CCC, even for those cases where the parties are reluctant. At the very least discussions may lead the parties to agree that there is little to be done, and to advance the matter to trial. For matters where a plea is not forthcoming, the parties should use the opportunity to discuss and identify for the court the issues at trial, the witnesses required, and whether the matter should be in the complex trial management stream.

  Conferences of this sort need not drain resources and the cost need not be high – the parties can communicate by telephone so long as all the obligations under the conferencing certificates (see paras 7.55-7.59) are fulfilled.

7.40 It may take some time to get used to the CCC regime. However, once CCC becomes a natural part of professional practice, it may become apparent that there are some identifiable kinds of cases where a conference will clearly not advance matters and would be a waste. In our view, it would be best for the program review, conducted by the implementation team in Recommendation 12.6, to consider whether there are such cases and determine whether the court should have a discretionary power to dispense with CCC in those cases.

Recommendation 7.1: mandatory case conferencing

The *Criminal Procedure Act 1986* (NSW) should provide that, unless a guilty plea is entered, a criminal case conference must occur and is to take place before the final case management appearance in the Local Court.

Recommendation 7.2: identifying whether the power to dispense is necessary

The implementation team in Recommendation 12.6 should determine, once there is adequate experience of the new system, whether the court needs to have the power to dispense with criminal case conferencing to avoid waste.

49. See para 7.15.

When and how should criminal case conferencing occur?

Alternative models and stakeholder views

7.41 Criminal case conferencing in NSW (2006-2012) occurred within a fixed timeframe, prior to committal, in the Local Court.

7.42 The VCCC in WA has adopted a more flexible schedule. Case conferences usually occur before the disclosure/committal hearing, but can take place at any point before the trial begins if the accused requests and the judge presiding over the criminal list orders.[50] In Quebec, the conference will generally occur after the preliminary inquiry, which operates in place of the committal hearing in NSW. The conference may extend over a number of sessions and may be adjourned to allow the prosecution to make further enquiries.[51] 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, and both may be conducted concurrently.[52]

7.43 The majority of stakeholders supported a framework where the timing of CCC could be responsive.[53] There was also support for case conferencing being flexible in form,[54] with Legal Aid NSW observing that case conferencing - both under the old regime and currently - can occur informally through telephone discussions between the parties.[55]

Our view: criminal case conferencing to occur before the final Local Court appearance and be in any form

7.44 Under our proposed framework CCC is to be a mandatory step in the criminal process, which needs to occur at a fixed point in time. Charge negotiations would still occur throughout the process as needed; CCC is part of a broader structure and has a distinct purpose.

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50. Supreme Court of Western Australia, "Protocol for Voluntary Criminal Case Conferencing" (29 August 2012) <www.supremecourt.wa.gov.au/P/protocol_for_voluntary_criminal_case_conferencing.aspx>.
51. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration, 2010) 60-61.
52. Court of Quebec, "Settlement Conference: Facilitation Conference in Criminal and Penal Matters" <www.tribunaux.qc.ca/mjq_en/c-quebec/Modes_alternatifs_de_reglement_anglais/fs_depliant_crim_ang.html>.
53. Police Association of NSW, *Submission EAEGP2*, 15; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission EAEGP9*, 4; NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 7; Legal Aid NSW, *Submission EAEGP11*, 14.
54. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission EAEGP9*, 4; NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 7; Legal Aid NSW, *Submission EAEGP11*, 14.
55. Legal Aid NSW, *Submission EAEGP11*, 14. Although we note that this was not encouraged by the 2006 Legal Aid NSW fee structure, which only renumerated a practitioner for the CCC if they attended a "face-to-face" conference: Legal Aid NSW, *Fee Structures for Committals, District Court Sentence Matters and Counsel to Advise on Defence* (2005) 3. Note that attendance at a CCC was also a condition of a grant of legal aid.

7.45 In Chapter 6, we propose case conferencing occur in the second stage of case management, before the final case management appearance in the Local Court and the requirement to enter a plea. In our view, at this stage a sufficient brief of evidence will be available for discussions to be meaningful. This timing reflects the observation of Legal Aid NSW that "criminal case conferencing will be most effective where it occurs as early as possible following service on the defence of adequate evidence to support the charge".[56]

7.46 This does not mean there should be no flexibility. In Chapter 6 we talk about creating an option for two CCCs to occur: before and after oral evidence. We think it best that the use of CCC be as flexible as possible, but that at least one CCC occurs while the matter is in the Local Court.

7.47 In our view, the conference can be in any convenient form. This could be in person or by telephone or AVL. Flexibility is required to enable an efficient process.

Recommendation 7.3: flexible form of criminal case conference

The *Criminal Procedure Act 1986* (NSW) should provide that attendance at the criminal case conference can be in person, by telephone or by audio-visual link.

Should criminal case conferencing be facilitated?

Alternative models and stakeholder views

7.48 Facilitated conferences occur in WA where the VCCC incorporates two retired District Court judges as "facilitators", who conduct the conferences alone or in partnership.[57] 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. Secondly, the status of the mediators as experienced members of the judiciary lends the program credibility and respect among the legal profession as well as the community.[58]

7.49 In Quebec, CCC is mediated by a judge, who steps out of the court system to facilitate the conference.[59] "Judge-mediators" are also used extensively in civil, commercial and family law matters in Quebec, in a way that reflects the more interventionist role of judges in this jurisdiction. Judges are required to undertake

56. Legal Aid NSW, *Submission EAEGP11*, 15.
57. Supreme Court of Western Australia, "Protocol for Voluntary Criminal Case Conferencing" (29 August 2012) <www.supremecourt.wa.gov.au/P/protocol_for_voluntary_criminal_case_conferencing.aspx>.
58. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration, 2010) 43.
59. For further information on the facilitated case conferences in Quebec see NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) [5.25]-[5.29].

extensive training to ensure they are capable of switching from an "adjudicative" to a "facilitative" context.[60] The Magistrates' Court of Victoria holds committal case conferences that are facilitated in court by an acting magistrate,[61] and, between 1999 and 2010, the County Court held case conferences prior to arraignment that were overseen by the listing judge.[62]

7.50 The Police Association of NSW supported facilitated CCC and suggested that two retired District Court Judges oversee CCC in NSW.[63] Legal Aid NSW expressed interest in facilitated conferences, but noted the resource implications of staffing a state wide program.[64] Accordingly, Legal Aid suggested that the use of facilitators could be limited to more complex or serious matters.[65]

Our view: criminal case conferencing does not need to be facilitated

7.51 We see clear benefits in having a conference mediated by an expert in law, evidence and court processes. However, this would be a costly addition as a standard process in proceedings on indictment. Additionally, successful conferences rely upon frank and full discussions between the parties, which may be stifled by the appearance of a judge as adjudicator – especially if the judge or magistrate is currently acting in the court.

7.52 Adopting a system of in-court conferences could lead to the case conference evolving into a case management hearing in the court. This appears to be what happened in Victoria, where committal case conferences that occurred 10 weeks after committal in the County Court under the direction of a judge were ultimately abolished (1999-2010). Commentators have noted that the conferences had developed from a discussion between the parties in an attempt to resolve the issues and settle the matter into a court appearance used simply to set a trial date. The conferences then no longer met the objective of early resolution and were instead putting further stress on the court.[66]

7.53 Accordingly, we propose that mandatory criminal case conferences should not be facilitated. They should be attended by the defence lawyer and a Crown Prosecutor or other senior prosecutor with the authority to negotiate. The defence lawyer may attend with written instructions or instructions received by telephone or AVL.[67]

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60. L Otis and E H Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice" (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351, 367.
61. For further information on the operation of committal case conferences in Victoria see NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) [5.35]-[5.37].
62. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration, 2010) 85.
63. Police Association of NSW, *Submission EAEGP2*, 15.
64. Legal Aid NSW, *Submission EAEGP11*, 4, 15.
65. Legal Aid NSW, *Submission EAEGP11*, 15.
66. A Flynn, "Victoria's Legal Aid Funding Structure: Hindering the Ideals Inherent to the Pre-trial Process" (2010) 34 *Criminal Law Journal* 48, 51-52, 54.
67. *Criminal Case Conferencing Trial Act 2008* (NSW) s 11.

7.54 We are not opposed to mediated conferences, at this early stage or any other stage of proceedings. In complex cases, where the magistrate and the parties consider that a mediator may be helpful and there is a mediator available, there should be no barrier to this being agreed and ordered.

Requirements for certificates

7.55 CCC needs to ensure that certain actions have taken place between the parties and to record the facts. Two certificates are proposed for this purpose. First, a disclosure certificate is submitted to the defence with the evidence. This confirms that all the relevant evidence on which a charge decision was made has been served and that the disclosure conforms to the requirement of the regime. We discuss disclosure in Chapter 5. Second, the conference certificate will confirm the details of the conference and whether the matter is to proceed to the ERD stream. The compulsory conference certificate was a verification tool used during the case conferencing trial. The prosecution was required to complete and sign the certificate after a case conference had occurred, seal and file it with the court.[68]

7.56 The certificate certified:

- The charged offence/s prior to the conference and the offence/s for which the prosecution would seek committal of the defendant for trial or sentence (which included any alternative offences discussed at the conference).
- The offences on which the defendant had offered to plead guilty, and whether the prosecution had accepted or rejected the offer.
- Where the defendant had agreed to enter a plea of guilty to any offence, the agreed facts and any facts in dispute.
- Any additional offences where the defendant had agreed to enter a plea of guilty and agreed to ask the court to take into account under s 33 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (on a Form 1).
- Where the defendant considered the brief of evidence insufficient to assess the prosecution's case, and the details of the insufficiency.[69]

7.57 The certificate was privileged, and could only be used if the parties consented at sentencing or where a guilty verdict was reached on a charge raised by the defence and rejected by the prosecution at the case conference.[70]

7.58 Under our proposed blueprint, the certificate would have a similar role as it did under the case conferencing trial. We consider that the conference certificate will be particularly useful when:

- identifying whether a guilty plea has been entered and the matter is to be included in the ERD stream, which attracts a significant discount on sentencing in most cases, or

68. *Criminal Case Conferencing Trial Act 2008* (NSW) s 12(4).
69. *Criminal Case Conferencing Trial Act 2008* (NSW) s 12(3).
70. *Criminal Case Conferencing Trial Act 2008* (NSW) s 13.

- recalling whether the defence agreed to enter a plea to a charge which is later made out at trial.

7.59 It is not clear that all aspects of the original disclosure certificate or CCC trial certificate need to be included in the certificate in our new scheme, and we recommend that the implementation team work with key stakeholders to confirm the exact content and form of the certificates.

Recommendation 7.4: content of the case conference certificate

(1) The *Criminal Procedure Act 1986* (NSW) should provide that a case conference certificate, detailing the outcome of the conference, must be lodged with the Local Court before the final case management appearance.

(2) The implementation team in Recommendation 12.6 should determine the form and content of the case conference certificate.

Application of the criminal case conferencing program to Commonwealth matters

7.60 As we note in our introduction (para 1.29), criminal case conferencing is meant to apply to Commonwealth indictable matters. Unlike the previous case conferencing program, the application of the discount is not inextricably tied to the case conference, which we view as a forum for discussing the issues and resolving the matter.

7.61 Commonwealth prosecutions in NSW courts follow the procedures of the courts and the *Criminal Procedure Act 1986* (NSW) (CPA).[71] We intend that case conferencing should be integrated in the CPA. Where a Commonwealth matter is particularly complex and contains voluminous evidence,[72] the court has the discretion to set an appropriate timetable. Accordingly, Commonwealth matters are included in this proposal.

How will criminal case conferencing be implemented in NSW?

7.62 The 2008-2012 statutory program was authorised by a discrete piece of legislation. The CCCTA prescribed all elements of the scheme, including the composition of the disclosure certificate,[73] case conference[74] and conference certificate.[75] The Act also prescribed the discount on sentence for an early guilty plea achieved at a

71. *Judiciary Act 1903* (Cth) s 62, s 79.
72. The CDPP has expressed concern about meeting time limits regarding mandatory case conferencing: Commonwealth Director of Public Prosecutions, *Submission EAEGP13*, 8.
73. *Criminal Case Conferencing Trial Act 2008* (NSW) s 8-9.
74. *Criminal Case Conferencing Trial Act 2008* (NSW) s 6.
75. *Criminal Case Conferencing Trial Act 2008* (NSW) s 12.

conference[76] and itemised when these discounts should apply. To end the program the Act only needed to be repealed.

7.63 Under our recommended framework, CCC will be an inherent aspect of the criminal justice system. We do not propose it as a trial or pilot. For this reason we recommend that CCC be integrated into the CPA.

7.64 The single practice note governing indictable procedures (which is recommended in Chapter 3) and the prosecution guidelines of the ODPP should provide for this. Legal Aid NSW fee structures will require amendment (see Chapter 12). A protocol may need to be developed to clarify communication between prosecution and defence lawyers. Such a protocol existed under the original CCC trials.

7.65 We note that the effectiveness of the CCC depends on a parallel process of engagement by the prosecution and *all* defence representatives. We have dealt chiefly with the issues around early and effective prosecution engagement. We refer to Legal Aid when talking about defence representation, but we also strongly urge private practitioners to actively participate in the implementation and operation of CCC.

Table 7.1: Required amendments and inclusions for implementation of the ERD and trial case management streams

Mandatory Criminal Case Conferencing Implementation			
Legislation or authorising authority	**Scheme**	**Proposed amendments**	**Notes**
Criminal Procedure Act 1986 (NSW)	Criminal case conferencing	**Division 3 Case management provisions** Add procedures to be followed in the mandatory Criminal Case Conferencing program.	The *Criminal Case Conferencing Trial Act 2008* (NSW) content could be adapted for the Mandatory Criminal Case Conferencing program and instituted in the CPA.
Crimes (Sentencing Procedure) Act 1999 (NSW)	Criminal case conferencing	**s 21A(3)(k) and s 22 Guilty pleas to be taken into account** to be repealed and amended so to embed the sentence discount scheme recommended in Chapter 9 of this report.	The *Criminal Case Conferencing Trial Act 2008* (NSW) content for s 17-18 could be adapted.
ODPP Prosecution Guidelines	Disclosure, Criminal case conferencing	Incorporate considerations for Mandatory Criminal Case Conferencing.	
Potential protocol between ODPP, Legal Aid NSW, Law Society of NSW and NSW Bar Association	Criminal case conferencing	Implementing protocols for communication between prosecution and defence lawyers.	

76. *Criminal Case Conferencing Trial Act 2008* (NSW) Pt 4.

Legal Aid NSW Fee Structure for Private Practitioners	Criminal case conferencing	Accounting for preparation and attendance at the case conference.	
Joint practice note	Criminal case conferencing	Make allowances for the operation of a mandatory case conferencing regime in the joint practice note proposed in Chapter 3 of this report.	

8. Committal proceedings

In brief

Committal proceedings provide some important benefits for the prosecution of indictable matters, including providing a forum for prosecution disclosure and charge negotiations, and allowing the defence to test the evidence before trial in limited cases. However, the decision by the magistrate whether there is sufficient evidence to commit the defendant to stand trial appears much less important – far more matters are discontinued or downgraded by the Office of the Director of Public Prosecutions. The committal decision does not provide sufficient value to justify its retention under the blueprint. The resources dedicated to committal hearings should be diverted towards processes that provide greater value to the system. We recommend, by majority, that the decision by the magistrate to commit a person for trial be replaced with our proposed scheme of Local Court case management, including a procedure for a prosecution witness to give oral evidence in the Local Court.

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Committal proceedings and early guilty pleas

8.1 Committal proceedings cover that part of the indictable criminal process that occurs in the Local Court. The historical function of a committal hearing is for the magistrate to hear the evidence against the defendant and assess whether that evidence is sufficient for the defendant to be committed to stand trial.

8.2 However, modern committal procedure in NSW looks very different to the historical committal hearing. In the vast majority of cases, the committal hearing is now waived, or the magistrate makes the decision whether or not to commit "on the papers" without oral evidence. It is relatively rare for cross-examination of one or more witnesses to be allowed. Although not unknown, it is the exception rather than the rule for the magistrate to discharge the case at the committal stage.

8.3 The process of case management that occurs in the Local Court in preparation for a committal hearing facilitates prosecution disclosure to the defence and enables early charge negotiations between the parties. Looked at through this lens, the committal process has important case management and disclosure management functions and has the potential to identify early those cases suitable for guilty pleas.

8.4 Although the committal process provides these important functions, it does so only incidentally. It is more likely to be the participation of the prosecuting agency than the actual process of committal that causes an increase in negotiation and plea activity at this time. Likewise, a court ordered date for service of the brief of

evidence is likely to be the driver behind prosecution disclosure at the committal stage.

8.5 Under our blueprint, the case management and disclosure management functions are placed at the centre. Our proposed system of Local Court case management, including the criminal case conference, is designed to ensure that adequate disclosure occurs, the prosecution gets the charge right early, and that defence and prosecution discussions about the charge proceed properly and early.

8.6 In light of these proposals, in this chapter we consider:

- whether there should continue to be a distinct decision to commit or not commit a case for trial, concluding by majority that there should not, and
- whether there should continue to be a role for oral evidence to be given at an early stage in the Local Court, concluding that there should be, as is the present situation, in limited circumstances.

Overview of the committal process

8.7 Committal proceedings are the first stage in the prosecution of indictable offences. In this section we provide an overview of the current operation of the committal process in the Local Court.

How do indictable offences progress through the committal process?

Magistrate case manages the matter through the initial appearances

8.8 The process leading up to a committal hearing involves case management by a magistrate in the following way:

- **First appearance**: unless a guilty plea is entered, the magistrate will order service of the brief of evidence within 6 weeks, and a reply to the brief to be filed within 8 weeks.
- **Second appearance**: unless a guilty plea is entered or there is a waiver of committal, the magistrate may adjourn the matter for not more than 6 weeks to allow for negotiations between the parties.
- **Third appearance**: if a party intends to apply for cross-examination of a witness under s 91 or s 93 of the *Criminal Procedure Act 1986* (NSW) (CPA) (see paras 8.12-8.16), the magistrate makes orders for filing submissions in support of the application within 2 weeks, and filing a reply within 4 weeks.
- **Fourth appearance**: the magistrate will list the matter at the first available opportunity for the hearing of a contested s 91 or s 93 application and/or a committal hearing.[1]

1. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [5]-[8].

8.9 The defendant may waive his or her right to a committal hearing. If the defendant applies for a waiver of committal, and the prosecution consents, the magistrate will commit the person for trial without considering the strength of the case.[2]

8.10 Following the fourth appearance, unless the defendant waives committal, the matter will be set down for a "committal hearing". This is a hearing at which the magistrate will consider the evidence presented by the prosecution (and any evidence presented by the defence) to determine whether the defendant should be committed to stand trial.

8.11 Since 1999 NSW has had a "centralised" committal process. Rather than committal hearings being conducted at each Local Court, they are heard at a "central" Local Court according to the location of the District Court registries.[3] Currently 25 out of 144 Local Court locations conduct committal hearings.[4]

Magistrate may direct prosecution witness to give oral evidence

8.12 Evidence for the prosecution is given by way of written statements from prosecution witnesses, which are to be served on the defendant within the time set by the Local Court.[5]

8.13 The magistrate may direct a person who gave a written statement that the prosecution intends to tender in the committal hearing to attend at court to give evidence, either on the magistrate's own motion or on application of either party.[6] This is known as a "**section 91 application**".

8.14 The magistrate may direct a witness to attend on the application of one of the parties where the other party consents, or otherwise where the magistrate is satisfied that there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence.[7] However, a direction may not be given so as to require the attendance of:

- a complainant of a prescribed sexual offence if the complainant is a cognitively impaired person, or
- a complainant of a child sexual assault offence, where the complainant was under 16 years at the time of the alleged assault and is currently under the age of 18 years.[8]

8.15 Where the defendant is charged with an "offence involving violence" (which includes most sexual offences), the magistrate may not direct the alleged victim to attend

2. *Criminal Procedure Act 1986* (NSW) s 68.
3. A Eyland, N Nheu and T Wright, *Legal Aid for Committals: An Evaluation of the Impact of the Centralised Committals Scheme* (Law and Justice Foundation of NSW, 2001) 1.
4. Local Court of NSW, *Listing and Sitting Arrangements, NSW Local Court 2014* (2014). Local Court locations that conduct committal hearings are marked as dealing with a "DPP List".
5. *Criminal Procedure Act 1986* (NSW) s 74, s 75.
6. *Criminal Procedure Act 1986* (NSW) s 91(1).
7. *Criminal Procedure Act 1986* (NSW) s 91(2)-(3).
8. *Criminal Procedure Act 1986* (NSW) s 91(7A)-(8).

unless satisfied there are special reasons why, in the interests of justice, the victim should attend to give oral evidence.[9] This is known as a "**section 93 application**".

8.16 As a matter of practice, any oral evidence is usually heard at the same time as the committal hearing. Although the terms of s 91 and s 93 of the CPA permit an application to be made by either party, or on the magistrate's own motion, in most cases it will be the defence that makes an application.

ODPP and Legal Aid NSW are involved during the committal process

8.17 A police prosecutor will initially prosecute a committal matter, but it will be handed over to the Office of the Director of Public Prosecutions (ODPP), usually prior to the second appearance in the Local Court. A solicitor from the ODPP will appear at the committal hearing in the Local Court, although Crown Prosecutors are also being increasingly briefed at the committal phase to help evaluate evidence and negotiate charges.[10]

8.18 Since 1999 legal aid has been available to a defendant in committal proceedings provided he or she otherwise meets the eligibility criteria.[11] Legal Aid NSW conducts committal proceedings in-house in 75% of matters where the defendant appears at a centralised committal court.[12]

On what basis is the magistrate's decision at committal made?

8.19 Committal hearings are non-judicial in nature. The purpose of a committal hearing is for the magistrate to assess whether there is sufficient evidence to commit the defendant to stand trial.

8.20 When a magistrate considers whether the defendant should be committed, the magistrate usually does so on the basis of the written statements of evidence tendered by the prosecution.[13] This is often referred to as a "paper committal". Oral evidence may be considered in rare cases where leave is granted following the making of a s 91 or s 93 application. The paper committal may be supplemented with submissions, usually oral, by the prosecution and defence about why the matter should or should not be committed.

8.21 The committal decision has two stages:

(1) The magistrate takes the prosecution evidence and determines whether it is capable of satisfying a jury, properly instructed, beyond reasonable doubt that the defendant has committed an indictable offence.[14] If the magistrate is not satisfied at this stage, the defendant is discharged.[15] Otherwise, the magistrate

9. *Criminal Procedure Act 1986* (NSW) s 93. See s 94 for definition of "offence involving violence".
10. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 29.
11. A Eyland, N Nheu and T Wright, *Legal Aid for Committals: An Evaluation of the Impact of the Centralised Committals Scheme* (Law and Justice Foundation of NSW, 2001) 1.
12. Legal Aid NSW, *Preliminary Submission PEAEGP4,* 9.
13. *Criminal Procedure Act 1986* (NSW) s 74.
14. *Criminal Procedure Act 1986* (NSW) s 62(1).
15. *Criminal Procedure Act 1986* (NSW) s 62(2).

must give the defendant a chance to answer the charge, and a warning that anything the defendant says may be used against the defendant in the trial.[16]

(2) Once all of the prosecution and defence evidence has been taken, the magistrate must consider all the evidence and determine whether or not, in his or her opinion, there is a reasonable prospect that a reasonable jury, properly instructed, would convict the defendant of an indictable offence.[17] If the magistrate answers this question in the affirmative, he or she must commit the defendant for trial.[18] Otherwise, the defendant is discharged.[19]

8.22 The Chief Magistrate of the Local Court observed that it was very rare for a defendant to be discharged at the second stage. He submitted that this two stage process could be reduced to a single test that considers the sufficiency of the evidence to establish the commission of an indictable offence.[20] We agree.

What happens after the committal process is concluded?

Case progresses to District Court or Supreme Court, or charge is downgraded to be dealt with in Local Court

8.23 If the magistrate decides that there is sufficient evidence to proceed, or the defendant waives a committal hearing, the defendant will be committed to stand trial in the District Court or Supreme Court. If the defendant pleads guilty to the offence while the matter is still in the Local Court (whether before or during the committal hearing) and the magistrate accepts the plea, the defendant will be committed for sentence in the District Court or Supreme Court.[21] The magistrate must commit the defendant for sentence if the guilty plea is accepted, and does not need to consider the sufficiency of the evidence in this case.[22]

8.24 Following committal, the ODPP will file a bill of indictment in the District Court or Supreme Court. Where a matter has been committed for trial, the indictment may be for the same charge or different charges to those that were committed. The matter will be listed for arraignment in the District Court or Supreme Court, where it will either proceed to a sentencing hearing (if the defendant pleaded guilty), or proceed to trial (if the defendant pleaded not guilty or did not enter a plea).

8.25 Alternatively, during the committal process in the Local Court the ODPP may downgrade the charge to one that can be heard by the Local Court, or will elect for a Table offence to be determined summarily rather than on indictment. The ODPP may also decide to withdraw the prosecution. The matter may not have reached the committal hearing before the charge is downgraded or withdrawn. Often the change in charge will be the result of discussions with the defence or, in exceptional cases,

16. *Criminal Procedure Act 1986* (NSW) s 63(1); *Local Court Rules 2009* (NSW) r 3.3.
17. *Criminal Procedure Act 1986* (NSW) s 64.
18. *Criminal Procedure Act 1986* (NSW) s 65.
19. *Criminal Procedure Act 1986* (NSW) s 66.
20. Chief Magistrate of the Local Court of NSW, *Submission EAEGP6*, 4.
21. *Criminal Procedure Act 1986* (NSW) s 99, s 102.
22. *Criminal Procedure Act 1986* (NSW) s 102.

it may occur following cross-examination of a prosecution witness. If the ODPP downgrades the charge to one that can be dealt with summarily, it will be finalised in the Local Court.

Magistrate's decision is not binding on the DPP

8.26 The decision made by the magistrate at committal is not binding on the ODPP. Where the magistrate finds that there is insufficient evidence to commit the defendant for trial, the ODPP may nevertheless bring an *ex officio* indictment before the District or Supreme Court. Conversely, even where a magistrate commits a person for trial, the ODPP may decline to file an indictment (referred to as a "no bill").

8.27 Following a decision to commit a person for trial, a Crown Prosecutor is charged with finding a bill of indictment.[23] The Crown Prosecutor, however, does not have the power to determine that no bill of indictment be found[24] - this function can only be performed by the Director of Public Prosecutions (DPP) or the Deputy DPP.[25] The ODPP's Prosecution Guidelines confirm that the decision to prosecute must involve not only a consideration of the sufficiency of the evidence, but also whether there is a reasonable prospect that a jury will convict and whether discretionary factors dictate that it is not in the public interest to prosecute.[26] This is a more demanding standard than the test that the magistrate applies at committal. The public interest component allows the ODPP to decline to prosecute on grounds not directly related to the strength of the prosecution case, such as the age or health of the defendant, the wishes of the victim or the triviality of the offending.[27]

8.28 A Crown Prosecutor is permitted to find a bill of indictment whether or not the defendant has been committed for trial for the offence.[28] However, the approval of the DPP or Deputy DPP is required to file an *ex officio* indictment.[29]

What are the statistics on committal proceedings?

8.29 There is a lack of court-held data about committal proceedings in NSW. This has made it difficult for us to conduct detailed quantitative analysis about the use and effectiveness of committal proceedings. The best data on committal proceedings is held by the ODPP in its internal case management database. These statistics are collected for the ODPP's internal record keeping purposes. They are not comprehensive in this area, but do provide a reasonable picture. We set out below the data we have been able to obtain. More information about the data and methodology is contained in Appendix C.

23. *Crown Prosecutors Act 1986* (NSW) s 5(1)(b).
24. *Crown Prosecutors Act 1986* (NSW) s 5(3).
25. *Director of Public Prosecutions Act 1986* (NSW) s 7(2)(a), s 33(2)(a).
26. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 4.
27. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 4.
28. *Crown Prosecutors Act 1986* (NSW) s 5(1)(b).
29. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 9.

Snapshot

Of completed committal matters in 2012/13:

- 28% were committed for sentence.
- 31% were committed for trial.
- 41% were disposed of in the Local Court, including 1% that were discharged at committal.

Less than 6% of completed committal matters in 2012/13 involved a successful application to cross-examine a prosecution witness.

18% of matters discharged at committal in 2012/13 were followed by an *ex officio* indictment.

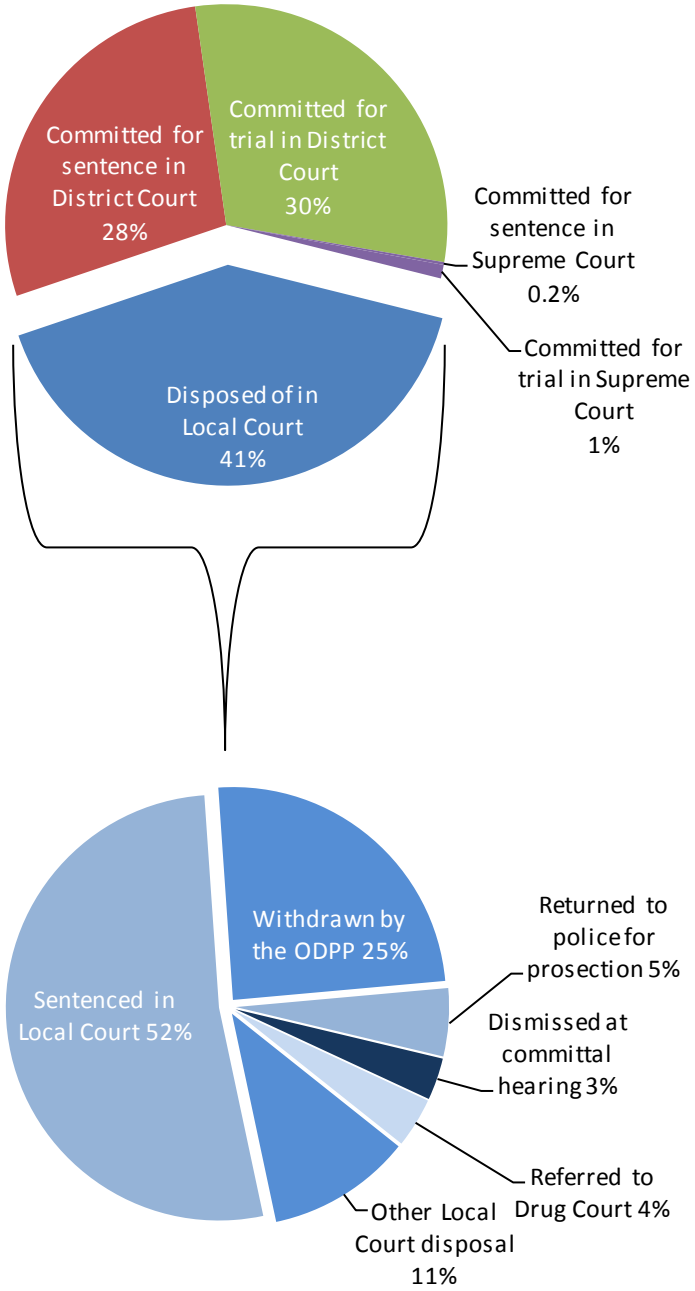
Outcome of matters listed for committal 2012/13

8.30 On the ODPP's figures, there were 5947 "completed committal matters" in 2012/13 (that is, indictable matters that had completed the process in the Local Court). Figure 8.1 shows the outcomes of these matters.

8.31 Of the completed committal matters, 41% were disposed of in the Local Court. Figure 8.1 also shows the percentage breakdown of the matters finalised in the Local Court. This includes matters that are withdrawn by the ODPP, those that are downgraded to an offence that can be dealt with in the Local Court (either a summary offence or a Table offence dealt with summarily), and those where the magistrate discharges the defendant at committal.

8.32 25% of matters listed for a committal hearing were recorded on the ODPP database as being a "paper committal", although this figure is likely to be an underestimation. Of the matters committed for trial (31%), we do not know how many were by way of waiver of the committal hearing.

Figure 8.1: Outcomes of indictable matters in the Local Court 2012/13



Source: NSW, Office of the Director of Public Prosecutions, Annual Report 2012/2013 (2013) 28; Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2014)[30]

8.33 Of the 5947 completed committal matters, 65 were discharged by the magistrate at a committal hearing. This means that **about 1% of completed committal matters were discharged by the Local Court at committal**.

30. "Other Local Court disposal" includes matters downgraded and dismissed at a summary hearing, dismissed because the ODPP offered no evidence to the charge, dismissed under the *Mental Health (Forensic Provisions) Act 1990* (NSW), placed on a Form 1, merged with other matters, or the defendant died or could not be located.

8.34 The matters recorded in the ODPP's database as being dismissed at a committal hearing are broken down in the following way:

(a) 40% were dismissed at a "committal mention"; that is, at a mention prior to the committal hearing

(b) 25% were dismissed following a s 91/s 93 application (although we do not know whether the cross-examination actually went ahead), and

(c) 26% were dismissed at a paper committal.[31]

Outcome of matters listed for committal 2011/12

8.35 In 2011/12 the ODPP recorded 6016 "completed committal matters". Of these:

- 28% were committed for sentence
- 27% were committed for trial, and
- 45% were disposed of in the Local Court.[32]

8.36 The outcomes of committal matters finalised in the Local Court are largely consistent between 2011/12 and 2012/13. Matters that were finalised in the Local Court in 2011/12 are broken down in the following way:

- 53% were sentenced in the Local Court
- 24% were withdrawn by the ODPP
- 6% were either dismissed at a committal hearing, or downgraded by the ODPP and then dismissed at a summary hearing,[33] and
- 17% were finalised through other means.[34]

Cross-examination of witnesses at committal

8.37 Witnesses are cross-examined in only a small number of committal matters. In 2012/13 the ODPP recorded 365 matters that were the subject of a successful s 91 or s 93 application and then listed for a committal hearing.[35] However, this figure is likely to be overstated as one matter may appear in the results more than once if it had multiple applications or adjournments.[36] This means that **less than 6% of**

31. Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2014). In the remaining 9% of cases the method of dismissal was unknown.
32. NSW, Office of the Director of Public Prosecutions, *Annual Report 2011-2012* (2012) 40.
33. Information provided by NSW, Office of the Director of Public Prosecutions (4 June 2014).
34. This includes matters placed on a Form 1, referred to the Drug Court, returned to the police for prosecution, merged with other matters or the defendant died or could not be located: Information provided by NSW, Office of the Director of Public Prosecutions (21 February 2014).
35. Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2014). "Successful" s 91 applications include those where the magistrate grants the application as well as those where the ODPP consents to the application.
36. Information provided by NSW, Office of the Director of Public Prosecutions (10 July 2014). See Appendix C for more information.

completed committal matters in 2012/13 involved a successful application to cross-examine a witness.

8.38 There is no available data about:

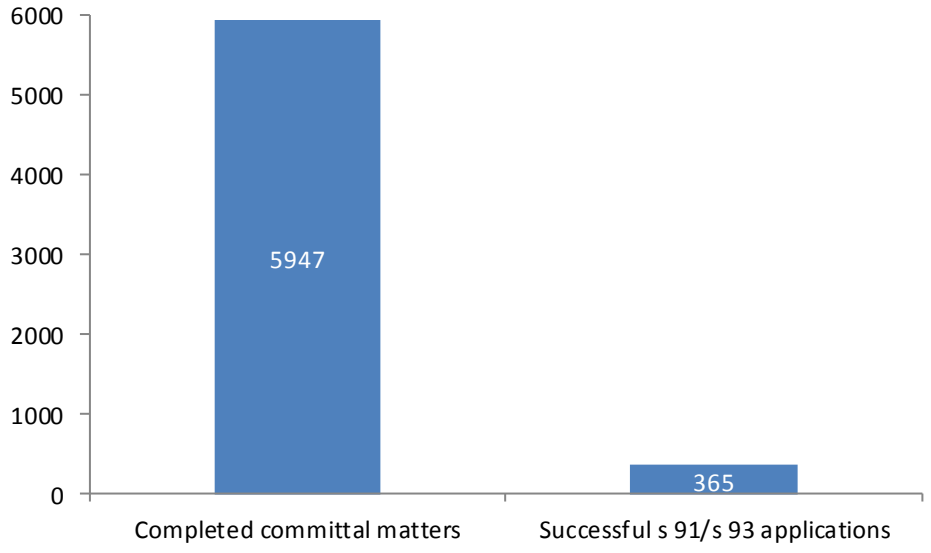
(a) whether these matters actually proceeded to cross-examination

(b) how many of the 365 were s 91 applications and how many were s 93 applications, or

(c) how many unsuccessful applications were made.

8.39 Figure 8.2 shows the proportion of successful s 91/s 93 applications when compared with the total number of completed committal matters.

Figure 8.2: Number of successful s 91/s 93 applications compared with number of completed committal matters 2012/13

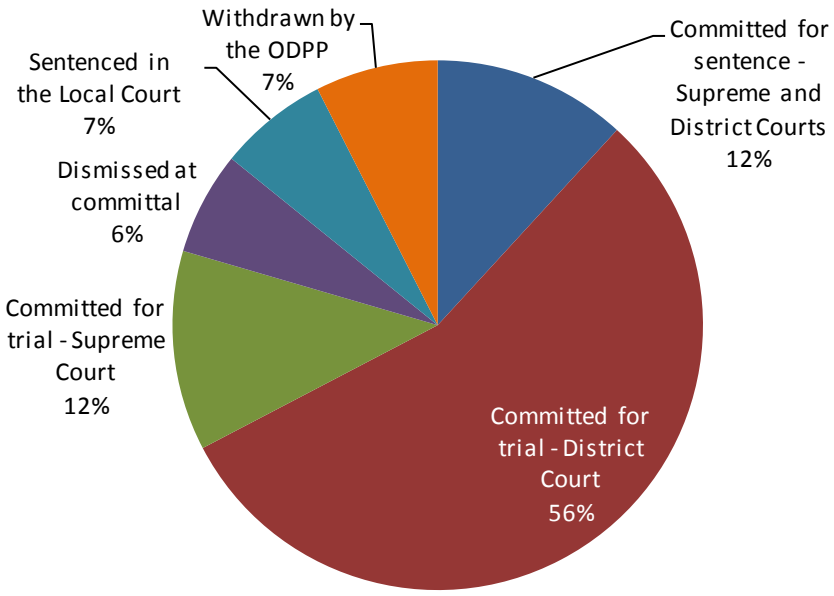


Source: NSW, Office of the Director of Public Prosecutions, Annual Report 2012/2013 (2013) 26; Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2014)

8.40 These figures show that successful s 91/s 93 applications are very uncommon. This accords with what we have been told; namely, that the cross-examination of witnesses at committal happens in only a small number of cases.

8.41 Figure 8.3 shows the outcomes of the matters that had a successful s 91/s 93 application and were then listed for a committal hearing.

Figure 8.3: Outcome of committal matters with successful s 91/s 93 application 2012/13



Source: Information provided by NSW, Office of the Director of Public Prosecutions (10 July 2014)[37]

8.42 Most matters with a successful application to cross-examine a witness were committed for trial. It is not possible to draw firm conclusions from this data about the utility of cross-examination at committal, particularly because cross-examination may result in a matter being committed for trial on a less serious charge, or on some charges but not others. However, we have been told by some stakeholders that cross-examination at committal can be useful in achieving a guilty plea or a discharge by the magistrate.[38] This appears to have been the outcome in only a minority of matters.

Discontinuance of proceedings after committal

8.43 Even if a magistrate makes an order for committal, the ODPP can discontinue the proceedings by declining to find a bill of indictment. The number of discontinuances after committal may indicate how effective the committal decision is. However, it is unlikely to provide an accurate measure. The ODPP may decline to find a bill of indictment for a number of reasons, including the wishes of the victim or the public interest, which are unrelated to the strength of the evidence against the defendant.

8.44 In 2012/13, 9% of matters listed for trial in the District Court were disposed of by way of "no bill".[39] This term as it is used in the ODPP Annual Report refers to any matter discontinued following committal, whether or not a bill of indictment had already been laid.[40]

37. Excludes one matter that was listed on the ODPP database as being "not before the court".
38. See para 8.129.
39. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 26.
40. Information provided by NSW, Office of the Director of Public Prosecutions (21 October 2013).

8.45 The exact number of no bills in the Supreme Court for 2012/13 is unknown, but 97% of Supreme Court matters resolved in a trial or a plea of guilty,[41] meaning it would be less than 3%. In 2011/12 there was only one matter discontinued in the Supreme Court after committal.[42]

8.46 The defendant or a complainant may apply to the ODPP to have the matter discontinued. In 2012/13 the ODPP received 903 submissions seeking discontinuance of a matter after committal. It discontinued 162 matters. There were 101 matters discontinued after the matter had been given a trial listing.[43] The other 61 matters did not have a trial listing – they may have been discontinued before arraignment in the District Court, or following a hung jury.[44] The ODPP does not keep separate figures on the number of matters where the ODPP declines to file a bill of indictment following committal. However, in the District Court matters are usually given a trial listing at the same time the bill of indictment is filed. For this reason, the number of matters discontinued before a bill of indictment was found would appear to be low.

8.47 Of the 162 matters discontinued, 59 of those (36%) were discontinued predominantly due to the wishes of the complainant in the case.[45]

Ex officio indictments filed by the ODPP following discharge at committal

8.48 Another measure of the effectiveness of the committal decision is how frequently the ODPP files an *ex officio* indictment following a decision by a magistrate to discharge the defendant at committal.

8.49 The ODPP may file an *ex officio* indictment for a number of reasons, including discharge of the defendant at committal, following a coronial inquiry that adequately ventilated the evidence, or where the defendant had a committal hearing on a different charge.[46]

8.50 The ODPP's database indicates that in 2012/13 there were 12 matters in which an *ex officio* indictment was filed following a discharge at committal.[47] That is, **18% of matters discharged at committal were followed by an *ex officio* indictment**.

Committals run by the Commonwealth Director of Public Prosecutions

8.51 The Commonwealth Director of Public Prosecutions (CDPP) reports that in 2012/13 it prosecuted 689 committals Australia-wide, only 6 of which resulted in a discharge

41. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 27.
42. NSW, Office of the Director of Public Prosecutions, *Annual Report 2011-2012* (2012) 38.
43. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 27.
44. Information provided by NSW, Office of the Director of Public Prosecutions (21 October 2013).
45. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 27.
46. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 9.
47. Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2014). This excludes *ex officio* indictments laid because the defendant had a committal hearing on a different charge.

of the defendant at committal.[48] In NSW it prosecuted 285 committals, only 3 of which resulted in a discharge at committal.[49] The breakdown by state and territory is shown in Table 8.1.

8.52 The CDPP's figures demonstrate that **about 1% of committal matters prosecuted by the CDPP in NSW were discharged at a committal hearing**. This is consistent with the discharge rate in ODPP matters.

8.53 Of the 6 matters discharged at committal, an *ex officio* indictment was laid in only 2 matters. Both of these were in NSW. One of these matters resulted in a guilty verdict at the conclusion of the trial and as at June 2014 the other matter had not yet proceeded to trial.[50]

Table 8.1: Committals prosecuted by Commonwealth Director of Public Prosecutions 2012/13

Description	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Australia
Defendants committed after a plea of guilty	155	108	27	21	4	5	9	1	330
Defendants committed after a plea of not guilty	127	74	79	30	20	11	5	7	353
Total defendants committed	282	182	10	51	24	16	14	8	683
Defendants discharged	3	1	2	0	0	0	0	0	6
Total number of committals	**285**	**183**	**108**	**51**	**24**	**16**	**14**	**8**	**689**
Number of *ex officio* indictments laid following discharge at committal	2	0	0	0	0	0	0	0	0

Source: Information provided by Commonwealth Director of Public Prosecutions (13 June 2014, 24 June 2014)

48. Commonwealth Director of Public Prosecutions, "Prosecution Statistics", <http://www.cdpp.gov.au/statistics/prosecution-statistics>.
49. Information provided by Commonwealth Director of Public Prosecutions (13 June 2014).
50. Information provided by Commonwealth Director of Public Prosecutions (24 June 2014).

Background to reform of committal proceedings

8.54 In this section we discuss previous proposals to change or remove committal proceedings, both in NSW and other jurisdictions.

History of committal proceedings

8.55 In England from the 14th century onwards, justices of the peace were responsible for the apprehension and arrest of offenders.[51] In the 16th century they were given the power to examine the accused person and any witnesses.[52] The evidence they collected was presented to a grand jury to determine whether the accused person should stand trial.[53] When an organised police force was established in 1829, the investigative role of the justices of the peace diminished.[54]

8.56 The *Indictable Offences Act 1848* 11 & 12 Vict c 42 introduced a new form of committal hearing. For the first time the defendant was required to be present at the hearing before the justice of the peace and was given the right to cross-examine witnesses and present evidence. The justice was given the task of deciding whether the evidence overall was sufficient to commit the person for trial.[55] The grand jury became superfluous and was abolished in England in 1933.[56]

8.57 Grand juries were used in NSW between 1824 and 1828, after which they were abandoned.[57] Legislation adopting the English approach to committal hearings was introduced in NSW in 1850.[58]

8.58 The scope of committal proceedings in NSW has gradually decreased over the last 30 years. Previously all evidence was given orally. A system of paper committals was introduced in 1983 and was available if both parties consented. In 1988 it became mandatory, subject to exceptions.

8.59 Originally the defendant was entitled to cross-examine all prosecution witnesses without restriction. Although the defence was required to nominate which prosecution witnesses they wished to cross-examine, often all witnesses were requested. This was because the defence gave little consideration before the hearing to whether cross-examination was necessary.[59] On the day of the committal hearing the defence lawyer would commonly indicate that cross-examination was only required of certain witnesses, or none at all, leading to witnesses attending

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51. J F Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol I, 190.
52. J F Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol I, 219-220.
53. NSW Law Reform Commission, *Procedure From Charge to Trial: Specific Problems and Proposals,* Discussion Paper 14 (1987) vol 1 [7.2].
54. J F Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol I, 197, 228-229; *Grassby v R* (1989) 168 CLR 1, 11 (Dawson J).
55. J F Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol I, 220-221.
56. *Administration of Justice (Miscellaneous Provisions) Act 1933* 23 & 24 Geo 5 s 1.
57. G D Woods, *A History of Criminal Law in New South Wales* (Federation Press, 2002) 59-61.
58. *Imperial Acts Adoption and Application Act 1850* (NSW) 14 Vict 43.
59. P Berman, "The Future of Committal Proceedings in New South Wales" in J Vernon (ed), *The Future of Committals,* Conference Proceedings No 7 (Australian Institute of Criminology, 1991) 31, 36.

court unnecessarily. Cross-examination was also sometimes used as a "fishing expedition".[60]

8.60 In 1992, amendments to the *Justices Act 1902* (NSW) limited the circumstances in which victims of violence could be cross-examined at a committal hearing.[61] This was intended to shorten the committal hearing and to strike "an appropriate balance between the rights of the accused and the need to reduce the trauma that court proceedings impose on the victims of crime".[62] In 1996 this limitation was extended to all prosecution witnesses.[63] These limitations are now found in s 91 and s 93 of the CPA.

Proposals have been made in NSW to abolish committals

8.61 In the late 1980s and early 1990s significant delays were being experienced in the completion of criminal proceedings in NSW.[64] This led to a number of reviews into how to improve the efficiency of the system.

NSW Law Reform Commission previously suggested abolishing committals

8.62 In a 1987 discussion paper published for our reference on criminal procedure, we expressed a tentative view that committal proceedings should be abolished and replaced with an alternative mechanism. At the time, paper committals were still optional, and there was no limit on the cross-examination of prosecution witnesses at committal. We were of the view that committal proceedings did not usually achieve the objectives for which they were designed. We considered that the intended functions of committal proceedings could be served by alternative procedures that were faster, fairer and less expensive.[65]

8.63 This aspect of our criminal procedure reference was not completed due to resource constraints and concurrent work being done by the NSW Attorney General's Department.[66]

NSW Attorney General's Department proposed modifying committal procedure

8.64 In 1989 the NSW Attorney General's Department released a Discussion Paper that proposed replacing committal proceedings. At the same time a report by an external

60. P Berman, "The Future of Committal Proceedings in New South Wales" in J Vernon (ed), *The Future of Committals,* Conference Proceedings No 7 (Australian Institute of Criminology, 1991) 31, 36.
61. *Justices (Paper Committals) Amendment Act 1987* (NSW), commenced 29 March 1992.
62. NSW, *Parliamentary Debates,* Legislative Assembly, 20 November 1987, 16 746.
63. *Justices Amendment (Committals) Act 1996* (NSW).
64. For example, in 1991 the median delay between committal and outcome for matters that proceeded to trial was upwards of 500 days, and 210 days for matters that proceeded to sentence only: P Salmelainen, *Understanding Committal Hearings*, Contemporary Issues in Crime and Justice No 18 (NSW Bureau of Crime Statistics and Research, 1992) 4.
65. NSW Law Reform Commission, *Procedure From Charge to Trial: Specific Problems and Proposals,* Discussion Paper 14 (1987) vol 1 [7.67].
66. NSW Law Reform Commission, *Annual Report* (1989) 17-18.

consultant commissioned by the Department recommended that committal proceedings be abolished.[67]

8.65 Following the responses to the Discussion Paper the Attorney General put a proposal to cabinet, which was accepted. The proposal was to modify committal procedure in the following way:

- Following arrest of the defendant, all witness statements would be forwarded by the police to the ODPP to decide whether proceedings should continue and, if so, on what charge. The ODPP would also decide whether the matter should be prosecuted summarily or on indictment.
- Prosecution evidence would be disclosed to the defence within a set period once the matter comes before the court, including the names of any witnesses the prosecution intends to call at the pre-committal hearing.
- The defence would inform the prosecution of those witnesses it wished to cross-examine. Cross-examination would only be permitted if the witness's evidence fell into one of the identified categories, or the prosecution otherwise consented.
- A pre-committal hearing would take place at which a magistrate would preside over the examination and cross-examination of witnesses, to ensure that the rules of evidence were complied with and the proceedings were conducted fairly. The defendant would have the right to give evidence.
- At the end of the pre-committal hearing the ODPP would make a decision as to whether the matter would proceed to trial. A certificate of committal would be prepared by the ODPP and filed with the court. This would serve to commit the matter to the Supreme or District Court for trial.
- If the ODPP decided not to commit a person for trial, reasons would have to be provided on request.[68]

NSW Attorney General's proposal attracted significant criticism

8.66 The Attorney General's proposal attracted significant criticism from the legal profession, both within and outside NSW. Two conferences were convened for the sole purpose of discussing the utility of the proposal.[69]

8.67 Aside from limiting the cross-examination of witnesses at committal, the primary objection to the proposal was the removal of the magistrate's decision to commit for trial. There was concern that the decision whether or not to commit a person for trial would be made behind closed doors by the DPP, who was a party to the proceedings, and whose decision would not be open to challenge. Some commentators argued that there was significant benefit in having an independent magistrate assess the evidence in open court and come to a conclusion about

67. J Dowd, "Committal Reform: Radical or Evolutionary Change?" (1991) 2 *Current Issues in Criminal Justice* 10, 11.
68. J Dowd, "Committal Reform: Radical or Evolutionary Change?" (1991) 2 *Current Issues in Criminal Justice* 10, 12.
69. Institute of Criminology, "Committal for Trial and Pre-Trial Disclosure" (Sydney University Law School, 11 April 1990); Australian Institute of Criminology, "The Future of Committals" (1-2 May 1990).

whether that evidence was sufficient to require a person to submit to the cost and restriction of liberty involved in being put on trial.[70]

8.68 In response to these criticisms, the Attorney General countered that the magistrate's decision whether to commit had never been binding on the DPP. The DPP has always, in effect, been able to "overrule" the magistrate's decision, either by declining to find a bill or by filing an *ex officio* indictment.[71] The removal of the magistrate's decision to commit for trial was said to be a natural consequence of the establishment of the DPP as an independent statutory prosecution agency in the 1980s.[72]

Proposal was defeated in Legislative Council

8.69 The Attorney General's proposal was introduced into parliament as the Criminal Procedure (Committal Proceedings) Amendment Bill 1990 (NSW). The Bill was passed by the Legislative Assembly but defeated in the Legislative Council, where the government did not have a majority.[73] Subsequent amendments were proclaimed to limit the cross-examination of witnesses at committal, which are now contained in s 91 and s 93 of the CPA.

How have other jurisdictions reformed committal proceedings?

8.70 England and Wales, WA, Tasmania and NZ have abolished committal proceedings in recent years. Abolition of committals in these jurisdictions sought to address issues of expediency and court efficiency. In Queensland and the NT recent reforms have placed restrictions on the circumstances when a witness can be cross-examined at a committal hearing. The Attorneys-General of Queensland and Victoria have also recently raised the possibility of abolishing committal proceedings.

England and Wales sends matters automatically to the Crown Court

8.71 Committal proceedings for indictable-only offences were abolished in 2001 and replaced with a system that sent such matters automatically to the Crown Court.[74] The rationale was that committals for indictable-only offences were an expensive and inefficient use of key resources, since the matter needed to end up in the

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70. C Briese, "A Critique of Proposed Committal Reform in New South Wales" in J Vernon (ed), *The Future of Committals,* Conference Proceedings No 7 (Australian Institute of Criminology, 1991) 49, 52-53; J Marsden, "The Case for the Retention of Committals in their Present Form is Overwhelming" in J Vernon (ed), *The Future of Committals,* Conference Proceedings No 7 (Australian Institute of Criminology, 1991) 41, 45-46; P Hidden, "The Benefits of Committal Proceedings" (1991) 2 *Current Issues in Criminal Justice* 19, 21; G James, "Committal Proceedings and Pre-Trial Disclosure: Where Are We? Where Do We Go?" (1991) 2 *Current Issues in Criminal Justice* 26, 36.
71. J Dowd, "Committal Reform: Radical or Evolutionary Change?" (1991) 2 *Current Issues in Criminal Justice* 10, 13-14.
72. J Dowd, "Committal Reform: Radical or Evolutionary Change?" (1991) 2 *Current Issues in Criminal Justice* 10, 17.
73. NSW, *Parliamentary Debates,* Legislative Council, 13 June 1990, 5541; see also B McKillop, "Committal for Trial and Pre-Trial Disclosure: Introduction" (1991) 2 *Current Issues in Criminal Justice* 8, 9.
74. *Crime and Disorder Act 1998* (UK) s 51-52, as enacted.

Crown Court regardless. In May 2013, committal proceedings for either-way offences were also abolished. The Magistrates' Courts now allocate either-way offences (that is, offences that may be tried summarily or on indictment) to be tried either in the Magistrates' Courts or the Crown Court.[75] This system of allocation is attached to the Early Guilty Plea Scheme, as it requires early case review by the prosecution to identify which cases may be unsuitable for summary disposal, and which cases may be appropriate for inclusion in the Scheme.

8.72 Statistics published by the UK Ministry of Justice in the year following the abolition of committal proceedings for either-way offences showed:

- There was a 27% increase in the number of either-way cases received for trial in the Crown Court. This has since stabilised.[76]
- There was an unexpected spike in the number of indictable-only matters received for trial in the Crown Court. However, this has since fallen quarter on quarter and most recently remains stable.[77]
- The number of matters committed for sentence for both indictable only and either-way offences has decreased since the start of 2013.[78]
- The number of outstanding cases in the Crown Court increased in the second quarter of 2014 by 63% for either-way cases and 16% for indictable only cases, compared to the first quarter of 2013 before committals for either-way offences were abolished.[79]
- The average number of days from offence to completion in the Crown Court was 304 days immediately prior to the abolition of committals for either-way offences, and increased to 317 days by the second quarter of 2014. The time a matter spent in the Magistrates' Courts prior to being allocated to the Crown Court decreased from 26 days to 7 days, while the time spent in the Crown Court increased from 134 days to 164 days.[80]

8.73 The UK Ministry of Justice attributed these changes mainly to the abolition of the committal process for either-way offences, but also to an increase in the Magistrates' Courts workload, possibly due to an increase in police reported crime data for certain types of offences.[81] The abolition of committal hearings has meant that matters spend less time in the Magistrates' Courts and more time in the Crown Court. This suggests that efficiency gains in the Magistrates' Courts by the abolition of committal proceedings may have been offset by an increase in the workload of the Crown Court.

8.74 This experience is, in our view, not entirely unpredictable. The reforms in England and Wales did not replace the committal process with any sort of case management

75. *Magistrates' Courts Act 1980* (UK) s 19.
76. UK, Ministry of Justice, *Court Statistics Quarterly April to June 2014* (2014) 27.
77. UK, Ministry of Justice, *Court Statistics Quarterly April to June 2014* (2014) 27.
78. UK, Ministry of Justice, *Court Statistics Quarterly April to June 2014* (2014) 27.
79. UK, Ministry of Justice, *Court Statistics Quarterly April to June 2014* (2014) 27.
80. UK, Ministry of Justice, *Court Statistics Quarterly January to March 2014* (2014) 29; UK, Ministry of Justice, *Court Statistics Quarterly April to June 2014* (2014) 28.
81. UK, Ministry of Justice, *Court Statistics Quarterly April to June 2014* (2014) 24.

that might have helped weed out weak cases or encourage early resolution between the parties. In streamlining processes in the Magistrates' Courts, the cases moved to the Crown Court earlier, bringing with them an accompanying delay.

New Zealand abolished committal hearings on the basis of redundancy

8.75 NZ moved to a paper based committal hearing in 2008. The prosecution was required to file a formal written statement and unless the defence applied for an oral hearing, the matter was automatically committed. There was also a process for the defence to apply for the case to be dismissed.[82] Following these changes, the committal process became redundant. There were very few applications for oral evidence (in only 3% of matters) and even fewer of these were granted.[83] During criminal procedure modernisation reforms in 2011 the committal process was formally abolished.[84]

8.76 Now, once initial disclosure has occurred, the court may require the defendant to enter a plea.[85] If the defendant pleads not guilty to a category 2 offence or above (category 1 offences are punishable by fine only), a case review is held.

8.77 Before the case review, the defendant and prosecution are required to discuss whether the matter will proceed to trial and file a joint "Case Management Memorandum".[86] The memorandum deals with issues such as whether: the defendant intends to change his or her plea; the prosecutor intends to seek leave to withdraw or change charges; the defendant requests a sentence indication; the disclosure obligations have been complied with; or there are any issues that require judicial intervention.[87]

8.78 If the memorandum raises issues that require judicial intervention, the court will deal with those issues at the case review.[88] If the memorandum does not raise issues requiring judicial intervention, a registrar may conduct the case review.[89]

8.79 After the case review hearing, if the matter is to proceed to trial, it may be adjourned to the trial date, in the case of a judge-alone trial, or to a "jury callover", which is a preliminary hearing before a judge in matters to be heard before a jury.[90]

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82. NZ, Crime Prevention and Criminal Justice Unit, Ministry of Justice and NZ Law Reform Commission, *Criminal Procedure (Reform and Modernisation) Bill: Departmental Report for the Justice and Electoral Committee* (2011) [601], [604].
83. NZ, Crime Prevention and Criminal Justice Unit, Ministry of Justice and NZ Law Reform Commission, *Criminal Procedure (Reform and Modernisation) Bill: Departmental Report for the Justice and Electoral Committee* (2011) [602].
84. NZ, Crime Prevention and Criminal Justice Unit, Ministry of Justice and NZ Law Reform Commission, *Criminal Procedure (Reform and Modernisation) Bill: Departmental Report for the Justice and Electoral Committee* (2011) [604].
85. *Criminal Procedure Act 2011* (NZ) s 39(1). See the discussion of disclosure requirements in NZ in Chapter 5.
86. *Criminal Procedure Act 2011* (NZ) s 55.
87. *Criminal Procedure Act 2011* (NZ) s 56; *Criminal Procedure Rules 2012* (NZ) r 4.8.
88. *Criminal Procedure Act 2011* (NZ) s 57(1).
89. *Criminal Procedure Act 2011* (NZ) s 57(4).
90. *Criminal Procedure Act 2011* (NZ) s 57(3).

Western Australia has replaced committals with a disclosure/committal hearing

8.80 Committals in WA were abolished in 2002 following a report from the Law Reform Commission of Western Australia. The Commission concluded that the committal hearing was redundant. The most important aspect of committal hearings was said to be the facilitation of prosecutorial disclosure, which the Commission considered could be achieved through other means. The Commission also considered that the DPP's power to indict was a more effective mechanism for screening charges than the committal hearing.[91]

8.81 Under the current process in WA, the defendant is to be served with an initial brief of evidence before the first appearance in the Magistrates Court.[92] If the defendant pleads guilty at the first appearance, the matter is "fast tracked" to the District Court or Supreme Court for sentencing.[93]

8.82 If the defendant pleads not guilty or does not enter a plea at the first appearance, the matter is adjourned to a disclosure/committal hearing.[94] The prosecution is obliged to provide full disclosure prior to that hearing.[95] At a disclosure/committal hearing the court must be satisfied that the prosecution has complied with its disclosure obligations. If the court is so satisfied, the defendant will be required to enter a plea, and will be committed for either trial or sentence.[96] If the court is not satisfied that full disclosure has occurred, the matter will be adjourned and a new date set for disclosure. The parties may circumvent the disclosure/committal hearing by consenting to an administrative committal, which commits the matter to the Supreme or District Court without a disclosure/committal hearing.[97]

8.83 In 2006 the Chief Judge of the WA District Court noted that some of the benefits of the reforms had been lost because the ODPP did not have an organised presence in the Magistrates Court.[98] Because trial counsel did not become involved until after the matter was committed to the District Court, the proper decisions as to the key evidence in issue were still not being made at an early stage.[99] Late disclosure was the major reason for adjournments in the District Court under the new scheme.[100]

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91. Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia,* Final Report (1999) [28.26]-[28.27].
92. *Criminal Procedure Act 2004* (WA) s 35(4), (9).
93. *Criminal Procedure Act 2004* (WA) s 41(3).
94. *Criminal Procedure Act 2004* (WA) s 41(4).
95. *Criminal Procedure Act 2004* (WA) s 42(5).
96. *Criminal Procedure Act 2004* (WA) s 44(1).
97. *Criminal Procedure Act 2004* (WA) s 43.
98. A Kennedy, "Getting Serious About the Causes of Delay and Expense in the Criminal Justice System" (Paper presented at 24th AIJA Annual Conference, Adelaide, 16 September 2006) 5. The WA Office of the Director of Public Prosecutions now manages committal hearings in the Perth Magistrates Court and Stirling Gardens Magistrates Court, but in suburban and most country courts this remains the responsibility of the WA Police: Office of the Director of Public Prosecutions for Western Australia, "Role of the ODPP" (14 January 2013) <http://www.dpp.wa.gov.au/R/role_of_the_dpp.aspx?uid=0614-3036-7819-9225>.
99. A Kennedy, "Getting Serious About the Causes of Delay and Expense in the Criminal Justice System" (Paper presented at 24th AIJA Annual Conference, Adelaide, 16 September 2006) 6.
100. A Kennedy, "Getting Serious About the Causes of Delay and Expense in the Criminal Justice System" (Paper presented at 24th AIJA Annual Conference, Adelaide, 16 September 2006) 6.

8.84 The Chief Justice of WA, who was the chair of the Law Reform Commission when its report was published, reflected in 2009 that the abolition of committal proceedings had expedited the resolution of many criminal cases. It had also enabled much greater flexibility in criminal procedure, including the creation of the Stirling Gardens Magistrates Court.[101] However, the Chief Justice noted that the abolition of committal proceedings was not accompanied by some of the Commission's other recommendations for reform, including mechanisms for taking evidence before trial on the application of the defence.[102]

Tasmania has automatic committal to the Supreme Court

8.85 Amendments in 2008 to criminal procedure in Tasmania modified the committal hearing (known as a preliminary proceeding). Now, the police are to provide the brief of evidence to the defendant between the first and second appearances in the Magistrates Court.[103] The defendant is required to enter a plea at the second appearance.[104] The matter is then committed to the Supreme Court for trial or sentence, or dealt with summarily if the offence is one that allows the defendant to elect a summary trial.[105]

8.86 At the first appearance in the Supreme Court, the defence or the prosecution may apply for an order that a preliminary proceeding be held, if there is an issue that requires examination or cross-examination of a witness in "the interests of justice".[106] An additional test of "exceptional circumstances" applies in cases involving sexual assault.[107] If the judge accepts the arguments offered by either party, the matter is transferred back to the Magistrates Court for a preliminary proceeding.[108] Following a preliminary proceeding the defendant is remanded to the Supreme Court for a further directions hearing.

8.87 A key driver of these reforms was the need to address inefficiency. In the first two years of operation the number of preliminary hearings decreased from 49% to 12%.[109] The median time to finalise a matter from first appearance in the Magistrates Court to finalisation in the Supreme Court reduced by 32%.[110]

8.88 However, the Tasmanian DPP considered that on the whole the reforms had "not proven an outstanding success".[111] The reforms were based on an expectation that a completed police brief would be provided to the ODPP and disclosure made to the

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101. See discussion of the Stirling Gardens Magistrates Court in NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) [5.18]-[5.19].
102. W Martin, "The Law Reform Commission of WA: Review of the Civil and Criminal Justice System – 10 Years On" (Paper presented at Perth, 13 October 2009) 11.
103. *Justices Act 1959* (Tas) s 56(3).
104. *Justices Act 1959* (Tas) s 58.
105. *Justices Act 1959* (Tas) s 60.
106. *Criminal Code* (Tas) s 331B(2), (3)(a).
107. *Criminal Code* (Tas) s 331B(3)(b); *Justices Act 1959* (Tas) s 3(1) (definition of "affected person").
108. *Criminal Code* (Tas) s 331B(5); *Justices Act 1959* (Tas) s 61(2).
109. Supreme Court of Tasmania, *Annual Report 2009-2010* (2010) 8.
110. Supreme Court of Tasmania, *Annual Report 2009-2010* (2010) 8.
111. Tasmania, Director of Public Prosecutions, *Annual Report 2007-2008* (2008) 1.

defence prior to the first appearance in the Supreme Court. However, this "almost never" happened, meaning that defendants were being committed to the Supreme Court without disclosure of the case against them. Previously there had been delays in completing the brief of evidence, but these were substantially dealt with while the matter was still in the Magistrates Court. The DPP considered that a change in police policy and emphasis was required.[112]

Recent consideration has been given to committals in Queensland, NT and Victoria

8.89 Recent reviews in both Queensland and the NT recommended the retention of committal hearings. However, they also recommended that restrictions be placed on cross-examination of witnesses at committal, similar to that which exists in other jurisdictions.[113] These recommendations were implemented in both jurisdictions.[114]

8.90 In 2012 the Victorian Attorney-General canvassed the abolition of committal proceedings as a way of dealing with the costs and backlog associated with the "unnecessary" examination of cases at committal.[115] Amendments have since been made to the provisions governing cross-examination to address this problem.[116]

8.91 A 2013 review commissioned by the Queensland Department of Justice and Attorney-General into the resourcing of the Queensland ODPP raised the abolition of committal proceedings as a possible way to reduce system costs. The report noted that "the [c]ommittals process is now very much a paper based system and having hearings in the Magistrates Court to simply rubber stamp cases to Superior Courts seems to add little value".[117] The Queensland Attorney-General was seeking stakeholder input on this proposal,[118] but no further action appears to have been taken to date.

What functions do committal hearings serve in NSW?

8.92 The primary legislative function of a committal hearing is to decide whether a person charged with an indictable offence should be committed for trial.[119]

8.93 In the 1980 High Court decision in *Barton v R*, Justices Gibbs and Mason, with Justice Aickin agreeing, stated:

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112. Tasmania, Director of Public Prosecutions, *Annual Report 2007-2008* (2008) 2.
113. M Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (2008) rec 45; Northern Territory Law Reform Committee, *Report on Committals*, Report No 34 (2009) 9.
114. *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010* (Qld) s 87-88; *Justices Legislation Amendment (Committal Reform) Act* (NT) s 7.
115. P Munro, "Justice System Faces 'Disaster'", *The Age,* 22 July 2012.
116. *Criminal Organisations Control and Other Acts Amendment Act 2014* (Vic) pt 4 div 1. See also the second reading speech for the Bill: Victoria, *Parliamentary Debates,* Legislative Assembly, 26 June 2014, 2386.
117. B Stewart, *Review of the Resourcing of the Office of the Director of Public Prosecutions* (2013) 41.
118. R Viellaris, "Queensland Government Urges Justice System to Dump Committal Hearings", *Courier Mail*, 8 October 2013.
119. *Criminal Procedure Act 1986* (NSW) s 3 (definition of "committal proceedings").

> It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice. They constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair.[120]

8.94 However, the High Court was evenly split on the question of the role of committal proceedings. In the same case Justices Stephen, Murphy and Wilson found it was not an essential prerequisite of a fair trial that it be preceded by a committal hearing.[121]

8.95 In *Grassby v R*, decided in 1989, Justice Dawson described committal hearings as having the following benefits:

> The importance of the committal in the criminal process should not, however, be underrated. It enables the person charged to hear the evidence against him and to cross-examine the prosecution witnesses. It enables him to put forward his defence if he wishes to do so. It serves to marshal the evidence in deposition form. And, notwithstanding that it is not binding, the decision of a magistrate that a person should or should not stand trial has in practice considerable force so that the preliminary hearing operates effectively to filter out those prosecutions which, because there is insufficient evidence, should not be pursued.[122]

8.96 The decisions in *Barton* and *Grassby* were handed down over 25 years ago, and it is now fair to ask whether the importance placed on committal hearings in those cases continues to apply in today's environment.

8.97 The issue in *Barton* was fairly narrow - whether an *ex officio* indictment could be laid, since there had been no committal and therefore no proper disclosure at all. In the modern context there are disclosure obligations that apply before the committal hearing and again before trial,[123] making it unlikely that a matter would proceed to trial without the defendant knowing the case against him or her.

8.98 As we discuss at para 8.71, committal hearings have been abolished in England and Wales – clearly that jurisdiction no longer views committals as an important part of the criminal justice system. Many things have also changed in NSW:

- The DPP was established in 1986 as an independent statutory officer not subject to the Attorney General's direction.
- Committal hearings are now waived in a great number of cases. Those that proceed are conducted primarily on the papers, with cross-examination of prosecution witnesses being permitted only rarely.
- The prosecution is required to serve a brief of evidence before the committal hearing, so that the evidence will already be marshalled in deposition form and the defendant will already know the nature of the case against him or her. The committal hearing no longer provides the first opportunity for the defendant to "hear the case" against them.

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120. *Barton v R* (1980) 147 CLR 75, 100, 109.
121. *Barton v R* (1980) 147 CLR 75, 104 (Stephen J), 107 (Murphy J), 109 (Wilson J).
122. *Grassby v R* (1989) 168 CLR 1, 15.
123. See *Criminal Procedure Act 1986* (NSW) s 75, s 141.

- It is very rare for the defendant to call evidence at the committal hearing – it is considered a risky tactic, to be used only if there is a very real chance the defendant would be discharged at committal.[124]

8.99 Justice Martin of the SA Supreme Court has noted that "as a consequence of [legislative] changes, some of the disadvantages that members of the High Court [in *Barton*] perceived would ensue to an accused in the absence of a preliminary examination might not occur".[125]

8.100 Other historical benefits of committal hearings were said to have included:

- allowing the defence to test the prosecution case before trial, so as to gain a better understanding of how the charge should be contested
- allowing the defence to test the consistency of evidence given at committal and then later at trial, and
- assisting the prosecution in preparing its case, by revealing witnesses who perform poorly during cross-examination.[126]

8.101 It is unlikely that these particular benefits continue to apply in most cases. There may be an opportunity for the evidence to be tested in those 6% of committal matters where cross-examination of a witness is permitted, but even then the cross-examination is usually limited to certain witnesses. It would be very unusual for the defence to be given leave to cross-examine every prosecution witness.

8.102 Modern committal proceedings, then, essentially provide three functions:

(1) filtering out those cases where there is insufficient evidence to commit the defendant to stand trial

(2) providing a trigger for prosecution disclosure, including an opportunity to test the prosecution evidence by way of cross-examination in a very small number of cases, and

(3) encouraging early disposition of the case, through a guilty plea or charge negotiations.

8.103 In the next section we discuss how effectively the committal process performs these functions.

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124. C Porter, "Committal Proceedings" (Paper presented at NSW Bar Association Bar Practice Course, February 1997, revised by R Greenhill August 2007) 9-10.

125. *R v Bunting (No 2)* [2003] SASC 250 [34].

126. NSW Law Reform Commission, *Procedure From Charge to Trial: Specific Problems and Proposals,* Discussion Paper 14 (1987) vol 1 [7.13]-[7.16].

Effectiveness of the modern committal hearing in achieving its functions

Is the committal decision an effective filter for weak cases?

8.104 The primary historical purpose of the committal hearing is to assess whether there is sufficient evidence for the defendant to stand trial. If the magistrate is not satisfied there is a reasonable prospect that a reasonable jury, properly instructed, would convict the defendant of an indictable offence, the defendant must be discharged.[127]

8.105 Statistics from the ODPP indicate that only 1% of all completed committal matters are discharged by a magistrate at this stage. In addition, the magistrate's discharge is not final as the ODPP may still file an *ex officio* indictment.

8.106 Stakeholders suggested the discharge of some matters at committal, however small that number might be, indicates that the committal decision is useful in filtering out weak cases. The ODPP files an *ex officio* indictment in only 18% of matters discharged at committal, meaning most discharges at committal will not be followed by further charges by the ODPP.

8.107 The NSW Bar Association argued that the committal decision is required in order to ensure fairness, and that even if the committal decision filters only a small number of cases, that is a small number of defendants who rightly avoid trial.[128] The Law Society of NSW argued that the progress of the case occurs in the shadow of the committal decision - it is the bulwark that ensures that the prosecution is properly conducted.[129]

8.108 We respect these arguments and have given close consideration to their implications.

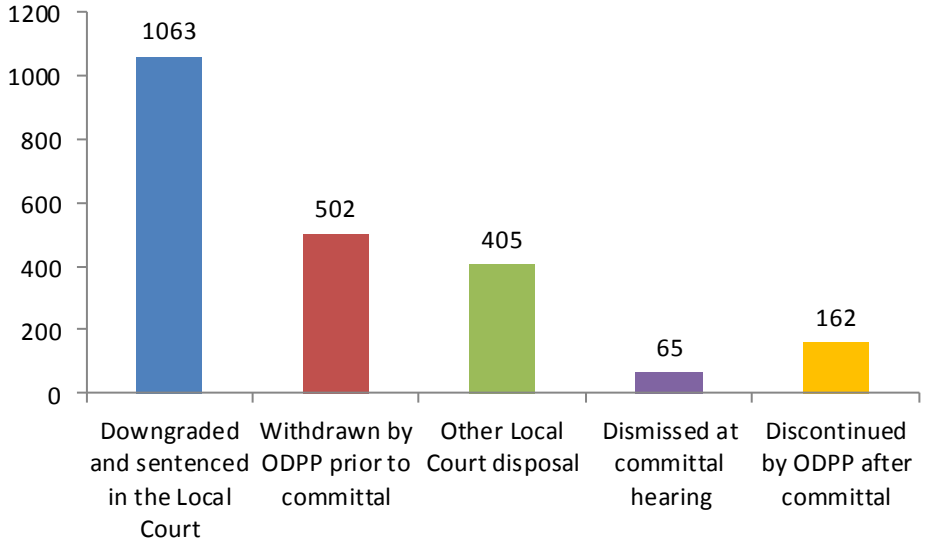
More cases are withdrawn by the ODPP than discharged at committal

8.109 The committal decision provides a filter in a very small number of cases. The great majority of cases that do not proceed on indictment do so due to ODPP review, rather than discharge by the magistrate. The ODPP continues to exercise this review function after committal. More matters are discontinued after committal by the ODPP than are filtered out by magistrates. And some matters that are discharged by a magistrate are revived by *ex officio* indictment.

8.110 In 2012/13, 77% of indictable matters that were disposed of in the Local Court were withdrawn or downgraded by the ODPP, compared with only 3% that were discharged by the magistrate. The difference between the filtering undertaken by the ODPP and that done by the committal hearing is illustrated in Figure 8.4.

127. *Criminal Procedure Act 1986* (NSW) s 64, see also s 62.
128. NSW Bar Association, *Consultation EAEGP33.*
129. Law Society of NSW, *Consultation EAEGP32.*

Figure 8.4: Outcomes of matters listed for committal that do not proceed to trial or sentence in the Supreme and District Courts 2012/13



Source: NSW, Office of the Director of Public Prosecutions, Annual Report 2012/2013 (2013) 27; Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2014)[130]

8.111 The ODPP already filters more charges than are filtered by the committal decision. The disparity is such that we do not think that the ODPP is exercising these functions only, or even principally, because of the threat or possibility that the magistrate may not commit.

8.112 In general, reforms that bolster the ODPP's role, and allow the ODPP to exercise this filtering function earlier in the process, would seem to provide the best promise of fairer and more efficient outcomes. We do consider, however, that a court framework for case management is required to ensure the prosecution gives timely consideration to the charges.

8.113 In 1990, when the Australian Institute of Judicial Administration undertook a review of committals, police prosecutors conducted the committal hearing in most jurisdictions. The authors pointed to the low discharge rate at committal for cases conducted by the CDPP, and noted that "what this data may indicate is that where the Crown has sole responsibility for the conduct of committals, there is a greater likelihood that weak cases will be weeded-out prior to commencement of the committal hearing".[131] In our view, the involvement of the ODPP at the committal stage is having (and will continue to have) the same effect in NSW.

130. "Other Local Court disposal" includes matters downgraded and dismissed at a summary hearing, dismissed because the ODPP offered no evidence to the charge, dismissed under the *Mental Health (Forensic Provisions) Act 1990* (NSW), placed on a Form 1, merged with other matters, or the defendant died or could not be located.

131. D Brereton and J Willis, "Evaluating the Committal" in J Vernon (ed), *The Future of Committals,* Conference Proceedings No 7 (Australian Institute of Criminology, 1991) 5, 11.

Committal decision as an independent and transparent filter

8.114 A further argument in support of committal hearings is the need to retain an independent judicial officer to scrutinise the evidence before the defendant is put to the expense of defending himself or herself at trial. This is said to be an important protection that should be retained, irrespective of how effective the committal hearing actually is in filtering out weak cases.

8.115 The Law Society of NSW submitted that the committal decision provides transparency and impartiality that could not be achieved if the ODPP were given sole responsibility for filtering out weak prosecutions.[132] NSW Young Lawyers submitted that there needed to be some form of pre-trial process, independent of the ODPP, that evaluates the strength of the evidence against the defendant.[133]

8.116 The Senior Public Defender submitted that the positive features of committals are not reflected in statistics about the number of discharges. In his view, if committals were abolished and the independent decision-maker removed from the process, there would be less impetus for the parties to engage to the same extent in the pre-arraignment phase.[134]

8.117 This was also an argument that featured strongly in the 1990 debates on the abolition of committals. Then Commonwealth DPP Mark Weinberg expressed the view that the integrity of the criminal justice system called for the continued involvement of magistrates in determining whether prosecution authorities are correct in saying that the case is of sufficient weight to justify putting the defendant on trial.[135] It is one thing, he argued, to have available the residuary power to *ex officio* indict in extreme cases, and another to take over the task of independently scrutinising the evidence from judicial officers.[136]

8.118 Then Senior Public Defender Peter Hidden noted in 1991 that:

> the presumption of innocence, which endures until a person has been found guilty of an offence by a jury, does not alter the fact that to require a citizen of this community to face trial on indictment is a major step … It is for these reasons that the decision to commit for trial must be made in public and by a person unconnected with the prosecuting authority.[137]

8.119 In our view this remains the most compelling argument in favour of committal proceedings. An independent and transparent filtering process, if it is providing value, should be retained. However, we question whether, in reality, the committal

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132. Law Society of NSW, *Consultation EAEGP32.*
133. NSW Young Lawyers, Criminal Law Committee, *Submission EAEGP12,* 13.
134. M Ierace, Senior Public Defender, *Submission EAEGP15,* 3.
135. M Weinberg, "A Prosecution Perspective" in J Vernon (ed), *The Future of Committals,* Conference Proceedings No 7 (Australian Institute of Criminology, 1991) 139, 145.
136. M Weinberg, "A Prosecution Perspective" in J Vernon (ed), *The Future of Committals,* Conference Proceedings No 7 (Australian Institute of Criminology, 1991) 139, 151.
137. P Hidden, "The Benefits of Committal Proceedings" (1991) 2 *Current Issues in Criminal Justice* 19, 21. See also C Briese, "A Critique of Proposed Committal Reform in New South Wales" in J Vernon (ed), *The Future of Committals,* Conference Proceedings No 7 (Australian Institute of Criminology, 1991) 49, 53; J Marsden, "The Case for the Retention of Committals in their Present Form is Overwhelming" in J Vernon (ed), *The Future of Committals,* Conference Proceedings No 7 (Australian Institute of Criminology, 1991) 41, 45.

decision by an independent judicial officer continues to provide a significant benefit to the defendant and the criminal justice system more generally. This is because:

- the vast majority of committals are determined on the papers or waived altogether, so the sufficiency of the evidence is not being tested in any meaningful way
- matters are committed for trial notwithstanding that the full brief of evidence was not available at the committal hearing, because enough evidence is available to sustain a committal decision[138]
- only 1% of matters listed for committal result in a discharge by the magistrate
- the magistrate's decision whether or not to commit does not bind the ODPP, which may file an *ex officio* indictment or decline to find a bill of indictment, and
- the establishment of the office of the DPP in 1987 ensures independent prosecution of indictable offences.

8.120 We note that the DPP's independence is unquestioned in this reference, although of course the DPP is a party to the prosecution and has an interest in the outcome of the case. ODPP processes have a considerable measure of transparency, and reforms in this reference to bolster disclosure of the brief of evidence will add to that.[139] The evidence on which the ODPP relies to prosecute a case should be clear, and the defence should be able to discuss the strength of that evidence openly and fearlessly with the ODPP.

Does the committal process effectively facilitate prosecution disclosure?

Service of the brief of evidence

8.121 The CPA requires that the prosecution serve on the defendant the written statements of evidence to be relied on at the committal hearing.[140] The time for service is to be set on the first return date for a court attendance notice in committal proceedings.[141] The Local Court practice note specifies that the brief of evidence is to be served on the defence within 6 weeks after the first appearance in the Local Court. This means that prosecution disclosure – at least partial disclosure – will occur before the committal hearing.

8.122 The Law Society of NSW considered that the committal hearing can compel prosecution disclosure where it may not have otherwise been forthcoming.[142] It noted that an upcoming committal hearing can sometimes provide the necessary incentive for serving key elements of the brief of evidence.

8.123 However, in conducting the committal hearing, the magistrate does not assess whether a complete brief of evidence has been served. He or she is only concerned

138. See para 8.124.
139. See Chapter 5.
140. *Criminal Procedure Act 1986* (NSW) s 75.
141. *Criminal Procedure Act 1986* (NSW) s 60(1).
142. Law Society of NSW, *Consultation EAEGP32*.

with whether there is "sufficient evidence" to commit the defendant to stand trial. This distinction can, and frequently does, involve different standards of prosecution disclosure.

8.124 The result of this is that comprehensive disclosure is not required and does not necessarily occur before committal. Under the Local Court practice note, failure to comply with the timetable for service of the brief of evidence does not provide grounds for an adjournment in and of itself. The adjournment must be necessary in the interests of justice.[143] The ODPP observed that, notwithstanding the time and legal costs spent in the Local Court, it is still the case that briefs are not entirely complete after committal and the expectation is that the brief will not be complete until the trial commences.[144] In many cases delivery of the brief is outside of the control of the ODPP – it may be due to delays in receiving forensic evidence or transcripts of telephone intercepts.

8.125 A 2007 report into criminal trial delays in Australia noted the views of many stakeholders that committal hearings were not properly fulfilling their purpose of identifying cases that should not proceed for trial in a higher court. Deficiencies in the committal process were attributed to external factors such as limited or late prosecution disclosure, the promise of evidence that is not yet available, poorly prepared witness statements or incomplete evidence briefs. It was the view of respondents to that study that matters were being committed for trial notwithstanding these deficiencies in the evidence presented at committal.[145]

8.126 Therefore, while the committal process does require that a level of disclosure occur, it may not be the most effective mechanism for ensuring timely delivery of comprehensive briefs of evidence.

8.127 In Chapter 5 we identify the importance of early disclosure of an initial brief of evidence adequate to assess the prosecution case and to present the key evidence to the defendant. Committal takes place relatively late in the proceedings for this to occur. Any reforms need to ensure adequate triggers for early disclosure, and safeguards if it does not occur. In Chapter 5 we propose reforms to the disclosure regime, which we believe will increase the timeliness and quality of disclosure.

Testing the prosecution evidence

8.128 The Law Society of NSW, NSW Bar Association and the Public Defenders also considered that one of the main benefits of a committal "hearing" was the opportunity to test the prosecution evidence.[146] The NSW Bar Association described this as a fundamental procedural fairness right.[147]

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143. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [4.5], [9.2].
144. NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PEAEGP6,* 5-6.
145. J Payne, *Criminal Trial Delays in Australia: Trial Listing Outcomes,* Research and Public Policy Series No 74 (Australian Institute of Criminology, 2007) 29.
146. Legally Aided Defence Group, *Consultation EAEGP27;* NSW Bar Association and Law Society of NSW, *Consultation EAEGP28*.
147. NSW Bar Association, *Consultation EAEGP33*.

8.129 It was suggested that there are a small but important number of cases in which the ability to test the prosecution evidence at the committal stage can have a significant effect on the outcome of the proceedings.[148] This is more likely where the prosecution case hinges on the evidence of one or two key witnesses. The Public Defenders noted that it uses the committal process to test the evidence of a witness sparingly. However, where the committal process is used to clarify a witness's evidence or to establish that an eyewitness's observations were impaired, in its experience the committal often prompts a plea of guilty, a reduction in charge or a discharge by the magistrate.[149]

8.130 Cross-examination at the committal hearing can require witnesses and victims to give evidence twice, once at the committal and again at the trial. This can be quite distressing. It was suggested in relation to the previous unrestricted right of cross-examination that defence counsel may not necessarily exercise the same level of discretion and finesse when cross-examining a witness at committal as they would before a jury, and this may make the witness reluctant to give evidence again at trial.[150]

8.131 It is not often that cross-examination of a prosecution witness will occur at committal – in less than 6% of matters. In the vast majority of cases, then, testing the evidence of a witness at committal would not appear to offer any significant evidentiary or tactical value to the defence. Further, while we do not doubt the views of stakeholders that cross-examination is beneficial in some cases, the data presented in para 8.42 suggests that most successful s 91/s 93 applications are nonetheless committed for trial. Thus, it seems that cross-examination is not always effective in resolving cases at the committal stage.

8.132 It is also important to note that the purpose of cross-examination at committal has evolved from its historical origins. The Hon Martin Moynihan has observed that:

> In the past prosecution witnesses gave oral evidence to ensure that there was sufficient evidence to justify a trial. Examination and cross-examination of witnesses was directed primarily at ensuring that the evidentiary threshold was met. Now, cross-examination of witnesses on their written statements is directed at laying the groundwork for trial, in particular by exposing inconsistencies in testimony. In other words, cross-examination is directed at 'pinning' down the witness, a purpose which is quite different from the historical purpose of the committal.[151]

8.133 It may be unnecessary to retain the committal hearing for the small number of cases where cross-examination is beneficial. At paras 8.177-8.179 we discuss whether an alternative procedure for cross-examination, independent of the committal process, could be incorporated into our blueprint.

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148. Legally Aided Defence Group, *Consultation EAEGP27;* NSW, Public Defenders, *Submission EAEGP8,* 7; NSW Young Lawyers, Criminal Law Committee, *Submission EAEGP12,* 13.
149. NSW, Public Defenders, *Submission EAEGP8,* 7.
150. J Murray, "Committals – Time for Change" in J Vernon (ed), *The Future of Committals,* Conference Proceedings No 7 (Australian Institute of Criminology, 1991) 151, 155.
151. M Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (2008) 165-166.

Does the committal process effectively facilitate guilty pleas?

8.134 The ODPP's data shows that about 47% of matters that originated on indictment resulted in a guilty plea (either to an indictable charge or to a downgraded summary charge) while the matter was in the Local Court. Many of these matters will have resolved in a guilty plea before reaching the committal hearing.

8.135 The committal process, then, provides a useful forum for early disposition of the matter. Stakeholders pointed to one of the significant benefits of committal proceedings as providing an opportunity for the parties to negotiate. In fact, an adjournment to give the parties time to negotiate is built into the Local Court practice note.

8.136 Although many cases resolve during the committal process, it is difficult to attribute this early resolution directly to the committal decision itself. Rather, matters resolve in the Local Court because this is when the ODPP takes control of the prosecution, and is the first time that the defence sees the bulk of the evidence in support of the charge. Engagement between the parties occurs in the shadow of the committal hearing. In most cases it is the work that the ODPP and defence lawyers do before committal, rather than the committal hearing itself, that results in a guilty plea or a negotiated charge.

8.137 Our blueprint includes a mandatory criminal case conference while the matter is in the Local Court. This, combined with early disclosure of an initial brief of key evidence and the involvement of senior prosecutors with the authority to negotiate, will be, in our view, a more effective mechanism for encouraging early guilty pleas than the committal process.

Changing committal hearings in NSW

8.138 This reference provides an opportunity to consider whether there should be a continued committal decision in the Local Court, given the requirements in our blueprint for early charge advice, early disclosure, criminal case conferencing and a scheme of Local Court case management.

8.139 In our consultation paper we dedicated a chapter to discussing the ongoing necessity of committal hearings. We canvassed the recent abolition of committal proceedings in England and Wales, WA and NZ. We asked whether NSW should maintain, abolish or change the present system of committals.[152]

8.140 Stakeholders were divided on whether committal proceedings should be retained or abolished. The ODPP, NSW Police Force and Legal Aid NSW supported the abolition of committal proceedings. The Chief Magistrate of the Local Court and the Chief Judge of the District Court did not oppose abolition. On the other hand, the Law Society of NSW, NSW Bar Association, NSW Young Lawyers and the Public Defenders strongly supported the retention of committal proceedings.

152. NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) Question 7.1(1).

8.141 The stakeholders' division on this issue is quite stark and the issues involved are, we appreciate, contentious. In this section we canvass the consequences of removing the committal decision.

Will removing the committal decision encourage earlier guilty pleas?

8.142 As this reference requires us to find ways to encourage appropriate early guilty pleas, any recommended reform to the committal decision must have this aim in mind.

8.143 Some stakeholders submitted that there is no clear relationship between abolishing committals and encouraging appropriate early guilty pleas. It was suggested that none of our 10 identified obstacles to early guilty pleas would be resolved by the abolition of committals.[153]

8.144 The CDPP noted that the abolition of committal proceedings may achieve efficiencies in the court process, but it was uncertain about its value in encouraging appropriate early guilty pleas.[154] The NSW Bar Association considered that committals operated as an efficient administrative step with safeguards built in to accommodate the interests of both defence and prosecution.[155] The Public Defenders suggested that committals on the papers take up very little time, and may filter out instances of inappropriate charging, thus facilitating guilty pleas.[156]

8.145 It is true that committal proceedings are not, of themselves, a cause of late guilty pleas. In fact, the process of case management in the Local Court leading up to the committal decision currently provides a number of benefits. In that sense, we agree that the committal decision itself is not a direct impediment to achieving the aim of encouraging appropriate early guilty pleas.

8.146 However, our blueprint contains a number of reforms that achieve the same functions that committals currently perform. Our recommended schemes of early charge determination and early disclosure in the Local Court will ensure that the charge is settled and the defence receives an initial brief of key evidence before the matter progresses in the Local Court. The criminal case conference requires the parties to discuss the case and provides a forum for charge negotiations to occur at an early point. Our scheme of Local Court case management will allow for the matter to be appropriately case managed in order to facilitate disclosure and the criminal case conference.

8.147 In light of these reforms, it is necessary to ask whether the committal decision would continue to provide value. The NSW indictable criminal justice system plainly has resource constraints on it, and in developing proposals for reform we cannot ignore this reality. The limited resources presently available need to be directed to those processes that add the most value to the fair and efficient resolution of cases,

153. Law Society of NSW, *Consultation EAEGP32*.
154. Commonwealth Director of Public Prosecutions, *Submission EAEGP13,* 9.
155. NSW Bar Association, *Submission EAEGP4,* 7.
156. NSW, Public Defenders, *Submission EAEGP8,* 6.

including those processes that are most likely to result in appropriate early guilty pleas.

8.148 Most stakeholders agree, for example, that adequate early disclosure, early confirmation of the charge, and early allocation of a senior prosecution lawyer to a case are the keys to early resolution. In order to achieve these ends, we need to look at the system as a whole and ask how current resources can be freed up to be used earlier. In our view, the time and effort currently expended on committal hearings would be better spent on early charge determination and case conferencing.

Will removing the committal decision save time and resources in the Local Court?

8.149 In addition to considering whether removing the committal decision will encourage early guilty pleas, we have also considered whether this would result in a saving of time and/or resources at the Local Court stage.

8.150 Legal Aid NSW suggested that the efficacy of the current system is questionable, and there are other mechanisms that can achieve greater efficiency without compromising the rights of the defendant.[157] The ODPP considered that the abolition of committal proceedings was one of the ways (and perhaps the only way) to find savings across the criminal justice system to enable a transition to a new criminal procedure.[158] All stakeholders agree that additional funding and the promise of further resources are critically needed at the present time.

Committal process takes much longer than the time standard

8.151 The NSW Bureau of Crime Statistics and Research reports that the median delay in 2013 from arrest/charge until a matter was committed for trial was 231 days (33 weeks). The median delay for matters committed for sentence was 197 days (over 28 weeks).[159] Since 2009, the median delay has been increasing.[160] Given that the Local Court has a time standard of 12 weeks from first appearance through to committal, this is a significant departure from best practice.

8.152 However, it is unclear whether the committal decision itself is the source of this delay. Much of the delay is at the stage of service of the brief of evidence. On the ODPP's figures the median number of days between arrest and service of the brief is 59 days for matters committed for trial, and 57 days for matters committed for sentence.[161] This represents a significant amount of the time that the matter spends in the Local Court. By comparison, the ODPP's figures report that the median

157. Legal Aid NSW, *Submission EAEGP11,* 18.

158. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10,* 10.

159. NSW Bureau of Crime Statistics and Research, *NSW Local Courts from 2009 to 2013: Number of Persons and Median Delay from Arrest to Committal (Days) in Finalised Local Court Appearances by Grouped Committal Outcome (Committed for Trial or Sentence)* (14/12269hclc).

160. See Figure 2.15.

161. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 28.

number of days between service of the brief of evidence and committal is 110 days for matters committed for trial, and 77 days for matters committed for sentence.[162]

Arguments about cost associated with committals

8.153 Many committals proceed on the papers or are waived entirely. In addition, in 2012/13, 41% of matters listed for committal were instead resolved in the Local Court, and 28% were committed for sentence. Many of these cases are likely to have been resolved before the committal hearing, obviating the need for that hearing.

8.154 The Public Defenders submitted that committals on the papers take up very little time.[163] However, a different view was put to us by Legal Aid NSW and the ODPP in consultation. Even where a committal decision is to be made by the magistrate on the basis of the written evidence (that is, "on the papers"), the parties have appeared before the Local Court numerous times and the ODPP has spent time in many cases preparing for a challenged committal that at the last minute is resolved into a paper committal.

8.155 There is a more time consuming process in those cases where a s 91 or s 93 application is made. The matter will be adjourned for four weeks to allow for the defendant to file written submissions and the prosecution to reply, and then it will be set down for a hearing of the application.[164] If the application is successful, a further date will be set for the oral examination, usually on the same date as the committal hearing. A contested committal hearing may be set down for a full day or longer. Although less than 6% of completed committal matters have a successful s 91/s 93 application, we have no information about how many unsuccessful applications are made. Even unsuccessful applications add an extra four weeks to the process and an additional hearing in the Local Court, with all the preparation time that goes into that.

8.156 The time required for committal hearings can be an argument both for and against retention of the committal process. On the one hand, committal hearings that are waived or proceed on the papers without argument may take little time, and removing them may produce limited efficiency gains. On the other hand, preparation for a committal hearing where argument might be anticipated and which is set down for a full day in the Local Court necessarily involves resources for the Local Court, the ODPP and Legal Aid NSW.

Committals currently treated as a distinct part of the criminal trial process

8.157 The committal hearing in the Local Court is currently viewed as a distinct legal process from sentencing or trial in the District Court or Supreme Court. This is reflected in the administrative structures of the ODPP and Legal Aid NSW, both of which have separate teams of lawyers to run the two different stages of criminal proceedings.

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162. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 28.
163. NSW, Public Defenders, *Submission EAEGP8,* 6.
164. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012 [7].

8.158 In the ODPP, the matter will typically be assigned to a committals lawyer to oversee the matter through the committals stage. Following committal, responsibility for the case shifts to a Crown Prosecutor to find the bill of indictment. In cases involving sexual assault, committal lawyers remain involved in the case until resolution if possible.[165] In other matters a different ODPP solicitor will usually be assigned to the trial. We note that the ODPP has started to change this process for complex cases, so that Crown Prosecutors can be briefed earlier.[166]

8.159 This creation of a discrete stage in the courts and in the ODPP's administration causes problems of lack of continuity of legal representation and approach to the case. This, as has been said repeatedly, is one of the key obstacles in achieving early guilty pleas.

Will removing the committal decision result in delay in the Supreme and District Courts?

8.160 In a recent article looking at the proposed abolition of committal proceedings in Victoria, Dr Flynn reviewed the effect of reforms in England and Wales, Tasmania and WA, where committal proceedings have been abolished or greatly limited.[167] She concluded that:

> the reforms implemented across Australian and international jurisdictions do not appear to have had the anticipated positive impact on court delay and efficiency levels. Instead, they have simply added delay, or shifted the problem to the superior jurisdiction.[168]

8.161 Our review of data and commentary from those jurisdictions, which we discuss above, tends to support Dr Flynn's conclusion. However, it is important to note that reforms to the committal process in these jurisdictions were not accompanied by other measures that would address pre-existing sources of delay. Therefore, when the committal process was abolished or restricted, those existing causes of delay were simply transferred from the lower jurisdiction to the higher jurisdiction. For example:

- In WA, the bottleneck in the District Court was caused by the fact that the ODPP was not (and other than in Perth, still is not) involved until the matter reaches the District Court. Counsel who would be likely to appear at trial were still not being briefed at an early stage.[169] The Chief Judge of the WA District Court, while not advocating a return to committals, suggested that there needed to be

165. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 26.
166. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 29.
167. A Flynn, "A Committal Waste of Time? Reforming Victoria's Pre-Trial Process: Lessons From Other Jurisdictions" (2013) 37 *Criminal Law Journal* 175.
168. A Flynn, "A Committal Waste of Time? Reforming Victoria's Pre-Trial Process: Lessons From Other Jurisdictions" (2013) 37 *Criminal Law Journal* 175, 183.
169. A Kennedy, "Getting Serious About the Causes of Delay and Expense in the Criminal Justice System" (Paper presented at 24th AIJA Annual Conference, Adelaide, 16 September 2006) 6. The WA Office of the Director of Public Prosecutions now manages committal hearings in the Perth Magistrates Court and Stirling Gardens Magistrates Court, but in suburban and most country courts this remains the responsibility of the WA Police: Office of the Director of Public Prosecutions for Western Australia, "Role of the ODPP" (14 January 2013) <http://www.dpp.wa.gov.au/R/role_of_the_dpp.aspx?uid=0614-3036-7819-9225>.

face to face discussions between prosecution and defence lawyers while the matter was still in the Magistrates Court. This would preserve the ability to negotiate at an early stage.[170]

- In Tasmania, the reforms were based on an expectation that a completed police brief would be provided to the ODPP and disclosure made to the defence prior to the first appearance in the Supreme Court. This "almost never" happened. Delay in serving the brief of evidence was a pre-existing problem that had previously been dealt with while the matter was still in the Magistrates Court.[171]

- In England and Wales, committals were replaced with a system whereby matters are automatically sent to the Crown Court. There is no process of case management in the Magistrates' Courts prior to the matter being sent up. This means the case reaches the Crown Court without the parties having had any prior discussions, resulting in adjournments and delay while the parties seek to discuss the case. We understand that the Senior Presiding Judge is now encouraging the parties to case conference before arraignment in the Crown Court.[172]

8.162 We have sought to design our blueprint in such a way that, if the committal decision were to be abolished, there would be no unintended or unanticipated delay in the Supreme and District Courts. At the core of our model is the need to avoid causing additional delay in the District Court where the trial lists are already at a critical level. Our blueprint does not simply involve automatic committal to a higher court, unlike some of the other jurisdictions Dr Flynn reviewed. It has a comprehensive case management process in the Local Court. Senior prosecutors will review and carefully consider the matter while it is still in the Local Court, and there are mandated discussions between the prosecution and defence at this stage.

8.163 We consider that our blueprint will avoid the experience in other jurisdictions where the matter is simply sent up to a higher court without proper disclosure having occurred or without the parties having had a chance to review and discuss the case between them.

Our conclusion on committal proceedings

8.164 We conducted extensive research, analysis and stakeholder engagement on the issue of committal proceedings. This included addressing the possible abolition of committals in our consultation paper as one of the models for discussion. We have given close consideration to the question regarding retention or removal of the committal decision. We have carefully and cautiously taken into account the fact that there are opposing views about whether the committal decision should be retained.

170. A Kennedy, "Getting Serious About the Causes of Delay and Expense in the Criminal Justice System" (Paper, presented at 24th AIJA Annual Conference, Adelaide, 16 September 2006) 9-10.

171. Tasmania, Director of Public Prosecutions, *Annual Report 2007-2008* (2008) 1-2.

172. Information provided by UK, Office of the Senior Presiding Judge (26 November 2013).

8.165 The Commission itself has been unable to reach a unanimous conclusion on this issue. We set out below the views of the minority and majority of the Commission, and provide the reasons for our ultimate preference.

Minority view: introduce default committal for trial with option to request committal decision by magistrate

8.166 The view of the minority of the Commission is that the committal decision provides an important safeguard and should be retained. The minority consider that the small number of matters filtered out by a magistrate at committal are not a direct reflection of the true value of the committal process.

8.167 The minority argue, first, that even if only a small number of matters are discharged, this still results in fewer defendants who are put to the expense of defending themselves at trial when the evidence is insufficient to justify a conviction. These may be matters that were not picked up by the ODPP's own filtering process, suggesting that a second filtering by the magistrate still has an important role to play. The minority is particularly concerned that abolishing the committal decision means that the first time judicial oversight of the charge occurs is when the matter proceeds to trial in the District Court or Supreme Court. The only filter in the Local Court will be the ODPP, who is a party to the proceedings.

8.168 Secondly, the minority argue that a number of things occur in the shadow of the committal hearing that the court is not privy to, and there will be less impetus for these things to happen if the committal decision is removed. For example, the need for both parties to present their case at an upcoming committal hearing provides an incentive for the parties to engage with the evidence and with one another, and for guilty pleas or negotiated charges to result. Notwithstanding the introduction of mandatory criminal case conferencing and case management in the Local Court under the blueprint, the minority consider that the process of committal offers benefits that should be retained.

8.169 However, the minority also consider that the current committal process can be streamlined, recognising that most committal hearings are waived or simply proceed on the papers. The minority suggest that there should be a default position of committal for trial, with the defendant able to request that the magistrate consider the sufficiency of the evidence. This would result in a reversal of the current position, in which the committal hearing may be waived at the defendant's request. The minority consider that this streamlined process would have the following benefits:

- It retains curial control in the Local Court and provides a safeguard for the relatively small number of cases that require it.
- A power for the magistrate not to commit is a necessary concomitant of the defence's ability to cross-examine a prosecution witness, which the Commission recommends at para 8.188 be retained.
- It could be incorporated into the blueprint without significant disruption. Where an application for cross-examination of a witness is successfully made, the application to the magistrate to make a committal decision could follow the oral evidence.

- It would not substantially increase the time spent in the Local Court, and indeed would likely result in a reduction in delay when compared with the current committal process, as there will be fewer matters proceeding to a committal hearing.
- It retains the committal decision as an important part of the criminal justice process.

Majority view: remove committal decision

8.170 The majority of the Commission, while paying considerable respect to the minority view, has come to a clear view that the committal decision should be removed and replaced with the system of Local Court case management contained in our blueprint.

8.171 The committal decision has been a part of the NSW criminal justice system for over 150 years. There is an understandable reluctance to change such an entrenched part of our system. However, a close review of the functions that the committal decision actually serves at the present time, and whether these can be more effectively fulfilled through other means, convinces the majority that the committal decision no longer adds value to the criminal justice system in NSW to such an extent as to justify its retention. Put shortly, the committal process is now, in the majority view, quite outmoded, expensive and unnecessary.

8.172 In most cases the committal decision is made on the papers, or waived entirely. In those cases that proceed to a committal hearing, the Local Court does not have the time or resources to engage with the brief of evidence in a meaningful way, and matters can be committed without there being a finalised brief of evidence. The committal decision no longer holds the importance that it did historically. Many jurisdictions have either abolished or significantly reformed committal proceedings, including England and Wales, from which our criminal justice system is derived.

8.173 Magistrates only discharge 1% of completed committal matters. The minority point to these cases as an indicator that the committal decision still provides an important filtering function. While some filtering does occur by the magistrate at the committal stage, the most significant amount of filtering is done by the ODPP before the matter reaches committal, or afterwards. The majority see this as highly persuasive. Our blueprint requires the ODPP to review the charges early, and for a mandatory criminal case conference to be held between the parties to discuss any issues in dispute. The majority believe that it is more likely that weak cases will be filtered out early under our blueprint than is achieved under the current committal process.

8.174 Other incidental functions of committal proceedings, such as disclosure of the prosecution case and triggering charge negotiations, are, in the majority view, far more achievable under the model we propose. Our blueprint retains the disclosure and case management functions currently provided for in the Local Court, but significantly improves upon them. We propose a system where early disclosure occurs and there are specific, mandated occasions for case conferencing and discussions. The minority consider that important engagement between the parties happens in the shadow of the committal hearing. However, the majority are of the view that early disclosure, mandatory criminal case conferencing and loss of the

maximum sentence discount once the matter leaves the Local Court will all act as pressure points to persuade the parties to engage with each other.

8.175 It is true that the committal decision is not a direct impediment to the earlier resolution of appropriate guilty pleas. It would be possible, but in the view of the majority undesirable, for the committal decision to continue in the Local Court alongside the Local Court case management scheme we propose in Chapter 6. It is clear that the committal decision provides little additional value to the overall process. Consequently, it would be an unnecessary use of time and resources to retain the committal decision. Those resources could be better directed to the front end of the process to create a more effective and efficient criminal justice system.

8.176 Our recommendation to abolish the committal decision is predicated on the implementation of our blueprint. Early charge determination, early disclosure in the Local Court and criminal case conferencing, in the majority view, render the committal decision unnecessary. We would be wary about removing the committal decision without having the alternative safeguards in place that we propose.

Recommendation 8.1: abolish the committal decision

The *Criminal Procedure Act 1986* (NSW) should be amended to remove committal hearings and replace them with a requirement that the magistrate allocate the matter for trial or sentence on the entry of a plea to an offence to be dealt with on indictment.

Pre trial oral evidence

8.177 Successful applications to cross-examine a prosecution witness under s 91 and s 93 of the CPA are uncommon, occurring in less than 6% of matters listed for committal. As we discuss at para 8.129, some stakeholders within the legal profession consider that the opportunity to test the prosecution evidence before trial is an important aspect of the committals process in this small number of cases.

8.178 The NSW Bar Association submitted that the opportunity to test the prosecution evidence at committal is important because it:

- serves as a fundamental procedural fairness right of the defendant
- highlights strengths or weaknesses in the prosecution case, leading either to a guilty plea or to a change or withdrawal of the charge
- benefits the prosecution by seeing how its witnesses testify in the Local Court, and
- allows for further investigation by the defence before trial if the cross-examination reveals that this is needed.[173]

173. NSW Bar Association, *Consultation EAEGP33.*

8.179 We have therefore considered whether our blueprint for the indictable criminal justice system should include an option for the taking of pre trial oral evidence, either in the Local Court or the District Court/Supreme Court.

Should there be a procedure for oral evidence in the Local Court?

8.180 The Law Society of NSW and the NSW Bar Association, while remaining opposed to the abolition of committals, supported an option for pre trial evidence in the Local Court if the committal decision were to be removed. On the other hand, the ODPP and Legal Aid NSW were opposed to the inclusion of an oral evidence procedure in the Local Court as part of the blueprint.

8.181 The issue of allowing oral evidence in the Local Court is a balanced one, and again stakeholders have divergent and strongly held views.

Cross-examination may lead to guilty plea or change of charge

8.182 Stakeholders tell us that cross-examination of a prosecution witness in a limited number of cases, for the purpose of clarifying the witness's evidence or to reveal shortcomings in the prosecution case, may reveal defects or issues that would lead to a guilty plea. It may also lead to the prosecution accepting a guilty plea to a lesser charge, changing the charge or withdrawing the prosecution. If this is to be a feature of the proceeding, then it is better to identify these issues early while the matter is in the Local Court. If cross-examination were to be permitted only once the case had been allocated to the trial case management stream and had entered the District Court or Supreme Court, a defendant who had legitimate concerns about the prosecution evidence would be required to forfeit entry into the Early Resolution with Discount (ERD) stream – and the maximum sentencing discount of 25% – so as to be able to test that evidence prior to trial.

8.183 Justice Rothman has noted:

> It is far better for witnesses to attend at a committal hearing and be cross-examined (even in the risk that they will be cross-examined twice) than have a jury stand down for a trial within a trial with the consequent delay and inconvenience that then occurs. That inconvenience, which is to judge, practitioners and jury, is also felt by the witness, who will, in any event be cross-examined twice, and the victims who must wait around. Ultimately the evidence, and details of it, must be known to the accused.
>
> It should also be borne in mind that if the evidence of these witnesses is sufficiently compelling, there may be a plea of guilty arising from their testimony.[174]

Oral evidence procedure may cause delay

8.184 Introducing a procedure for oral evidence in the Local Court has the potential to cause delay in the case management process. At present, if a s 91/s 93 application is made, the Local Court will set a timeframe for the defence and prosecution to file written submissions, and set a date to hear the application. This process may be

174. *Abdel-Hady v Magistrate Freund* [2007] NSWSC 1247; 177 A Crim R 517 [44]-[45].

shortened where the prosecution consents to the defence application. If the application is granted, a further date will be set for the oral evidence to be taken. Thus, a s 91/s 93 application, even if ultimately unsuccessful, adds four weeks to the progression of the matter through the Local Court, as well as the use of additional prosecution and defence resources.

8.185 While less than 6% of matters listed for committal have a successful s 91/s 93 application, we have no data on how many unsuccessful applications are made. There is a real concern that allowing oral evidence in the Local Court will cause delay through unmeritorious applications made simply for tactical, or even less meritorious, reasons. We are wary of introducing potential mechanisms for delay. Stakeholders expressed concern about the difficulty of designing a system to allow for meritorious applications for cross-examination while preventing unmeritorious ones.

8.186 Further, if oral evidence is permitted without the need for a committal decision at the end, the magistrate will be required to preside over cross-examination when he or she has no specific statutory interest in its outcome. The magistrate would also be required to review the brief of evidence for the purposes of determining whether a s 91/s 93 application should be granted. This may diminish, at least to some degree, the efficiency benefits to be obtained by removing the committal decision.

8.187 Finally, the criminal case conference may act as an alternative forum to focus the issues in the case. The parties can use the conference to discuss the sufficiency of the prosecution evidence or the need for further written material to address any evidentiary gaps. This may decrease the frequency of the need for cross-examination in the Local Court.

Our view: retain oral evidence in the Local Court with safeguards

8.188 On careful balance, we are of the view that our blueprint should include a provision for oral evidence to be given in the Local Court. When used appropriately, it can have the effect of prompting pleas of guilty or leading to a change in or withdrawal of the charge.

8.189 This proposal is not without its difficulties – the potential for abuse and delay being chief among them. However, we are persuaded that early testing of the prosecution evidence in appropriate cases will be beneficial. It is a benefit, if carefully maintained, that should not be lost to the system. Where there is a genuine need for the prosecution evidence to be clarified and tested, it is better that this occur early in the Local Court rather than wait until the matter reaches the District Court or Supreme Court. We are also concerned that leaving cross-examination to a *Basha* inquiry (see para 8.209) would not only be more expensive, but it would also deprive a defendant of the opportunity to obtain the maximum sentencing discount if he or she had legitimate concerns about the sufficiency of the evidence to support the charge alleged.

8.190 Oral evidence in the Local Court is presently used on limited occasions, and we consider that the introduction of criminal case conferencing, as well as early charge determination and prosecution disclosure, may further reduce the need for cross-

examination. Nevertheless, our proposed model for oral evidence in the Local Court has the following features:

- **Cross-examination should be available on the same grounds currently contained in s 91 and s 93 of the CPA.** There was no stakeholder support for a move to a different formulation, and we do not consider that reframing the limitations is likely to bring any significant benefit.
- **The Local Court should have the discretion whether to hear an application for cross-examination before or after the criminal case conference.** We do not propose to make any specific recommendation as to whether cross-examination should occur before or after the criminal case conference. This is best determined on a case by case basis, although we suggest that a case conference both before and after the cross-examination may be desirable to maximise the benefit from the process.

8.191 We discuss these aspects in more detail below.

Retain oral evidence on limited grounds

8.192 The current grounds for cross-examination of a prosecution witness at committal under s 91 and s 93 of the CPA require "substantial reasons in the interests of justice" why the witness should be called to give oral evidence, and "special reasons" if the witness is the victim of an offence involving violence. There are also limitations on the cross-examination of sexual assault complainants who are cognitively impaired, and child sexual assault complainants under the age of 18. Leave is not required if the prosecution consents to the cross-examination.

8.193 Justice Whealy outlined the circumstances that may amount to "substantial reasons" under s 91:

> Each case will depend on its own facts and circumstances. It is not possible to define exhaustively or even at all what might, in a particular case, constitute substantial reasons. It may be a situation where cross-examination may result in the discharge of the defendant or lead to a successful no-bill application; it may be a situation where cross-examination is likely to undermine substantially the credit of a significant witness. It may simply be a situation where cross-examination is necessary to avoid the defendant being taken by surprise at trial. The categories are not closed and flexibility of approach is required in the light of the issues that may arise in a particular matter.[175]

8.194 The need to avoid a *Basha* inquiry in the District Court or Supreme Court following committal "must, without more" be a "substantial reason" to allow cross-examination.[176]

8.195 The requirement for "special reasons" in s 93 of the CPA requires something more than a disadvantage to the defendant from the loss of the opportunity to cross-examine the complainant at the committal.[177] It would be necessary to show that there would be a real risk of an unfair trial should oral evidence not be permitted and

175. *Sim v Magistrate Corbett* [2006] NSWSC 665 [20].
176. *Abdel-Hady v Magistrate Freund* [2007] NSWSC 1247; 177 A Crim R 517 [44].
177. *R v Kennedy* (1997) 94 A Crim R 341, 352.

that the prospect of prejudice or possible prejudice should be shown to be beyond the ordinary.[178]

8.196 Queensland has recently adopted the grounds for cross-examination in s 91 of the CPA.[179] In making this recommendation, the Moynihan report noted that the NSW provisions are "generally regarded as working satisfactorily" and referred to a submission from the CDPP that "a fairly pragmatic approach is taken to the grant of leave" in NSW.[180]

8.197 In Victoria and the NT, leave will be granted for cross-examination if the defendant identifies an issue to which the proposed questioning relates, provides a reason why the evidence of the witness is relevant to that issue, and the court considers that cross-examination of the witness on that issue is justified.[181] It had been suggested in Victoria that the controls governing cross-examination at the committal hearing were not sufficiently stringent, and that they ultimately contributed to unnecessary delays and duplication of what is later presented at the trial.[182] Recent amendments now seek to control more tightly the grant of leave to cross-examine a witness, to improve the efficiency of committal hearings.[183]

8.198 Other jurisdictions have variations on the NSW restrictions on cross-examination:

- SA requires "special reasons" and, in the case of victims of sexual offences or children under the age of 12 years, "the interests of justice cannot be adequately served" except by permitting cross-examination.[184]
- In Tasmania it must be shown that cross-examination "is necessary in the interests of justice", and additionally there are "exceptional circumstances" for victims of sexual assault offences.[185]
- In the ACT the threshold is that "the interests of justice cannot adequately be satisfied by leaving cross-examination of the witness about the issue to the trial". No cross-examination of sexual assault complainants is available.[186]

8.199 The NSW Bar Association and the Law Society of NSW supported retention of the current grounds for cross-examination in s 91 and s 93 of the CPA.[187] There was no support amongst other stakeholders for a change to the current grounds for cross-examination.

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178. *Murphy v DPP* [2006] NSWSC 965 [44].
179. *Justices Act 1886* (Qld) s 110B.
180. M Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (2008) 193-195.
181. *Criminal Procedure Act 2009* (Vic) s 124; *Justices Act* (NT) s 105H.
182. A Flynn, "A Committal Waste of Time? Reforming Victoria's Pre-Trial Process: Lessons From Other Jurisdictions" (2013) 37 *Criminal Law Journal* 175, 190. See also Magistrates' Court of Victoria, *Annual Report 2011-12* (2012) 38.
183. *Criminal Organisations Control and Other Acts Amendment Act 2014* (Vic) pt 4 div 1. See also the second reading speech for the Bill: Victoria, *Parliamentary Debates,* Legislative Assembly, 26 June 2014, 2386.
184. *Summary Procedure Act 1921* (SA) s 106(2).
185. *Criminal Code* (Tas) s 331B(3); *Justices Act 1959* (Tas) s 3(1) (definition of "affected person").
186. *Magistrates Court Act 1930* (ACT) s 90AB.
187. Law Society of NSW, *Consultation EAEGP32*; NSW Bar Association, *Consultation EAEGP33*.

8.200 Legislation in some other jurisdictions requires the defendant to identify the issue on which examination is sought. In our view, the current NSW legislation requires this by implication: there can be no substantial or special reason without a reason being given. For this reason we do not propose amendments to the form of words. However, we do consider that magistrates should continue to closely manage the provisions of the legislation.

When should the procedure for oral evidence occur?

8.201 Under our proposed scheme, the defendant will be provided with the initial brief of evidence, and connected with Legal Aid NSW where necessary, at an early stage.[188] This should then allow the defence lawyer to become familiar with the initial brief of evidence and discuss the case with the defendant. As part of that assessment of the evidence, if the lawyer considers that it would be beneficial to cross-examine particular prosecution witnesses, the lawyer should make an application at the next appearance. A date would then be set for hearing the application and, if successful, for the prosecution witness/es to give oral evidence before a magistrate.

8.202 It should be left to the discretion of the Local Court to decide whether an application for cross-examination should be made before or after the criminal case conference. On the one hand, having cross-examination before the case conference would allow both parties to see the strength of the prosecution case, and to resolve any issues with the prosecution evidence prior to discussions. This may allow the conference to be more productive.

8.203 On the other hand, having the case conference early may negate the need for cross-examination altogether, because either the evidence is clarified in conference or the conference results in a plea of guilty. However, it may also mean that the defence cannot fully participate in the case conference, because it is unwilling to make concessions until it has tested the prosecution evidence.

8.204 The Law Society of NSW considered that cross-examination should occur after the case conference, with an opportunity to hold a further case conference as a result of the cross-examination.[189] The NSW Bar Association agreed that it may be most appropriate to "sandwich" the cross-examination between a case conference on either side.[190] It noted that currently informal discussions usually occur between the parties following cross-examination at committal, but that this could be formalised into a case conference. We agree that there may be benefit in holding more than one criminal case conference where there is to be cross-examination of a prosecution witness, and magistrates should have the discretion to so order.

How could the potential for abuse be mitigated?

8.205 Unmeritorious applications, wasting court time, or making applications for the purpose of harassing the witness are not legitimate or consistent with a legal practitioner's ethical duties. Stakeholders who support retention of committals and

188. See Chapter 6.

189. Law Society of NSW, *Consultation EAEGP32*.

190. NSW Bar Association, *Consultation EAEGP33.*

retention of cross-examination at the Local Court stage argue that abuse by some should not mean that the process should be abolished or limited. Other mechanisms for preventing abuse should be examined. As we note in Chapter 12, there are a range of professional duties that apply to barristers and solicitors. Other lawyers and the courts have a responsibility to make complaints if these duties are being breached and the professional bodies have a responsibility to enforce the rules.

8.206 Legally aided private practitioners are subject to Legal Aid fee agreements and to panel arrangements. There should be safeguards against practitioners using legal aid resources unnecessarily, possibly through a requirement for urgent approval prior to making an application for cross-examination or through ongoing eligibility for the Legal Aid panel.

8.207 In addition, under our proposed structure of sentencing discounts, a maximum discount of 25% will be available for guilty pleas entered while the matter is still in the Local Court. However, there will be circumstances where the maximum discount (or indeed any discount) will not be appropriate, including for reasons such as the seriousness of the offending or the need to protect the public.[191] In Chapter 9 we recommend that the court continue to have the discretion to award less than the maximum sentencing discount for ERD matters, but that it be required to provide its reasons for doing so.

8.208 The 25% sentencing discount is intended to reflect the utilitarian value of an early guilty plea. Arguably that utilitarian value may be diminished where in rare cases the defendant has deliberately and unmeritoriously caused additional cost and delay to be incurred in the Local Court.

Recommendation 8.2: maintain the Local Court's ability to hear oral evidence

(1) The *Criminal Procedure Act 1986* (NSW) (CPA) should continue to include a procedure for a prosecution witness to give oral evidence in the Local Court.

(2) The Local Court should only be able to direct oral evidence if the grounds in s 91(3) or s 93(1) of the CPA are made out.

(3) The joint practice note in Recommendation 3.1 should include directions about the timing and the procedure to be followed when an application is made for a prosecution witness to give oral evidence.

Should there be a procedure for oral evidence in the Supreme and District Courts?

8.209 Where the prosecution seeks to tender evidence of a witness at trial that was not adduced at the committal hearing, the judge may permit the defence to cross-examine the witness in the absence of the jury before the witness is called at the trial. This known as a "*Basha* inquiry".[192]

191. *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 1 [32].

192. *R v Basha* (1989) 39 A Crim R 337, 339.

8.210 The purpose of a *Basha* inquiry is to remove any prejudice that may be caused to a defendant by reason of the evidence not previously being called during committal. A *Basha* inquiry may be ordered where:

- the defendant has demonstrated, in advance, the particular issue which he or she intends to pursue
- the judge is satisfied that there is at least a serious risk of an unfair trial if the defendant is not given the opportunity to do what would otherwise have been done at the committal proceedings
- the procedure is not to be used inappropriately to try out risky questions that might otherwise prove to be embarrassing in the presence of a jury, and
- the examination will not interrupt the trial itself significantly.[193]

8.211 It has been suggested that a *Basha* inquiry in the Supreme or District Court could be used as an alternative to cross-examination in the Local Court if committal hearings were abolished. That is, once the case enters the trial case management stream, one of the case management functions of the court could be to hear *Basha* inquiries where necessary.

8.212 The Public Defenders submitted that *Basha* inquiries are inherently more expensive than cross-examination in the Local Court.[194] The NSW Bar Association also noted that if the need for further inquiries by the defence was not raised until during a *Basha* inquiry, there would be less opportunity for the defence to conduct investigations prior to trial.[195] It is unlikely that the defence would be successful in obtaining an adjournment following a *Basha* inquiry for the purpose of investigating further evidence. There was no strong stakeholder support for a more widespread use of *Basha* inquiries.

8.213 We do not propose to change the ability of the Supreme or District Court to order a *Basha* inquiry. However, given that the initial brief of evidence will be disclosed while the matter is still in the Local Court,[196] we expect that in the majority of cases it would be unusual for any additional witnesses to be identified after the matter enters the trial case management stream.

193. *R v Sandford* (1994) 33 NSWLR 172, 181.
194. NSW, Public Defenders, *Submission EAEGP8,* 7.
195. NSW Bar Association, *Consultation EAEGP33.*
196. See Chapter 5.

9. Applying the discount on sentence

In brief

The discount on sentence provides the principal incentive for defendants to enter the proposed "early resolution with discount" stream. To establish certainty of discount we recommend that the maximum available discount for the utilitarian value of the plea of 25% be instituted in statute. To ensure the integrity of the program, we further recommend that in general the maximum discount be available only while the matter remains in the Local Court of NSW, with any following discounts on sentence for the utilitarian value of the plea to be capped at 10%.

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9.1 Our proposed blueprint for reform adopts the approach that a clear structure of sentence discounts provides the key incentive for defendants to enter an early guilty plea in indictable matters. Our recommended three-tiered discount structure reflects this position. We propose that guilty pleas that are entered in the Local Court be recognised as having been entered under the "early resolution with discount" (ERD) stream. These matters may receive a maximum discount of up to 25% for the utilitarian value of the plea. Where the matter has already entered the trial case management stream in the higher court, the maximum available discount for a guilty plea should be 10%. There is a proposed maximum 5% discount for pleas received on the day of trial.

9.2 We must stress that the statutory discount regime proposed in this chapter should be implemented only where the blueprint is adopted – particularly disclosure in the Local Court and early charge advice.[1] Without the other proposed components that operate to ensure that the charge in the Local Court is the most appropriate, excluding pleas entered in the higher courts from the maximum discount could produce unfair and unwanted results.

9.3 In this chapter we review the current law for applying a discount on sentence in recognition of the utilitarian value of entering a guilty plea. We then present our proposal for change and outline our three tiered approach, which puts emphasis on the need for certainty of discount and consistency of application.

9.4 We do not review the impact of any current or proposed mandatory sentencing laws on the proposed discount regime.

Sentencing discounts for the utilitarian value of a guilty plea

The current application of a sentence discount for a guilty plea in NSW

9.5 Currently the *Crimes (Sentencing) Procedure Act 1999* (NSW) (CSPA) requires the court to consider a sentence discount (or sentence variation) in return for an early guilty plea. The various possible levels of discount at common law are discussed in the guideline judgment of *R v Thomson*[2] and the following judgment of *R v Borkowski*.[3]

A mitigating factor under the CSPA

9.6 Early guilty plea sentence discounts and variations of sentence are given for the utilitarian value of the plea, and to encourage defendants to enter a plea of guilty at the earliest opportunity. Under the CSPA a guilty plea is a mitigating factor for which a court may impose a lesser penalty.[4] If a defendant enters a plea of guilty, a sentencing court must take this into account. Specifically, the court must consider the timing and circumstances of the plea or the indication of intention to plead

1. See Chapters 4 and 5.
2. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383.
3. *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 1.
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(k), s 22.

guilty.[5] 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.[6] The court must record its reasons if a lesser penalty is not given despite a plea of guilty.[7]

The utilitarian value of the plea at common law

9.7 In *R v Thomson (*a guideline judgment on the effect of early guilty pleas) and the later judgment of *R v Borkowski*, the NSW Court of Criminal Appeal confirmed the common law principles applicable to sentence discounts for early guilty pleas. Principally, the court found that 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. The discount applied for the utilitarian value of an early guilty plea requires separate treatment in the sentencing process and should be quantified.[8] 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]

9.8 While there are other potential justifications for providing a discount for a guilty plea – most importantly 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[10] - the utilitarian value of the plea is the qualifying factor in determining whether a discount should be given for an early guilty plea 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.[11] Further, as remorse is a separate mitigating factor,[12] and has implications for other objectives of the sentencing process,[13] it would be double counting to consider it afresh in quantifying a discount for a guilty plea.[14]

9.9 In addition, the common law has confirmed that:

- The offences may be so serious that no discount should be given.[15] A substantial sentence may be required for the protection of the public, notwithstanding the entry of a guilty plea.[16]

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5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1)(a)-(c).
6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1A).
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2).
8. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383.
9. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [160].
10. See, eg, *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [3].
11. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [115]-[123].
12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i).
13. For example, genuine remorse can indicate personal deterrence does not need much weight, and prospects of rehabilitation are good: *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [116].
14. *R v MAK* [2006] NSWCCA 381; 167 A Crim 159 [41]-[45]. See also *Kite v R* [2009] NSWCCA 12 [10]-[12].
15. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [158], [160]. We note that this is usually because the offence is so serious that any discount is not going to impact upon the (usually life) sentence.

- 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]

9.10 *R v Thomson* encourages sentencing courts to quantify the discount.[18] In our report on sentencing, we recommended that courts be required to quantify a sentence discount given for the utilitarian value of a guilty plea.[19]

Previous statutory regime in NSW: Criminal Case Conferencing Trial Act 2008

9.11 From 2008 to 2012, all applicable indictable proceedings heard in Sydney Central Local Court and the Downing Centre Local Court were subject to a criminal case conferencing trial.[20] A distinct statutory sentencing discount regime for the utilitarian value of the plea applied to these matters:[21]

- **A 25% discount on sentence for early guilty pleas:** Where an offender entered a guilty plea any time before being committed for sentence (while the matter remained in the Local Court), the sentencing court was to apply a discount at 25% less than the term the court would have otherwise imposed.[22]

- **Up to 12.5% discount on sentence for late guilty pleas**: Where a guilty plea was entered any time after the matter had been committed for trial, the sentencing court could allow for a discount of up to 12.5% less than the term that would have otherwise been imposed.[23] The exact proportion of the discount for late pleas was to be worked out with reference to the benefits that the guilty plea delivered to the criminal justice system (the utilitarian value) and the victim.[24]

9.12 In all matters sentenced under the criminal case conferencing trial, the sentencing court was required to indicate to the offender, and make a record of, the penalty it would have imposed but for the guilty plea.[25]

9.13 The discount regime did not apply to Commonwealth offences,[26] or where the NSW Director of Public Prosecutions (DPP) had certified that no discount should apply because of the seriousness of the offence and the strong likelihood of conviction by a jury.[27]

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16. *R v El-Andourl* [2004] NSWCCA 178 [34].
17. *R v Oinonen* [1999] NSWCCA 310; *R v Johnson* [2003] NSWCCA 129.
18. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [160].
19. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [5.29]. This was also prescribed by the *Criminal Case Conferencing Trial Act 2008* (NSW) s 16(1), repealed in 2012.
20. *Criminal Case Conferencing Trial Act 2008* (NSW) s 4(1). See Chapter 7 for further information on case conferencing.
21. To the exclusion of the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(k) and s 22: *Criminal Case Conferencing Trial Act 2008* (NSW) pt 4.
22. *Criminal Case Conferencing Trial Act 2008* (NSW) s 17(1)(a).
23. *Criminal Case Conferencing Trial Act 2008* (NSW) s 17(2).
24. *Criminal Case Conferencing Trial Act 2008* (NSW) s 17(3), s 16(2).
25. *Criminal Case Conferencing Trial Act 2008* (NSW) s 16(1)(a).
26. *Criminal Case Conferencing Trial Act 2008* (NSW) s 18(1)(a).
27. *Criminal Case Conferencing Trial Act 2008* (NSW) s 18.

9.14 Criminal case conferencing is discussed in detail in Chapter 7.

Sentencing discounts in other jurisdictions

9.15 Our consultation paper, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion* (CP15), presented the sentencing discount structures in place in the early guilty plea schemes of England and Wales and the previous scheme in WA.[28] It also presented the application of discounts on sentences generally for early pleas in other Australian jurisdictions.[29] There are some key differences between the operation of other jurisdictions and NSW. Sentencing courts in Victoria, the ACT and WA must disclose the head sentence and non-parole period that would have been imposed but for the guilty plea.[30] SA has implemented a detailed sliding scale in statute, expressly intended to codify the proposition "the earlier the plea, the greater the discount".[31] The maximum available discount for an early plea (anytime up to four weeks after first appearance) in SA is 40%.[32]

England and Wales: discount attached to an early guilty plea scheme

9.16 England and Wales is the only jurisdiction that currently operates a sentence discount regime which is attached to an early guilty plea scheme (EGPS). Under the EGPS a guilty plea entered at or before the early guilty plea hearing is to be understood as a plea given at the "first available opportunity", and accordingly, is to receive the maximum discount on sentence of one-third.[33]

9.17 The discount for a guilty plea decreases on a sliding scale the further into the process that the plea is entered. A guilty plea received at the next hearing (usually, the Plea and Case Management Hearing) in the Crown Court receives a discount of up to one quarter, and a plea entered any time after this point receives a discount for the plea of one tenth of the sentence.[34]

The Commonwealth

9.18 The *Crimes Act 1914* (Cth) sets out the factors to which a sentencing court must have regard when sentencing for a federal offence. One relevant factor is where the

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28. NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) Ch 6.
29. NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) Ch 9.
30. *Sentencing Act 1991* (Vic) s 6AAA; *Crimes (Sentencing) Act 2005* (ACT) s 37(2); *Sentencing Act 1995* (WA) s 9AA(5).
31. SA, *Parliamentary Debates*, Legislative Council, 4 September 2012, 2001.
32. *Criminal Law (Sentencing) Act 1988* (SA) s 10B(a).
33. 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 early guilty plea hearing or agree to a prosecution request for an early guilty plea hearing: see Cambridge, Peterborough and Huntingdon Crown Court, *Practice Note - Early Guilty Plea Protocol* (March 2012) 7.
34. See NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation Paper 15 (2013) Figure 5.1.

person entered a plea of guilty to the offence.[35] This does not include consideration as to whether the person has shown contrition for the offence, which is a separate sentencing factor.[36] The Act does not require courts to consider the timing of the guilty plea.

9.19 The approach to a plea of guilty for federal offences is different from that which applies to NSW offences. For federal offences, the High Court's approach in *Cameron v R* is followed:

> Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of *willingness to facilitate the course of justice* and not on the basis that the plea has saved the community the expense of a contested hearing.[37]

9.20 It is not the timing of the plea that is relevant, but whether it was possible to enter a guilty plea at an earlier time.[38]

9.21 The NSW Court of Criminal Appeal has described the approach to guilty pleas in Commonwealth matters:

> When sentencing for a Commonwealth offence, there is no requirement for the sentencing judge to specify a quantifiable discount for an offender's guilty plea. The principles set out in *R v Thomson, R v Houlton* (2000) NSWCAA 309; 49 NSWLR at [155], do not apply to sentencing for Commonwealth offences. When a Commonwealth offence is involved, a sentencing judge is required to take the offender's guilty plea into account in accordance with the principles stated in *Cameron v R* [2002] HCA 6; 209 CLR 339. The plea of guilty is taken into account as recognition of an offender's willingness to facilitate the course of justice but not on the basis that the plea has saved the community the expense of a contested hearing.
>
> Since the test in a Commonwealth offence is the willingness of the offender to facilitate the course of justice, a relevant consideration (particularly in this case) is the strength of the Crown case. This is because the strength of the Crown case may bear upon the question of whether the plea of guilty was motivated by a willingness to facilitate the course of justice, or simply a recognition of the inevitable.[39]

9.22 The fact that witnesses are spared from giving evidence at trial may also be relevant to facilitating the course of justice.[40] Although the sentencing court is not required to quantify the amount of the discount given for a guilty plea,[41] quantifying the discount is also not an error.[42]

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35. *Crimes Act 1914* (Cth) s 16A(2)(g).
36. *Crimes Act 1914* (Cth) s 16A(2)(f).
37. *Cameron v R* [2002] HCA 6; 209 CLR 339 [14] (Gaudron, Gummow and Callinan JJ) (emphasis added).
38. *Cameron v R* [2002] HCA 6; 209 CLR 339 [9] (Gaudron, Gummow and Callinan JJ).
39. *Lee v R* [2012] NSWCCA 123 [58]-[59].
40. *Cameron v R* [2002] HCA 6; 209 CLR 339 [79] (Kirby J).
41. *Lee v R* [2012] NSWCCA 123 [58].
42. *Markarian v R* [2005] HCA 25; 228 CLR 357 [24].

9.23 **The recommendations in this chapter do not apply to Commonwealth offences.**

Current NSW law on sentencing discounts does not encourage early guilty pleas

9.24 In our consultation paper we identified a level of cynicism among defence advocates in NSW concerning the application of discounts on sentence for the utilitarian value of a guilty plea. This reflects at least two contrasting views: concern that the discount will not make a material difference, and a view that the full discount may well be available even where a late plea is entered.

The belief that the sentence discount for an early guilty plea will not make a difference

9.25 The NSW Bureau of Crime Statistics and Research (BOCSAR) highlighted this issue in its 2010 report on the impact of the criminal case conferencing trial on guilty pleas. The authors noted that "there appears to be a widespread scepticism in the legal profession that [utilitarian] discounts are, in fact, conferred on their clients".[43] The NSW Criminal Court of Appeal acknowledged this scepticism in its guideline judgment.[44]

9.26 A key element of the criminal case conferencing trial was the setting of a discount of 25% for all applicable guilty pleas entered before a matter was committed.[45] As mentioned above, a guilty plea entered after a matter was committed for trial could only access a discount of up to 12.5%.[46] BOCSAR found that scepticism towards the application of the maximum discount was likely to have contributed to the lack-lustre effect of the criminal case conferencing trial. BOCSAR considered that the continuing view that a significant sentencing discount for an early plea was uncertain (even with legislative support) was exacerbated by the court's disinclination to state what sentence would have been imposed had the discount not been applied.[47]

9.27 Stakeholders to this reference have reiterated that a general cynicism exists towards the application of a real and quantifiable discount on sentence for the

43. W Yin Wan and others, *The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court*, Bureau Brief No 44 (NSW Bureau of Crime Statistics and Research, 2010) 1; see Chapter 7.
44. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [126].
45. *Criminal Case Conferencing Trial Act 2008* (NSW) s 17(1).
46. *Criminal Case Conferencing Trial Act 2008* (NSW) s 17(2).
47. This was required under the *Criminal Case Conferencing Trial Act 2008* (NSW) s 16(1)(a): W Yin Wan and others, *The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court*, Bureau Brief No 44 (NSW Bureau of Crime Statistics and Research, 2010) 8.

utilitarian value of the early guilty plea.[48] The inclusion of this prevailing view in the ten obstacles to early guilty pleas has received universal stakeholder support.

The belief that the timing of the plea has little effect upon whether the maximum discount is applied

9.28 It has been reported to us that - even during the criminal case conferencing trial - a late guilty plea entered after committal could still generate the maximum, or a significant, discount. This practice may be tied to systemic problems with the current criminal justice system, but it continues to seriously undermine the use of the maximum discount as an incentive to enter a guilty plea early in proceedings.

Stakeholder views

9.29 The problems identified in our consultation paper were reiterated by stakeholders in submissions and consultations. The majority of stakeholders considered that prescribing the discount regime for the utilitarian value of a guilty plea in statute could facilitate certainty and consistency. The Office of the Director of Public Prosecutions (ODPP) noted that the discount regime in the statutory criminal case conference trial worked well to prevent late pleas receiving a significant discount, and as a consequence generated early guilty pleas. The ODPP supported the institution of a statutory system of plea discounts.[49] The NSW Bar Association, the Chief Magistrate of the Local Court of NSW, NSW Young Lawyers and Legal Aid NSW also support instituting a statutory discount regime, operating on a sliding scale.[50] This aligns with the rationale that the discount represents the utilitarian value of a guilty plea. The Law Society and Bar Association, however, were cognisant of the sentencing court's discretion to apply a significant discount when a late guilty plea is entered at the "first available opportunity" in practical terms.

9.30 Not all stakeholders support the use of sentence discounts in return for the utilitarian benefit that a guilty plea gives to the criminal justice system. Two key reasons have been advanced to us. First, from the victims' perspective sentence discounts for this purpose can appear to be unjust. A discount applied for the utilitarian value that a guilty plea has to the workings of the criminal justice system can mean that sentences fail to represent the criminality of the offence.[51]

9.31 We have also heard some concern from victims groups about the concept of "discount" being perceived as somehow "discounting" what has occurred to them.[52]

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48. NSW Young Lawyers, Criminal Law Committee, *Preliminary Submission PEAEGP10*, 12; NSW Bar Association, *Preliminary Submission PEAEGP8*, 4-5; Legal Aid NSW, *Preliminary Submission PEAEGP4*, 3; P Lowe, *Preliminary Submission PEAEGP7*, 4.
49. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 12; NSW, Office of the Director of Public Prosecutions, *Preliminary Submission PEAEGP6,* 3.
50. NSW Bar Association, *Submission EAEGP4,* 8-9; Chief Magistrate of the Local Court of NSW, *Submission EAEGP6,* 4-5; Legal Aid NSW, *Submission EAEGP11,* 20; NSW Young Lawyers, Criminal Law Committee, *Submission EAEGP12,* 17.
51. Homicide Victims' Support Group, *Consultation EAEGP37*; see also K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995) 167.
52. Victims roundtable, *Consultation EAEGP36.*

9.32 Secondly, sentence discounts of this type may present as an inappropriate inducement to plead guilty. The Public Defenders note:[53]

> We suggest that there is a limit to the use of sentence discounts as an enticement to early pleas of guilty. There are significant disparities between custodial sentences handed down following an early guilty plea compared to those handed down after a conviction at trial. The former are "discounted" sentences, partly justified for pragmatic policy concerns to do with the saving of community resources. However it is explained, the fact remains that an accused person who is convicted at trial will usually serve a significantly longer sentence for the privilege. It cannot be assumed that all accused who are convicted at trial are in fact guilty; from time to time wrongful convictions are discovered. The greater this disparity, the greater the danger that accused persons who are in fact innocent of the charges against them, but who face strong evidence to the contrary, will plead guilty for fear of serving a longer sentence, should they be convicted at trial.
>
> For these reasons we are against the creation of a new category of even greater sentence discounts for a plea entered in an EGPS scheme. For the same reasons we are also against a movement of the existing maximum level of discounts to an EGPS scheme, and the withdrawal of that level of discounts for pleas later in the process.

9.33 The Public Defenders' key concern appears to be that sentence discounts have the potential to coerce an innocent person to enter a plea of guilty, and that the greater the disparity in sentence quantum received at trial compared to a plea, the more likely it is that a person will enter a false or inappropriate guilty plea. This argument has been supported in academic literature,[54] and we discuss "inappropriate" pleas in Chapter 13.

Our view: a statutory sentence discount regime is required

9.34 We support the introduction of a graduated statutory sentencing discount scheme. In our view such a scheme is required to ensure that there are clear incentives for a defendant to plead guilty early, and that the available discounts are transparent and available only in cases where the efficient operation of the criminal justice system is facilitated. There is no intention at all to discount the experience of victims. Indeed, in one respect, we consider the discount reflects the avoidance of the trauma the victim might have suffered if the matter had proceeded to trial.

9.35 A sentencing hearing at all times remains a serious procedure and victims have an entrenched right to tell the court about their experience. Our proposals do not trespass upon this right.

9.36 Early resolution on the basis of a guilty plea, with the availability of a sentence discount, gives a proper incentive to defendants. We accept that it is necessary to continue to approach matters on this basis to allow the system to operate effectively.

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53. NSW, Public Defenders, *Submission EAEGP8*, 6.
54. K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995) 167–171.

9.37 A graduated statutory sentence discount regime for NSW should:

- continue to reflect the utilitarian value of the plea
- have three clearly delineated tiers with limited exceptions, and
- continue to support judicial independence and discretion in sentencing by prescribing that the discounts be maximums available on sentencing.

9.38 These points are further discussed below.

The discount reflects the utilitarian value of the plea

9.39 As recognised at common law, the purpose of the discount that we propose should be to recognise the utilitarian value of the plea only. It does not impact upon any other sentencing factor, including recognition of assistance to authorities or remorse.

9.40 The rules of applying the utilitarian value to a discount on sentence have been defined at common law as:[55]

> 1. The discount for the utilitarian value of the plea will be determined largely by the timing of the plea so that the earlier the plea the greater the discount.
>
> 2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy.
>
> 3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse; nor is it affected by post-offending conduct.
>
> 4. The utilitarian discount does not take into account the strength of the prosecution case.
>
> 5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse or for the "Ellis discount".
>
> 6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence.
>
> 7. There may be offences that are so serious that no discount should be given; or where the protection of the public requires a longer sentence.
>
> 8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced.
>
> 9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain; or where the offender is waiting to see what charges are ultimately brought by the Crown; or the offender has delayed the plea to obtain some forensic advantage, such as having matters put on a Form 1.

55. *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 1 [32] (references omitted).

10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value.

11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount.

12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.

9.41 We recognise that the application of these principles means that the sentence that would otherwise be imposed - one that reflects the criminality of the offending and the subjective features of the offender - is reduced. This has clear implications for the integrity of the sentencing process. The law has determined to make this concession in the interests of the system as a whole. The victims groups we have talked to recognise this, and the majority support the application of the discount to ensure early pleas.[56]

The discount should be reflected in statute

9.42 The maximum sentence discount available for the entry of a guilty plea should be prescribed by statute. Setting the discount in statute will help ensure that the sentence discount for a guilty plea is consistently applied. It will set a clear incentive for defendants to enter an appropriate guilty plea while the matter remains in the Local Court. The statutory discount option received majority support from stakeholders,[57] though a minority preferred that it remain governed solely by the common law.[58]

9.43 The aim is to provide a clear and transparent regime. A transparent framework should address scepticism around whether maximum discounts are or will be applied for the entry of early pleas. It should also prevent the discount applying later in the process. Both of these factors have generated a real obstacle to the entry of guilty pleas in NSW.

9.44 From this perspective, we also consider that the court should disclose the quantum of discount given for the guilty plea, and give reasons where the maximum discount is not given. To this end, we repeat our recommendation that the court quantify the discount for the utilitarian value of a plea.[59]

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56. Victims roundtable, *Consultation EAEGP36*; Homicide Victims' Support Group, *Consultation EAEGP37*. A minority of attendees did not support a discount on sentence for an early guilty plea.

57. NSW Bar Association, *Submission EAEGP4*, 2, 8; Chief Magistrate of the Local Court of NSW, *Submission EAEGP5*, 4; NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 12; Legal Aid NSW, *Submission EAEAGP11*, 20; NSW Young Lawyers, Criminal Law Committee, *Submission EAEGP12*, 17.

58. Police Association of NSW, *Submission EAEGP2*, 23; NSW, Public Defenders, *Submission EAEGP8*, 8-9; Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission EAEGP9*, 6; NSW Police Force, *Submission EAEGP14*, 12.

59. NSW Law Reform Commission, *Sentencing*, Report 139 (2013).

The discount should have three clear tiers

Tier 1: 25% discount on sentence for guilty pleas entered in the Local Court

9.45 We are of the view that where a guilty plea is entered in the Local Court the maximum available discount available should be 25%. This is for two reasons:

- **Continuity of discount with summary matters:** We agree with stakeholders who expressed concern about the implementation of two separate discount systems. The Deputy Chief Magistrate of the Local Court of NSW has noted that implementation of a discount regime that exceeded the 25% maximum discount currently operating in the summary jurisdiction would essentially mean that the more serious the crime, the greater the available discount.

- **Public policy:** We do not believe that the discount needs to be overly generous to be compelling. A maximum discount of up to 40% could have negative public policy outcomes. This was the experience in WA where the original maximum discount on sentencing for fast tracked matters was 35% under the common law.[60] Public pressure and concern over the possibility that sentences could be imposed which did not accurately reflect the criminality of the act - and the desire for consistency in sentencing - resulted in the maximum available sentence discount being decreased to 25% by statute.[61]

Tier 2: 10% discount on sentence for guilty pleas entered after a matter exits the Local Court

9.46 As mentioned above, there is a current perception that the District Court can be overly flexible in the way it applies the maximum discount for the utilitarian benefit of an early guilty plea, and that a sentencing court will often apply the maximum discount (or close to it) to a plea entered late in proceedings. The problem is at present primarily caused by the uncertainty surrounding the original charge, and the fact that the prosecution and defence do not consider the charge and the evidence until late in the piece. This particular perception dilutes the impact of any maximum sentence, and undermines the utilitarian rationale of the discount on sentence for an early plea.

9.47 In our view the power of the maximum sentence discount in this scheme is its exclusivity. Subject to the exceptions in para 9.65 and 9.69 below, only defendants who enter a guilty plea in the Local Court would be able to access the maximum discount. Once a matter exits the Local Court, the available discount will be substantially less. We recommend that the maximum discount available for the utilitarian value of the plea after a matter exits the Local Court should be 10%. A reduction of this amount will ensure that the efficacy of the scheme is retained.

9.48 A 10% discount is not out of step with stakeholder views. The ODPP suggests that the maximum discount for guilty pleas entered once a matter has been listed for trial in the trial case management stream should be 12%.[62] The Chief Magistrate of the

60. *Moody v French* [2008] WASCA 67; 36 WAR 393.
61. WA, *Parliamentary Debates*, Legislative Council, 26 September 2012, 6521-6528.
62. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 8.

Local Court considers a 15% maximum for a second tier plea to be appropriate.[63] It is noted that the NSW Bar Association does not support a sizeable drop in discount once the matter leaves the early guilty plea stream.[64] There is also an argument that reducing the discount amount at this point in the process may reduce the number of guilty pleas entered at the arraignment stage, a factor which could be counter-productive to the key objective of encouraging guilty pleas.

9.49 We conclude, however, that the vigour of the scheme demands a meaningful drop in the available discount, and to this end we recommend that the discount for the utilitarian value of a guilty plea entered once the matter has left the Local Court be confined to a maximum of 10%.

Tier 3: 5% discount on sentence for guilty pleas entered on the day of trial

9.50 We were initially hesitant to apply *any* statutory discount to guilty pleas entered on the first day of trial or later. However, stakeholders have advised us that without any incentive to enter a plea at this point unnecessary trials would proceed. The ODPP suggested a maximum discount of 5% be available for this group. The NSW Bar Association does not agree with any maximum for this group, and considers that here, as above, judicial discretion should be unfettered.

9.51 However, our view is that the utilitarian value of a day-of-trial plea is quite limited. By the trial date significant preliminary work has already been done. Both defence and prosecution will have expended resources in preparation for trial, as would witnesses, experts and victims.

9.52 The final obstacle we have identified to the entry of an early guilty plea involves the defendant's reluctance to face up to his or her predicament.[65] Crucially, we note that a defendant will not enter a guilty plea where he or she is hopeful that the case will fall over due to the absence of a witness or lack of evidence. We recognise that a significant amount of day-of-trial pleas are likely to be entered in matters related to domestic violence or sexual assault, or both. Research conducted by BOCSAR supports the assertion that defendants in matters which contain a sexual assault and/or domestic violence related offence are less likely to enter a plea of guilty.[66] These offence types are also more likely to be withdrawn than the other offence types included in the BOCSAR research. It has been reported to us that day of trial guilty pleas occur in these matters where the defence strategy has been to wait until the day of trial to see if the witness/victim attends. Where the witness/victim attends, the defendant enters a guilty plea.[67] In our view a defendant who engages in this type of conduct should not be rewarded with a significant discount.

9.53 We note that a court can still make allowances (non-mathematical) in setting a sentence which reflects the defendant's remorse, his or her contrition, and

63. Chief Magistrate of the Local Court of NSW, *Submission EAEGP6*, 3.
64. Law Society of NSW and NSW Bar Association, *Consultation EAEGP28*.
65. See para 1.45.
66. C Ringland and L Snowball, *Predicators of Guilty Pleas in the NSW District Court*, Bureau Brief No 96 (NSW Bureau of Crime Statistics and Research, 2014).
67. Domestic and Family Violence, *Consultation EAEGP17*; NSW Office of the Director of Public Prosecutions, Witness Assistance Service, *Consultation EAEGP30.*

recognises assistance to the court and authorities. These allowances will remain available to a defendant in a day-of-trial plea. Despite our initial hesitation, we acknowledge the concern of stakeholders, however, and concede that some discount incentive for day-of-trial pleas should exist.

9.54 On balance, we suggest a maximum discount of 5% should apply to matters where a plea is entered on the first day of trial or after.

Recommendation 9.1: a three tiered statutory discount stream

(1) The *Crimes (Sentencing) Procedure Act 1999* (NSW) should set out statutory discounts that recognise the utilitarian value of guilty pleas.

(2) The statutory discounts should have three tiers:

(a) guilty pleas entered in the Local Court should receive a maximum discount on sentence of 25%

(b) guilty pleas entered after the matter leaves the Local Court should receive a maximum discount on sentence of 10%, and

(c) guilty pleas entered on the first day of trial or after should receive a maximum discount on sentence of 5%.

(3) The court should quantify the reduction in penalty given for the utilitarian value of the guilty plea.

The maximum discount should be referred to as the "ERD"

9.55 In our blueprint, the Local Court is identified as the earliest possible point to plead guilty and we tie the maximum discount closely to this. For this reason we recommend that the higher courts case management stream for sentencing be established and labelled the "Early Resolution with Discount" (ERD) stream. This makes it clear to defendants what they can expect when they enter a guilty plea in the Local Court.

Recommendation 9.2: early resolution with discount stream

The joint practice note in Recommendation 3.1 should establish an early resolution with discount stream in the Supreme and District Courts for matters where the defendant has pleaded guilty in the Local Court.

The discount is a maximum

9.56 We do not propose that a statutory regime remove the discretion of the court to apply a discount less than the maximum discount to matters where a guilty plea is entered under the ERD stream or at any other point. We do not propose to change the statutory rule that the discount given cannot be disproportionate to the nature and circumstances of the offence.[68] The sentencing judge in his or her discretion may even consider that, due to the high criminality of the conduct, no discount

68. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1A).

should apply, regardless of the timing of the plea. This principle is enunciated in the common law (see para 9.40).

9.57 We understand that by making the discount a maximum rather than a fixed amount, we may undermine certainty and not entirely dispel the potential for cynicism. However, there are some cases where the criminality is so serious that to apply a discount is simply unjust, and would seriously undermine public confidence in the criminal justice system.

9.58 We do, however, recommend that where the court exercises its discretion not to apply the maximum discount to ERD matters, the court must record its reasons for doing so. The reasons for departure should be absolutely clear.

Recommendation 9.3: court to give reasons why maximum discount not applied
Where the discount given for a guilty plea in the early resolution with discount stream is less than 25%, the court should record its reasons why the maximum discount was not given.

Exceptions to the three tiered approach

Exceptions to the cut off should be limited

9.59 We recognise that in some cases the maximum 25% discount should be available after the case has left the Local Court. However, in our view exceptions must be cautiously applied as they have the potential to undermine the regime and the usefulness of the discount.

9.60 We are mindful that the discount represents the utility value to the court of any early guilty plea. The discount for an early guilty plea etches into a sentence that the court has found otherwise reflects the criminality of the offence. Application of a discount should only occur where the entry of a guilty plea has produced a real utilitarian benefit to the court and the criminal justice system. The maximum discount should not apply where a discount is not genuinely warranted.

The current situation: the first available opportunity

9.61 Currently, a maximum or significant discount may still be given to pleas entered "late" in the criminal justice process, meaning after a matter has entered a superior court. The grant of a significant discount for a late plea may occur when:

- late disclosure of critical evidence by the prosecution occurs
- late plea negotiations result in a charge variation, or
- a change in Crown Prosecutor results in a new charge.

9.62 In all of these cases, a guilty plea is seen to be entered at the "first available opportunity", and some argue the maximum discount should still apply. The NSW Bar Association has also raised other circumstances where a late plea should still

generate a significant discount. These include where a person becomes fit to plead late in the process;[69] the defendant has been unable to access legal advice earlier; or earlier legal advice has since been corrected.[70] We review these below.

9.63 Stakeholders have pointed out to us that the automatic application of the proposed utilitarian discount regime has the potential to produce inequities, and that there should be further exceptions to capture the circumstances itemised above. We consider that the current circumstances that lead to a late guilty plea entered at the "first available opportunity" are symptomatic of the way the criminal justice system currently operates. We do not propose to dilute the impact of an exclusively available maximum discount on sentence for guilty pleas entered in the Local Court by instituting these types of exceptions to the proposed cut-off point. Instead we are proposing a whole of system response, which seeks to address the causes of "first opportunity" late pleas.

9.64 Under our proposed blueprint the ODPP will have reviewed the charge and the matter will generally commence on the most appropriate, rigorous charge.[71] While the matter is in the Local Court prosecution disclosure will have occurred,[72] and the parties will have already met in a case conference,[73] where any issues in dispute will have been resolved, including any further requisitions for evidence. Cross-examination may also occur in the Local Court.[74] The DPP has confirmed to us that continuity of carriage is to be a priority in any new system. These safeguards mean that generally it is unlikely that a guilty plea entered when the matter is in the superior court will in truth represent the first available opportunity that the defendant has had to enter a plea to that charge.

An early offer to plead to a lesser charge

9.65 An exceptional case arises where the defence offers to enter a plea to a charge which the ODPP rejects at or before the criminal case conference, and later either:

- the ODPP downgrades the charge, and the plea is taken (which should be very rare in our blueprint), or
- the defendant is found guilty of the lesser charge.

9.66 In such cases the maximum discount for what would have been the utilitarian value of that plea should still apply. The existence and timing of the defence offer should be recorded by the case conferencing certificate discussed in para 7.55-7.59.

9.67 This principle can be found in the case law discussed above (see para 9.40). This exception should not extend to situations where the defence has offered to enter a plea to a lesser charge that differs from the lesser charge ultimately accepted by the

69. For a detailed examination of fitness to plead and associated issues see NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Report 138 (2013).
70. Information provided by NSW Bar Association (10 April 2014).
71. See Chapter 4.
72. See Chapter 5.
73. See Chapter 7.
74. See Chapter 8.

prosecution or found by the court. This is for two reasons. First, as mentioned above, under our blueprint late variations to the charge should be extremely rare, so this set of circumstances should infrequently arise. Secondly, we do not want to widen the net so that the discount is available simply for offering to enter a plea to *any* lesser charge.

9.68 It has been suggested that the ODPP should be required to advise the defence on which alternative charges the ODPP may accept if a plea were to be offered. We do not accept this. The purpose of early charge advice and early intervention by senior prosecutors is to ensure that the charge which the ODPP initially certifies is the appropriate charge and one which the ODPP is confident to prosecute.

Should there be any further exceptions to the application of the statutory discount?

Fitness to plead

9.69 We recognise that issues of fitness are less straightforward. Fitness procedures under the *Mental Health (Forensic Provisions) Act 1990* (NSW) do not apply to preliminary or committal proceedings in the Local Court[75] and, as a consequence, fitness is rarely raised early in proceedings. In Chapter 6 we suggest that, when fitness is at issue under our blueprint, there should be an immediate referral to a fitness hearing from case management in the Local Court. However, fitness is generally raised when proceedings are in the District Court or Supreme Court.[76] Accordingly, if the court finds a person unfit to be tried, and the person subsequently becomes fit, proceedings will continue in the District Court or Supreme Court.

9.70 This affects only a small number of defendants. In 2011/12 the Mental Health Review Tribunal considered that 20% (9) of the 45 people found unfit were likely to become fit.[77] We do not know how many of this group did in fact become fit or how many entered a guilty plea on being found fit for trial.

9.71 Under our blueprint, a person who had been found unfit by the court and then later becomes fit to be tried, may enter a guilty plea on the matter recommencing in the higher court. We accept that this may be the first real opportunity the person has had to review the charge/s against him or her, and to enter an appropriate guilty plea. In this rare set of circumstances, there is a clear need to extend the higher discount to include those defendants that enter a guilty plea at the first mention after he or she becomes fit for trial.

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75. We have recommended that this be changed: NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Report 138 (2013) Recommendation 12.1.

76. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 4.

77. See NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Report 138 (2013) Table 6.1.

Access to legal advice

9.72 We understand that accessing legal advice can be an intimidating process for some defendants. For policy reasons, however, we cannot recommend an extension of the maximum discount where legal advice has not been sought. We are concerned that an exception of this type may encourage a defendant to delay or change legal representation, or that delay or change of representation may be used as a strategy to access the discount where it is otherwise not warranted.

9.73 The blueprint intentionally builds time to access legal advice into the early case management of a matter. Where a person does not qualify for Legal Aid, it is up to the person, where he or she has not done so already, to use that time to seek advice from a private practitioner.

Quality of legal advice

9.74 We consider that our proposed regime of early disclosure and criminal case conferencing should provide adequate opportunities for legal practitioners to give informed advice early to defendants.

Recommendation 9.4: when 25% discount available for late guilty pleas

The maximum 25% discount should be available only for pleas entered after a matter leaves the Local Court if:

(a) the defendant offered to plead guilty to a lesser charge in the Local Court, and that plea is later accepted by the prosecution or the charge is found at trial, or

(b) the defendant was found unfit to be tried and:

  (i) proceedings have recommenced after a finding of fitness, and

  (ii) the defendant enters a plea of guilty at the first appearance.

How should the statutory discount regime be implemented in NSW?

9.75 Below we broadly list the changes to legislation and procedural instruments that need to occur to set up the sentencing discount regime. There may be other residual statutes or protocols that also require amendment, and we recognise that our list is not exhaustive.

Table 9.1: Required amendments and inclusions for implementation of the ERD and trial case management streams

Legislation or authorising authority	Scheme	Proposed amendments
Criminal Procedure Act 1986 (NSW)	Statutory discount regime	**Division 3 Case management provisions:** add procedure if person pleads guilty in the Local Court. Add procedure for if person does not agree to enter a plea of guilty following the case conference.
Crimes (Sentencing Procedure) Act 1999 (NSW)	Statutory discount regime	**s 21A(3)(k) and s 22 Guilty pleas to be taken into account to be amended.** CSPA to incorporate the three tiered sentencing regime for the utilitarian value of a guilty plea.
Joint practice note	Instituting the Early Resolution with Discount stream	Formalise and recognise the sentencing stream when coming into the higher court from the Local Court as matters under the "early resolution with discount" stream.

10. Case management in the Supreme and District Courts

In brief

The need to ensure the progression of cases, and to continue to explore the possibility of a guilty plea, does not end once the case reaches the higher courts. There remains potential to identify guilty pleas earlier once a matter reaches the higher courts and to undertake better pre-trial case management to enable trials to progress with greater efficacy.

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The value of case management in the higher courts

10.1 The intention of our blueprint is to ensure, to the maximum extent possible, that matters that are to proceed on a guilty plea are identified as early as possible in the Local Court. When those matters come to the District or Supreme Court they should be entered into the "early resolution with discount" stream, and listed as soon as possible for a sentencing hearing.

10.2 We have considered "fast track" case management approaches used in England and Wales and in WA. We detail those in Appendix E. These measures are used to fast track to a sentencing hearing those matters identified as likely to result in a guilty plea. In our model, this work would be done in the Local Court before the matters come to the higher courts. In our view, this is a more efficient use of resources. The relevant features of those schemes are built into our Local Court processes in Chapter 6.

10.3 That said, opportunities to identify guilty pleas do continue in the higher courts, and there is considerable value in pre-trial measures that focus the issues and reduce trial time. We identified problems of lengthening trial times and increasing complexity for juries in our report on *Jury Directions*.[1] In that report we supported increasing the use of pre-trial management as a means of narrowing and focusing issues and we recommended reconvening the Trial Efficiency Working Group to identify further reform.

10.4 The legislative infrastructure for pre-trial disclosure and case management orders currently exists but it is underused. In this chapter we summarise current criminal procedure in the higher courts. We highlight areas that will be affected by our blueprint and suggest more extensive use of the existing powers.

Current pre-trial procedure in the higher courts of NSW

10.5 The *Criminal Procedure Act 1986* (NSW) (CPA) provisions on indictable proceedings apply to the higher courts. Each court has practice notes on criminal procedure, which underpin the legislation to create distinct pathways for proceedings in each court.

Key legislative provisions

10.6 The key pre-trial legislative provisions are contained in Chapter 3 of the CPA, Part 3 Division 3 (encompassing s 134-145F). The current form of these provisions derives from the work of the Pre-trial Efficiency Working Group and the most recent amendments were made in 2013 to clarify and make mandatory a system of pre-trial disclosure for both parties.

10.7 The key aspects of the regime are:

- pre-trial hearings for the purpose of sorting out legal and other issues (s 139)
- pre-trial conferences (s 140), and
- a regime of pre-trial mandatory prosecution and defence disclosure (s 141-143).

Pre-trial hearing and conference (CPA s 139-140)

10.8 Under s 139 of the CPA, the court may direct a pre-trial hearing. Such hearings can be held for the purpose of making orders or directions aimed at efficient trial management, including dealing with:

- any objection to the indictment
- any issues of formal proof
- any advance rulings on evidence admissibility or other issues of evidence
- any submission that the case should not proceed to trial, and

1. NSW Law Reform Commission, *Jury Directions*, Report 136 (2012) [1.45]-[1.56], Ch 7.

- any question of law that might arise at the trial.

10.9 The court may also order a pre-trial conference and a timetable for pre-trial disclosure. Section 140 allows the court to order, on application or its own motion, that the parties hold a pre-trial conference for the purpose of discussing issues.

10.10 In practice, it appears that this level of case management in the District Court rarely occurs, and that this is well-known within the legal profession.[2] Present resourcing levels simply do not allow for case management procedures so matters are usually instead arraigned at first mention and set down for trial.

Mandatory pre-trial disclosure (CPA s 141-144)

10.11 The CPA provides for a regime of mutual disclosure, which applies unless the court orders otherwise. It operates in conformity with a practice note timetable or a specific timetable order.

10.12 Under s 142(1), the prosecutor must serve a full disclosure brief including: the indictment and statement of facts; all statements of witnesses who will be called; all documents and exhibits to be adduced; all summaries, charts and other aids proposed to be used; all reports of expert witnesses; and any documents or information provided by law enforcement or in the prosecutor's possession that could be relevant.

10.13 There are sanctions for non-compliance with statutory disclosure, including the exclusion of material at trial.[3] Failure of the defence to disclose can lead to an unfavourable inference at trial.[4] Section 148 of the CPA gives the court the ability to waive the disclosure requirements if it is in the interests of the administration of justice to do so. Like the provisions enabling pre-trial provisions above, we have been told that the District Court often waives disclosure provisions.

10.14 These disclosure provisions were intended to "facilitate the course of justice" and to "narrow the contested issues at trial."[5] The purpose of disclosure at this particular stage is not necessarily to encourage guilty pleas, although disclosure may facilitate that end result.

The impact of our blueprint on criminal procedure in the higher courts

10.15 The proposed reforms to criminal procedure for indictable matters in the Local Court aim to ensure that proceedings commence on the most appropriate charge;[6] that

2. NSW, *Parliamentary Debates*, Legislative Council, 20 March 2013, 18 859. It was noted that, with reference to the case management provisions in the *Criminal Procedure Act 1986* (NSW): "There is little evidence to suggest that the provisions are being used, especially in the District Court."
3. *Criminal Procedure Act 1986* (NSW) s 146.
4. *Criminal Procedure Act 1986* (NSW) s 146A(2)(b).
5. NSW, *Parliamentary Debates*, Legislative Council, 20 March 2013, 18 858.
6. See Chapter 4 for a review of early charge advice.

they bring forward prosecution disclosure;[7] and mandate preliminary discussions between the defence and prosecution to refine the issues.[8] By the time a matter is progressed to the District Court or the Supreme Court for trial the following should have already occurred:

- **Prosecution disclosure:** Early charge advice will have relied upon an initial brief of evidence. The prosecution will provide the brief of evidence to the defence after the charge certification is filed with the court (if not before).
- **Criminal case conferencing:** Unless a guilty plea is entered, all parties will be directed to attend a mandatory criminal case conference. Where a matter has not been identified as likely to resolve in a guilty plea, the objective of the conference will be to define the issues for trial. A Crown Prosecutor or senior prosecutor with authority to negotiate will attend the conference.
- **Continuity of carriage:** In most instances, the evidence will have been reviewed while the matter was in the Local Court by the Crown Prosecutor or senior prosecutor who has carriage of the matter to trial.
- **Entering of appropriate guilty pleas:** The defendant will be advised that guilty pleas entered while the matter remains in the Local Court will attract a maximum discount of 25% for the utilitarian value of the plea. This discount will not be available where a guilty plea is entered after the matter enters the higher court, where the maximum available sentence discount for the entry of a guilty plea will be capped at 10%.

10.16 The operation of the blueprint in the Local Court is intended to decrease the rate of late guilty pleas received in the District Court.

The District Court practice note

10.17 Matters committed from the Local Court to the District Court at Sydney, Sydney West, Newcastle, East Maitland, Gosford, Wollongong and Lismore follow these steps:

- Defendants committed for trial in Sydney are committed to the last sitting day of the week following committal (usually a Friday) for first mention in the arraignment list (this procedure is followed as closely as possible by the other courts mentioned above). In regional areas the CPA prescribes a period of up to four weeks between committal and arraignment.[9]
- Where a defendant is committed for sentence, the magistrate may order a pre sentence report. This is encouraged in order to prevent delay in the District Court.[10]

10.18 The purpose of the first mention in the District Court is to ensure that a defendant is represented, and that case management directions under the CPA are made

7. See Chapter 5 for a review of the proposed disclosure regime.
8. See Chapter 7 for a review of the proposed mandatory criminal case conference program.
9. *Criminal Procedure Act 1986* (NSW) s 129(2).
10. District Court of NSW, *Criminal Practice Note 1 - Listing Procedures at Courts with Full Time Sittings*, 18 December 2009 [1.3].

(where required).[11] Where the defendant is represented and the prosecution can confirm the probable charge, a trial date may be fixed at this time.[12] Where legal representation needs to be sought, the judge is to set a date for arraignment within eight weeks.[13]

10.19 Where the defendant indicates a plea of not guilty at arraignment, the list judge will normally fix the matter for trial. The prosecution is to provide suitable dates for witnesses, and practitioners are to provide estimates for the length of trial and any special requirements for the trial at this time.[14]

10.20 An application to vacate the hearing date of a trial is to be made as soon as possible, and if possible, at least ten days before the listed trial date.[15]

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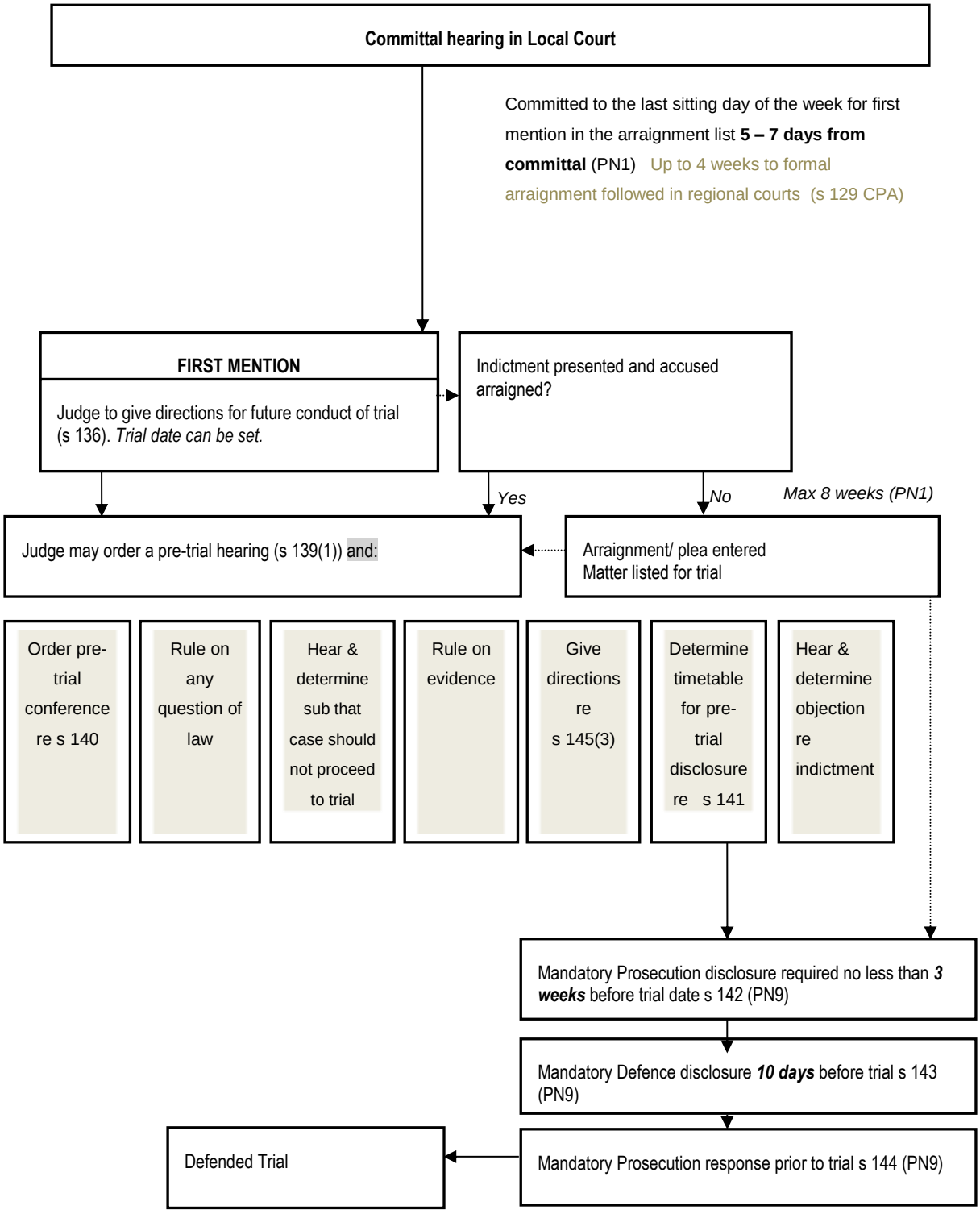
11. *Criminal Procedure Act 1986* (NSW) s 136, s 139.
12. District Court of NSW, *Criminal Practice Note 1 - Listing Procedures at Courts with Full Time Sittings*, 18 December 2009 [5].
13. District Court of NSW, *Practice Note 1 - Listing Procedures at Courts with Full Time Sittings*, 18 December 2009 [2]-[3].
14. District Court of NSW, *Practice Note 1 - Listing Procedures at Courts with Full Time Sittings*, 18 December 2009 [5].
15. District Court of NSW, *Practice Note 1 - Listing Procedures at Courts with Full Time Sittings*, 18 December 2009 [6].

Figure 10.1: Criminal procedure in the District Court of NSW



Source: District Court of NSW, Criminal Practice Note 1 - Listing Procedures at Courts with Full Time Sittings, 18 December 2009. Section numbers refer to provisions of the Criminal Procedure Act 1986 (NSW)

Issues in practice in the District Court

Late guilty pleas and court listing practices

10.21 Currently, 53% of matters that are committed for trial in the District Court resolve instead in a guilty plea and the majority of those are entered on the first day of trial.[16] Looked at another way, 49% of matters that proceed to the first day of trial resolve in a "steps of the court" guilty plea. The District Court lists matters for trial with this in mind. It lists double the number of matters for trial than it can actually accommodate. Where necessary a raft of acting judges are called in to provide a cover for the over-listing. This may also mean that where more matters proceed to trial than resolve in a guilty plea, some matters may be stood over to the following week or so, although ultimately all matters are reached (at least in the metropolitan areas).

10.22 We expect that the current listing practices of the District Court – whereby matters are over-listed on the understanding that up to half will resolve in a plea before trial – will need to be revised to align with the prospect that most matters listed for trial under the blueprint will proceed to trial.

Delay

10.23 The NSW Bureau of Crime Statistics and Research (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 the median number of days between the committal hearing and the outcome (whether trial or sentencing). BOCSAR data shows that delay for matters finalised by trial in the District Court has increased incrementally since 2010. In 2008, matters that proceeded to trial took a median of 238 days from the committal to the District Court outcome, compared to a median of 288 days in 2013. Delay has also steadily increased for matters finalised by sentencing only. In 2008, these matters took a median of 142 days from committal to sentencing, compared to 164 days in 2013.[17]

10.24 We expect that implementing the blueprint will result in fewer matters being committed for trial, and more being committed for sentence in the District Court. This should have a positive impact on delay that has been caused by an influx of matters for trial in the District Court. It has been noted (see para 10.21) that up to half of the matters currently committed for trial resolve instead in a late guilty plea in the District Court, most of which are entered on the day of trial. Under our blueprint, a significant number of these pleas should occur in the Local Court, freeing up District Court resources to manage the more complex matters, and those matters actually destined for trial.

16. See Figure 2.5 and Figure 2.10.
17. See Figure 2.14.

Case management

10.25 We do not know how many adjournments or preliminary hearings are held in the District Court, but we are told that the majority of cases proceed to trial with only a single preliminary appearance at a callover that lists the matter for trial.

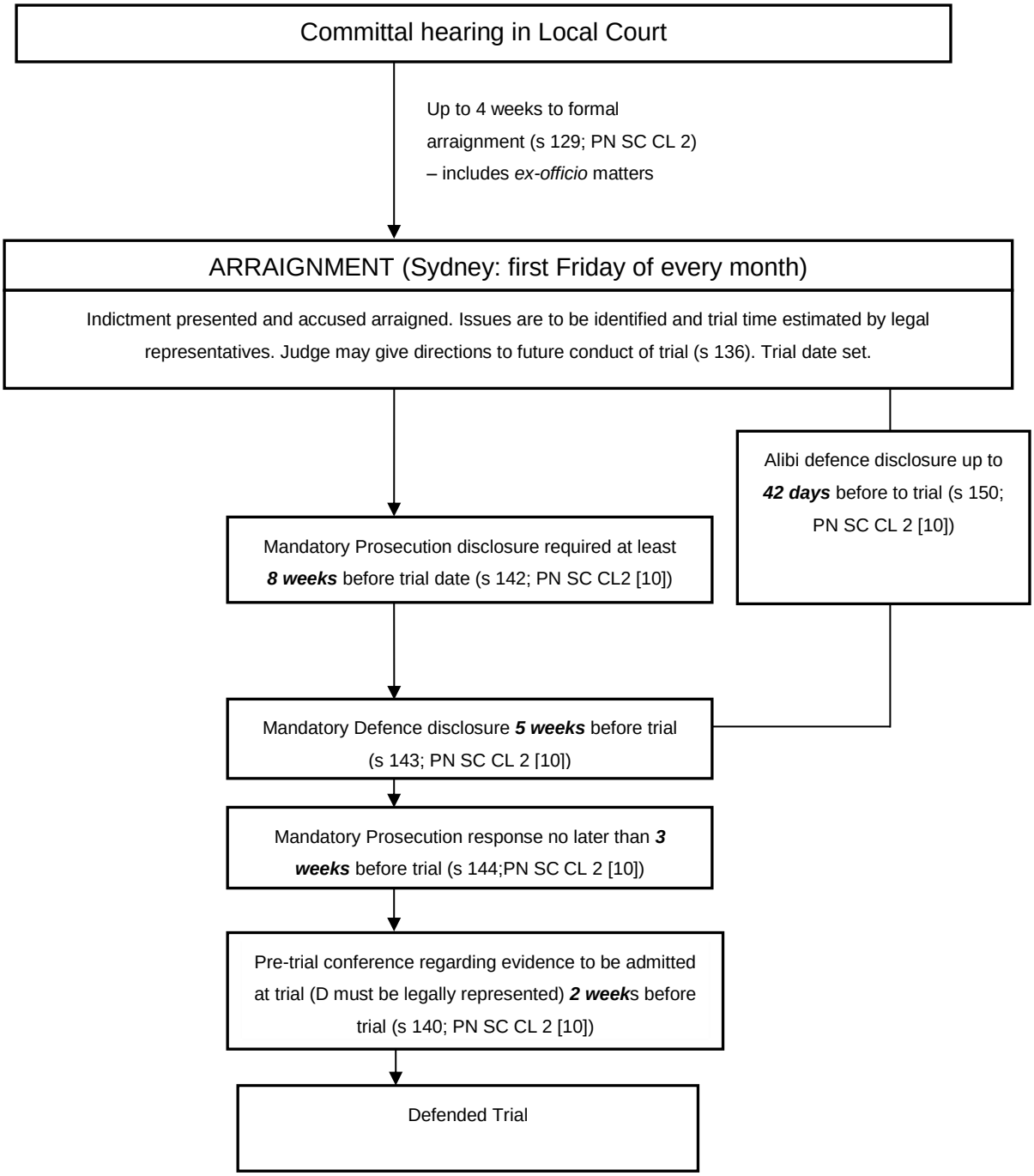
10.26 We are told that the sheer volume of matters committed for trial in the District Court prevents any meaningful case management. Decreasing the volume of matters committed for trial should free up the court and permit a greater degree of early case management, with the effect that the court runs more efficiently and trials are shortened. It may also mean that more attention will be given to defence disclosure than at present.

Disclosure

10.27 The statutory mandatory disclosure regime has little effect upon our reference to encourage appropriate early guilty pleas. However, implementation of the blueprint may impact upon the level of prosecution disclosure required by statute, as much of the material outlined in s 143(1)(a)–(m) of the CPA will have already been disclosed.

The Supreme Court practice note

Figure 10.2: Criminal procedure in the Supreme Court of NSW



Source: Supreme Court of NSW, Practice Note SC CL 2 - Supreme Court Common Law Division – Criminal Proceedings, 29 September 2014; Criminal Procedure Act 1986 (NSW)

Issues in practice in the Supreme Court

Late guilty pleas

10.28 Late guilty pleas frequently occur in matters heard in the Supreme Court. Of all matters committed for trial in the Supreme Court and finalised in 2013 (107), 37% (40) resolved in a guilty plea. Late guilty pleas constituted the overwhelming majority (78%) of all guilty pleas entered in the same period.

Table 10.1: Matters committed for trial or sentence in the Supreme Court finalised in 2012 and 2013

YEAR	Committed for sentence	Committed for trial	Proceeded to trial	Committed for trial but finalised by sentence	Committed for trial but no charges proceeded with	Committed for trial but otherwise disposed of
2013	11	107	59	40	3	5
2012	20	124	77	34	4	9

Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Courts Statistics (2012-2013)

10.29 We recognise that the volume and nature of matters dealt with in the Supreme Court is markedly different to those dealt with in the District Court. The Supreme Court deals with the most serious matters in the criminal calendar. For that reason, it may be argued that the obstacle that a person withholds a plea to postpone the inevitable penalty is more likely to apply.[18] We have no direct evidence of this, but the frequency with which people charged with murder enter a day-of-trial plea may support this proposition. Our blueprint cannot fully address this obstacle.

10.30 As with proceedings in the District Court, we do however envisage a decrease in the number of late guilty pleas in the Supreme Court once the blueprint is implemented. For example, early allocation of senior prosecutors, and the requirement that prosecutors and defence practitioners with authority to negotiate attend the criminal case conference, should lead to the parties identifying any partial defence – such as substantial impairment in a murder case – while the matter is in the Local Court.[19] This means that, where a defence is accepted by the prosecution, the defendant may enter a guilty plea earlier in the proceedings than currently occurs. Where a plea is not entered, early meaningful discussions should enable the parties to meet the mandatory disclosure requirements of the CPA[20] in

18. See para 1.45
19. For an example of late identification of a possible substantial impairment defence see: *R v Hunter* [2013] NSWSC 1713; *R v Kaewklom (No 1)* [2012] NSWSC 1103 [7]-[44].
20. *Criminal Procedure Act 1986* (NSW) s 143(1)(g), s 151; *Criminal Procedure Regulation 2010* (NSW) cl 20.

preparation for trial within the timetable set by the court,[21] which will increase court efficiencies.

Delay

10.31 BOCSAR reports that the median delay in 2013 was 323 days in the Supreme Court.[22] Accordingly, matters committed for trial take approximately 11 months from committal to disposal in the Supreme Court. This length of time is similar to that recorded in 2012, where it took a median of 336 days for matters to be disposed of in the Supreme Court.[23]

10.32 Implementation of the blueprint, particularly the inclusion of the criminal case conference where parties can refine the issues for trial, should decrease the delay currently experienced within the court.

Proposed measures for the higher courts

A trial case management stream

10.33 In Chapter 9 we propose the introduction of a sentencing stream – to be called the "early resolution with discount" stream - and a trial case management stream for matters that enter the higher courts.

10.34 The trial case management stream should begin once a matter has progressed through criminal case conferencing and there has not been a guilty plea. In the Supreme Court this will have limited impact. The small number of very serious or complex cases in the Supreme Court are, we are told, managed well in the Supreme Court. The court and counsel take a practical approach and are able to identify easily those cases which require additional management. The District Court has much higher volumes and faces, for the reasons identified earlier, a much greater challenge.

Complex case management stream in the District Court

10.35 We noted in our report *Jury Directions* that there was considerable opportunity to use the pre-trial case management provisions to reduce trial length and to identify the nature of the case early so juries could find it much easier to perform their functions.[24]

10.36 The District Court, we suggest, might also further use the provisions of the CPA to explore the possibility of a complex matters stream. Matters involving multiple defendants or complex evidence may usefully be more actively managed. Allocation

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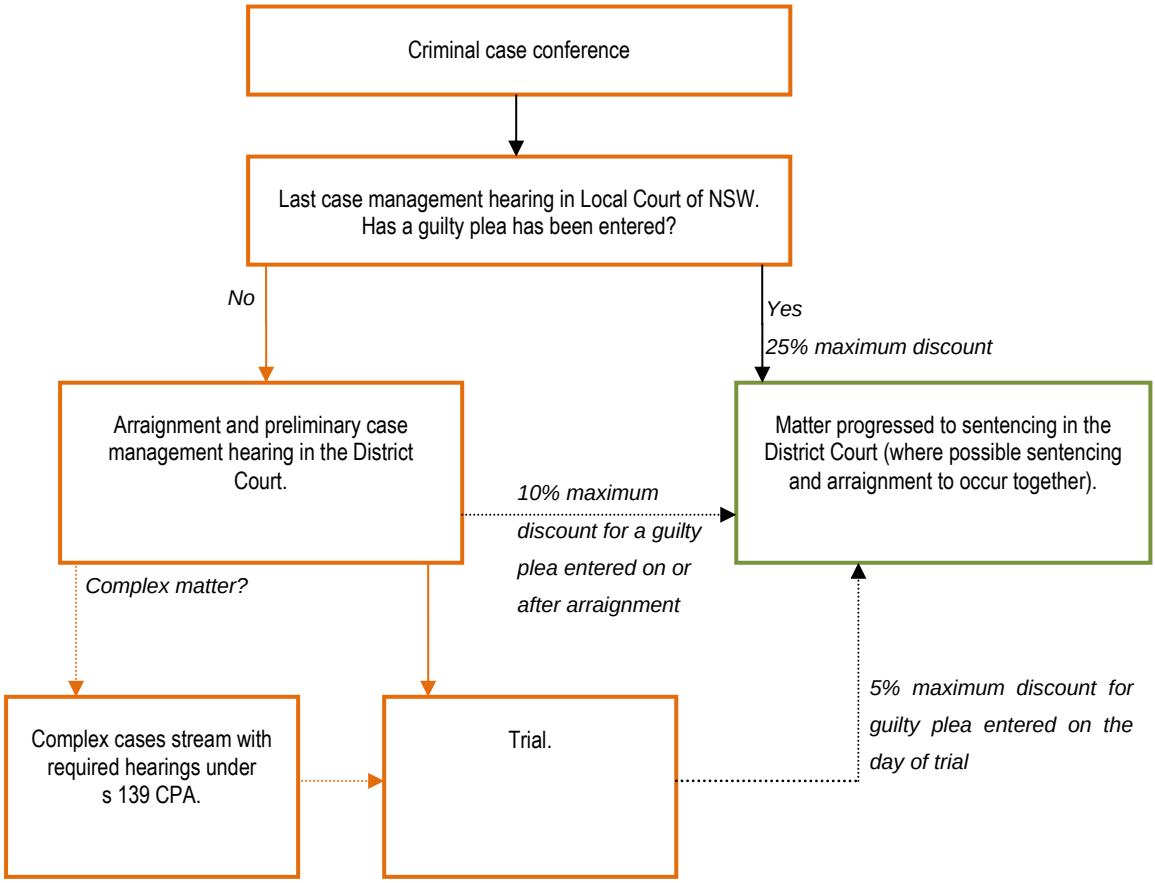
21. Supreme Court of NSW, *Practice Note SC CL 2 - Supreme Court Common Law Division – Criminal Proceedings*, 29 September 2014.
22. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2013* (2014) Table 3.14a.
23. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2012* (2013) Table 3.14a.
24. NSW Law Reform Commission, *Jury Directions*, Report 136 (2012) [7.42].

to a complex matters stream – whether by the trial judge or a specialist list judge - could use the CPA powers effectively to identify and resolve issues pre-trial.

10.37 Below we give an outline of how matters in this stream should progress in the District Court. Primarily, we encourage the court at first appearance/arraignment to divide these matters into complex matters (requiring the use of the case management provisions of the CPA) and straightforward matters, ready and appropriate to list for trial.

10.38 As we do not generally propose any significant departure from current practice and procedure, we simply provide a framework for the District Court to consider.

Figure 10.3: A suggested framework for progressing matters in the trial case management stream in the District Court of NSW



Managing disclosure in the District Court

10.39 The current practice note makes little use of pre-trial hearings, and leaves pre-trial disclosure to commence very late in the piece - three weeks before trial. This reflects the current practicalities of the allocation of prosecution and defence counsel, and the lack of resources and other pressures placed on the court. By then it is too late to explore any practical possibility of a guilty plea in a reasonable timeframe. The present system virtually encourages day-of-trial pleas.

10.40 We are not confident that pre-trial disclosure is operating in the way envisaged.

10.41 Continuity of lawyers, and early preparation of the case in the Local Court, should mean that cases coming to the District Court for trial management are much better understood than previously. Real opportunities to identify and enter early guilty pleas should have already been fully explored. Further prosecution disclosure may be a prompt, and the need to identify the defence in terms of s 142 of the CPA may also focus the defendant and the prosecution further on a guilty plea. If this is to be effective, the timetable for pre-trial disclosure needs to be well advanced. In addition, any trial issues, such as evidence admissibility (resolution of which may also encourage pleas), should be identified and resolved early.

10.42 From this perspective the current timetables for District Court case management should be moved forward.

10.43 Consistent with our view that there should be a single practice note governing proceedings on indictment, we consider that Supreme and District Court proceedings should be broadly aligned, though differences may be necessary to take account of differing volumes and the nature of the cases dealt with in each jurisdiction.

Recommendation 10.1: case management in the Supreme and District Courts

(1) The joint practice note in Recommendation 3.1 should provide for a trial case management stream in the Supreme and District Courts. The timetables and events may differ for each court but should be broadly aligned.

(2) The joint practice note should move the current timetables for case management and pre-trial disclosure in the Supreme and District Courts forward to allow identification of any further guilty pleas, and to use pre-trial orders more effectively to narrow the issues for trial.

(3) The District Court should establish a complex trial management stream to assist in more actively managing complex matters, including multi-defendant matters.

11. Victims and the indictable criminal justice system

In brief

Victims experience a number of problems with the current system, including a lack of information, inconsistent consultation on charge negotiations and substantial sentence discounts for late guilty pleas or pleas to changed charges. We consider that the blueprint will provide significant improvements for victims. We recommend that the Office of the Director of Public Prosecutions hold a conference with the victim before the criminal case conference, and that the Prosecution Guidelines be updated to reflect this. We also propose measures to improve communication between prosecuting agencies and victims, including training and information provision.

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11.1 Victims of crime experience the criminal justice system from a unique perspective – they are most directly impacted by the offence being prosecuted, yet they are not a party to the prosecution. The purpose of this chapter is to describe our blueprint for the indictable criminal justice system as it relates to victims of indictable offences. We refer throughout the report to the impact on victims of particular parts of the blueprint, but this chapter seeks to take a focused approach.

11.2 In preparing this chapter we consulted with a range of victims' representative groups, as well as victims themselves. A clear, consistent theme emerged from these consultations – victim stakeholders want early and regular engagement with the prosecutor. They want victims to be told of the decisions the prosecutor is making and why these decisions are being made. In our view the blueprint will improve victims' experience with the system, although there is still more that can be done by way of communication and engagement.

11.3 This chapter looks only at matters prosecuted on indictment by the NSW Office of the Director of Public Prosecutions (ODPP). It does not deal with victims of Commonwealth offences that are prosecuted by the Commonwealth Director of Public Prosecutions. Many Commonwealth offences are less likely to have a clearly identifiable victim, such as preparatory terrorism offences, drug importation offences, fraud or regulatory offences. The nature of Commonwealth offences means that the vast majority of individual victims of indictable offences will come into contact with the ODPP.

11.4 This chapter canvasses victims' interaction with the current criminal justice system and the problems that can arise. It then moves on to consider what might change for victims under our blueprint. Finally, we consider some suggestions for reform to improve victims' experiences.

How do victims currently interact with the indictable criminal justice system?

11.5 The victim's first point of contact with the criminal justice system will usually be with a police officer. The NSW Police Force (NSWPF) has carriage of the matter during the investigation stage and in the laying of the charge, and sometimes in the first and second appearances in the Local Court. Once it is established that the offence should be dealt with on indictment, the ODPP will become involved. The victim's primary contact will then usually be with the ODPP until the conclusion of the case.

11.6 Victims of indictable offences include people who have been subject to theft, property damage, physical or psychological harm and family members of homicide victims. Some victims' rights apply to all victims of crime, whereas others only apply where the victim has suffered specified types of harm or was the victim of a certain type of offence. The extent of a victim's interaction with the indictable criminal justice system, then, will depend on the type of harm suffered by the victim as well as their preferred level of involvement. Not all victims may wish to participate in the prosecution, and unless they are required as a witness there is no obligation for them to do so.

11.7 Figure 11.1 shows the current indictable criminal justice system as it applies to victims. Not all of these steps may occur, and not necessarily in the order we have set out. In particular, the defendant may plead guilty at any stage after the charge is laid, at which point the matter would move straight to sentencing. Generally, however, if the matter proceeds to trial, a victim's interaction with the criminal justice system might occur at the following stages.

11.8 **Police investigation**: The victim will usually come into contact with police during or shortly after an offence is committed when the police are called to the scene, or when the victim makes a complaint to police. Depending on the nature of the offence, police may conduct an initial investigation at this time, such as taking a statement from the victim, or collecting physical evidence. Under NSWPF guidelines the victim is to be given a victim's card, which includes the name and contact details of the police officer assigned to the matter, and contact details for the Victims Access Line. The victim is to be contacted within 7 days to be informed about how the matter is to be progressed.[1]

11.9 For some offences an investigation may be required. If the police proceed with an investigation, the victim is to be given a copy of his or her statement and kept informed of the progress of the investigation at least every 28 days, until the investigation is completed.[2]

11.10 **Arrest and laying the charge**: The victim is to be informed if the suspect is arrested and charges are laid. The victim is also to be informed if the police decide not to lay charges.[3]

11.11 **Bail**: If the defendant makes an application for bail, the bail authority will consider whether the defendant would endanger the safety of the victim if released.[4] Conditions may be imposed on the grant of bail if necessary.[5] In addition, recent amendments to the *Bail Act 2013* (NSW), to commence on proclamation, require the bail authority to consider the views of the victim or any family member of the victim (where available) in the case of serious offences, to the extent relevant to a concern that releasing the defendant on bail would endanger the safety of the victim, individuals or the community.[6]

11.12 **Appearances in the Local Court**: Victims should be kept informed of the date of any appearances in the Local Court prior to the committal hearing, and the outcome of those hearings. Victims should not be required to attend hearings unless the court directs.[7]

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1. NSW Police Force, *Customer Service Guidelines* (2011) 6; NSW Police Force, *Initial Police Response,* Victims of Crime Fact Sheet 4 (2002) 1.
2. NSW Police Force, *Customer Service Guidelines* (2011) 6; NSW Police Force, *Initial Police Response,* Victims of Crime Fact Sheet 4 (2002) 2.
3. *Victims Rights and Support Act 2013* (NSW) s 6.5.
4. *Bail Act 2013* (NSW) s 17(2).
5. *Bail Act 2013* (NSW) s 23-24.
6. *Bail Amendment Act 2014* (NSW) sch 1 [8], inserting *Bail Act 2013* (NSW) s 18(1)(o).
7. *Victims Rights and Support Act 2013* (NSW) s 6.9.

11.13 **Committal hearing**: Victims should be kept informed of the date of the committal hearing, and outcome. The defendant may make an application to cross-examine a prosecution witness under s 91 or s 93 of the *Criminal Procedure Act 1986* (NSW). The Act places limits on when a victim of child sexual assault or serious personal violence may be cross-examined at a committal hearing. As we discuss in Chapter 8, successful applications for cross-examination are unusual.

11.14 **Information about the case**: Under the ODPP's Prosecution Guidelines, victims are to have the prosecution process and their role in it explained to them at an early stage of the proceedings.[8]

11.15 **Conference with prosecutor**: The ODPP's Prosecution Guidelines state that the victim is to have a conference with the prosecutor at the earliest possible opportunity before all court hearings.[9]

11.16 **Charge negotiations**: Charge negotiations between the prosecution and defence may occur at any point in the proceedings. The detail of the prosecution's obligations to the victim when charge negotiations are conducted is discussed in the next section. Generally, the prosecutor should obtain the views of the victim before charge negotiations are agreed upon.

11.17 **Trial**: Victims of crime may wish to attend the trial. They must attend if they are to give evidence but this will limit the parts of the trial they are permitted to view.

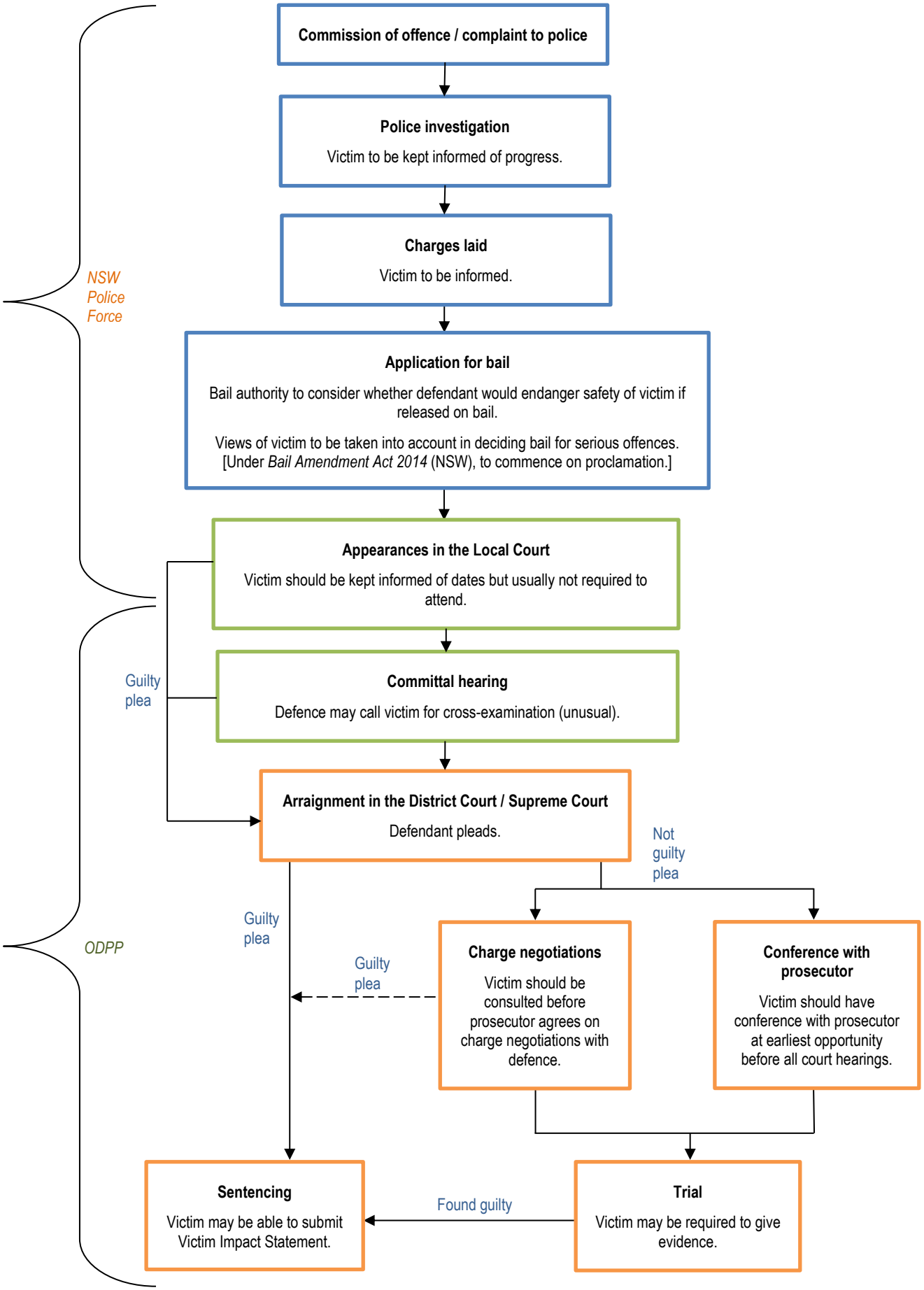
11.18 **Sentencing**: If the defendant pleads guilty or is found guilty at trial, the victim may be able to submit a Victim Impact Statement (VIS) for the court to take into consideration. A VIS may only be submitted for:

- offences involving death or actual physical bodily harm, or actual or threatened violence
- offences where there is a higher maximum penalty if the offence results in actual physical bodily harm or death, and
- prescribed sexual offences.[10]

11.19 Recent amendments now permit the court to consider a VIS given by a family member of a deceased victim, and to take it into account when determining the punishment for an offence. This is on the basis that the harmful impact of the deceased's death on the deceased's immediate family is an aspect of harm done to the community.[11]

8. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 19.
9. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 19.
10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2).
11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(4), amended by *Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014* (NSW) sch 1 [1].

Figure 11.1: Victim's interaction with the current indictable criminal justice system



Prosecution obligations regarding victims

11.20 Once the ODPP takes over an indictable prosecution from the NSWPF, it will be responsible for liaising with the victim until the conclusion of the case. The ODPP's obligations are found in three places: the Charter of Victims Rights, the ODPP's Prosecution Guidelines and the *Crimes (Sentencing Procedure) Act 1999* (NSW) (CSPA). The obligations contained in these documents overlap in places.

Charter of Victims Rights

11.21 The Charter of Victims Rights is given statutory force by the *Victims Rights and Support Act 2013* (NSW). It applies to "victims of crime"; namely, a person who suffers harm as a direct result of an act committed by another person in the course of a criminal offence.[12] "Harm" can include physical harm, psychological or psychiatric harm, or deliberate taking, destruction of or damage to the person's property.[13] If the person dies as a result of the act, the person's immediate family are considered victims of crime for the purpose of the Charter.[14]

11.22 The Charter governs the treatment of victims in the administration of the affairs of the State as far as practicable and appropriate.[15] It places responsibility on agencies exercising official functions in the administration of the affairs of the State to comply with the Charter, to the extent that it is relevant and practicable to do so.[16]

11.23 Relevant to the prosecution of indictable offences, the Charter states that victims have the right to:

- be informed in a timely manner about the prosecution, including the charges laid, any decision to modify or not proceed with the charges, the date and place of the hearing and the outcome of the hearing
- be consulted about a decision to modify or not proceed with the charges, or to accept a guilty plea to a less serious charge in return for a full discharge of the other charges, if the defendant is charged with a serious crime that involves sexual violence or that results in actual bodily harm or psychological or psychiatric harm to the victim[17]
- be informed about the trial process and the role of the victim as a witness, where relevant
- be relieved from attending preliminary hearings or committal hearings unless the court otherwise directs
- have their need for protection put before a bail authority by the prosecutor in a bail application by the defendant

12. *Victims Rights and Support Act 2013* (NSW) s 5(1).
13. *Victims Rights and Support Act 2013* (NSW) s 5(2).
14. *Victims Rights and Support Act 2013* (NSW) s 5(3).
15. *Victims Rights and Support Act 2013* (NSW) s 7(1).
16. *Victims Rights and Support Act 2013* (NSW) s 7(2).
17. The exception to this is where the victim has indicated that he or she does not wish to be consulted, or the whereabouts of the victim cannot be ascertained after reasonable inquiry.

- be informed about any special bail conditions imposed on the defendant that are designed to protect the victim or the victim's family
- be informed about the outcome of a bail application if the defendant has been charged with sexual assault or other serious personal violence, and
- have access to information and assistance so they can prepare a VIS.[18]

ODPP's Prosecution Guidelines

11.24 The victim obligations contained in the ODPP's Prosecution Guidelines can be broadly divided into two categories: an obligation to provide information, and an obligation to consult with victims.

Table 11.1: Victim obligations under the NSW ODPP's Prosecution Guidelines

Obligation to inform	Obligation to consult
Explain to the victim at an early stage of the proceedings the prosecution process and their role in it. (Guideline 19)	Consult with the victim and police officer-in-charge where the prosecutor seeks to discontinue the proceedings. (Guideline 7)
Make contact with the victim and provide ongoing information about the progress of the case. (Guideline 19)	Consult with the victim and police officer-in-charge where the charge proposed to be laid in the indictment is reduced in scope or severity from the committal charge. (Guideline 9)
Inform the victim in a timely manner of charges laid or reasons for not laying charges; any decision to change, modify or not proceed with charges laid or to accept a plea to a less serious charge; the date and place of the hearing; and the outcome of proceedings. (Guideline 19)	Consult with the victim before a decision to change, modify or not proceed with charges laid, or to accept a guilty plea to a lesser charge, where the offence involves sexual violence or results in actual bodily harm, mental illness or nervous shock to the victim. (Guideline 19)
Conduct a conference with the victim at the earliest available opportunity, to inform the victim of charge negotiations and to discuss any agreed statement of facts. (Guideline 19)	Consult with the victim and police officer-in-charge about the acceptance of a guilty plea, the contents of a statement of agreed facts where reference to substantial and otherwise relevant and available evidence is proposed to be omitted, or a decision about placing offences on a Form 1. (Guideline 20)

11.25 ODPP lawyers and, where appropriate, the Crown Prosecutor, are to provide ongoing information to the victim about the progress of the case. This includes the charges laid, the date for hearing the charges and the outcome of the proceedings. This obligation applies whether or not the victim has requested to be kept informed.[19]

11.26 A conference with the victim should be held at the earliest available opportunity. Conferences serve a dual purpose – to obtain information from the victim about

18. *Victims Rights and Support Act 2013* (NSW) s 6.
19. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 19.

evidentiary issues (where the victim is also a witness), and to inform victims about the proceedings. Conferences should also be held to inform the victim about charge negotiations and to discuss any agreed statement of facts.[20]

11.27 The ODPP must seek the views of the victim and police officer-in-charge at the outset of formal charge negotiation discussions before it communicates any formal position to the defence, and must record them on the ODPP file.[21] Views of victims will be considered and taken into account in making decisions about prosecutions, but significantly they are not determinative.[22] It is the general public interest, rather than any individual interest of the victim, that the prosecution must serve.[23]

11.28 For matters that are in the District Court or Supreme Court, if the victim or police officer-in-charge objects to the proposed changes, the Crown Prosecutor should consult the Senior Crown Prosecutor or Deputy Senior Crown Prosecutor, or in regional areas the most senior Crown Prosecutor available, or if appropriate the Director or a Deputy Director.[24]

11.29 The victim must be notified of the prosecutor's final decision about charge negotiations in a timely manner.[25]

11.30 The prosecutor's obligations to victims are scattered throughout the Prosecution Guidelines and are not altogether consistent in places. They are provided for in Guideline 7 (Discontinuing Prosecutions), Guideline 9 (Finding Bills of Indictment), Guideline 19 (Victims of Crime; Vulnerable Witnesses; Conference) and Guideline 20 (Charge Negotiation and Agreement; Agreed Statement of Facts; Form 1).

11.31 Guideline 19 reflects the requirement in the Charter of Victims Rights that victims be consulted before a decision is made to change, modify or not proceed with charges laid, or to accept a guilty plea to a lesser charge, where the offence involves sexual violence or results in actual bodily harm, mental illness or nervous shock to the victim. Guidelines 7 and 20, on the other hand, seem to suggest that the views of all victims be sought before discontinuing a prosecution or accepting a guilty plea.

Crimes (Sentencing Procedure) Act 1999 (NSW)

11.32 Under the CSPA, the sentencing court cannot take into account offences placed on a Form 1 or any statement of agreed facts unless the prosecutor submits a certificate to the court certifying that there has been consultation with the victim and

20. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 19.
21. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 20.
22. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guidelines 19 and 20.
23. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guidelines 19 and 20.
24. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guidelines 9 and 20.
25. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 19.

police officer-in-charge in compliance with the ODPP's Prosecution Guidelines. If consultation has not taken place, the certificate must state the reasons why.[26]

11.33 "Victim" in this context means:

- a person against whom the offence was committed and who suffered personal harm as a direct result
- a person who was a witness to an act of actual or threatened violence, a sexual offence, death or the infliction of physical bodily harm and who suffered personal harm as a direct result, and
- if the person died as a direct result of the offence, a member of the victim's immediate family.[27]

11.34 The requirement for certification was inserted in 2010[28] on the recommendation of the NSW Sentencing Council. It considered that additional safeguards were necessary to ensure that the consultation obligations in the Prosecution Guidelines were being complied with.[29]

11.35 It does not appear that the Prosecution Guidelines have been updated to incorporate this legislative amendment.

What problems do victims experience with the current indictable system?

11.36 Consultation with victim stakeholders identified a number of areas where they experience dissatisfaction with the current indictable criminal justice system. Their principal complaints relate to lack of information, concern about charge negotiations, delay in finalising the case, the committal process and sentence discounts for guilty pleas.

Lack of information

11.37 Victims' groups expressed concern that victims are not kept properly informed as their cases progress through the various stages from investigation to sentencing.[30] In particular, some felt that victims do not receive enough information about what is happening and what they can expect after charges are laid.[31]

11.38 It was the experience of many victims we spoke to that they did not receive sufficient information about the matter until a Crown Prosecutor had been briefed. This was often close to the trial date. They expressed frustration that instructing

26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35A.
27. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35A(1) (definition of "victim"), s 26.
28. *Crimes (Sentencing Procedure) Amendment Act 2010* (NSW) sch 1 [10].
29. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.88]-[8.93].
30. Victims roundtable, *Consultation EAEGP36*; Homicide Victims' Support Group, *Consultation EAEGP37.*
31. Victims roundtable, *Consultation EAEGP36*.

solicitors from the ODPP often could not provide them with information about the case at the committal stage, because the solicitor was unlikely to have carriage of the matter at trial.[32]

11.39 Australian Institute of Criminology (AIC) research has suggested that victims need to be kept informed about decisions that affect them.[33] The AIC's report stressed that victims need accurate information about procedures and the likely timetable for steps in the prosecution of cases, and they should be informed of the likelihood of potentially traumatic procedures.[34]

11.40 When victims do receive information from the prosecutor, this can sometimes be difficult for them to understand. Many victims have a limited knowledge of the legal system and consequently may have trouble understanding legal jargon and criminal procedure.[35]

Charge negotiations

11.41 Charge negotiation refers to a "process by which the prosecutor agrees to withdraw a charge or charges upon the promise of an accused to plead guilty to others".[36] Where there is to be a guilty plea, charge negotiation usually also involves the parties preparing a statement of agreed facts to be submitted to the sentencing judge.[37] Charge negotiations are an accepted element of criminal prosecutions in NSW. However, they emerged as a contentious issue during consultation with victims groups.

Victims believe they are not adequately consulted during charge negotiations

11.42 Despite the requirement in the ODPP's Prosecution Guidelines that prosecutors consult with victims before a decision is made to accept a guilty plea to a changed charge, the experience of those we spoke to was that victims were not always informed about charge negotiations. We were told that consultation may not occur until after the negotiations have been completed.[38]

11.43 Inadequate consultation with victims may occur because charge negotiations, particularly for matters in the District Court, frequently do not occur until close to the

32. Victims roundtable, *Consultation EAEGP36*.
33. B Cook, F David and A Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia*, Research and Public Policy Series No 19 (Australian Institute of Criminology, 1999) 54.
34. B Cook, F David and A Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia*, Research and Public Policy Series No 19 (Australian Institute of Criminology, 1999) 53.
35. Victims roundtable, *Consultation EAEGP36*; B Cook, F David and A Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia*, Research and Public Policy Series No 19 (Australian Institute of Criminology, 1999) 55.
36. G Samuels, *Review of the NSW Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts* (2002) [6.1], citing D Andrew, "Plea Bargaining" (1994) April *Law Institute Journal* 236, 236.
37. N Cowdery, "Negotiating With the DPP" (Paper presented at Legal Aid Commission of NSW Criminal Law Conference, Sydney, 3 August 2006) 5.
38. Victims roundtable, *Consultation EAEGP36*; Homicide Victims' Support Group, *Consultation EAEGP37.*

date for trial. Statistics indicate that 66% of day-of-trial pleas in the District Court are to a changed charge.[39] Prosecutors may believe, we suspect, that there is insufficient time to obtain the views of the victim where a guilty plea is only offered just before the trial is due to commence.

11.44 In cases where the victim was consulted about the charge negotiations, the experience of those we spoke to was that they felt pressured to agree to the guilty plea. In some cases the defendant's offer to plead guilty was presented to the victim in a conference with the Crown Prosecutor. They felt overwhelmed by the formality of the environment, their lack of understanding about how the criminal justice system operates, and a fear that the defendant would be acquitted if the guilty plea were not accepted.[40]

11.45 We were told that this can lead to victims feeling that they have had no, or at least an inadequate, say in the decision to accept a guilty plea, contributing to a sense of disillusionment with the criminal justice system.[41] Parsons and Bergin have noted that "[t]hose who are seeking a public apology from the perpetrator, or the opportunity to discuss their ordeal, may be frustrated by cases which are settled quickly through a plea bargain or otherwise do not offer an opportunity to participate".[42] It has also been suggested that victims see charge negotiations as a practice that removes them from the criminal justice system.[43]

Victims believe the less serious charge does not reflect their view of the offence

11.46 Victim stakeholders expressed frustration that charge negotiations result in the defendant pleading guilty to a lesser charge or having some of the charges dropped.[44] They felt that the lesser charge and the sentence the defendant received did not fully recognise the harm that the victim has suffered.[45] This view was particularly prevalent from family members of homicide victims where the ODPP subsequently downgraded the initial police charge from murder to manslaughter.

11.47 Dr Flynn has noted that "downgrading" offences through charge negotiation can impact on a victim's right to be recognised as a legitimate victim of the full extent and number of crimes that were committed against them.[46]

11.48 Downgrading or dropping of charges may also limit the material the victim can present to the court in a VIS at sentencing. A VIS can only refer to the impact upon

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39. See Figure 2.10.
40. Homicide Victims' Support Group, *Consultation EAEGP37.*
41. Homicide Victims' Support Group, *Consultation EAEGP37.*
42. J Parsons and T Bergin, "The Impact of Criminal Justice Involvement on Victims' Mental Health" (2010) 23 *Journal of Traumatic Stress* 182, 184.
43. P Darbyshire, "The Mischief of Plea Bargaining and Sentence Rewards" [2000] *Criminal Law Review* 895, 905.
44. Homicide Victims' Support Group, *Consultation EAEGP37.*
45. Homicide Victims' Support Group, *Consultation EAEGP37;* Victim Support Australia Inc, *The Role of Crime Victims in the Criminal Justice System*, Position Paper No 6 (2003) <http://www.victimsupport.org.au/policy_6.php>.
46. A Flynn, "Bargaining With Justice: Victims, Plea Bargaining and the *Victim's Charter Act 2006* (Vic)" (2011) 37 *Monash University Law Review* 73, 86.

the victim of the offence before the court.[47] As such, details of the conduct of the offender contained in a VIS which would indicate a more serious offence than the offence before the court cannot be considered during sentencing.[48] This means that victims can be left feeling that they have been prevented from informing the court about the full impact of the offender's conduct on them.

Victims feel that statements of agreed facts are not an accurate representation of the offence

11.49 Although the prosecutor is required to consult with the victim before substantial and other relevant facts are omitted from an agreed statement of facts, we were again told in consultations that this does not always occur.[49] Particularly where there has been a late guilty plea, agreed statements of facts may not be negotiated until close to the sentencing hearing.

11.50 Victims' groups expressed concern that statements of agreed facts are often not a true representation of the events as they occurred from the victim's perspective, and may dilute the seriousness of the offender's conduct.[50] Because victims may not see the statement before it is submitted to the sentencing judge, they may be surprised and frustrated if it contains information they do not believe to be true, especially if that information contributes to the offender receiving a more lenient sentence.[51] Where the victim does not believe that the statement of agreed facts is a full and accurate account of the offence, it may have the effect of trivialising his or her suffering.[52]

Delay

11.51 As we discuss in Chapter 2 there are significant delays in progressing matters through the indictable criminal justice system, particularly in the District Court.

11.52 Delay in the completion of the prosecution can have a negative impact on a victim's recovery from the crime. Particularly in sexual assault cases, a lengthy delay between charge and trial can result in victims wishing to discontinue the prosecution. The ODPP reports that in 2012/13, the wishes of the victim were the primary reason why it discontinued proceedings in 36% of matters discontinued after committal.[53]

11.53 AIC research has indicated that victims are generally unaware of how long the criminal justice process takes. Consequently, they can find court delays very

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47. *R v H* [2005] NSWCCA 282 [56].
48. *R v De Simoni* (1981) 147 CLR 383, 389.
49. Victims roundtable, *Consultation EAEGP36*; Homicide Victims' Support Group, *Consultation EAEGP37*.
50. Victims roundtable, *Consultation EAEGP36*.
51. Homicide Victims' Support Group, *Consultation EAEGP37*.
52. R Johns, *Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services*, Briefing Paper No 10/02 (NSW Parliamentary Library Research Service, 2002) 53.
53. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 27.

distressing.[54] Many victims report that they feel as though their lives have been "put on hold" until their case reaches a conclusion.[55] The AIC noted that "[e]ach inaction by the criminal justice system can exacerbate a victim's feelings of helplessness and confusion".[56]

11.54 Victims' representatives were especially frustrated by delays they perceived as unnecessary, such as those caused by late and inadequate disclosure of briefs of evidence.[57]

Committal hearings

11.55 Victims' groups expressed concerns about the effect on victims of cross-examination at committal hearings.[58] If the court process is unduly harsh or unsympathetic, the requirement to attend twice can have an adverse effect on the witness.[59] It is well established that for many victims, and in particular victims of sexual assault, cross-examination and the courtroom experience can be traumatic and may lead to secondary victimisation.[60] One commentator has suggested that the absence of a jury at committal means that defence counsel, if unrestrained, do not need to exercise the same levels of discretion and finesse in their questioning of the victim, and this can make the victim reluctant or unwilling to appear again at the trial.[61]

11.56 Additionally, for victims who are unfamiliar with the criminal justice system, it can be difficult to appreciate the distinction between committal for trial and a conviction. This may compound the victim's frustration and distress if the charges against the offender are subsequently downgraded. The role of the magistrate at the committal hearing is to consider all the evidence and determine whether there is a reasonable prospect that a reasonable jury, properly instructed, would convict the defendant of an indictable offence.[62] We were told that victims may find it difficult to understand how a guilty plea to a lesser charge can be accepted by the ODPP once a magistrate has determined there is a reasonable prospect of a jury convicting the defendant of a more serious offence.[63]

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54. B Cook, F David and A Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia*, Research and Public Policy Series No 19 (Australian Institute of Criminology, 1999) 53.
55. Northern Ireland, Department of Justice, *Encouraging Earlier Guilty Pleas: A Department of Justice Consultation* (2012) 7.
56. B Cook, F David and A Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia*, Research and Public Policy Series No 19 (Australian Institute of Criminology, 1999) 54.
57. Victims roundtable, *Consultation EAEGP36*.
58. Victims roundtable, *Consultation EAEGP36*.
59. J Murray, "Committals – Time for Change" in J Vernon (ed), *The Future of Committals,* Conference Proceedings No 7 (Australian Institute of Criminology, 1991) 151, 154.
60. See C Corns, *Public Prosecutions in Australia* (LawBook Co, 2014) 260 and the authorities cited.
61. J Murray, "Committals – Time for Change" in J Vernon (ed), *The Future of Committals,* Conference Proceedings No 7 (Australian Institute of Criminology, 1991) 151, 155. See also Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (2000) Report No 55, Part 2, 252-3.
62. *Criminal Procedure Act 1986* (NSW) s 64.
63. Homicide Victims' Support Group, *Consultation EAEGP37.*

Sentence discounts for early guilty pleas

11.57 Under the current common law, the utilitarian benefits of a guilty plea are generally represented by a sentence discount of 10 to 25%, depending on the timing of the plea.[64]

Victims have mixed views on sentence discounts for guilty pleas

11.58 Different views were expressed in consultations about the appropriateness of sentence discounts for guilty pleas. Some victim stakeholders did not believe that any reduction in sentence for a guilty plea is warranted because it unduly rewards the offender for saving the government the expense of going to trial.[65] Others recognised the value of sentence discounts in saving victims from having to go through the ordeal of a trial.[66] Of those who supported sentence discounts, some felt that a maximum discount of 25% was too high.[67]

11.59 Some victim stakeholders expressed the view that for serious offences such as homicide, no sentence discount should be available for a guilty plea.[68] It was also suggested that the strength of the prosecution case against the defendant should be taken into account in determining the amount of the discount. The view was expressed that offenders who plead guilty "only" because the prosecution case against them is overwhelming are less deserving of a sentence discount.[69]

Victims do not support sentence discounts for late guilty pleas

11.60 At present it is possible for offenders to receive a substantial sentence discount for a guilty plea that occurs after the matter leaves the Local Court and even, in some instances, when the plea is entered close to or even on the day of trial. Victims' groups perceived late guilty pleas as being of little value, and did not believe that the defendant should be rewarded for a late plea through a discount on sentence.[70]

11.61 When offenders enter a late guilty plea, victims have already had to prepare themselves for the trial. They have usually had to make arrangements to attend court on the trial date and prepare themselves to give evidence. They may experience anger and frustration when an offender pleads guilty at a late stage, and especially if the plea is entered on the day of trial. The UK Sentencing Council found that many victims, as well as the general public, tend to view late guilty pleas as dishonest and perceive offenders as "playing the system".[71]

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64. *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [160].
65. Homicide Victims' Support Group, *Consultation EAEGP37.*
66. Victims roundtable, *Consultation EAEGP36;* Homicide Victims' Support Group, *Consultation EAEGP37.*
67. Homicide Victims' Support Group, *Consultation EAEGP37.*
68. Homicide Victims' Support Group, *Consultation EAEGP37.*
69. Victims roundtable, *Consultation EAEGP36.*
70. Victims roundtable, *Consultation EAEGP36;* Homicide Victims' Support Group, *Consultation EAEGP37.*
71. W Dawes and others, *Attitudes to Guilty Plea Sentence Reductions,* Research Series 02/11 (UK Sentencing Council, 2011) 28.

Victims do not support sentence discounts for guilty pleas to lesser charges

11.62 We were told in consultation that victims find it difficult to accept a sentence discount where the offender pleads guilty to a changed charge.[72] In these cases, victims felt that the offender is "double dipping", by benefiting from both a lesser charge and a sentencing discount for pleading guilty to that charge. For homicide offences, we were told that victims may feel as though a sentence discount on a charge that has been downgraded from murder to manslaughter unfairly rewards the offender.[73]

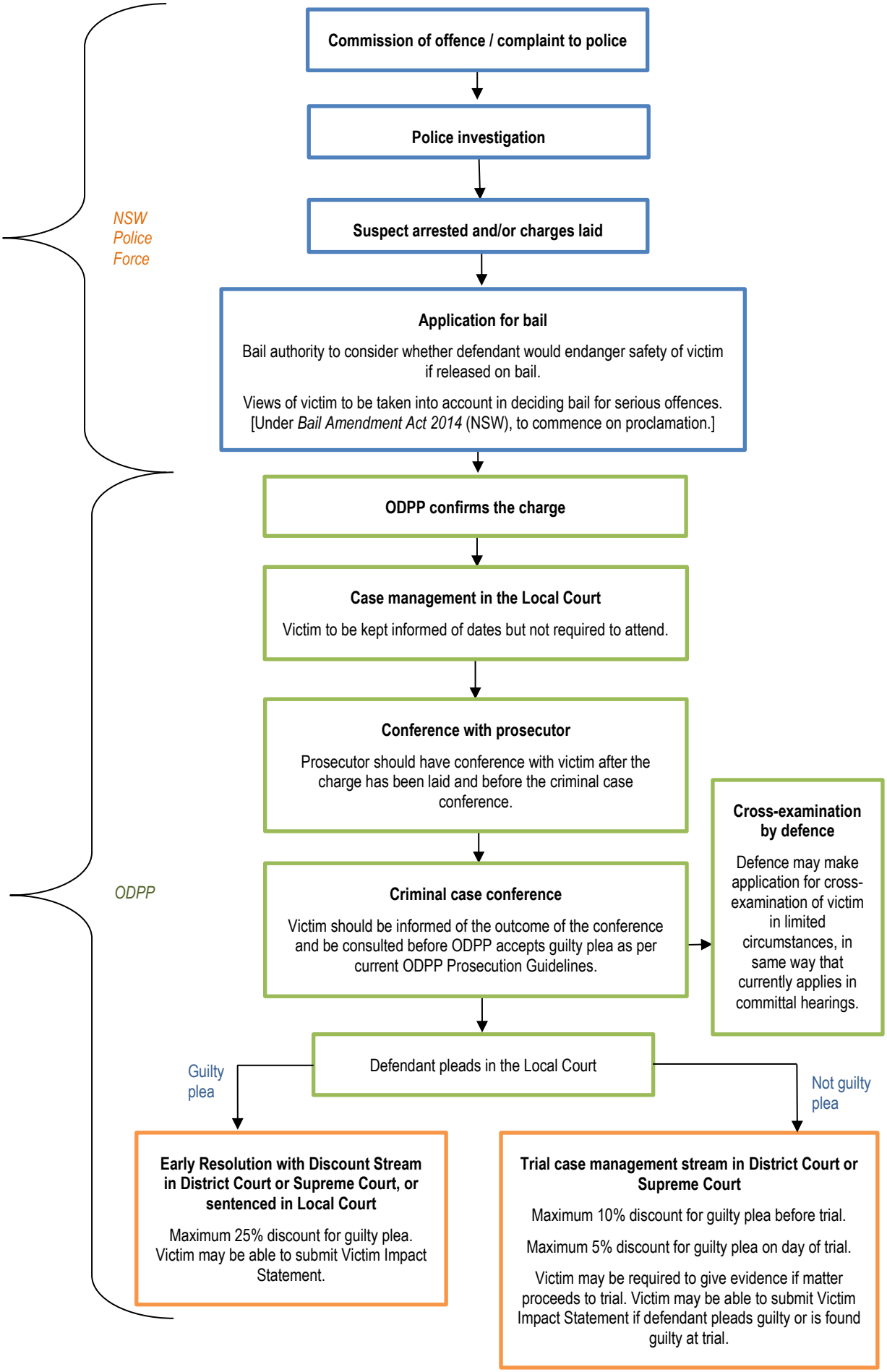
What does the proposed blueprint look like from a victim's perspective?

11.63 We set out in Figure 11.2 the stages of a victim's interaction with the indictable criminal justice system under the blueprint.

72. NSW Office of the Director of Public Prosecutions, Witness Assistance Service, *Consultation EAEGP30*; Victims roundtable, *Consultation EAEGP36;* Homicide Victims' Support Group, *Consultation EAEGP37.*

73. Homicide Victims' Support Group, *Consultation EAEGP37.*

Figure 11.2: Victim's interaction with the indictable criminal justice system under the blueprint



What are the advantages for victims under our blueprint?

11.64 The blueprint is not intended to change the existing victim obligations placed on the NSWPF and the ODPP under the Charter of Victims Rights, the CSPA and the ODPP's Prosecution Guidelines. In fact, we believe that our blueprint will provide a number of additional benefits for victims of indictable offences. These are outlined below.

Getting the charge right early

11.65 Under our early charge advice scheme, once the police have charged a person, the matter will be forwarded to the ODPP for review and confirmation of the charge. This means that the ODPP will review the charge much earlier in the process than is presently the case. Having the ODPP confirm the charge shortly after it is laid will also mean the charge is less likely to change later on in the proceedings.

11.66 Victim stakeholders felt it was important from the victim's perspective to commence proceedings on the most appropriate charge.[74] Many victim stakeholders supported a pre charge advice regime. They believed that victims would be willing to accept a delay in the laying of the charge if it meant that the charges were settled at the outset. This will allow for victims' expectations to be realistic, and minimises the stress for victims where the defendant later pleads guilty to a lesser charge, often months or years after police first charge the defendant. Greater charge certainty would also reduce the likelihood of offenders "double-dipping", by receiving a sentence discount for a guilty plea to a less serious charge.

Minimising delay

11.67 Our blueprint aims to reduce delay in the prosecution of indictable offences, which is a current source of frustration for victims. There will also be a reduction in ineffective appearances in the Local Court.

Continuous ODPP involvement

11.68 Our blueprint is predicated on early, continuous involvement by the ODPP and Crown Prosecutors. Victims' advocates considered that this would greatly improve victims' experience with the prosecution process.[75]

11.69 It would enable victims to be better informed about the case when it is in its early stages and to consult with the Crown Prosecutor or other senior prosecutor who is assigned to the case much earlier than present. Continuity of representation and consistency in decision making gives victims more confidence in the prosecution and a greater degree of certainty about the way the matter is to be handled. Early and consistent involvement would also remove the perception that a lack of

74. Victims roundtable, *Consultation EAEGP36*; Homicide Victims' Support Group, *Consultation EAEGP37.*

75. Victims roundtable, *Consultation EAEGP36;* Homicide Victims' Support Group, *Consultation EAEGP37.*

continuity in ODPP representation may provide an advantage to the defendant, who may have consistent legal representation.[76]

Earlier charge negotiations

11.70 The criminal case conference requires the parties to discuss the matter while it is still in the Local Court, with the effect that any charge negotiations will happen early. Currently these negotiations may not occur until a week or two before the trial is due to start, with late changes of charge resulting.

11.71 The criminal case conference will provide a formalised, structured process for the charge negotiations that currently occur on an ad hoc basis. In some cases charge negotiations may still occur on an informal basis, but this is less likely to occur close to trial.

11.72 Some victims' representatives supported early discussions between the prosecution and defence because it would avoid the problem currently experienced whereby negotiations do not occur until quite close to the trial date.[77] Others did not support measures that aim to encourage charge negotiations.[78]

11.73 We appreciate that the concept of charge negotiations can be a difficult one for victims to accept. They can perceive charge negotiations as offering perhaps unjustified leniency to the defendant. However, charge negotiations already occur in the current system – late in the proceedings, when the matter is close to trial. The criminal case conference seeks to move these discussions to an earlier point in the proceedings. Additionally, our proposed scheme of early charge advice aims to set the most appropriate charge at the outset, thereby changing the current perception that the charge can be negotiated down later in the proceedings.

Less likelihood of a late guilty plea close to trial

11.74 The blueprint aims to move late guilty pleas to an earlier point in the process, minimising the need for victims to prepare for trials that do not go ahead. Early charge review by the ODPP and criminal case conferencing in the Local Court will reduce the number of late guilty pleas to changed charges.

Only early guilty pleas receive the maximum sentencing discount

11.75 Where the defendant pleads guilty in the Local Court, the matter will be allocated to the Early Resolution with Discount stream and the defendant may receive a maximum discount of 25% for the utilitarian value of the guilty plea.

11.76 Where the defendant pleads not guilty, the matter will proceed to the trial case management stream in the District Court or Supreme Court. Guilty pleas entered after the matter enters the higher court will generally receive a maximum discount

76. NSW Office of the Director of Public Prosecutions, Witness Assistance Service, *Consultation EAEGP30*.
77. Victims roundtable, *Consultation EAEGP36.*
78. R Kelly, *Consultation EAEGP38*.

on sentence of 10%, and guilty pleas entered on the day of trial or later receive a maximum discount on sentence of 5%.[79] In very serious matters, the sentencing court will still be able to decline to give a discount.

11.77 While the maximum sentencing discount of 25% for an early guilty plea will remain, it will only be available for defendants who plead guilty while the matter is still in the Local Court. That is, only "early" guilty pleas are entitled to the maximum discount. Although there were different views on the appropriateness of sentence discounts for guilty pleas generally, all victim stakeholders agreed that significant sentence discounts for guilty pleas entered close to or on the day of trial should be avoided.

When should victims be consulted under the blueprint?

11.78 The ODPP's process for consulting with victims will need to be updated if the blueprint is implemented. The Prosecution Guidelines currently require that a consultation with the victim occur "at the earliest available opportunity" before all hearings.[80] Because of the way matters are currently conducted, the victim may not meet with the Crown Prosecutor or other senior prosecutor assigned to the case until close to the trial date.

11.79 We consider that victims' involvement in charge negotiations will be improved by earlier charge negotiations at the criminal case conference and the early involvement of Crown Prosecutors and senior prosecutors. These changes mean that negotiations are less likely to happen at the last minute and there will be more time to seek victims' views.

Victim should be consulted as soon as possible after charge is confirmed

11.80 Under the blueprint the ODPP is to review and confirm the charge as soon as possible after it has been laid. Although this process may result in the ODPP preferring a different charge to that initially laid by the police, we do not consider that it would be necessary for the ODPP to consult with the victim prior to it confirming the charge. The charge laid by the police will be temporary pending ODPP review.

11.81 The ODPP has submitted that, if a scheme of pre charge advice were implemented, victims would attend a conference with the Crown Prosecutor handling the case after a charge determination has been made. The victim would be provided with information about the court process and possible outcomes of their case.[81] Although we do not recommend a scheme of pre charge advice,[82] we consider that the ODPP's proposal for victim consultation should be adopted. A conference with the victim should be held as soon as possible after the charge is confirmed, and prior to the criminal case conference with the defence. The conference with the victim

79. We recommend two exceptions: see Recommendation 9.4.
80. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 19.
81. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, Annexure A, 5.
82. See para 4.74.

should be attended by the Crown Prosecutor or other senior prosecutor assigned to the case.

11.82 Consulting with the victim at this stage serves a number of purposes. First, it allows the prosecutor to clarify any evidence given by the victim before the case is discussed with the defence. Secondly, it allows the prosecutor to obtain the victim's views on the possibility of a guilty plea, or any change in charge, that may be raised by the defence during the criminal case conference. Finally, it puts the victim in early contact with the Crown Prosecutor or other senior prosecutor assigned to the case, something we are told is important to victims. As the ODPP's Prosecution Guidelines note, early conferences enable compliance with the Charter of Victims' Rights, more effective screening of cases and more accurate disclosure of relevant material.[83]

Victim should continue to be consulted prior to charge negotiations

11.83 We do not propose any changes to the circumstances in which the prosecutor must consult with the victim under the ODPP's Prosecution Guidelines. That is, the views of the victim should be obtained before the prosecutor accepts a guilty plea, changes the charge (after a charge determination has been made), agrees to place charges on a Form 1 or agrees to a statement of facts.

11.84 The ODPP will need to ensure that the views of the victim have been obtained before formally accepting any guilty plea offered by the defence during the criminal case conference. Where the victim has expressed clear views on his or her attitude towards a guilty plea during the conference with the prosecutor, it may not be necessary to go back to the victim after the criminal case conference. In other situations, the prosecutor may need to obtain or revisit the views of the victim before the defence offer can be accepted.

11.85 A further conference with the victim should also take place should the matter proceed to trial.

Recommendation 11.1: revise Prosecution Guidelines that relate to victims

(1) The Office of the Director of Public Prosecutions should hold a conference with the victim of an indictable offence before the criminal case conference. The Crown Prosecutor or senior prosecutor assigned to the case should attend the conference with the victim.

(2) The Director of Public Prosecutions should revise guidelines in the Prosecution Guidelines of the Office of the Director of Public Prosecutions NSW that relate to victims, to reflect the new procedure in the blueprint.

83. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 19.

Improving the interaction between the prosecutor and the victim

11.86 Victim stakeholders feel that victims are not adequately consulted during the progress of the case from the initial charging decision through to trial. This was a key theme that emerged from consultations. Poor communication between the ODPP and victims was identified as a major cause of this problem.

11.87 Victim stakeholders have told us that they were unable to obtain useful information until a Crown Prosecutor was assigned to the case. In their experience, victim stakeholders felt they were not properly consulted before charge negotiations occur, and that decisions to downgrade or drop charges were not adequately explained to them. They may not be consulted before a statement of facts is agreed with the defence and as a result feel that the statement does not adequately reflect what happened. We are also concerned that, despite clear obligations in the ODPP's Prosecution Guidelines to consult with victims, the experience of many we spoke to was that this did not always occur.

11.88 Moreover, many victims have a limited knowledge of the criminal justice system. They may find it difficult to understand the information they receive, which can be complex and legalistic. Victims can also develop unrealistic expectations about the sentence the offender is likely to receive, based on the initial charges that are laid and the information and assurances they receive from police and Crown Prosecutors.

11.89 Some of these concerns will be alleviated under the blueprint. Early involvement of Crown Prosecutors and senior prosecutors, as well as continuity of carriage, will enable victims to liaise with the prosecutor assigned to their case and obtain information about the case much sooner. The expectation that any charge negotiations will occur at the criminal case conference will assist Crown Prosecutors and senior prosecutors to ensure that victims are consulted before discussions take place. Early charge advice will reduce the likelihood of the confirmed charge being downgraded later on, with the result that victims can develop more realistic expectations about the case.

11.90 However, there are still a number of ways in which victims' experiences with the criminal justice system could be improved.

11.91 First, in light of what we have been told about inconsistent consultation with victims, we recommend that the ODPP conduct staff training for solicitors and Crown Prosecutors to ensure that all staff are aware of their obligations to victims. We recognise that the level of consultation required under the CSPA and the Prosecution Guidelines is significant, and can be resource intensive for the ODPP. Nevertheless, it is important that consultation with victims occur before any charge negotiations are concluded. We consider that the blueprint, and in particular the criminal case conference, will assist in streamlining the timing of victim consultation.

11.92 Secondly, the ODPP suggested in its submission that, should a scheme of pre charge advice be adopted, it would provide victims with information about the indictable criminal justice process in a conference after the charge has been

settled.[84] In our view providing standardised, accessible information for victims as early as possible is a useful initiative. The information should, in particular, explain the role of criminal case conferencing and the fact that charge negotiations with the defendant may occur.

11.93 Thirdly, the ODPP should consider giving victims the opportunity to put their views in writing on any proposed negotiations with the defendant. If the victim chooses to do so the written record should be kept on file. Under the ODPP's Prosecution Guidelines the relevant solicitor must record the victim's views on the file. However, giving victims the opportunity to put their views in writing will ensure that there is no doubt as to the victim's views, and it gives victims the sense that they are participating in a tangible way.

11.94 Finally, we recommend that the NSWPF update its existing policies for communicating with victims, to incorporate the changes to charging decisions recommended by the blueprint. When a victim of an indictable offence is contacted to be informed how the matter is to be dealt with, the investigating officer should explain the system of early charge advice if they think it is likely that charges will be laid. The officer should inform the victim that the ODPP will ultimately confirm the charges against the defendant, and a realistic timeframe within which this is expected to occur. This will assist in managing the victim's expectations.

Recommendation 11.2: improve communication with victims

(1) The Office of the Director of Public Prosecutions should:

(a) provide additional training to solicitors and Crown Prosecutors to ensure they are aware of their obligations to victims

(b) consider giving victims the opportunity to put their views in writing about any proposed negotiations with the defendant, and

(c) distribute information about the criminal justice system to victims of indictable offences when they are first consulted.

(2) The NSW Police Force should update its policies about communicating with victims of indictable offences to require investigating officers to provide information about early charge advice.

Other suggestions for reform

11.95 Stakeholders put forward some additional suggestions for possible reforms to ensure that victims are properly informed.

Free legal advice for victims

11.96 One suggestion was to make free legal advice available to a victim for a set number of hours.[85] The lawyer would explain the legal process and advise the victim about

84. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, Annexure A, 5.

85. Victims roundtable, *Consultation EAEGP36*.

the case in a way that they can understand. The role of the lawyer would be to provide advice rather than legal representation in court.

11.97 Representatives of victims' groups highlighted that a significant problem for many victims is that they have a very limited knowledge of the legal system and, as a result, often find it very difficult to understand the information they receive from the ODPP about their case. It was suggested that the provision of legal advice would address this issue and would facilitate a greater level of victim participation in, and understanding of, the prosecution process.

11.98 The issue of legal advice for victims is outside the scope of this reference. However, it is likely that the early participation of Crown Prosecutors and other senior prosecutors under the blueprint would alleviate some of the current concerns about the extent to which victims receive information about their case.

Requirement to "obtain" victim and police views

11.99 The current Prosecution Guidelines of the ODPP state that in relation to charge negotiations, "the views of the police officer-in-charge and the victim must be *sought* at the outset of formal discussions".[86] The NSWPF submitted that the Guidelines should be amended to require the ODPP to obtain, rather than merely seek, the views of police and victims.[87]

11.100 The NSWPF expressed concern that the current requirement can be met by an attempt to discover the views of the police officer-in-charge and the victim, regardless of whether that attempt is successful or not. The NSWPF submitted that strengthening the Guidelines to ensure that the views of the police and victim must actually be *obtained* at the outset of charge negotiations would make charge negotiations more transparent.

11.101 The NSWPF also suggested that the ODPP provide written advice on the reasons for a decision following charge negotiations. It submitted that the reasons should be specific to the circumstances of the particular case and not merely refer generally to the Prosecution Guidelines. Once prepared the reasons should be made available to the NSWPF, the victim and the defendant.[88]

11.102 In our view, the primary concern with the ODPP's Prosecution Guidelines is not the way they are worded. Rather, it is the fact that they are not always followed. Greater focus on compliance with the Guidelines should surely improve this situation. Therefore, we do not make a specific recommendation for the Prosecution Guidelines to be amended in the way the NSWPF has suggested, although this may be something the Director of Public Prosecutions might wish to consider.

11.103 It is also likely that the introduction of criminal case conferencing, including the requirement to provide a criminal case conferencing certificate to the court, would,

86. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 20 (emphasis added).

87. NSW Police Force, *Submission EAEGP14,* 8.

88. NSW Police Force, *Submission EAEGP14,* 8.

in a practical sense, address the concerns about the transparency of charge negotiations that were expressed by the NSWPF.

12. Reform of criminal justice agencies and evaluation of the blueprint

In brief

Success of implementation should be measured. The outcomes sought should be clearly specified, and the data required to measure those outcomes should be collected. A program of evaluation should be instituted.

Successful implementation of our blueprint cannot be achieved unless it is supported by changes to the way criminal justice agencies operate. This includes operational change to involve senior lawyers earlier, as well as changes to features such as Legal Aid fee and panel arrangements.

Implementation should be governed by an implementation team convened by the Department of Justice, with broad representation.

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Supporting systemic changes

12.1 Our blueprint for reform was designed in consultation with the agencies it most affects. Key stakeholders, including the NSW Police Force, the Office of the Director of Public Prosecutions (ODPP), Legal Aid NSW and the Local Court of NSW have participated in this reference, and understand and support the need for the reallocation of resources and structural changes within their agencies.

12.2 The changes outlined in this report will not work unless they are supported by operational and cultural change in the agencies and practitioners that make up the criminal justice system. Change needs to be built around the following propositions:

- Guilty pleas are the most common way in which criminal proceedings are resolved and early identification of a guilty plea is fundamental to the fair and efficient operation of indictable proceedings.
- Senior lawyers need to be allocated to the early part of proceedings, to get the charge right; to ensure the issues are identified; and to conduct effective discussions between the defence and the prosecution. Meaningful and focused discussion between the authorised representation of the Crown and the defendant at an early stage is the key to early fair resolution.
- A sufficient prosecution brief needs to be collated and available. In the first instance police must provide the ODPP with sufficient evidence to inform a charge decision. The ODPP must provide the prosecution brief to the defence as soon as possible. Charge decisions and legal advice cannot be given without sufficient evidence.
- Practitioners need to conduct the case mindful of their duty to the administration of justice. While acting in the best interests of their clients, lawyers must be cognisant of their overriding duty to the court, to conduct proceedings expeditiously and responsibly, and to pursue only those issues actually in dispute.
- Prosecutors and defence lawyers who undertake indictable proceedings require high skill levels. The system should encourage, promote and support high quality representation, and should ensure that ineffective practitioners, and those few who abuse the system, are not able to operate.

12.3 Criminal justice is fundamental to the public good. The proper resolution of serious criminal proceedings in the courts is vital to the maintenance of the rule of law, and of a safe and just society.

12.4 To implement our blueprint, significant cultural and organisational change will be required across criminal justice agencies and the legal profession. A number of these changes are already well underway in the ODPP and Legal Aid NSW, and other agencies. Reforms of the sort we recommend provide a further opportunity to build supporting agency and process change.

Public and private service provision

12.5 The component services that make up the criminal justice system are mixed between public and private providers, and the private providers include a mix of for-profit law firms, and not-for-profit non-government organisations (NGO) like community legal centres. Each of these has a legitimate and important role in the system.

12.6 Many services in the system are publicly funded and provided:

- the courts
- the police
- the ODPP and the Crown Prosecutors, and
- Legal Aid NSW in-house lawyers.

12.7 Some services are publicly funded but privately provided:

- Legal Aid NSW funded private lawyers, and
- Prosecution work briefed out to the private bar, limited in NSW state matters, but the dominant model in Commonwealth matters.

12.8 Some are privately funded and provided:

- Defence lawyers funded by the client.

Specifying outcomes and collecting data

12.9 The clear specification of outcomes and high level outputs as a means of measuring system performance, and of measuring the performance of service providers, is fundamental to the ability to ensure the system is performing optimally, and achieving the results it is designed to achieve.

12.10 While some aspects of the system are well measured at the moment, there are key areas where we have had to rely on management data kept by the ODPP or the courts, rather than system wide data. The key issue is the timing of guilty pleas. In this area we know whether guilty pleas occur before or after committal, but no other detail is kept system wide.

12.11 A redesigned system must build a set of performance data that includes at a minimum:

(1) Timeliness data, including data measuring:

(a) the period between the point of arrest and charge determination

(b) the periods between the point of charge determination and each key court event

(c) the time taken to the point of referral to a higher court, and

(d) the time taken to the point of resolution.

(2) Method of disposal and timing:

(a) Guilty pleas at first appearance; while in the Local Court; post Local Court at key case management points; at the door of the court; and during trial.

(b) Guilty pleas vs not guilty pleas. We need to track whether and when the changes to indictable proceedings have an effect on this mix.

(3) Change of charge, how often and with what prompt.

(4) Withdrawal of charges, how often and at what point.

(5) Length of trial (a proxy efficiency measure to help determine whether critical issues have been isolated).

12.12 In addition, it should be possible to sort this data by type of defence representation, and by type of prosecution. It should show how public agencies perform against private representation. We should be able to gauge the effect of changes of practice on the court system overall.

12.13 Consistent counting methods should be adopted across agencies. The data should also be available per court. We should be able to tell if different courts are achieving better results, so that best practice can then be replicated throughout NSW.

Recommendation 12.1: increase accountability by enhancing data collection and analysis

(1) The implementation team in Recommendation 12.6 should:

(a) establish a data set of performance indicators that, in particular, tracks the timing of guilty pleas, and

(b) review the information technology systems used to support court case management to ensure they capture the data set of performance indicators.

(2) The NSW Bureau of Crime Statistics and Research should collect and publish the data.

Legal Aid NSW

12.14 The important role that Legal Aid NSW has in indictable proceedings cannot be underestimated. Legal Aid NSW provides lawyers (either in-house or private practitioners funded by Legal Aid NSW) in 72% of criminal matters on indictment.[1] Legal Aid NSW is a major stakeholder to this reference, and has expressed general agreement with the requirements imposed on it by the blueprint.

12.15 Legal Aid NSW deploys a mixed model of legal service delivery, where some matters are assigned to private practitioners. This is the model it has operated under for a long time. The agency is very familiar with the notion that obtaining appropriate early guilty pleas is a key outcome to be pursued.

12.16 If the blueprint is to be properly implemented, Legal Aid NSW will need to give close consideration as to how to align its services to get the most out of the changes. As we discuss below, this will include reviewing the process of assignment; quality control of matters assigned; and the fee structure.

Assignment

12.17 Currently, Legal Aid NSW takes a strategic approach to assigning matters. It tries to keep committal work in-house, as a means of ensuring a practical approach to guilty pleas in the Local Court. We anticipate that Legal Aid NSW would reallocate committal staff members to case management hearings, including case conferencing, where they could continue using their negotiating and practical skills.

1. Information provided by Legal Aid NSW (7 May 2014).

12.18 Private practitioners are briefed on legally aided matters where there is a conflict of interest; a surplus of cases; an irretrievable breakdown in the client/practitioner relationship; or where there is no Legal Aid NSW office in the region.[2] These practitioners are chosen from a "panel" – a database of practitioners approved against certain criteria to be briefed in matters of varying levels of complexity. In 2012/13, Legal Aid NSW assigned 38.5% of criminal law matters to private practitioners.[3]

Quality control of the panel

12.19 Stakeholders to this reference have suggested that there may be an issue with the panel system in Legal Aid NSW. It has been reported that there have been occasions where matters better suited to early resolution have been extended unnecessarily by private practitioners acting in legally aided matters. The clear implication is that these private practitioners are trying to maximise their remuneration under the fee structure, contrary to the best interests of the client and the efficient running of the criminal justice system. This is obviously an abuse of the system, and a problem if it occurs.

12.20 The issue is potentially highlighted by a 2003 study. Legal Aid NSW undertook a study of the impact late guilty pleas had in matters listed for trial in the District and Supreme Courts. In the study there were 32 matters where a change of plea occurred on the first day of trial. Four matters (13%) were in-house cases, and 28 (87%) had been assigned. The study identified, however, that these findings occurred in an environment where 68% of guilty pleas received on the first day of trial were to a change in the indictment submitted on the day.[4]

12.21 It is hard to establish practice standards in the absence of transparent and neutral data about practitioners' performance. Our recommendations about data collection are key to any system working properly. There are approaches that could be tried in the interim. One possible measure may be for Legal Aid NSW to implement a formalised reporting procedure where matters resolve in a guilty plea close to trial.

12.22 Legal Aid NSW should review the existing panel system. It is important that lawyers who wish to compete for legal aid work be able to do so. It is equally important that the system ensures that only efficient and effective practitioners are selected for the panel.

Recommendation 12.2: review of Legal Aid NSW panel arrangement

Legal Aid NSW should review its panel arrangement, and consider measures that:

(a) improve the data collected to measure practitioner performance

2. Legal Aid NSW, *Annual Report 2012-2013* (2013) 124.
3. Legal Aid NSW is currently reviewing the existing conflict of interest policies intending, where possible, to keep more matters in-house: Information provided by Legal Aid NSW (2 September 2014).
4. Information provided by Legal Aid NSW (2 September 2014).

(b) impose stricter reporting arrangements in matters that resolve with a guilty plea on the day of trial, and

(c) limit panel membership to those practitioners who demonstrate their ability to represent their clients efficiently and effectively, noting the need to maintain a contestable framework so that lawyers who wish to compete for legal aid work can do so.

Fees

12.23 The Legal Aid NSW fee structure prescribes the payments to be received by private practitioners who conduct legally aided matters. The fee structure of Legal Aid NSW may be a contributing factor to the late submission of guilty pleas because:

- It does not explicitly include payment for pre-trial negotiations.
- First day of trial or court appearance rates are higher than guilty plea/sentence rates.
- The pay scale is generally quite low for the profession and there is incentive to "spin matters out".

12.24 Under the fee structure, payment for preparation work is restricted. Approval for increased preparation time is subject to various levels of designation, with approval from the CEO of Legal Aid NSW required for preparation in excess of 10 days. Legal Aid NSW has identified a risk currently associated with paying for extensive preparation at committal stage in the hope of negotiating a guilty plea, where a guilty plea does not occur. In these instances further preparation would then be required once the matter has been committed. Accordingly, preparation is limited to three days at the committal stage regardless of the size of the brief or complexity of the matter. If this restriction were not in place, adequate preparation resources would then be unavailable for the trial.

12.25 The fee structure was amended to accommodate the criminal case conferencing trial in NSW (2006-2012) and - at the very least - it will need to be amended in a similar way to reflect the work that will be conducted under the proposed blueprint. This would include:

- reviewing the brief of evidence
- attending and preparing for case management appearances, and
- attending and preparing for the criminal case conference.

12.26 Fixed fee approaches to legal aid work that set fees according to stages of proceeding are the dominant approach across jurisdictions. Other jurisdictions have experimented with fixed fee structures of various sorts, these include:

- **Scotland**: Scotland has introduced a one-off fee for service for criminal proceedings heard without a jury. Under this regime, solicitors received £300 per case in the District Court (equivalent to the Local Court of NSW), and £500 per matter in the Sheriff Court (equivalent to the District Court of NSW). After the first 30 minutes of trial further payments are available. There are no additional preparation fees. Fixed payments cover all work and almost all cases.

This was introduced to discourage practitioners from carrying out non-essential work for financial gain and to encourage early appropriate guilty pleas. The result, however, is that lawyers have taken on more cases,[5] and dedicate less time to each matter. This has resulted in an increase in late guilty pleas.[6]

- **Victoria:** In Victoria, private practitioners conduct about 70% of all criminal legally aided matters, through a panel select scheme. Victoria has lump sum fees for indictable criminal procedures that are paid per procedure.[7] In the Magistrates' Court stage of an indictable matter, a practitioner will be paid up to 2.5 hours to negotiate, and can only claim for a committal mention if he or she satisfies Victoria Legal Aid that "substantial negotiation took place". A guilty plea that is entered at this stage garners a $425 additional payment.[8]

  No extensive study has been taken on the effect that the fee structure has on the guilty plea rate in Victoria.[9] Victoria Legal Aid is, however, currently consulting on ways to improve the quality of legal trials, including the impact of assigning matters and the fee structure.[10]

- **New Zealand:** A recent review of Legal Aid in NZ proposed an option for bulk funding of firms or groups of lawyers to provide legal aid services.[11] It was considered that bulk funding would address issues generated by individuals who take advantage of the fee for service structure; it would reduce the administrative burden associated with legal aid; and take advantage of efficiencies. It was considered that moving away from a system that dealt with individual lawyers, and creating an environment of supervision, internal reporting and mentoring would provide safeguards against individual abuse of the system.

  This proposal has not been implemented.

Recommendation 12.3: review of Legal Aid NSW fee structure

Legal Aid NSW should review its fee structure to align with the blueprint and ensure that there are incentives for practitioners to resolve matters with appropriate early guilty pleas.

5. C Tata, "In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and 'Ethical Indeterminacy' in Criminal Defence Work" (2007) 34 *Journal of Law and Society* 489, 502.
6. C Tata, "In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and 'Ethical Indeterminacy' in Criminal Defence Work" (2007) 34 *Journal of Law and Society* 489, 514.
7. See Victoria Legal Aid, *VLA Handbook for Lawyers: Current* (2014).
8. Unless the plea occurs in the course of a contested committal: Victoria Legal Aid, *VLA Handbook for Lawyers: Current* (2014) Ch 24, Sch 1, Table E.
9. Empirical research has been done on the impact of the fee structure on court efficiencies: see A Flynn, "Victoria's Legal Aid Funding Structure: Hindering the Ideals Inherent to the Pre-trial Process" (2010) 34 *Criminal Law Journal* 48. See also P Tague, "Guilty Pleas or Trials: Which Does the Barrister Prefer?" (2008) 32 *Melbourne University Law Review* 242.
10. Victoria Legal Aid, *Delivering High Quality Criminal Trials,* Consultation and Options Paper (2014).
11. NZ, Legal Aid Review, *Transforming the Legal Aid System: Final Report and Recommendations* (Ministry of Justice, 2009) Rec 74-76.

The Office of the Director of Public Prosecutions

12.27 The blueprint is highly dependent on the ODPP exercising its functions effectively. This includes providing early charge advice to police; commencing indictable proceedings in the Local Court; and compulsory attendance at criminal case conferencing. The blueprint will affect solicitors of the ODPP and Crown Prosecutors, and require consideration of how ODPP resources are organised and deployed.

12.28 The ODPP notes:[12]

> In order to realign our most experienced resources to the beginning of the criminal trial process there will need to be changes to the way the ODPP manages its resources and allocates work, our work practices and modification to our prosecution guidelines. One of the most critical changes will be to create an ODPP advice of charges system.

Changes the ODPP has made

12.29 The Director of Public Prosecutions (DPP) advises that the ODPP has implemented a number of measures to ensure that matters proceed as efficiently and effectively as possible in the current system. These include:

- Attempting to ensure that all Supreme Court and complicated District Court matters are briefed as far in advance as possible, including, in some murder matters and complex District Court matters, briefing Crown Prosecutors at committal.
- Making expanded and extensive use of the private bar, using non-salaried Crown Prosecutors on retainer and expanding the list of private barristers available to accept briefs to well over 100 barristers. The ODPP advises that over 20% of trials are briefed to private counsel.
- Increasing the number of solicitor trial advocate positions within the ODPP, as a cost effective way of running simple trials.
- Ensuring defence counsel can have meaningful discussions with the ODPP prior to trial. In accordance with the ODPP protocol, defence counsel can make representations which are then considered by either a Trial Preparation Unit Crown Prosecutor or another Crown Prosecutor who may be out of court. Representations are considered by experienced Crown Prosecutors, Deputy DPPs, or the DPP.

12.30 Briefing practices have been considered. Crown Prosecutors in regional locations hold multiple trial briefs for a single week. When matters are listed before the Court of Criminal Appeal one Crown Prosecutor generally appears in the entire list for that day. Efficient practice however can be inhibited by listing practices in the courts - in Sydney and Parramatta the courts' listing practices result in prosecutors being unable to hold multiple briefs for one week.

12. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, Annexure A, 4.

12.31 We note that, while these various measures are designed to introduce considerable efficiency into ODPP operations, without systemic change there are limits to what can be achieved. Day-of-trial pleas and court over-listing create significant inefficiencies beyond the control of the ODPP. In addition, multiple appearances, and low value processes (such as committals) tie up resources where they need not be deployed. The ODPP's submission calls for a raft of changes to assist in driving efficiencies. Our blueprint for reform aims to address these issues, though it does not provide support for all the changes the ODPP seeks.

Changes to ODPP processes required under the blueprint approach

12.32 The blueprint is designed to:

- Ensure that charge determination from the point where the ODPP takes over the charge is as robust as possible and is based on the key evidence.
- Create a clear disclosure regime including early provision of a sufficient brief.
- Create a clear framework for discussion with the defence early on to address issues the defence wants to raise, and to provide clarity about agreed facts, Form 1 issues, and any other relevant matters.
- Create a clearer approach to sentencing discounts for guilty pleas and more robust incentives.

12.33 It is important that defence counsel do not perceive that there may be a better "deal to be done" nearer the trial. The best chance for a lower sentence on a guilty plea must be at the earliest possible point.

12.34 From this perspective, the ODPP needs to be in a position to ensure that there is continuity of approach to a case, and in particular that the charges are not routinely reassessed at the point of trial. In some cases, especially the more complex cases, the ODPP recognises this may require continuity of personnel, including early briefing of a Crown Prosecutor. What is important is consistency both at the systemic level, and in individual cases. The issue is not just one of ODPP resource allocation, but also of defence perceptions. Defence behaviour will only change if the ODPP is perceived to have adopted a consistent approach that means charges will not change as the case proceeds unless there is a significant change in circumstances.

12.35 We also suggest more data collection about day-of-trial pleas, and more analysis of why they occurred, and what could have been done to prevent them.

Recommendation 12.4: ODPP front loading of resources

The Director of Public Prosecutions should review the processes of the Office of the Director of Public Prosecutions to ensure that:

(a) senior prosecutors are involved in early charge advice

(b) there is continuity of approach so far as possible, and

(c) the opportunities afforded by the blueprint are optimised.

The role of Crown Prosecutors

12.36 The role of Crown Prosecutors is vital to achieving reform. Section 5 of the *Crown Prosecutors Act 1986* (NSW) provides:

> (1) The functions of a Crown Prosecutor are:
>
> (a) to conduct, and appear as counsel in, proceedings on behalf of the Director,
>
> (b) to find a bill of indictment in respect of an indictable offence, whether or not the person concerned has been committed for trial in respect of the offence,
>
> (c) to advise the Attorney General or Director in respect of any matter referred for advice by either of them, and
>
> (d) to carry out such other functions of counsel as the Attorney General or Director approves.
>
> (2) Functions under subsection (1) (b) shall be exercised in the name and on behalf of the Director.
>
> (3) A Crown Prosecutor does not have the function of determining that no bill of indictment be found or directing that no further proceedings be taken against a person.

12.37 These are broad functions and certainly include taking an early role in the case. However, they give great emphasis to finding a bill of indictment. In the blueprint system, finding a bill of indictment will not be a significant step. The charge should have been settled long before this point on the basis of a sufficient brief of evidence. It should have been thoroughly discussed at a case conference between the parties and any issues ironed out. These are the key prosecutorial steps. The indictment lodged in the higher court should simply reflect these steps and should reflect the charge as already determined. Lodging the indictment will become essentially an administrative step in the proceedings.

Recommendation 12.5: Crown Prosecutor reforms
The *Crown Prosecutors Act 1986* (NSW) should be reviewed to ensure the functions of Crown Prosecutors are consistent with the blueprint reforms.

The courts

12.38 Indictable proceedings begin with the police, are lodged with the Local Court and are intended to be resolved ultimately in the higher courts. A criminal proceeding should be thought of as a single process, not two distinct processes: one in the lower court and the other in a higher court. The courts, however, do not presently have a coordinated approach or a single view of the cases.

Joint practice note

12.39 A single practice note outlining the process from beginning to end that allocates roles to police, prosecution, defence, and the magistrates and judges would be valuable in outlining the process. Case management standards could be developed against the stages in this practice note and measured accordingly. All courts could have a clear view of the caseload, and where it currently sits, and how close it is to resolution.

12.40 The practice note should be jointly issued by the Chief Justice, the Chief Judge of the District Court and the Chief Magistrate. This recommendation can be found in Chapter 3.

Create centralised courts with increased audio-visual link capability

12.41 In Chapter 6, we make recommendations about establishing centralised Local Courts. Local Courts will conduct important proceedings that need to be centralised in the same way that committal proceedings are currently centralised. There is a current project within the NSW Department of Justice to extend audio-visual link (AVL) capability, and this should be a consideration within centralised courts, permitting defendants in regional areas to attend the appearances by AVL. These initiatives will ensure that all participants can attend the appearances.

The NSW Police Force

12.42 For the NSW Police Force, the primary process issue raised by the blueprint is the development of an initial brief of evidence. This is the fundamental key to early charge advice and early resolution. Early charge advice will only be as good as the evidence provided. A charge determination cannot be made until the ODPP has reviewed evidence sufficient to support a reasonable prospect of conviction. We consider police disclosure requirements in Chapters 4 and 5.

12.43 The NSW Police Force may need to reorganise resources to fulfil its obligations to complete the brief of evidence for charge advice, and fulfilling the disclosure obligations outlined in Chapter 5. There needs to be close, sympathetic and cooperative relationships between police and the ODPP. This is fundamental to the success of our reforms.

The legal profession

12.44 Solicitors and barristers provide their clients with high quality representation, protect the rights of their clients, and form a part of the broader system of the administration of justice. Lawyers have duties to their client, but also have overriding duties to the courts and the administration of justice. Their ability to balance these separate duties while protecting the rights of their client is fundamental to the notion of a legal *profession*.

12.45 The Barristers' Rules and the Solicitors' Rules each provide guidance on the proper approach to representation:

25 A **barrister** has an overriding duty to the Court to act with independence in the interests of the administration of justice.[13]

3.1 A **solicitor's** duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.[14]

12.46 The Barristers' Rules also have specific rules about managing issues in dispute, for example:

57. A barrister must seek to ensure that work which the barrister is briefed to do in relation to a case is done so as to:

(a) confine the case to identified issues which are genuinely in dispute;

(b) have the case ready to be heard as soon as practicable;

(c) present the identified issues in dispute clearly and succinctly;

(d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and

(e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.

12.47 And the Barristers' Rules contain specific guidance about guilty pleas:

Criminal pleas

40A. It is the duty of a barrister representing a person charged with a criminal offence:

(a) to advise the client generally about any plea to the charge; and

(b) to make clear that the client has the responsibility for and complete freedom of choosing the pleas to be entered.

40B. For the purpose of fulfilling the duty in rule 40A, a barrister may, in an appropriate case, advise the client in strong terms that the client is unlikely to escape conviction and that a plea of guilty is generally regarded by the court as a mitigating factor to the extent that the client is viewed by the court as cooperating in the criminal justice process.

40C. Where a barrister is informed that the client denies committing the offence charged but insists on pleading guilty to the charge, the barrister;

(a) must advise the client to the effect that by pleading guilty, the client will be admitting guilt to all the world in respect of all the elements of the charge;

(b) must advise the client that matters submitted in mitigation after a plea of guilty must be consistent with admitting guilt in respect of all of the elements of the offence;

13. NSW Bar Association, *New South Wales Barristers' Rules* (2014).

14. Law Society of NSW, *New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules)* (2014).

(c) must be satisfied that after receiving proper advice the client is making a free and informed choice to plead guilty; and

(d) may otherwise continue to represent the client.

12.48 We strongly support the ethical rules that recognise the need to progress the case expeditiously, and uncover and focus on the real issues in dispute. In this respect, the guidance provided by the Barristers' Rules is helpful. The Law Society of NSW should consider whether similar rules should apply to solicitors.

12.49 A number of stakeholders reported stories of possible "rorts" to the system where practitioners have lengthened processes allegedly for monetary gain. We have received this information through oral consultation and we do not rely upon this as evidence of a widespread problem. Nonetheless it is troubling to think that this may be occurring and, if it were, it would be a clear breach of the rules of professional conduct.

12.50 Abusing court procedure to lengthen processes is not consistent with the duties of a legal practitioner to the court and the administration of justice. Such behaviour is likely to breach the professional conduct rules. It is also unlikely to be an effective way to represent the best interests of the client. Barristers and solicitors who witness this type of conduct should take action to report breaches to their professional bodies. Magistrates and judges should not shy away from reporting practitioners who abuse the system and fail in their duties. The NSW Bar Association and the Law Society of NSW should continue to actively pursue complaints of this nature.

Resourcing the blueprint

12.51 Stakeholders have expressed concern about resourcing any reform to indictable proceedings, and have stressed the need generally for greater government resourcing of the criminal justice sector. Legal Aid NSW notes:

> Most importantly, as stressed in our initial submission, the underlying requirement for an effective and efficient criminal justice system which encourages appropriate early guilty pleas is adequate front end resourcing.[15]

12.52 Some stakeholders have expressed concern that the ODPP would be unable to fund the critical elements of the blueprint, such as early charge advice and continuity of approach. On this, the Public Defenders have stated that the "DPP needs to be appropriately funded so that it may facilitate the early briefing of the ultimate trial counsel."[16]

12.53 The DPP has stressed to us that reform can be resourced on current budget allocations but only if the efficiencies of early charge advice and the abolition of committals are realised. If, for example, the proposed program of post charge advice does not yield any saving of time and resources in Local Court appearances,

15. Legal Aid NSW, *Submission EAEGP11*, 2.
16. NSW, Public Defenders, *Submission EAEGP8*, 4, 5.

then the ODPP cannot finance the "front-end" loading required to make the blueprint successful.

12.54 There may also be resource implications for Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT) Ltd (ALS). For instance, Legal Aid NSW may need to fund any additional hours required for criminal case conferencing and the increased capacity required to monitor the efficiency of private practitioners. Legal Aid NSW and ALS may have other additional costs associated with front-end loading at the outset. These activities should lead to efficiencies over time, but we acknowledge that there will be initial costs and there may be a need for increased resources (including from the Commonwealth, in the case of the ALS).

12.55 We are not in a position to cost the proposals we make in detail. We develop these proposals based essentially on the advice of agencies about the needed efficiencies to the system. Agencies will need, in due course, to consider the blueprint and advise government on costs and savings. We have no doubt, however, that if the required changes can be achieved, efficiency will result.

12.56 Nonetheless, initial investment may be required in order to move resources earlier in the system, while coping with the residual cases that are managed under the old system. The Local Court will carry a lot of the burden. Moreover, system resourcing needs to be considered and modelled as a whole; additional investment in one agency may result in savings in another.

12.57 Some of the stakeholder criticism of the current system is that it is, as a whole, underfunded to achieve the quality of outcomes sought. While there may be some legitimacy in this view, we are not in a position to comment usefully on it. We note, however, that any case for additional funding should be built on a system that is operating optimally. In our view, the reforms proposed in this report provide a good basis for improving system operation.

12.58 In considering their responses to this report, agencies will need to model their cost structures, and provide advice to government on what is needed to achieve the improvements sought in this blueprint.

Implementation

12.59 Change of this magnitude will impact upon all criminal justice agencies. Aspects of this change - especially case management - need to be judicially led. Introducing changes of the scale proposed and the level intended in our blueprint will require an organised implementation strategy.

12.60 We recommend the formation of an implementation team to develop, implement and supervise the strategy. As identified throughout this report, problems with the current criminal justice system and the persistent obstacles to early guilty pleas are systemic and multi-disciplinary. They will require cross-agency cooperation to form a solution. The implementation team should report to the Justice Cluster leadership group. It should be chaired by a senior official of the NSW Department of Justice at Deputy Secretary level.

12.61 The implementation team should involve:

- ODPP
- Legal Aid NSW and ALS
- the NSW Police Force
- the Law Society of NSW and the NSW Bar Association
- representatives of the heads of jurisdiction and key court administrators
- BOCSAR, and
- Justice Policy.

Recommendation 12.6: create an implementation team

(1) The Secretary of the Department of Justice should appoint an implementation team convened by the Department and including representatives from:

(a) the NSW Police Force

(b) the NSW Office of the Director of Public Prosecutions

(c) Legal Aid NSW

(d) the Public Defenders

(e) Aboriginal Legal Service (NSW/ACT) Ltd

(f) the NSW Bar Association

(g) the Law Society of NSW

(h) the heads of jurisdiction

(i) court administrators

(j) the NSW Bureau of Crime Statistics and Research, and

(k) the Commonwealth Director of Public Prosecutions.

(2) The implementation team should develop and be responsible for an implementation strategy for the cross-agency operation of the blueprint.

Evaluation of the blueprint

12.62 We are recommending reform on a large scale. Under the *NSW Government Evaluation Framework,* our blueprint would be a Tier 3 program requiring:[17]

- an agreed evaluation plan, with clear Key Performance Indicators and responsibility for data collection
- a quarantined evaluation budget
- evaluation by NSW Treasury, consultants or by cluster specialists

17. NSW Government, *Evaluation Framework August 2013* (2013) 10.

- a steering committee with cross-agency membership (this is distinguished from the recommended Implementation Team above)
- consideration of peer reviews
- reporting to the responsible Minsters and Secretaries, and
- publication of an evaluation report.

Recommendation 12.7: evaluate the operation of the blueprint

(1) The implementation team in Recommendation 12.6 should develop a program for evaluating all elements of the blueprint reforms. The program should accord with the government's evaluation framework, including process and outcome evaluations.

(2) The implementation team should establish at the outset a clear data set to measure the outcomes sought. The necessary changes to supporting information technology systems should be made to ensure the data can be captured.

How should any evaluation be staged?

12.63 There are two types of evaluation that should be considered in this program. The first is unstructured evaluation, which is overseen by the implementation team. Unstructured assessment is fluid and can occur at any and every stage of the program lifecycle. This type of monitoring can identify issues to be acted upon, and allows for constant updates and improvements.

12.64 The second is structured and measurable evaluation. Programs should be put in place through the recommended two-stage approach in the *Evaluation Framework,* which we outline below.

Table 12.1: Two stage evaluation program for NSW

Stage 1: Process evaluation
A process evaluation should be undertaken on the basis of preliminary outcome data, and qualitative stakeholder views. The implementation team should work with participants to gather information throughout the implementation phase on: ▪ Participants' views on the success or weaknesses of the program. ▪ Identified risks and obstacles to successful implementation.
A process evaluation report should be distributed to all stakeholders.

Stage 2: Outcome evaluation (three - five years after implementation is finalised)				
The evaluation plan would delegate data collection responsibility, which would be used by an independent assessor to measure against the program's performance indicators.				
Data not currently available, but necessary to measuring the success of the blueprint would include:				
Timeliness data measuring At the point of: ▪ arrest to charge determination ▪ charge determination to each key court event and the point of referral to the higher court ▪ resolution.	**The entry of guilty pleas** The proportion of guilty pleas entered: ▪ at the first case management hearing ▪ in the Local Court ▪ after entry into the higher courts ▪ at the first day of trial ▪ during trial.	**Charge variations** ▪ Where in the process they occur. ▪ How often charge variations occur.	**Withdrawal of charges** ▪ Where in the process they occur. ▪ How often charge variations occur.	**Trial length**
Other performance indicators may include:				
▪ An increase in guilty pleas entered for indictable proceedings in the Local Court (early guilty pleas). In 2013, 65% of guilty pleas were entered in the Local Court. ▪ An increase in the proportion of matters progressed for sentenced in the District Court and Supreme Court. In 2013, 1756 matters were committed for sentence in the District Court (50% of all committed matters). ▪ A decrease in matters that proceed to trial in the District Court or Supreme Court. In 2013, 1744 matters were committed for trial in the District Court (50% of all committed matters). ▪ A decrease in matters that proceed to trial in the District Court or Supreme Court and resolve in a guilty plea. In 2013, 915 matters committed for District Court trial resolved in a guilty plea (52% of all matters committed for trial). ▪ A decrease in matters that proceed to trial in the District Court but resolve in a guilty plea on the day of trial. In 2012/13, 516 guilty pleas were entered on the day of trial (66% of late guilty pleas). ▪ A decrease in the matters where the charge is varied (including those that commence on indictment but resolve summarily). In 2012/13, 41% of all matters commenced on indictment resolved instead in the Local Court. ▪ A decrease in delay from commencement of proceedings to progressing into the higher courts. In 2013, the median days from charge to committal in the Local Court was 231 where committed for trial and 197 days where committed for sentence. ▪ A decrease in delay from commencement of proceedings to disposal in the higher court.				
Qualitative information should be collected to accompany the statistics. This will aid the implementation team and Steering Committee to identify any area in need of correction. Resource expenditure needs to be noted and measured against the success of the program.				
An outcome evaluation report should be published and publicly available via the Department of Justice website.				

Source: NSW Bureau of Crime Statistics and Research, New South Wales Criminal Court Statistics 2013 (2014); NSW, Office of the Director of Public Prosecutions, Annual Report 2012/2013 (2013) 26-28; NSW Bureau of Crime Statistics and Research, NSW Local Courts from 2009 to 2013: Number of Persons and Median Delay from Arrest to Committal (Days) in Finalised Local Court Appearances by Grouped Committal Outcome (Committed for Trial or Sentence) (14/12269hclc); Information provided by NSW, Office of the Director of Public Prosecutions (3 July 2013).

13. Safeguarding against inappropriate guilty pleas

In brief

Inappropriate guilty pleas are generally understood to be pleas entered to a charge that cannot be supported on the evidence and where the plea does not represent a true acknowledgement of guilt. The entering of inappropriate guilty pleas may be more likely where the defendant is unrepresented or vulnerable and the chance of an inappropriate may increase where a significant discount on sentence is available. We consider that our blueprint safeguards against inappropriate pleas.

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13.46 In this chapter we consider inappropriate guilty pleas to be guilty pleas entered to a charge where there is a strong likelihood that the person did not commit the charged offence. Accordingly, the charge on which the guilty plea was entered could not have been supported by the evidence at trial and does not represent a true acknowledgement of guilt. There is general concern that an inappropriate guilty plea (especially an inappropriate early guilty plea) is more likely to occur where the defendant is unrepresented or part of a vulnerable group. This likelihood is considered to augment where the sentence received for an early guilty plea is substantially less than one for a late plea or where convicted at trial.

13.47 Below we review each issue in reference to our blueprint.

Unrepresented defendants

13.48 At the time of writing this report there were no available statistics on the number of unrepresented defendants in indictable proceedings in NSW. It has been acknowledged that the proportion would be significantly less than that of unrepresented defendants reported in summary matters.[1] Legal Aid NSW has advised that, in their experience, it is rare for a defendant to represent themselves in indictable proceedings.[2]

13.49 Statistics on unrepresented defendants in summary proceedings in the Local Court of NSW show that in 2013:

- 35% (36 058) of all defendants were unrepresented.
- 93% of unrepresented defendants were found guilty compared to 86% of represented people.[3]
- 52% of unrepresented defendants were sentenced after a guilty plea, compared to 69% of represented defendants.[4]

Current practice and procedure regarding unrepresented defendants in indictable proceedings

13.50 The law operates so that people who cannot afford legal representation are generally not forced to defend themselves at trial. NSW courts are subject to the *Dietrich* principle, a High Court decision that established that a trial judge may grant a stay if an impoverished person is denied a fair trial because he or she is unable to obtain legal representation.[5] Defendants must prove that they are unable to obtain legal representation and their trial would be unfair.[6] They must also prove on the balance of probabilities that they are impoverished.[7]

13.51 In NSW, a defendant may still appear personally and may conduct his or her own case.[8] This applies to "all offences, however arising … whenever committed and in whatever court dealt with".[9] Instruments of criminal procedure, including statute, case notes and guidelines, prescribe that in some instances matters with unrepresented defendants are to proceed differently from other indictable matters. There are three primary concerns:

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1. See C Craigie, "Unrepresented Litigants: The Criminal Justice Perspective" (2005) <http://www.publicdefenders.justice.nsw.gov.au/pdo/public_defenders_unrepresented_litigants.html>.
2. Information supplied by Legal Aid NSW (October 2014)
3. "Found guilty" includes being found by the court after trial, entering a guilty plea, conviction ex parte, and sentenced matters whether by guilty plea or trial.
4. NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2013* (2014) Table 1.5.
5. *Dietrich v The Queen* (1992) 177 CLR 292.
6. *Attorney-General (NSW) v Milat* (1995) 80 A Crim R 530.
7. *R v Small* (1994) 33 NSWLR 575.
8. *Criminal Procedure Act 1986* (NSW) s 36(1), s 37(2).
9. *Criminal Procedure Act 1986* (NSW) s 28(1).

- to protect any witness/victim from being cross-examined by a defendant who is acting in their own defence
- to ensure the defendant receives fair administration of justice, and
- to alleviate any undue pressure or coercion that the defendant may feel to enter a guilty plea.

Unrepresented defendants and cross-examination

13.52 There are rules regarding unrepresented defendants and oral evidence. These include:

- An unrepresented defendant cannot directly examine in chief, cross-examine or re-examine a complainant in sexual offence proceedings. Instead a person appointed by the court may examine the complainant.[10] The court cannot decline to appoint a person.[11]
- An unrepresented defendant in personal assault matters may not directly examine in chief, cross-examine or re-examine a vulnerable witness.[12] Instead a person may be appointed by the court.[13] The court may choose not to appoint such a person if the court considers it is not in the interests of justice.[14]

Ensuring the administration of justice

13.53 For the fair administration of justice, a balance must be struck between informing unrepresented defendants of their rights on the one hand and permitting them to "run" the matter as they see fit (which may not be the best and most obvious way) on the other. This has resulted in prosecution rules regarding fair and proper disclosure and an even-handed approach at trial, but does not extend to the prosecution providing legal or procedural advice.

13.54 Accordingly:

- It is a "basic requirement" that the prosecutor ensure that an unrepresented defendant is properly informed of the prosecution case against him or her.[15] The prosecutor is not, however, required to advise a defendant about legal issues, evidence, possible defences, or the conduct of the defence, but they do have a duty to ensure that the trial judge gives appropriate assistance to the unrepresented defendant.
- Prosecutors must not take advantage of an unrepresented defendant by, for example, asking an inadmissible question of a witness.[16]

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10. *Criminal Procedure Act 1986* (NSW) s 294A(2).
11. *Criminal Procedure Act 1986* (NSW) s 294A(5).
12. *Criminal Procedure Act 1986* (NSW) s 306ZL. "Vulnerable person" is defined as a child or a cognitively impaired person: *Criminal Procedure Act 1986* (NSW) s 306M(1).
13. *Criminal Procedure Act 1986* (NSW) s 306ZL(1)-(2).
14. *Criminal Procedure Act 1986* (NSW) s 306ZL(5).
15. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 23.
16. *R v Reeves* (1992) 29 NSWLR 109.

- Prosecutors are encouraged not to make an address to the jury where the defendant is unrepresented.[17]

13.55 The role of the magistrate or judge is more complex. We understand that the court is very active in ensuring that defendants are legally represented, where required. Where a person proceeds unrepresented, the magistrate must fully inform him or her of his or her rights before written statements can be admitted in committal proceedings.[18] At trial the judge must advise the defendant of his or her procedural rights, such as seeking an adjournment. The judge has a duty to ensure "the accused is put in a position where he [or she] is able to make an effective choice as to the exercise of his [or her] rights during the course of the trial, but it is not [the judge's duty] to tell [the accused] how to exercise those rights".[19]

13.56 The judge or magistrate is not required to advise on the substantive criminal law. The judge or magistrate should:

- rule on the admissibility of questions and explain the form in which they should be asked, but does not have to formulate the questions for an unrepresented defendant, and
- advise the unrepresented defendant that he or she may put matters to witnesses in the presence of the jury, but does not have a duty to remind the defendant that he or she has not put parts of their case to witnesses or advise them how to put their case in a better way.[20]

Coercion and pressure

13.57 The NSW Office of the Director of Public Prosecutions (ODPP) Prosecution Guidelines state that prosecutors must exercise "particular care" when dealing with an unrepresented defendant.[21] This does not go as far as the Victorian counterpart which states that "Crown-initiated proposals for resolution of a matter should not be undertaken with an unrepresented accused except with the approval of the Director".[22]

13.58 Previous programs, such as the criminal case conferencing trials in NSW (2006-2012), excluded participation by unrepresented defendants. This was due to concern that without an independent adjudicator an unrepresented defendant may be coerced or pressured into entering a guilty plea. Equally, pre-trial conferences in the Supreme Court of NSW that occur before the trial judge are not held when defendants are unrepresented.[23]

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17. *R v Zorad* (1990) 19 NSWLR 91, 94.
18. *Criminal Procedure Act 1986 (*NSW) s 89, s 289.
19. *R v Zorad* (1990) 19 NSWLR 91, 99.
20. *R v Zorad* (1990) 19 NSWLR 91, 99-102.
21. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 23.
22. Victoria, Director of Public Prosecutions, *Director's Policy on Early Resolution* [17].
23. Supreme Court of NSW, *Practice Note SC CL 2 - Supreme Court Common Law Division – Criminal Proceedings*, 29 September 2014 [10(e)].

Stakeholder views

13.59 Stakeholders have expressed concern for unrepresented defendants in the criminal justice system. NSW Young Lawyers submitted that duty solicitors should be made available to otherwise self-represented people to help encourage appropriate early guilty pleas. This is because "[a]ccused persons are often unfamiliar with the elements [of] a criminal offence and may plead not guilty based on a misperception of what constitutes the offending behaviour as well as his or her disagreement with certain facts stipulated in a police Facts Sheet". Further, unrepresented defendants are "likely to misapprehend the advantages of an early plea under the current system".[24]

13.60 Other stakeholders expressed continued support for the exclusion of unrepresented defendants in criminal case conferencing. Legal Aid NSW is of the view that if criminal case conferencing were to be introduced as part of the Local Court case management the defendant must be legally represented.[25] The Intellectual Disability Rights Service submitted that if criminal case conferencing is reintroduced in NSW, defendants with impaired capacity would need to be assured of legal representation and appropriate support persons should be made available.[26]

Our view: unrepresented defendants are sufficiently protected under current guidelines and practices

13.61 In this report we recommend wholesale reform of indictable proceedings, which includes mandatory criminal case conferencing where a guilty plea has not been entered.[27] Although there remains some concern among stakeholders regarding the potential coerciveness of the case conference for people who are not represented, we think that the benefit of early and frank communication between the parties and the ability for everyone to participate in the system outweighs this concern.

13.62 The effective operation of the criminal justice system should include all who come before it, and accordingly, we do not recommend excluding an unrepresented defendant at any point in our blueprint. (Nonetheless, where a person is unrepresented, an option for facilitated criminal case conferences discussed in para 7.54 could be further explored.)

13.63 The current safeguards put in place by the courts and prosecution should remain. It is our view that *Dietrich* should continue to operate to prevent impoverished people from being forced to act in their own defence. This generally means that unrepresented defendants will constitute people who choose (rightly or wrongly) to be unrepresented, and in the indictable system this is rare. Where a person decides to be unrepresented the prosecution has existing duties, including the duty to ensure that the defendant is properly informed of the case against him or her. Preliminary hearings are also overseen by the court. While the possibility of coercion in these circumstances cannot be totally eliminated, there appears to be

24. NSW Young Lawyers, Criminal Law Committee, *Preliminary Submission PEAEGP10,* 6, 11.
25. Legal Aid NSW, *Submission EAEGP11,* 22.
26. Intellectual Disability Rights Service, *Submission EAEGP5*, 7.
27. See Chapter 7.

proper safeguards in place to enable unrepresented defendants to come to the best decision about entering a plea.

13.64 We do not see any clear need for reform in this area. However, we do not have information about the number of unrepresented defendants in indictable proceedings and the outcomes in these matters. To enable meaningful reforms to be developed, future systems should attempt to capture this data (if any) and further evaluation should be conducted.

The particular characteristics of the defendant

13.65 There is international research to suggest that the particular characteristics of an individual defendant may render that person more likely to enter an inappropriate guilty plea. Various studies in overseas jurisdictions have suggested that age,[28] gender[29] and race[30] may be influencing factors to entering an inappropriate plea. There is some Australian research to suggest that vulnerable groups, such as women and indigenous people,[31] may be more likely to enter a plea of guilty due to external pressures or the desire to avoid a trial, rather than because of the strength of the prosecution case.

13.66 These are complex issues and we are unable to fully explore the breadth of these within this report. The impact of gender, ethnicity and age on a person's decision to plead guilty is only briefly explored below.

Gender and guilty pleas

13.67 A number of studies have indicated that female defendants face particular pressure to admit guilt.

13.68 A 2011 UK study based on semi-structured interviews with 50 convicted women revealed three pressures relevant to women which may lead to women entering an inappropriate guilty plea. The first relates to family responsibilities. As women are often the primary caregivers, being separated from family can be of particular concern to them if a custodial sentence is given. The potential for a non-custodial sentence to be imposed following an early guilty plea is therefore a strong incentive

28. A Redlich, "The Susceptibility of Juveniles to False Confessions and False Guilty Pleas" (2010) 62 *Rutgers Law Review* 943, 957.
29. S Jones, "Under Pressure: Women who Plead Guilty to Crimes They Have Not Committed" (2011) 11 *Criminology and Criminal Justice* 77, 82.
30. R Everett and R Wojtkiewicz, "Difference, Disparity and Race/Ethnic Bias in Federal Sentencing" (2002) 18 *Journal of Quantitative Criminology* 189, 207; E Frenzel and D Ball, "Effects of Individual Characteristics on Plea Negotiations Under Sentencing Guidelines" (2007) 5(4) *Journal of Ethnicity in Criminal Justice* 59, 76-77. See also C Albonetti, "Race and the Probability of Pleading Guilty" (1990) 6 *Journal of Quantitative Criminology* 315, 330-1; K Kwok-Yin Cheng, "Pressures to Plead Guilty: Factors Affecting Plea Decisions in Hong Kong's Magistrates' Courts" (2013) 53 *British Journal of Criminology* 257, 262.
31. J Stubbs and J Tolmie, "Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women" (2008) 41 *Australian and New Zealand Journal of Criminology* 138; K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995) 13.

to admit guilt.[32] Secondly, some of the interviewees described being coerced by their male partners to enter a guilty plea to offences which their partners had committed. These women reported threats of violence, intimidation and emotional blackmail, and that they felt they had no alternative but to admit guilt. Thirdly, some women were influenced by a desire to protect their male partner or associate. The report suggests that instances of men admitting to crimes in order to protect their female partner are less frequent.[33]

13.69 A 2008 Australian study analysed 55 cases in Australia of women charged with homicide offences who invoked the defence of battered women's syndrome.[34] These women found the process of plea negotiations to be a source of extreme pressure to enter a plea of guilty. Some of the factors which discourage battered women from going to trial included the trauma involved if the children of the relationship were required to give evidence and the defendant's personal distress at having the details of the relationship publicly analysed.[35]

Minority groups and guilty pleas

13.70 In some overseas jurisdictions it has been noted that minority or vulnerable groups are more likely to exercise their right to trial and are less likely to enter a guilty plea.[36] This would lead to the conclusion that minority status is unlikely to affect a person's likelihood of entering an inappropriate guilty plea.

13.71 A 2007 American study in relation to African American and Hispanic defendants supported this proposition. This study concluded that defendants identifying as African American or Hispanic were more likely to have their case go to trial rather than entering or negotiating a plea, than non-African American and non-Hispanic defendants.[37] It has been suggested that ethnic minority groups may be more likely to distrust the system and would prefer to have their cases proceed to trial, an option many think places them in a less vulnerable position.[38]

13.72 The 2008 study on battered women found that there were particular pressures on indigenous women in Australia to plead guilty. Conversely, for these types of

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32. S Jones, "Under Pressure: Women who Plead Guilty to Crimes They Have Not Committed" (2011) 11 *Criminology and Criminal Justice* 77, 82.
33. S Jones, "Under Pressure: Women who Plead Guilty to Crimes They Have Not Committed" (2011) 11 *Criminology and Criminal Justice* 77, 84.
34. J Stubbs and J Tolmie, "Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women" (2008) 41 *Australian and New Zealand Journal of Criminology* 138.
35. J Stubbs and J Tolmie, "Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women" (2008) 41 *Australian and New Zealand Journal of Criminology* 138, 149-150.
36. R Everett and R Wojtkiewicz, "Difference, Disparity and Race/Ethnic Bias in Federal Sentencing" (2002) 18 *Journal of Quantitative Criminology* 189, 207.
37. E Frenzel and D Ball, "Effects of Individual Characteristics on Plea Negotiations Under Sentencing Guidelines" (2007) 5(4) *Journal of Ethnicity in Criminal Justice* 59, 76-77. See also C Albonetti, "Race and the Probability of Pleading Guilty" (1990) 6 *Journal of Quantitative Criminology* 315.
38. C Albonetti, "Race and the Probability of Pleading Guilty" (1990) 6 *Journal of Quantitative Criminology* 315, 330-1. The author also notes that a range of other variables may affect the probability of a plea of guilty including whether legal representation is obtained, whether a weapon was used in the offence and the kind of punishment that the offence is likely to attract.

defendants, their fear and distrust of the justice system operated as an inducement to plead guilty to avoid the trauma associated with going to trial.[39]

13.73 This is an extremely complex area, and in Australia the position regarding indigenous offenders and other minority groups, and the entry of guilty pleas is not clear. There is a paucity of research in this regard. In their 1995 seminal study on guilty pleas, Professor Mack and Professor Roach Anleu suggested that indigenous defendants are probably more likely to enter a guilty plea than non-indigenous defendants due to an identified "desire to get matters over with".[40] By way of contrast, a recent Queensland study of defendants in the Magistrates Court found that the Aboriginal and Torres Strait Islander offenders were less likely to enter a plea of guilty (78.6%) than non-indigenous offenders (88.4%).[41]

13.74 The NSW Bureau of Crime Statistics and Research (BOSCAR) has recently conducted research into correlates of a guilty plea that indicates little difference between indigenous and non-indigenous people and the likelihood of a guilty plea.[42] The research uses data to explore the likelihood of a plea depending upon different attributes and characteristics of the offender. It did not look at pressures to plead or the likelihood of an inappropriate plea.

Age of the offender and guilty pleas

13.75 While there are particular characteristics of young offenders which may make them more likely to enter an inappropriate guilty plea, such as impulsiveness and the inability to understand long term consequences, a detailed study conducted in 2010 found no empirical evidence that juveniles face more pressure to enter false guilty pleas than adults.[43]

13.76 BOCSAR research found that young people are more likely to enter an early guilty plea, but this does not necessarily mean that young people are more susceptible to pressure to plead inappropriately.[44]

Our view: complex causative factors cannot be dealt with in this report

13.77 We acknowledge that our blueprint does not definitively address individual characteristics that may influence a defendant's decision to enter an inappropriate guilty plea under the current system. The causative factors are complex. The ways

39. J Stubbs and J Tolmie, "Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women" (2008) 41 *Australian and New Zealand Journal of Criminology* 138, 150.
40. K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995) 13. An exploration of the issues can be found at 119-121.
41. C Bond, S Jeffries and H Loban, *Exploring Indigenous and Non-Indigenous Sentencing in Queensland* (Queensland Premier and Cabinet, Indigenous Criminal Justice Research Agenda, 2011) 51.
42. C Ringland and L Snowball, *Predictors of Guilty Pleas in the NSW District Court*, Bureau Brief No 96 (NSW Bureau of Crime Statistics and Research, 2014) 4.
43. A Redlich, "The Susceptibility of Juveniles to False Confessions and False Guilty Pleas" (2010) 62 *Rutgers Law Review* 943, 957.
44. C Ringland and L Snowball, *Predictors of Guilty Pleas in the NSW District Court*, Bureau Brief No 96 (NSW Bureau of Crime Statistics and Research, 2014) 5.

to address these issues are broad and varied, and include ongoing policy development with cultural and community groups, police and legal service providers. While we recognise that these important issues exist and need to be addressed, we are not able to deal with them within the terms of this reference. We have instead looked to mitigate the risk of inappropriate charges being laid in the first instance, which we discuss in Chapter 4.

Sentence disparity

13.78 Sentence discounts for early guilty pleas are a well-established feature of criminal justice systems, and we discuss our support of the application of a discount on sentence for the utilitarian benefit of the plea in Chapter 9.

13.79 Consensus about the use of sentence discounts in exchange for guilty pleas is by no means unanimous. Many legal theorists have criticised the potential coerciveness of discount systems.[45] Criticism has been particularly pronounced where the entry of a guilty plea produces a stark difference in the length of the sentence or where it may mean the difference between a custodial or non-custodial sentence.[46]

13.80 Much of the literature that explores this area emerges from the US, which has been heavily criticised for the practice of "unrestricted plea bargaining".[47] In the frequently cited case of *Bordenkircher v Hayes*,[48] for example, the defendant was offered a term of five years imprisonment if he entered a guilty plea to the offence of passing a forged cheque. Hayes refused to enter a plea of guilty and, as a result of two prior convictions, was charged under the Kentucky *Habitual Criminal Act* and sentenced to life imprisonment. An appeal to the US Supreme Court was denied. While this case is an extreme example, the large plea/trial differential evident on those facts certainly makes an early guilty plea appear the most rational option for a defendant in similar circumstances. This appears to be so whether or not there would be sufficient evidence for such a person to be convicted.[49] By elevating the risk of receiving a significantly larger sentence following a trial, plea negotiations and the application of a discount for an early plea in the US has the potential to be coercive and intensify pressure on an accused person to plead guilty.

13.81 Such criticism is not confined to the US. Australian socio-legal scholars Professor Mack and Professor Roach Anleu argued in 1995 that the most "substantial objection in principle to sentence discounting is its coercive impact, particularly in

45. A Ashworth, *Sentencing and Penal Policy* (Weidenfeld and Nicholson, 1983) 312-313; K Mack and S Roach Anleu, "Sentence Discount for a Guilty Plea: Time for a New Look" (1997) 1 *Flinders Journal of Law Reform* 123, 134-6; F Leverick, "Tensions and Balances, Costs and Rewards: the Sentence Discount in Scotland" (2004) 8 *Edinburgh Law Review* 360, 360-361.
46. K Mack and S Roach Anleu, "Sentence Discount for a Guilty Plea: Time for a New Look" (1997) 1 *Flinders Journal of Law Reform* 123, 135.
47. See, eg, N Vamos, "Please Don't Call it 'Plea Bargaining'" (2009) 9 *Criminal Law Review* 617, 619-622; P Tague, "Guilty Pleas or Trials: Which Does the Barrister Prefer?" (2008) 32 *Melbourne University Law Review* 242, 243.
48. *Bordenkircher v Hayes* (1978) 434 US 357, 365.
49. N Vamos, "Please Don't Call it 'Plea Bargaining'" (2009) 9 *Criminal Law Review* 617, 622.

coercing a guilty plea from an accused who may have an arguable defence."[50] For Professor Mack and Professor Roach Anleu, the sentence discount is an improper inducement to plead, which has become an institutionalised tool of coercion that must be recognised as a penalty imposed on a defendant who pleads not guilty and unsuccessfully contests charges at trial.[51]

13.82 Underpinning this objection is the concern that, in staggered discount systems, people may be enticed to enter a plea on the least available information.[52]

13.83 We note that there are also objections to the discount system, raised by victims among others, who consider that the sentence received does not reflect the criminality of the offending.[53]

Stakeholder views

13.84 Stakeholders have also raised concerns that programs likely to encourage early guilty pleas might also produce inappropriate pleas. The NSW Public Defenders agree with Professor Mack and Professor Roach Anleu that sentencing discounts may act as an inappropriate inducement to plead guilty. The Public Defenders note:[54]

> We suggest that there is a limit to the use of sentence discounts as an enticement to early pleas of guilty. There are significant disparities between custodial sentences handed down following an early guilty plea compared to those handed down after a conviction at trial. The former are "discounted" sentences, partly justified for pragmatic policy concerns to do with the saving of community resources. However it is explained, the fact remains that an accused person who is convicted at trial will usually serve a significantly longer sentence for the privilege. It cannot be assumed that all accused who are convicted at trial are in fact guilty; from time to time wrongful convictions are discovered. The greater this disparity, the greater the danger that accused persons who are in fact innocent of the charges against them, but who face strong evidence to the contrary, will plead guilty for fear of serving a longer sentence, should they be convicted at trial.

13.85 The key concern articulated by the Public Defenders appears to be that sentence discounts have the potential to coerce an innocent person to enter a plea of guilty, and the greater the disparity in sentence quantum received after trial compared to a plea, the more likely a false guilty plea is.

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50. K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995) 167.
51. K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995) 171.
52. K Mack and S Roach Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995) 171.
53. See Chapter 11.
54. NSW, Public Defenders, *Submission EAEGP8*, 6.

13.86 NSW Young Lawyers suggested that inappropriate guilty pleas may be entered to access the sentence discount; to avoid trial; to positively affect the likelihood of parole; or may be entered due to financial stress or other personal considerations.[55]

Our view: inappropriate pleas mitigated under our blueprint

13.87 We recognise the genuine concerns raised against the use of sentence discounts as an incentive to enter a guilty plea. The majority of our stakeholders have told us, however, that the sentence discount is an important consideration to entering a plea of guilty, and that reform needs to concentrate on further defining and appropriately applying the discount. The sentence discount is now an established feature of the criminal justice landscape.

13.88 Although our reference is about encouraging early guilty pleas, we are equally mindful of ensuring that the criminal justice system remains fair to those who seek to have their matter determined by a defended trial. We have sought to ensure that, in incentivising defendants to enter an early guilty plea, we have not created such a disparity between early guilty pleas and defended trials that a defendant may be induced to enter an inappropriate plea. Accordingly, under our blueprint the maximum discount on sentence for the utilitarian value of an early guilty plea would be capped at the current common law maximum of 25%. This has been the maximum discount since 2000[56] and the percentage of discount has not caused controversy (although the manner in which it has been applied has on occasion earned criticism in the appeal courts).

13.89 In this reference, we are looking to create a system where guilty pleas that would otherwise be entered late in proceedings are instead entered early in criminal proceedings. It is not our intention to create a system that would encourage an innocent person to enter a plea. Nor is it our intention that a person enters a guilty plea to an inappropriate charge. In fact, our proposed system is designed to counter that possibility by instituting safeguards against the entry of inappropriate guilty pleas.

13.90 Under our proposed blueprint, indictable matters that are in the Local Court will have been reviewed by an officer of the ODPP, and the most appropriate, rigorous charge will be laid on the evidence. Sufficient disclosure will have been made so that an early guilty plea could be entered on sufficient evidence to support that charge. The prosecution and the defence, well informed as to these matters, will have met to discuss and resolve any issues. In this framework, it is unlikely that a charge could stand on insufficient evidence and, as a corollary, unlikely that a defendant could enter an "inappropriate" guilty plea.

55. NSW Young Lawyers, Criminal Law Committee, *Preliminary Submission PEAEGP10*, 8. See also NSW, Public Defenders, *Submission EAEGP8*, 6.

56. *R v Thomson* [2000] NSWCCA 309; 49 NSWLR 383 [160].

Appendix A
Submissions

Preliminary submissions

PEAEGP1	Law Society of NSW, Criminal Law Committee, 20 June 2013
PEAEGP2	NSW, Public Defenders, 21 June 2013
PEAEGP3	Mr Paul Shaw, 21 June 2013
PEAEGP4	Legal Aid NSW, 21 June 2013
PEAEGP5	Chief Magistrate of the Local Court of NSW, 21 June 2013
PEAEGP6	NSW, Office of the Director of Public Prosecutions, 26 June 2013
PEAEGP7	Mr Peter Lowe, 27 June 2013
PEAEGP8	NSW Bar Association, 5 July 2013
PEAEGP9	Aboriginal Legal Service (NSW/ACT) Limited, 4 July 2013
PEAEGP10	NSW Young Lawyers, Criminal Law Committee, 5 July 2013
PEAEGP11	NSW Police Force, 28 August 2013

Submissions

EAEGP1	Public Interest Advocacy Centre, 10 December 2013
EAEGP2	Police Association of NSW, 11 December 2013
EAEGP3	Children's Court of NSW, 13 December 2013
EAEGP4	NSW Bar Association, 13 December 2013
EAEGP5	Intellectual Disability Rights Service, 13 December 2013
EAEGP6	Chief Magistrate of the Local Court of NSW, 16 December 2013
EAEGP7	Mersal & Associates Pty Ltd, 17 December 2013
EAEGP8	NSW, Public Defenders, 20 December 2013
EAEGP9	Law Society of NSW, Criminal Law and Juvenile Justice Committees, 19 December 2013
EAEGP10	NSW, Office of the Director of Public Prosecutions, 20 December 2013
EAEGP11	Legal Aid NSW, 10 January 2014
EAEGP12	NSW Young Lawyers, Criminal Law Committee, 13 January 2014
EAEGP13	Commonwealth Director of Public Prosecutions, 6 February 2014
EAEGP14	NSW Police Force, 12 May 2014
EAEGP15	Mr Mark Ierace SC, Senior Public Defender, 20 June 2014

Appendix B
Consultations and stakeholder engagement

Justice Policy, NSW Department of Attorney General and Justice (EAEGP1)

3 May 2013

Ms Penny Musgrave, Director Criminal Law Review

Legal Aid NSW (EAEGP2)

3 June 2013

Mr Bill Grant, Chief Executive Officer
Mr Steve O'Connor, Deputy Chief Executive Officer
Mr Brian Sandland, Executive Director, Legal Services Criminal Law
Ms Annmarie Lumsden, Executive Director, Strategic Policy and Planning

NSW Office of the Director of Public Prosecutions (EAEGP3)

5 June 2013

Mr Lloyd Babb SC, Director of Public Prosecutions
Ms Johanna Pheils, Deputy Solicitor for Public Prosecutions (Legal)

A Hucklesby (EAEGP4)

12 June 2013

Professor Anthea Hucklesby, Leeds University

NSW Police Force (EAEGP5)

18 June 2013

Chief Superintendent Anthony Trichter
Senior Sergeant Amee Templeman
Inspector Brendan Searson

NSW Public Defenders (EAEGP6)

3 July 2013

Mr Mark Ierace SC, Senior Public Defender
Ms Dina Yehia SC, Deputy Senior Public Defender

NSW Bureau of Crime Statistics and Research (EAEGP7)

12 July 2013

Mr Don Weatherburn, Director

Local Court of NSW (EAEGP8)

16 July 2013

His Honour Judge G L Henson, Chief Magistrate
Her Honour Deputy Chief Magistrate J E Mottley
Her Honour Deputy Chief Magistrate J A Culver
Ms Alison Passé-de Silva, Policy Officer

Newcastle Pilot Meeting (EAEGP9)

19 July 2013

NSW Law Reform Commission observation

Legal Aid NSW (EAEGP10)

5 August 2013

NSW Law Reform Commission attendance at committal proceedings in Sydney Central Local Court with Legal Aid NSW

NSW Bar Association and Law Society of NSW (EAEGP11)

28 August 2013

Mr Alex Dimos, Law Society of NSW
Mr David Giddy, Law Society of NSW
Mr Phillip Gibson, Law Society of NSW
Ms Megan Black, NSW Bar Association
Mr Philip Boulten SC, NSW Bar Association
Mr Stephen Odgers SC, NSW Bar Association
Ms Kara Shead, NSW Bar Association

District Court of NSW (EAEGP12)

11 September 2013

The Hon Justice Reginald Blanch, Chief Judge

S Roach Anleu (EAEGP13)

20 September 2013

Professor Sharyn Roach Anleu, Flinders University

PricewaterhouseCoopers (EAEGP14)

16 October 2013

Ms Jen Bhula, Programme Manager - Future Court Services (NZ)

Children's Court of NSW (EAEGP15)

23 October 2013

His Honour Judge Peter Johnstone, President
His Honour Magistrate Paul Mulroney
Her Honour Magistrate Joanne Keogh
Ms Rosemary Davidson, Executive Officer
Ms Paloma Mackay-Sim, Research Associate

UK, Office of the Senior Presiding Judge (EAEGP16)

26 November 2013

Ms Sara Carnegie, Legal Adviser
Ms Vanessa Castle

Domestic and Family Violence, NSW Department of Attorney General and Justice (EAEGP17)

15 January 2014

Ms Kristen Daglish-Rose, Acting Manager
Ms Deborah Bradford, Senior Policy and Projects Officer
Ms Carolyn Thompson, Manager

Aboriginal Legal Service (NSW/ACT) Ltd (EAEGP18)

23 January 2014

Mr John McKenzie, Chief Legal Officer

NSW Police Force (EAEGP19)

13 February 2014

Inspector Brendan Searson

A Hucklesby (EAEGP20)

19 February 2014

Professor Anthea Hucklesby, Leeds University

NSW Office of the Director of Public Prosecutions and Legal Aid NSW (EAEGP21)

19 February 2014

Mr Lloyd Babb SC, Director of Public Prosecutions
Ms Johanna Pheils, Deputy Solicitor for Public Prosecutions (Legal)
Mr Bill Grant, Chief Executive Officer, Legal Aid NSW
Ms Annmarie Lumsden, Executive Director, Strategic Policy and Planning, Legal Aid NSW

Behavioural Insights Unit, NSW Department of Premier and Cabinet (EAEGP22)

4 March 2014

Dr Rory Gallagher, Managing Advisor
Mr Xian-Zie Soon

Commonwealth Director of Public Prosecutions (EAEGP23)

11 March 2014

Ms Ellen McKenzie, Deputy Director, Sydney Office
Mr Chris Murphy, Senior Assistant Director, Sydney Office

NSW Office of the Director of Public Prosecutions and Legal Aid NSW (EAEGP24)

6 March 2014

Mr Lloyd Babb SC, Director of Public Prosecutions
Ms Johanna Pheils, Deputy Solicitor for Public Prosecutions (Legal)
Mr Bill Grant, Chief Executive Officer, Legal Aid NSW
Ms Annmarie Lumsden, Executive Director, Strategic Policy and Planning, Legal Aid NSW
Mr Andrew Chatterton, NSW Department of Justice

Local Court of NSW (EAEGP25)

24 March 2014

Her Honour Deputy Chief Magistrate J E Mottley
Her Honour Deputy Chief Magistrate J A Culver
Ms Alison Passé-de Silva, Policy Officer

District Court of NSW (EAEGP26)

26 March 2014

The Hon Justice Reginald Blanch, Chief Judge

Legally Aided Defence Group (EAEGP27)

26 March 2014

Mr Mark Ierace SC, Senior Public Defender
Mr John McKenzie, Chief Legal Officer, Aboriginal Legal Service (NSW/ACT) Limited
Ms Annmarie Lumsden, Executive Director, Strategic Policy and Planning, Legal Aid NSW
Mr Paul Hayes, Deputy Executive Director Criminal Law, Legal Aid NSW
Mr Steven Doumit, Senior Criminal Lawyer, Grants Division, Legal Aid NSW

NSW Bar Association and Law Society of NSW (EAEGP28)

25 March 2014

Mr Stephen Odgers SC, NSW Bar Association
Ms Megan Black, NSW Bar Association
Mr Brett Wallace, Law Society of NSW
Mr Alex Dimos, Law Society of NSW

NSW Police Force and NSW Ministry of Police and Emergency Services (EAEGP29)

8 May 2014

Chief Superintendent Anthony Trichter, NSW Police Force
Superintendent Ken Finch, NSW Police Force
Mr Sam Toohey, Policy Director, NSW Ministry of Police and Emergency Services
Ms Angela Zekanovic, Policy Analyst, NSW Ministry of Police and Emergency Services

NSW Office of the Director of Public Prosecutions, Witness Assistance Service (EAEGP30)

21 May 2014

Ms Deb Scott, Witness Assistance Service Officer
Ms Edna Udovich, Witness Assistance Service Officer
Ms Rhonda Dodd, Witness Assistance Service Officer
Ms Sophie Kingston, Witness Assistance Service Officer
Ms Kate Goninan, Witness Assistance Service Officer

NSW Office of the Director of Public Prosecutions, Legal Aid NSW and NSW Police Force (EAEGP31)

2 June 2014

Mr Lloyd Babb SC, Director of Public Prosecutions
Ms Johanna Pheils, Deputy Solicitor for Public Prosecutions (Legal)
Mr Bill Grant, Chief Executive Officer, Legal Aid NSW
Ms Annmarie Lumsden, Executive Director, Strategic Policy and Planning, Legal Aid NSW
Chief Superintendent Anthony Trichter, NSW Police Force

Law Society of NSW (EAEGP32)

4 June 2014

Mr Sebastian De Brennan
Mr Alex Dimos
Mr David Giddy

NSW Bar Association (EAEGP33)

13 June 2014

Mr Stephen Odgers SC
Ms Megan Black

NSW Office of Director of Public Prosecutions (EAEGP34)

17 June 2014

Ms Claire Girotto, Deputy Solicitor for Public Prosecutions (Operations)

NSW Public Defenders and Aboriginal Legal Service (NSW/ACT) Ltd (EAEGP35)

23 June 2014

Mr Mark Ierace SC, Senior Public Defender

Mr John McKenzie, Chief Legal Officer, Aboriginal Legal Service (NSW/ACT) Limited

Victims roundtable (EAEGP36)

2 July 2014

Mr Howard Brown, Deputy President, Victims of Crime Assistance League

Ms Robyn Cotterell-Jones, President, Victims of Crime Assistance League

Ms Mahashini Krishna, Acting Commissioner of Victims Rights, Victims Services, NSW Department of Justice

Ms Louise Lenard, Executive Officer, Victims Services, NSW Department of Justice

Ms Faye Leveson, Homicide Survivors Support After Murder

Mr Mark Leveson, Homicide Survivors Support After Murder

Mr Peter Rolfe, President, Homicide Survivors Support After Murder

Ms Karen Willis, Executive Officer, Rape & Domestic Violence Services Australia

Homicide Victims' Support Group (EAEGP37)

18 July 2014

Ms Martha Jabour, Executive Director

Ms Clare Blanch, Counsellor

Ms Denise Day, Counsellor

Ms Karen Chapman

Ms Leonie Collins

Ms Jannice Florendo

Ms Kelly Parker

Mr Robert Taylor

Ms Rosalie Taylor

R Kelly (EAEGP38)

21 July 2014

Mr Ralph Kelly

NSW Director of Public Prosecutions (EAEGP39)

9 September 2014

Mr Lloyd Babb SC, Director of Public Prosecutions

District Court of NSW (EAEGP40)

17 September 2014

The Hon Justice Derek Price, Chief Judge

NSW Police Force (EAEGP41)

10 October 2014

Chief Superintendent Anthony Trichter

Appendix C
Methodological notes on NSW committal statistics

c.1 In this appendix we set out the methodology behind the statistics on committal proceedings in NSW contained in Chapter 8.

c.2 Due to a lack of court-held data in this area, statistics were provided by the NSW Office of the Director of Public Prosecutions (ODPP). Data from the ODPP was sourced from CASES, an internal case management database used to manage the ODPP's workload.

c.3 CASES is the best available source for statistics on NSW committal proceedings. However, there are two primary limitations in using the data from CASES:

(1) CASES is not designed to capture all of the information we sought. In some areas the precise information we sought was not recorded. For example, there was no record of how many matters proceeded by waiver of committal. In other areas a number of searches needed to be conducted to obtain the required data. For example, there was no single search that could be conducted to find out how many matters dismissed at committal were followed by an *ex officio* indictment.

(2) The entry of information into CASES is done manually by ODPP administrative staff, meaning there is a risk of human error in the data captured.

c.4 Each prosecution is treated in CASES as a "file". Where there are co-accused being tried together, or multiple offences against an accused being tried at the same time, these will be recorded as one file.

Outcome of matters listed for committal 2012/13

c.5 The first pie chart in Figure 8.1 shows the outcome of completed committal matters in 2012/13. It is taken from the ODPP's Annual Report.

c.6 The ODPP recorded 5947 completed committal matters during this period. "Completed committal matter" means that the matter has been recorded in CASES as having completed the Local Court phase of proceedings. Of these matters:

- 1768 (29.7%) were committed for trial in the District Court.
- 1659 (27.9%) were committed for sentence in the District Court.
- 70 (1.2%) were committed for trial in the Supreme Court.
- 9 (0.2%) were committed for sentence in the Supreme Court.

- 2441 (41%) were disposed of in the Local Court.[1]

c.7 The ODPP's Annual Report reports on how many committal matters were "disposed of" in the Local Court during the relevant period - that is, committal matters that were not committed for trial or sentence. This means they were finalised in the Local Court in some other way.

c.8 A matter is "disposed of" when the ODPP closes its file. The number of matters disposed of in the Local Court in 2012/13, therefore, represents the number of files closed by the ODPP during that period. However, some of these matters may have been finalised in the Local Court in the previous financial year, but there was a delay in closing the file.

c.9 In 2012/13 there were 2030 committal matters finalised in the Local Court. This means that there were 411 matters where the file was closed by the ODPP in 2012/13 but the matter was finalised in the Local Court in a previous year. This constitutes the total of 2441 referred to above.

Matters finalised in the Local Court

c.10 The second pie chart in Figure 8.1 shows the breakdown of the 2030 committal matters that were finalised in the Local Court during 2012/13. It does not include the remaining 411 matters where the file was closed during 2012/13 but the matter was finalised in a previous year. It was not possible to ascertain the outcome of these 411 matters. However, there is no reason to suggest that the proportionate outcomes of these matters would be significantly different. The percentages in the pie chart should therefore be a proportionate representation of the outcome of matters disposed of during 2012/13.

c.11 Of the 2030 matters finalised in the Local Court:

- 1063 (52%) were sentenced in the Local Court.
- 502 (25%) were withdrawn by the ODPP.
- 105 (5%) were returned to the police for prosecution.
- 77 (4%) were referred to the Drug Court.
- 65 (3%) were dismissed at a committal hearing.
- 223 (11%) were finalised in other ways. This included:
  - 97 matters where the defendant failed to appear and could not be located. In these matters a warrant is put out for the defendant's arrest and the proceedings remain on foot in the Local Court, but the ODPP records these matters as "closed" for its internal record keeping purposes.
  - 42 matters merged with other files.

1. NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 27; Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2014).

- 31 matters dismissed under the Mental Health (Forensic Provisions) Act 1990 (NSW).
- 18 matters where the charge was downgraded to one that could be heard summarily and the matter was then dismissed.
- 15 matters dealt with on a Form 1.
- 15 matters where the defendant died.
- 5 matters where the matter was dismissed because the ODPP offered no evidence to the charge.[2]

Matters dismissed at a committal hearing

c.12 Of the 65 matters that were dismissed at a committal hearing:

- 26 (40%) were dismissed at a "committal mention"; that is, at a mention prior to the committal hearing.
- 16 (25%) were dismissed following an application for cross-examination of a prosecution witness under s 91 or s 93 of the *Criminal Procedure Act 1986* (NSW) (CPA). It is not possible to ascertain whether the cross-examination actually occurred.
- 17 (26%) were dismissed at a paper committal.
- 6 (9%) were dismissed but the method of dismissal could not be ascertained from the file.[3]

Paper committals

c.13 There were 1498 matters listed as being a "paper committal" for 2012/13.[4] This represents 25% of the 5947 committal matters completed by the ODPP during that period. However, this number is likely to be an underestimation, as a committal matter may be listed for a mention and then resolved as a paper committal, without being specifically recorded as such in CASES.

Outcome of matters listed for committal 2011/12

c.14 The ODPP's Annual Report recorded 6016 completed committal matters during 2011/12:

- 1571 (26.1%) were committed for trial in the District Court.
- 1664 (27.6%) were committed for sentence in the District Court.
- 68 (1.1%) were committed for trial in the Supreme Court.
- 10 (0.2%) were committed for sentence in the Supreme Court.

2. Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2014).
3. Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2014).
4. Information provided by NSW, Office of the Director of Public Prosecutions (17 June 2014).

- 2703 (45%) were disposed of in the Local Court.[5]

c.15 There were 2476 matters finalised in the Local Court during 2011/12. This means that there were 227 matters where the file was closed by the ODPP in 2011/12 but the matter was finalised in the Local Court in a previous year. Again, there is no reason to suspect that the percentage breakdown of these 227 matters would be significantly different to the breakdown of matters finalised in the Local Court during 2011/12.

c.16 Of the 2476 matters finalised in the Local Court in 2011/12:

- 1310 (53%) were sentenced in Local Court.
- 600 (24%) were withdrawn by the ODPP.
- 140 (6%) were dismissed by the magistrate. This includes both matters dismissed by the magistrate during a committal hearing, and matters downgraded to a charge to be dealt with summarily and then dismissed.
- 426 (17%) were finalised by other means. This includes:
  - 15 matters placed on a Form 1.
  - 11 matters referred to the Drug Court.
  - 400 matters that were returned to police for prosecution, merged into other matters or where the defendant died or could not be located.[6]

Cross-examination of witnesses at committal

c.17 CASES does not record easily accessible data on the cross-examination of witnesses at committal pursuant to s 91 or s 93 of the CPA. The best way to extract this information was to search for entries where there had been a successful s 91/s 93 application and the matter was then listed for a committal hearing. This search yielded 365 listings for 2012/13.

c.18 This number is likely to overstate the number of matters with a successful s 91/s 93 application. It may be possible for a matter to be included in the search results more than once - for example, where there was more than one s 91/s 93 application or the matter was listed for a committal hearing but then adjourned and relisted.

c.19 There are other limitations to this data, which we discuss in Chapter 8:

- It does not show how many matters actually proceeded to cross-examination.
- It does not break down the applications between those made under s 91 and those made under s 93.
- It does not record how many unsuccessful applications were made.

5. NSW, Office of the Director of Public Prosecutions, *Annual Report 2011-2012* (2012) 40.
6. Information provided by NSW, Office of the Director of Public Prosecutions (21 February 2014).

c.20 Of the 365 listings, 255 had a recorded "outcome". That is, there were 255 matters where there was a successful s 91/s 93 application and the matter was completed in the Local Court (by committal or otherwise) during 2012/13. This does not include matters where a successful s 91/s 93 application was made in 2012/13 but the matter was not listed for a committal hearing during that period.

c.21 Figure 8.3 shows the outcome of committal matters with a successful s 91/s 93 application in 2012/13. Of these 255 matters:

- 141 (56%) were committed for trial in the District Court.
- 31 (12%) were committed for trial in the Supreme Court.
- 30 (12%) were committed for sentence in the District Court or Supreme Court.
- 16 (6%) were dismissed by the magistrate.
- 17 (7%) were sentenced in the Local Court.
- 19 (7%) were withdrawn by the DPP.
- 1 was recorded as "not before the court".[7]

Ex officio indictments

c.22 In 2012/13 there were 12 matters in which an *ex officio* indictment was laid following a dismissal at committal.

c.23 This number was obtained by searching CASES for files that had a "changed state" to an *ex officio* indictment – that is, the matter did not commence on an *ex officio* indictment. Each of these files was then manually reviewed to determine whether the *ex officio* indictment was laid following dismissal at a committal hearing.

c.24 As there were 65 matters dismissed at a committal hearing, this indicates that 18% of matters dismissed at committal were followed by an *ex officio* indictment.

7. Information provided by NSW, Office of the Director of Public Prosecutions (10 July 2014)

Appendix D
A proposed framework for pre charge advice

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d.1 During our consultation period for this reference, we developed a detailed framework for "pre charge" advice. In Chapter 4, for pragmatic reasons, we ultimately recommend a form of post charge advice. As discussed in that chapter, we still see considerable merit in a pre charge model. This appendix contains the proposed operational detail of a pre charge advice model, including the interaction between the NSW Police Force (NSWPF) and the Office of the Director of Public Prosecutions (ODPP); an outline of the proposed operation of charge decision bail; and frameworks for implementation. We consider the material may still be of assistance to policy and law makers.

d.2 The material in this appendix discusses the features of a possible pre-charge advice system that incorporates pre charge bail. We have expressed views below about the best way a pre charge advice system could work, and our conclusions are expressed in the draft proposals. However, they are not recommendations of the Commission.

Overview of pre charge advice

Key elements of a pre charge advice regime

d.3 Under a pre charge advice model, police must seek charge advice from the ODPP on all matters to be heard on indictment. Pre charge advice requires clearly delineated roles and responsibilities. Some of the key elements should include:

d.4 **The initial police brief of sufficient evidence:** This constitutes all available material relevant to the alleged offence on which the ODPP will determine the best charge. Charge certainty depends, to a large extent, upon the ODPP forming the charge on sufficient evidence. Consequently the role that the police brief of evidence will play in developing a successful outcome cannot be underestimated. We discuss the content and nature of the police brief in Chapter 5. As indicated there, work would need to be done to define what needs to be in the initial brief.

d.5 **The police recommendation on charge:** Police should include recommended charges in the police brief of evidence. While the ODPP would not be bound to accept the recommendation, the police – who have investigated and, possibly, arrested a person for the crime – are well placed to indicate the nature of the offence.

d.6 **Deployment of expert prosecutors in the ODPP:** Experienced ODPP prosecutors, adept at identifying key evidential and procedural issues, will be required to provide charge advice.

d.7 **A communication protocol between the NSWPF and ODPP:** An agreement would be necessary to define how material is to be transferred between the NSWPF and ODPP, relying to the maximum extent possible on electronic means. This is necessary to ensure that:

- the police alert the ODPP to an arrest
- the police effectively and securely transfer the brief of evidence to the ODPP, and
- the ODPP supplies a charge determination to police.

What offence types would be subject to a pre charge advice regime?

d.8 The ODPP would only provide charge advice on matters that the ODPP is to prosecute. This would include matters that the police consider appropriate for the indictable jurisdiction. Matters that are to be heard summarily and prosecuted by the NSWPF or other agencies would not be included in the scheme. The Commonwealth DPP already has an established system of pre charge advice,[1] and, therefore Commonwealth offences do not need to be included.

d.9 Matters subject to mandatory charge advice would include all strictly indictable offences and Table offences where election is sought. Currently strictly indictable offences constitute two thirds of matters heard in the District Court. Table offences comprise the remaining third.[2]

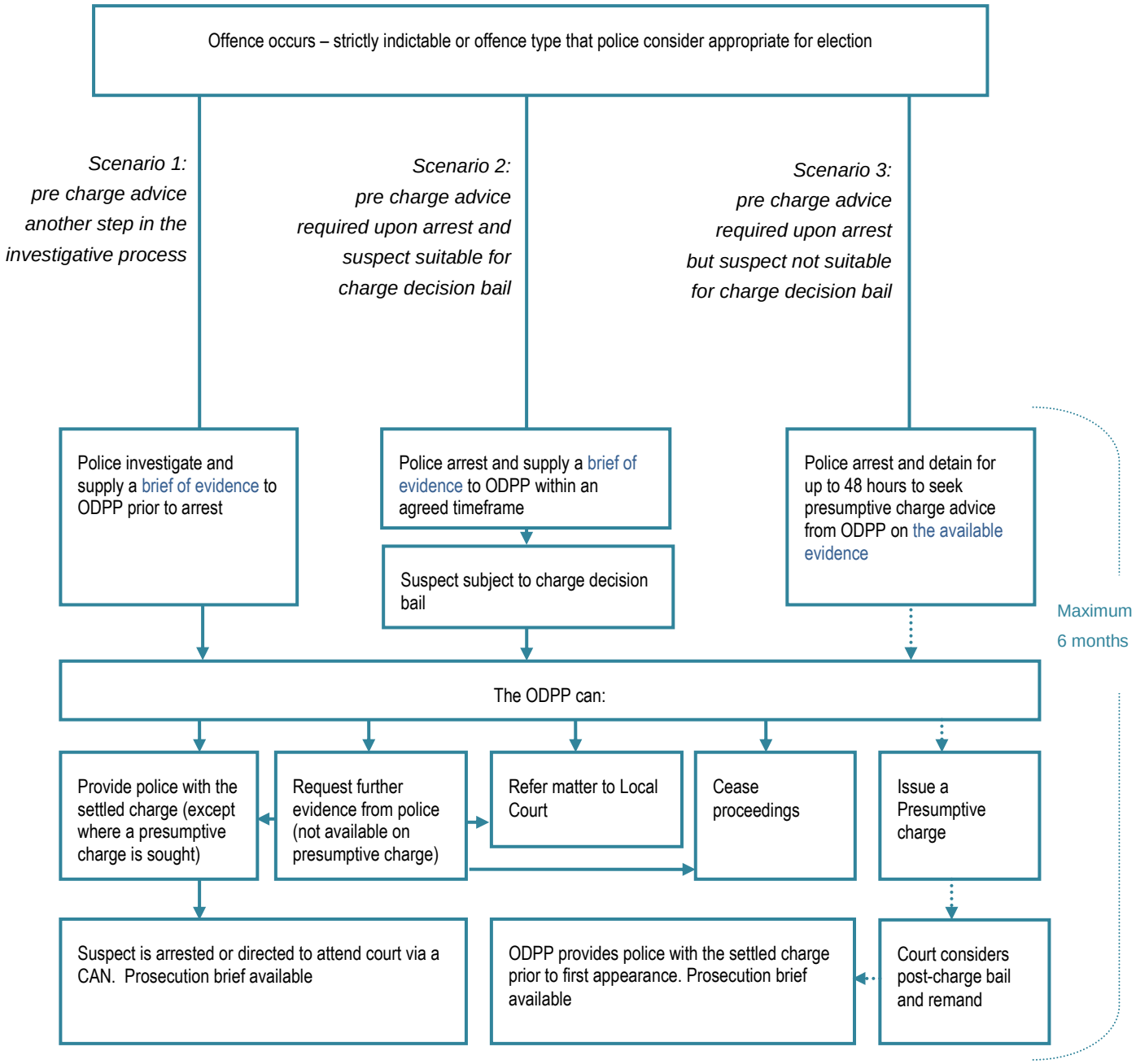
1. Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2009) [3.4].
2. NSW Bureau of Crime Statistics and Research, *Number of Persons Charged in Trial and Sentence Cases Finalised* (Hc13/11432dg). In 2012, 1765 matters committed for trial or sentence in the District Court were for strictly indictable offences (or the primary offence was strictly indictable); 873 were table offences.

A flexible system of pre charge advice covering three scenarios

d.10 Put in simple terms, pre charge advice involves the ODPP making a determination of the most accurate charge based on sufficient evidence. The operation of a program of pre charge advice is, however, more complex. Pre charge advice cannot operate in a vacuum; it must recognise the practical realities of police investigations. As police investigations are fluid, our proposed model for pre charge advice must be flexible and receptive to the needs of an investigation. Importantly, the requirement to seek pre charge advice should not hamper police powers of arrest, nor should it inappropriately hasten an investigation.

d.11 There are broadly three scenarios where the program for charge advice would differ. Under our proposal these scenarios are not fixed. There may be cases – for instance where charge decision bail conditions cannot be met under Scenario 2, or where charge decision bail has lapsed – where a suspect can move from Scenario 2 into Scenario 3. A suspect under investigation in Scenario 1 may suddenly require prompt arrest, and may then be bailed under Scenario 2. The scenarios are traced in a flow chart and discussed in further detail below.

Figure d.1: Flowchart of three scenarios in the proposed pre charge advice regime



Draft proposal 1

The pre charge advice scheme would operate to encompass three distinct scenarios:

Scenario 1: pre charge advice that occurs towards the end of an investigation prior to any arrest

Scenario 2: pre charge advice that occurs after arrest where a suspect is released on charge decision bail, and

Scenario 3: presumptive pre charge advice that occurs after arrest where a suspect is in police detention, followed by a settled charge determination prior to case management hearings commencing in the Local Court.

Scenario 1: Prior to arrest

d.12 In Scenario 1, the NSWPF investigates an offence and provide the ODPP with a brief of evidence without arresting the suspect. The ODPP provides charge advice prior to any arrest.

d.13 Under this first scenario, the police, once satisfied that there was sufficient evidence for a reasonable prospect of conviction, would transfer the brief to the ODPP for a determination as to the appropriate charge.[3] There are four possible directions that the ODPP could give the police once it had reviewed the police brief of evidence.

(1) Advise that the suspect be charged: The ODPP might issue advice that the suspect should be charged with either the recommended police charge or other charges. The police would promptly arrest and/or issue a Court Attendance Notice (CAN). Bail would be dealt with under the *Bail Act 2013* (NSW) (Bail Act) by police or the court as it is now.

(2) Request further evidence: The ODPP might require further evidence, and could request the police to collect this evidence for the purpose of formulating a charge. The required evidence would be added to the initial police brief of evidence and reconsidered.

(3) Refer the matter to police to pursue in the Local Court: The ODPP might consider that the matter was better suited to the Local Court's jurisdiction. It might suggest a charge that is not strictly indictable. The ODPP would then decline to prosecute the matter and hand it back to the NSWPF to prosecute.

(4) Advise that charges should not be laid: The ODPP might advise that there is not enough evidence or that it is not in the public interest that a prosecution be brought.

3. For further discussion on the standard of evidence required to issue charge advice see paras d.30-d.32.

d.14 This approach to Scenario 1 mirrors current Commonwealth charging procedures. The *Prosecution Policy of the Commonwealth* encourages pre charge advice in the majority of matters that the CDPP prosecutes:[4]

> 3.4 If as a result of the investigation an offence appears to have been committed the established practice (subject to the exceptions referred to in paragraphs 3.5 and 3.6 below) is for a brief of evidence to be forwarded to the DPP where it will be examined to determine whether a prosecution should be instituted and, if so, on what charge or charges. Although an AFP or other Commonwealth officer has authority to make the initial decision to prosecute, the Director has the responsibility under the Act to determine whether a prosecution, once commenced, should proceed. It is therefore generally desirable wherever practicable that matters be referred to the DPP prior to the institution of a prosecution.
>
> 3.5 Inevitably cases will arise where it will be necessary and appropriate that a prosecution be instituted by way of arrest and charge without an opportunity for consultation with the DPP. However, in cases where difficult questions of fact or law are likely to arise it is most desirable that there be consultation on those issues before the arrest provided the exigencies of the situation permit. The decision to arrest is a decision of the investigating official.

Scenario 2: After arrest – suspect released on bail

d.15 In Scenario 2 the offence has occurred and the police arrest the suspect before seeking pre charge advice. In this case, police could release the suspect on police bail for the purpose of obtaining the ODPP's determination of the charge. On charging, the defendant is issued a CAN to appear in court.

d.16 Under Scenario 2, police have sufficient evidence to arrest, but time is needed in order to consider the brief and to form a charge decision. Police would be required to do two things upon arrest:

(1) The appropriate officer should assess whether the suspect is suitable for bail, and issue bail where appropriate. Charge decision bail is further discussed from para d.43 below.

(2) The police should forward the initial brief of evidence to the ODPP for charge advice. This should be done within a time frame that enables police to source and collate all the available evidence, which may, at this stage, still be in short form.

Depending on the requirements of the brief, a person may be bailed pending charge advice for up to six months. As discussed from para d.64, the conditions and terms of bail should be subject to court review.

d.17 The four possible directions that ODPP can give the NSWPF once they have reviewed the file remain, but they have additional considerations to Scenario 1:

4. Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2009) [3.4].

(1) Advise that the suspect be charged: The ODPP would issue advice that the suspect be charged. The police would promptly issue a CAN and the person would be brought to court.

(2) Request further evidence: The ODPP may request further evidence from police for the purpose of formulating a charge. The required evidence would be added to the police brief and reconsidered.

Where this occurs, charge decision bail ceases to operate purely for the purposes of facilitating charge advice, and may be seen as facilitating ongoing police investigations. In England and Wales, pre charge bail for the purposes of facilitating further investigation is an authorised limb of bail,[5] and pre charge bail for this purpose is available for an indeterminate amount of time. In NSW, stakeholders do not support pre charge bail merely to facilitate ongoing police investigations.[6] In our view, this is not a desirable extension. Pre charge bail issued to facilitate further police investigation may result in a person's liberty being restrained for an extended period of time, without there being sufficient evidence against the person to charge him or her with an offence.

In this model, bail would automatically lapse at six months. A limit of six months should prevent charge decision bail being extensively used for the purpose of further facilitating police investigations. Police and the ODPP should work together to ensure that all charges for people on bail are determined within the time frame. Charge decision bail and associated time limitations are discussed in more detail from para d.43.

(3) Refer the matter to the NSWPF to pursue in the Local Court: The ODPP may consider that the matter is better suited to the Local Court's and therefore advise a charge that is not strictly indictable and decline to elect. The ODPP would then hand it back to the NSWPF to prosecute.

Charge decision bail would only operate on matters to be heard on indictment. Where the ODPP determines that the charge should be dealt with summarily, the suspect should be notified and bail would lapse. Police could then determine to rearrest and issue a CAN for summary proceedings, and bail would be dealt with by police and the courts in the normal way.

(4) Advise that charges should not be laid: The ODPP may advise that there is not enough evidence or that it is in the public interest that a prosecution not be brought. In these matters bail should lapse and the suspect should be advised that he or she has been released from charge decision bail.

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5. *Police and Criminal Evidence Act 1984* (UK) s 47.
6. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission EAEGP9*, 2; NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 3; Legal Aid NSW, *Submission EAEGP11*, 6; NSW Young Lawyers, Criminal Law Committee, *Submission EAEGP12*, 6.

Scenario 3: After arrest – suspect detained

d.18 In Scenario 3, the suspect needs to be arrested and, in the police view, may be required to be detained without bail. Here the suspect would be detained by police (for up to 48 hours) while the police receive an urgent determination on the presumptive charge from the ODPP. The suspect would then be brought to court on the presumptive charge. The court would grant bail or order the person's detention pending trial. The presumptive charge would be under constant monitoring from the ODPP, who would work with police to ensure that the charge is settled prior to first appearance.

d.19 Under Scenario 3 the NSWPF will have determined that a suspect should be arrested, and that the person is not suitable for police bail under the Bail Act.[7] In this scenario a person is arrested, taken into custody, and a presumptive charge is sought by police based on the available evidence.

d.20 Scenario 3 operates in a similar way to current arrest and charge procedures in NSW, the key difference being that a person may be held in custody for somewhat longer - up to 48 hours in our proposal - to facilitate the ODPP determination of the most reliable presumptive charge.

d.21 Once presumptively charged, the defendant can go before the court for consideration of bail or remand, and court proceedings against that person begin.

d.22 In this scenario, police would continue to finalise the brief in order to provide the ODPP with a basis for providing final charge advice. Proceedings would not move forward until the final charge advice had been issued. The court would make timetabling orders to ensure prompt action.

d.23 The ODPP will be able to respond to a presumptive charge request with three of the four options available in Scenario 1 and 2. The ODPP will be able to;

- advise on the proper presumptive charge
- advise that the matter is not suitable for a charge to be laid in the indictable jurisdiction, or
- advise that there is insufficient material to lay a charge at this stage.

d.24 The ODPP would not request further evidence in order to formulate the presumptive charge. The very nature of a presumptive charge is that it is formed on the *available* evidence. This will usually be the evidence on which the police have arrested.

Time limits in Scenario 3

d.25 In Scenario 3 police need to seek presumptive charge advice and this will add to the time it takes to process a person and bring that person to court. In written submissions and in consultation, the ODPP suggested the period should be up to 48 hours. This is a significant increase in the time currently allowed by law for

7. *Bail Act 2013* (NSW) s 16A, s 19.

detention following arrest for the purpose of investigation, namely up to 12 hours.[8] The DPP has noted that he would need to run a 24 hour advice line to enable police to seek prompt advice in these cases.[9] We accept that additional time will be required, and that the safeguard to the accused of early ODPP involvement is significant. We also note that under the current system people can wait in detention for up to 24 hours over a weekend before coming to court.

d.26 In our view, in Scenario 3 the charging decision should be made within a reasonable time, but in any case no later than 48 hours after arrest. The 48 hours would run from the time of arrest, not from the end of the current period of detention for investigation.[10]

Table d.1: Comparison between current operation of arrest and charge and the proposed operation under Scenario 3

Description	Current criminal procedure	Proposed criminal procedure
a. Suspect is arrested	Police power of arrest as per *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 8	Police power of arrest as per *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 8
b. Suspect can be detained for purposes of investigation	Detention permitted for 4+8 (to be 6+6) hours as per *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 115(2), s 117	Detention permitted for 4+8 (to be 6+6) hours as per *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 115(2), s 117
c. Police can make a charge decision bail decision	N/A	Police form the view that suspect **should not be given police bail under the** *Bail Act 2013* (NSW)
d. Police seek presumptive charge advice	N/A	Brief of evidence relied upon for arrest supplied to ODPP, along with the recommended charge
e. Suspect is charged	Within 4+8 (6+6) hours of being detained *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 115(2), s 117	Within a reasonable time and in any case no longer than 48 hours after arrest (whether or not the person is detained for the purposes of investigation under Part 9)
f. Suspect is brought before the Court	As soon as reasonably practical once charged, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); *Bail Act 2013* (NSW) s 46	As soon as reasonably practical once charged, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); *Bail Act 2013* (NSW) s 46
g. Time in custody taken into account in sentencing	Yes, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 121	Yes, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 121

d.27 Currently, as has been said, if a person is arrested and charged on a Sunday or public holiday he or she may be held in custody pending the opening hours of the court for up to 24 hours between **e.** and **f.** above. It is anticipated that the ODPP may need only a few extra business hours to review the evidence, and that the

8. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 9.
9. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, Annexure A, 5.
10. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 115(2), s 117.

person will be charged and brought before the court later that day. Where an arrest occurs during the week or in business hours, the ODPP will not require the same amount of time to review the file and make a presumptive charge decision.

d.28 Scenario 3 requires the creation of a "presumptive advice unit" within the ODPP that promptly services custody matters. A presumptive advice unit should be readily accessible, and should incorporate a system where advice can be received over secure email and telephone, akin to "CPS Direct" in England and Wales.[11]

d.29 The presumptive charge may change as further evidence is gathered. It is preferable that the charge is settled before the next appearance. Where a person presumptively charged is held on remand it is envisaged that the court will consider the ongoing requirement for police to collect and finalise evidence, and the desirability for the ODPP to finalise the charge, when setting the timetable to first appearance.

Draft proposal 2

(1) Where presumptive charging is necessitated under Scenario 3:

(a) The NSW Police Force should seek presumptive charge advice as soon as the decision is made not to release a person from police custody after arrest.

(b) The Office of the Director of Public Prosecutions should determine the presumptive charge on the available evidence.

(c) A presumptive charge should be determined within 48 hours of arrest.

(2) The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) should be amended to allow additional time in police detention to seek presumptive pre charge advice, but not to further investigate.

(3) The Office of the Director of Public Prosecutions business model should accommodate the fast turnaround of advice.

(4) The NSW Police Force and the Office of the Director of Public Prosecutions should enter into a protocol to ensure that time standards are set and complied with for the service of the brief of evidence where a person is arrested and released on charge decision bail or held in custody pending a presumptive charge.

11. NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) [3.42].

The proposed operation of pre charge advice

Brief of sufficient evidence required

d.30 Under this pre-charge model, the NSWPF would forward all matters to be heard on indictment to the ODPP for charge advice. In elected matters and all three scenarios detailed above, police will have accumulated a brief of evidence. The brief of evidence, along with a recommendation of the charge by police, should be supplied to the ODPP in an agreed form. The *sufficiency* of the content should also be assessed by police before the matter is considered ready for charge advice.

d.31 The efficacy of any pre charge advice scheme rests squarely on the adequacy of the evidence supplied by police. An inadequate brief means that the supplied evidence will not support an appropriate charge. Inadequate briefs may result in the ODPP directing the police to discontinue the matter altogether or requisitioning the police to collect further and better evidence. This will lengthen the process.

d.32 One of the key lessons derived from the implementation of statutory charging in England and Wales is that an efficient pre charge advice scheme must rely upon the police and the prosecuting agency using the same evidentiary standard for the initial police brief.[12] In England and Wales this was achieved by introducing two evidentiary tests. The first accommodated Scenarios 1 and 2; and the second, Scenario 3. Similar tests exist in British Columbia.[13] In NSW, the ODPP and the NSWPF would need to develop a clear and specific agreement on this issue.

Draft proposal 3

(1) Pre charge advice should be given on a brief of sufficient evidence.

(2) The Office of the Director of Public Prosecutions and the NSW Police Force should agree to evidential standards that the police brief of evidence should meet before charge advice is given.

(3) These standards should be instituted in guidelines, handbooks and within a protocol between agencies.

Variation for matters to be heard on election

d.33 Table offences are offence types that will be heard summarily unless an election is made to hear the matter on indictment. Elections may be made where the jurisdiction of the Local Court is insufficient to appropriately deal with the matter. The lists of indictable offences in respect of which an election may be made are contained in Table 1 and Table 2 of Schedule 1 of the *Criminal Procedure Act 1986* (NSW) (CPA).

12. J Hillier and J Kodz, *The Police Use of Pre-Charge Bail: An Exploratory Study* (National Policing Improvement Agency, 2012) 5: One of the key reasons identified for overuse and extended delays in statutory charge advice referrals in England and Wales was "differing perceptions on levels of evidence required for charge leading to delays in the process".

13. See NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) [3.33]-[3.38].

d.34 For Table 1 offences, either the prosecution or the person charged with the offence may elect to have the offence dealt with on indictment.[14] In 2013, the defence elected to have the matter heard on indictment in only 36 matters.[15] Table 1 offences are generally the more serious of the Table offences and include violent offences,[16] in addition to child sex offences,[17] fraud[18] and firearm offences.[19] An election is only available for Table 2 offences by the prosecution.[20] In 2013, the prosecution elected to proceed on indictment in 646 Table 1 and 2 matters.[21]

d.35 The current election procedure is generally:

- Table **offence/s occur.**
- **Police investigate** or arrest at the scene.
- **Police charge** a suspect with a Table offence/s.
- The suspect is released on a CAN, given police bail or brought to court and bailed or remanded.
- Police prosecutors are given the matter and have up to the second mention to decide if the matter is **appropriate for election**.[22]
- If so, prosecutors ask the court for an **adjournment while an election decision** is made.
- Police prosecutors forward a **statement of facts** and any other relevant material to the ODPP for a decision on election.
- The **ODPP confirms or rejects** the request for election, with reference to whether the accused person's criminality can be adequately addressed within the jurisdiction of the Local Court and whether it is in the interests of justice to proceed on indictment:[23]
  - Rejects: the matter **remains in the Local Court** under police prosecution.[24]
  - Confirms: the **ODPP takes over prosecution** of the matter prior to committal proceedings.

d.36 Referral by police to the ODPP for election is a common occurrence. In the 2010/11 reporting period, the ODPP processed 2997 referrals for election.[25] This figure

14. *Criminal Procedure Act 1986* (NSW) s 260(1).
15. Information provided by NSW, Office of the Director of Public Prosecutions (4 April 2014).
16. See, eg, reckless grievous bodily harm or wounding: *Crimes Act 1900* (NSW) s 35.
17. Attempted sexual intercourse upon a child under 10, or assault with intent to commit such an offence: *Crimes Act 1900* (NSW) s 66D.
18. Offences involving fraud: *Crimes Act 1900* (NSW) s 192E.
19. Eg stealing a firearm: *Crimes Act 1900* (NSW) s 154D.
20. *Criminal Procedure Act 1986* (NSW) s 260(2).
21. Information provided by NSW, Office of the Director of Public Prosecutions (4 April 2014).
22. Local Court of NSW, *Practice Note Comm 1 – Procedures to be adopted for committal hearings in the Local Court*, 24 April 2012. See also Figure 6.1.
23. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 8.
24. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 8.
25. NSW, Office of the Director of Public Prosecutions, *Annual Report 2010-2011* (2011) 44.

remained stable in 2011/12 with 2910 referrals for election being received and processed.[26] In both reporting periods, approximately 74% of the referrals for election were completed within 14 days.[27]

d.37 Statistics supplied by the NSW Bureau of Crime Statistics and Research (BOCSAR) indicate that the number of Table matters committed for trial or sentence is quite low. In the District Court, Table matters comprise around only one third of all strictly indictable matters. These figures have remained relatively stable from 2010-2012, as illustrated in the table below.

Table d.2: Matters committed for trial and sentence by offence type in the District Court of NSW 2010-2012, and number of referrals for election made

Matter type	Year		
	2010	2011	2012
Strictly indictable	1934	2011	1765
Table offences	846	865	873

	2010/11	2011/12
Number of referrals for election from the police to the ODPP	2997	2910

Source: NSW Bureau of Crime Statistics and Research, Number of Persons Charged in Trial and Sentence Cases Finalised (Hc13/11432dg); NSW, Office of the Director of Public Prosecutions, Annual Report 2010-2011, 2011-2012.

Procedure for pre charge advice on Table offences appropriate for election

d.38 The election procedure adds a further layer of complexity to the proposed pre charge advice regime. To maintain a consistent approach, best-practice would be for the police and/or the police prosecutor to pass the matter to the ODPP for an election determination *prior* to charging. The ODPP would then decide if the matter should be elected, and, if it should, conduct a review of the most appropriate charge. This is essentially Scenario 1 or 2.[28]

d.39 However, there will be occurrences where a Table matter that may be appropriate for election is summarily charged and commenced in the Local Court. This may be because further evidence is revealed after the decision not to refer for election has been made. In these cases, this procedure could be followed:

26. NSW, Office of the Director of Public Prosecutions, *Annual Report 2011-2012* (2012) 42.
27. NSW, Office of the Director of Public Prosecutions, *Annual Report 2010-2011* (2011) 44; NSW, Office of the Director of Public Prosecutions, *Annual Report 2011-2012* (2012) 42. The ODPP has noted that delay in the election decision can often be attributed to insufficient information gathered by the police, which inhibits the proper consideration of the appropriate jurisdiction for the offence: NSW, Office of the Director of Public Prosecutions, *Annual Report 2012/2013* (2013) 28.
28. See paras d.12 and d.15 above.

- A Table **offence/s occur.**
- **Police investigate** or arrest at the scene.
- Police **charge a suspect** with a Table offence/s.
- The suspect is released on a CAN, given police bail or brought to Court and bailed or remanded.
- Police prosecutors are given the matter and decide sometime after the person has been charged that the matter is **appropriate for election**.
- Prosecutors ask the court for an **adjournment while an election decision** is made (election decisions usually take about 14 days).
- Police prosecutors forward a **statement of facts** and any other material relevant to the ODPP for a decision on election.
- The ODPP **confirms or rejects** the request for election.
- Rejects: the matter remains in the **Local Court under police prosecution**.
- Confirms: the ODPP makes a charge determination concurrently. The person is charged and the **ODPP takes over prosecution** of the matter.

Draft proposal 4

(1) The pre charge advice scheme should apply to matters that are commenced summarily and then successfully referred from the NSW Police Force to the Office of the Director of Public Prosecutions for election.

(2) In these matters police should supply the initial brief of evidence so that an election decision and a charge determination can happen concurrently.

(3) Procedures for election/charge determinations should be included in the Prosecution Guidelines of the Office of the Director of Public Prosecutions and NSW Police Force operating procedures.

How would a regime of pre charge advice be implemented?

d.40 This pre charge model would represent a significant departure from current criminal process and procedures. The regime affects police powers to charge in indictable matters, and introduces a new framework for charge decision bail. It relies upon changes to ODPP operation, and the introduction of protocols between the ODPP and police. Interagency cooperation is crucial to the successful implementation of this pre charge regime.

d.41 Above all, for change to the operation of the criminal justice system of this magnitude to be effective, a corresponding cultural change would need to occur. This need is particularly pronounced because the scheme essentially relocates the police power to formulate the initial charge to the ODPP.

d.42 Below we list the changes to statutes and guidelines that need to occur to authorise the regime. There may be other residual statutes or protocols that also require amendment, and we recognise that our list is not exhaustive.

Table d.3: Framework for pre charge advice

Legislation/authorising agent	Amendments
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)	Requires amendment to permit detention for the purposes of receiving early charge advice.
Director of Public Prosecutions Act 1986 (NSW)	Add that it is a function of the ODPP to provide charge advice to NSW Police on all indictable matters prior to police charging a suspect".
Prosecution Guidelines of the Office of the Director of Public Prosecutions	**Guideline 14:** Advice to Police to be updated to include procedures relevant to all three scenarios and the applicable pre charge evidentiary standard tests.
NSW Police Force operational guidelines	Protocol, practices and evidentiary standard tests to be outlined in NSW Police handbook/guidelines.
Protocol between ODPP and NSW Police Force	The creation of a protocol outlining responsibilities and obligations of each party.

Draft proposal 5

A mandatory pre charge advice scheme should be implemented through:

(1) the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)

(2) the Prosecution Guidelines of the Office of the Director of Public Prosecutions

(3) NSW Police Force operating procedures, and

(4) a protocol between the Office of the Director of Public Prosecutions and the NSW Police Force outlining the roles, obligations and responsibilities of each agency within the pre charge advice scheme.

Charge decision bail

d.43 Pre charge bail is a feature of existing pre charge advice regimes. In England and Wales pre charge bail operates to facilitate further police investigations and the receipt of pre charge advice, and as such, affects a large number of people currently under criminal investigation.[29] In some Canadian jurisdictions, pre charge bail operates in the form of an undertaking to observe particular conditions after arrest and prior to charge.[30]

d.44 Under this model charge decision bail would be a form of police bail, administered after arrest and prior to charge. It is differentiated from the "pre charge bail" regime of England and Wales because it will be available *only* to facilitate charge advice

29. See NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) [3.21], [3.59]-[3.60].

30. *Criminal Code,* RSC 1985 (Can) s 499(2), 503, Form 11.1.

from the ODPP to the police where arrest of a person is necessary but where detention following arrest is not (this set of circumstance is reviewed in para d.15 above and identified as "Scenario 2"). It should not be available in NSW to facilitate further investigations.

d.45 In the main, the model would not require changes to the provisions of the *Bail Act 2013* (NSW) (the Bail Act) as they apply to police bail, with the exception of allowing bail after arrest and before a charge is determined. Bail would be considered with reference to the police recommended charge (see para d.5). The standards for issuing bail, and the limitation of conditions would apply as they do now.

The proposed operation of charge decision bail

d.46 Generally, charge decision bail would operate so that:

- A person is **arrested** for an indictable offence (including an offence that the police believe should be heard in the indictable jurisdiction).[31]
- The person is **taken to the police station** (if not already there).
- The custody officer assesses whether the suspect should be **released on bail** while charge advice is sought**.**
- The custody officer may **release on bail with conditions**. The custody officer will be required to record the conditions and issue a bail acknowledgment.[32] Generally in cases of charge decision bail, the bail acknowledgment would not give the time and date of the persons court appearance. This **information would appear on the CAN**, which the police would dispatch to the person on receiving a charge determination from the ODPP.
- The person released on bail may seek a **variation of bail conditions** from a senior police officer.[33] The person may also request that the **Local Court dispense with or vary** the bail decision.[34]
- The brief of evidence, which can comprise of evidence in a short form where required,[35] and the police recommendation of charge are **forwarded to the ODPP** from the NSWPF within 14 days.
- There are then five potential pathways for people on charge decision bail:

  (1) When charge advice is received, the person may be **charged** as advised by the ODPP via a police issued CAN, and the current procedures relating to bail/remand after charging then ensue.

  (2) If the ODPP advises that **charges should not proceed**, the person must be notified and the arrest discontinued. The bail will lapse.

31. See from para d.33 on election processes in NSW.
32. As per the bail acknowledgment required by the *Bail Act 2013* (NSW) s 33.
33. *Bail Act 2013* (NSW) s 47.
34. *Bail Act 2013* (NSW) s 49(4), s 51.
35. See Chapter 5 on disclosure.

(3) If the ODPP advises that only **summary charges should proceed**, the person should be notified, and bail will lapse unless the police rearrest or issue a CAN for the summary charge.

(4) Where charge advice has not yet been received, and six months have passed since the arrest, the person must be **released from bail**.

(5) Where charge advice has not yet been received, and six months have passed since the arrest, the police may seek **urgent presumptive charge advice** (Scenario 3).

What limits should be placed on the use of charge decision bail?

d.47 Police bail is currently available after a person has been charged under the Bail Act. The introduction of charge decision bail would mean that police bail could arise at two distinct stages in criminal proceedings in NSW – before and after charge. It has been noted that pre and post charge bail raise different considerations. Prior to charge, bail raises the question of the extent to which a person's liberty should be restricted in circumstances where there may not be sufficient evidence to charge the person with a criminal offence or where the person has simply not yet been charged.[36]

d.48 Pre charge bail is a controversial practice. In England and Wales it has drawn criticism for its indeterminacy and potential for overuse.[37] In its 2012 review on bail, the Northern Ireland Law Commission captured the key areas of concern when it noted:

> In relation to pre charge bail granted at a police station, the Commission considers the imposition of potentially onerous conditions for an indefinite period upon persons not charged with an offence and the possibility of prosecution for an offence for failure to surrender to pre charge bail to be disproportionate and overly punitive. The lack of judicial oversight of the decision to release on bail … is also a matter of concern.[38]

d.49 Below we deal with the three key areas of concern in turn and consider how charge decision bail could operate to support pre-charge advice. These are:

- the conditions applying to charge decision bail
- time limits, and
- court review.

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36. E Cape, "Police Bail and the Decision to Charge: Recent Developments and the Human Rights Deficit" (2007) 7 *Archbold News* 6.
37. A Hucklesby, "Not Necessarily a Trip to the Police Station: The Introduction of Street Bail" [2004] *Criminal Law Review* 803, 804; J Hillier and J Kodz *The Police Use of Pre-Charge Bail: An Exploratory Study* (National Policing Improvement Agency, 2012) 5; <http://www.lawsociety.org.uk/news/stories/law-society-calls-for-28-day-limit-on-police-bail/>; 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. See also NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) [3.14]-[3.17].
38. Northern Ireland Law Commission, *Bail in Criminal Proceedings*, Report 14 (2012) [2.26].

Conditions that police may apply to charge decision bail

d.50 There are three possible options for police to impose conditions under a charge decision bail model:

(1) Police are able to access the full set of conditions, subject to the tests in the existing Bail Act.

(2) Police can only apply a limited set of prescribed conditions.

(3) Police cannot attach any conditions to charge decision bail.

d.51 In our model, police should be able to impose the same conditions, restricted by the same considerations, as post charge bail currently operating under the Bail Act.

d.52 **Option 1: charge decision bail with conditions that mirror those currently available post charge.** This option has been implemented in other jurisdictions. In England and Wales, release on bail with conditions after arrest but before charge is sanctioned by legislation[39] and operates under the ordinary provisions of the *Bail Act 1976* (UK).[40] In NSW, a similar approach would mean that charge decision bail would be treated in exactly the same way as police bail under the Bail Act in other situations.[41]

d.53 This would mean the scope of available bail conditions would be wide, but their imposition would need to be justified under the Bail Act provisions. Charge determination bail conditions that police in NSW would be able to access under the Bail Act could include any conduct requirement, which can require the person to do or refrain from doing something.[42] Pre-release requirements could also include surrendering the person's passport; depositing a security; supplying a character acknowledgement and agreeing to an accommodation requirement.[43]

d.54 The application of conditions would be subject to review by a senior officer at first instance.[44] The officer may affirm or vary the bail decision.[45] The bail decision is also subject to court review (discussed below).

d.55 **Option 2: charge decision bail with a limited set of conditions.** In the Canadian province of British Columbia pre charge bail operates in a different form from England and Wales and the one we are proposing. Essentially, a person is arrested and, while charge advice is sought, released on either an appearance notice[46] or

39. *Police and Criminal Evidence Act* 1984 (UK) s 47. For further detail see M Zander, *Zander on PACE: The Police and Criminal Evidence Act 1984* (Sweet and Maxwell, 6th ed, 2013) [4.69].
40. *Police and Criminal Evidence Act* 1984 (UK) s 47(1).
41. *Bail Act 2013* (NSW) s 43.
42. *Bail Act 2013* (NSW) s 25(2).
43. *Bail Act 2013* (NSW) s 29(1).
44. *Bail Act 2013* (NSW) s 47. A senior officer may review the bail and must review the conditions on request of the bailed person. Although, a review cannot be carried out if to do so would cause a delay in bringing the person before a court: *Bail Act 2013* (NSW) s 47(5).
45. *Bail Act 2013* (NSW) s 47(4).
46. *Criminal Code,* RSC 1985 (Can) s 496-7: an official notice directing an accused person to appear in court at a specified time and place. It is usually issued by police officers at the scene of the alleged offence, before the person has been charged, and may be issued without the police making an arrest. It will indicate the offence type, whether summary or indictable, and may

upon a promise to appear (with or without an undertaking)[47] or a recognisance to an officer in charge,[48] which stipulates a sum of money that the person will have to pay if he or she does not appear.[49]

d.56 If a person is released on an appearance notice or promise to appear, he or she may enter into an undertaking to observe any of the following itemised conditions: [50]

- to remain within a designated territory
- to notify the officer of any change in address, employment or occupation
- to abstain from communicating with a certain person or from going to certain location
- deposit the person's passport
- abstain from possessing any firearm and to surrender any firearms licenses
- to report at certain times to the police
- to abstain from the consumption of alcohol or other intoxicating substances
- to abstain from the consumption of drugs except in accordance with a medical prescription, or
- to comply with any other condition the officer in charge considers necessary to ensure the safety and security of any victim or witness.[51]

d.57 A person who has given an undertaking to abide by certain conditions may apply at any time to appear before a justice to have the undertaking varied or vacated. Such an application will be considered as if the person were before a justice for an interim release (bail) hearing.[52]

d.58 A discrete set of conditions could be created to apply to a proposed NSW charge decision bail regime, reviewable as if the conditions constitute bail conditions. In a submission to us, the Chief Magistrate of the Local Court of NSW suggested that pre charge bail conditions be limited to conditions that assist police and authorities to locate that person.[53] In consultation, other stakeholders including the Law Society

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require the person to attend the police station to have fingerprints and photographs taken prior to their initial appearance: *Criminal Code,* RSC 1985 (Can) Form 9; see also British Columbia, Justice BC, "Criminal Justice Information and Support" <http://www.justicebc.ca/en/cjis/meta/glossary.html#appearance-notice>.

47. *Criminal Code,* RSC 1985 (Can) s 498-9: a form prepared by the police and signed by the accused when they are released from police custody following an arrest. By signing the document, the person is promising to appear in court at a specified time and place: *Criminal Code,* RSC 1985 (Can) Form 10; see also British Columbia, Justice BC, "Criminal Justice Information and Support" <http://www.justicebc.ca/en/cjis/meta/glossary.html#appearance-notice>.
48. *Criminal Code,* RSC 1985 (Can) s 493, 498-9, Form 11.
49. British Columbia, Justice BC, "Criminal Justice Information and Support" <http://www.justicebc.ca/en/cjis/you/accused/going_to_court/index.html>.
50. *Criminal Code,* RSC 1985 (Can) s 499(2), 503(2.1), Form 11.1.
51. *Criminal Code,* RSC 1985 (Can) Form 11.1.
52. *Criminal Code,* RSC 1985 (Can) s 499(3), 503(3), Form 11.1.
53. Chief Magistrate of the Local Court of NSW, *Submission EAEGP6*, 2.

of NSW have suggested that conditions be limited to ones that operate to prevent the person from leaving the jurisdiction. It is suggested that conditions be used to control the person's movements only, and that other conduct requirements, such as directing that the person reside at a particular address, instituting a curfew or preventing the person from consuming drugs or alcohol, be outside of the allowable conditions for charge decision bail.

d.59 **Option 3: Bail without conditions:** Currently, a person can be bailed (post charge) without conditions.[54] Pre charge bail without conditions often occurs in England and Wales. Under a "charge decision bail without conditions" model, charge decision bail in NSW would be available *only* without the imposition of conditions. This approach is favoured by advocates of vulnerable people and other defence representatives who have recognised the potential for police to misuse pre charge decision bail and overstate the need for conditions. Here a person would instead be bailed to appear at the court on charging, and would not have conditions imposed in the intervening period. Where it is considered necessary to protect the public, victims or witnesses, protection could occur through other means, such as apprehended violence orders, arrest or detention (under Scenario 3).

d.60 We share the concern of stakeholders who have identified police imposition of conditions pre charge as potentially problematic. We understand that people subject to conditions are yet to be charged and the imposition of potentially onerous conditions could be an unwarranted intrusion into their daily lives. Above all, we firmly agree that charge decision bail should never be used as a form of preventive control. However, we do not see the utility of implementing a pre charge regime without any available conditions. It could lead to the usefulness of charge decision bail being undermined because the imposition of conditions is precluded. This has been the experience in England and Wales, where early evaluations of statutory charging observed that the (then) inability to impose conditions on people bailed pending a charge determination meant that police were compelled to arrest and charge in matters where statutory charging would otherwise have been perfectly appropriate.[55]

d.61 The ODPP and Legal Aid NSW are in agreement that police should have the same powers to impose conditions as police currently do under the Bail Act.

d.62 The creation of a discrete list of conditions applicable only to the pre charge group may inadvertently leave the police unable to sufficiently manage unacceptable risk. It is also extremely difficult to predict what conditions should be allowed. We have not been able to compile a list that meets these needs, without replicating the range of conditions available under the Bail Act.

d.63 Accordingly, in a pre-charge model we would support the view that charge decision bail should operate similarly to police imposed post charge bail. We do, however, see an imperative to implement a rigorous program of evaluation. Charge decision bail would be a new police power, and we cannot predict its exact operation across all circumstances and localities. Periodic review of the use of bail conditions by an

54. *Bail Act 2013* (NSW) s 20.

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

independent agency, such as the Ombudsman, would help to identify any over use or misuse, as well as enable an in-depth analysis of the imposition of conditions, which may aid future consideration of a discrete list.

Draft proposal 6

A new section would be added to the *Bail Act 2013* (NSW) to allow police to bail a person before charge when a person has been arrested on suspicion of having committed an indictable offence, only for the purpose of seeking charge advice.

The provisions governing the decision to grant bail and the conditions to be applied would be the same under "charge decision bail" as normal police bail under the *Bail Act 2013* (NSW).

Draft proposal 7

Charge decision bail use should be evaluated. The NSW Bureau of Crime Statistics and Research would collect consistent data about the number of people on charge decision bail, the relevant offences, the length of time people are subject to bail, and the conditions attached.

Police imposed charge decision bail conditions should be reviewable by the court

d.64 In England and Wales a suspect can request a variation of the conditions of bail, from the custody officer or by a magistrate.[56] First, a person granted bail may request that a "relevant officer" (usually the custody officer) at a designated police station varies or cancels conditions imposed. The custody officer must consider the request, and can decide to remove, alter or add conditions.[57]

d.65 If a custody officer has varied or refused to vary the conditions or the bailed person has requested a variation and it has not been dealt with within 48 hours of the request, the person or his or her representative may apply at a Magistrates' Court to review conditions. After a magistrate's review, police bail continues as police bail – it does not convert to court ordered bail.[58] The magistrate can vary the conditions against a person,[59] but is unlikely to review the imposition of police bail, which is mandatory after arrest where charge advice is sought and the person is not detained. As noted by Justice Underhill, it is:

> very unusual for issues as to the lawfulness of decisions to issue a search warrant or to make an arrest to be raised by way of judicial review. Typically, they arise in private-law actions for trespass or unlawful imprisonment, where the Court will have the opportunity to hear oral evidence and to have the reasons for the actions taken fully explored in cross-examination ... [60]

56. See *Bail Act 1976* (UK) s 3(8); *Police and Criminal Evidence Act 1984* (UK) s 47(1E).
57. If the conditions are removed, the Custody Officer must complete a Form 43 and serve it on the bailed person.
58. *Criminal Procedure Rules 2014* (UK) pt 19.
59. Including imposing more onerous conditions: *Magistrates' Courts Act 1980* (UK) s 43B.
60. *R v "A" Magistrates' Court* [2006] EWHC 2352 (Admin) [6].

d.66 The *Criminal Procedure Rules 2014* (UK) state that the court can review the imposition of bail where police bail has been imposed after a charge has been laid, but only prescribes court review of conditions for pre charge bail.[61] It has been considered by jurists that review of the imposition of bail in England and Wales would be tantamount to review of the validity of the arrest, and is unlikely to occur.[62] It has not occurred to date.

d.67 Stakeholders to this reference agree that access to the court to vary, alter or remove police conditions placed on charge decision bail is a necessary prerequisite to a charge decision bail regime in NSW.[63]

d.68 The English model presents an option, and we present two further options for consideration below.

d.69 **Option 1:** The person on bail is able at any time to apply to the Local Court to dispense with bail or vary bail conditions under the Bail Act.[64] It may be possible for the court to assess a bail decision in light of the police reasons for arrest without a formal charge or with reference to the police recommended charge.

d.70 **Option 2:** Where an arrested person makes an application to the court for bail to be dispensed with or varied, the ODPP should be asked to provide urgent presumptive charge advice. In this way, the court can be assured that the prosecution has at least considered the case.

d.71 We do not see the need for the restrictions currently in place in England and Wales on the court reviewing the imposition of pre charge bail. The Bail Act has options for people subject to police bail to apply to senior police or the court to vary or release from bail and bail conditions. In our view the existing provisions are appropriate for review of charge decision bail and associated conditions. We anticipate that when making a variation or release order the court will assess its decision against the police recommended charge. Incorporating a presumptive charge simply for the purposes of a bail decision may increase the number of matters that receive presumptive charge advice. This may well undermine the purpose and objectives of charge decision bail.

Draft proposal 8
The provisions governing variation or review by a senior officer or a court under the *Bail Act 2013* (NSW) would apply to charge decision bail.

61. *Criminal Procedure Rules 2014* (UK) pt 19.
62. E Cape, "Police Bail and the Decision to Charge: Recent Developments and the Human Rights Deficit" (2007) 7 *Archbold News* 6; Northern Ireland Law Commission, *Bail in Criminal Proceedings*, Report 14 (2012) [2.17].
63. Law Society of NSW, Criminal Law and Juvenile Justice Committees, *Submission EAEGP9, 2*; NSW Young Lawyers, Criminal Law Committee, *Submission EAEGP12, 6*; NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10*, 3; Legal Aid NSW, *Submission EAEGP11, 7.*
64. *Bail Act 2013* (NSW) s 48.

A person should be subject to charge decision bail for no longer than six months

d.72 The most common criticism of the British pre charge bail system is its indeterminacy.[65] There are no statutory limits to the length of time a person may be subject to pre charge bail. Stakeholders to this reference have suggested time limits for pre charge bail in NSW that range from 14 days[66] to six months.[67] The ODPP and Legal Aid NSW have agreed that six months would give adequate time for complicated or evidence-heavy matters to be carefully reviewed and the most appropriate correct charges applied.[68]

d.73 We note that the majority of matters will not require six months for a charge determination. The ODPP has advised that guidelines and protocols will be in place to ensure that the majority of matters progress as soon as possible, but well within the six month outer limit.

d.74 If a charge has not yet been finalised within this period, there is a serious question whether the arrest should continue. If it does, the best course of action, in our view, is for a presumptive charge to be given by the ODPP, and the matter brought to court.

Draft proposal 9

The *Bail Act 2013* (NSW) would be amended so that charge decision bail is available for no longer than six months, after which bail automatically lapses. During this time the person must be:

(a) charged

(b) presumptively charged, or

(c) released from bail.

Draft proposal 10

The protocol between the Office of the Director of Public Prosecutions and NSW Police Force would include strict time standards to ensure that charges are settled as soon as possible.

65. 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. For a full discussion see NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) [3.14]-[3.18].

66. NSW, Public Defenders, *Submission EAEGP8,* 2.

67. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10,* 3.

68. NSW, Office of the Director of Public Prosecutions, *Submission EAEGP10,* 3; NSW Office of the Director of Public Prosecutions and Legal Aid NSW, *Consultation EAEGP24*.

Breach of condition and failure to meet a condition of pre release should trigger an urgent presumptive charge

d.75 The provisions regarding breach in the Bail Act have been recently considered[69] and implemented in statute.[70] We consider that these provisions could be adequately extended to breaches that occur on charge decision bail.

d.76 **Breach of a condition of charge decision bail:** Currently, under the Bail Act, police have discretion to act where a breach or a potential breach has occurred.[71] When a person has been brought before the court following a failure to comply with a condition of bail, the court may reassess whether a different decision should be made concerning release or a review of conditions. This can include the imposition of a conduct requirement (a condition which tests whether the original condition is being adhered to, like undergoing a breath test to check for alcohol consumption).

d.77 We consider that, where police consider the breach of a charge decision bail condition to be serious,[72] the person should be brought before the court, to assess whether different or further conditions should be applied. If the court considers that detention is necessary, the person will enter Scenario 3, and a presumptive charge would need to be determined by the ODPP within 48 hours.

d.78 **Failure to meet a condition of pre release:** A pre release requirement may include, for example, the surrendering of a passport.[73] In our proposed pre charge model, pre release requirements, where necessary, may have to be met before the person is released from police custody to charge decision bail. Where police consider a pre release condition is necessary to mitigate any unacceptable risk, and the person does not meet that condition, the person would enter Scenario 3 and a presumptive charge would need to be determined by the ODPP within 48 hours.

d.79 A right of review by the court would apply to a pre release requirement.

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The provisions in the *Bail Act 2013* (NSW) relevant to breach of conditions would apply to breach of a charge decision bail condition.

If police are faced with a serious breach of a bail condition and the police seek to bring the person to court to have bail revoked, the police should seek an urgent presumptive charge from the Office of the Director of Public Prosecutions.

How would charge decision bail be implemented?

d.80 Charge decision bail to facilitate charge advice introduces a new police bail framework into criminal procedure in NSW. We believe that the principles and

69. NSW Law Reform Commission, *Bail*, Report 133 (2012) Ch 15.
70. *Bail Act 2013* (NSW) s 77, s 79.
71. *Bail Act 2013* (NSW) s 77.
72. See also *Bail Act 2013* (NSW) s 77(3).
73. *Bail Act 2013* (NSW) s 29.

approach of the Bail Act can be adopted to apply to charge decision bail, but some amendments will need to be made.

d.81 The charge decision bail regime will require strong protocols and policies to support a program of evaluation and review. Putting infrastructure and practices in place to capture the data to enable accurate evaluation is crucial. A key issue in England and Wales has been the lack of a nation-wide system for recording data regarding pre charge bail. This leaves an often incomplete picture of the pre charge bail population, pre charge use and the use of conditions,[74] which we would seek to avoid.

d.82 Below we list the changes to statutes and guidelines that need to occur to authorise the regime. There may be other residual statutes or protocols that also require amendment, and we recognise that our list is not exhaustive.

Table d.4: Framework for charge decision bail

Legislation/authorising agent	Amendments
Bail Act 2013 (NSW)	Incorporate charge decision bail for indictable matters where early charge advice is pending
Local Court Act 2007 (NSW)	**Definitions s 3** include proceedings relating to charge decision bail under definition of criminal proceedings
NSW Police Force guidelines	Consider the inclusion of considerations regarding the application of bail and bail conditions Consider the implementation of a state wide policy on data collection
Prosecution Guidelines of the Office of the Director of Public Prosecutions	Institute strict time standards

74. See our findings in NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) [3.21].

Appendix E
Fast-track early guilty plea schemes in England and Wales and WA

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e.1 England and Wales introduced an early guilty plea scheme in 2010, designed to facilitate the early entry of guilty pleas in the Crown Court.[1] The scheme does not attempt to replace pleas received in the Magistrates' Courts. 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.[2]

e.2 WA has a "fast-track" procedure where defendants who plead guilty before committal proceedings are transferred to the District Court for sentencing. Defendants who take the fast-track stream generally receive a sentence discount of up to 25%.

e.3 These models were presented in detail in our consultation paper *Encouraging Appropriate Early Guilty Pleas: Models for Discussion* (CP15).[3] We briefly recap the operation of the early guilty plea and fast-track schemes below.

England and Wales

e.4 The first Early Guilty Plea Scheme (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. The EGPS has three facets:

(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 as such to enter into the early guilty plea stream.

(2) It provides for a **distinct early sentencing hearing**, which can combine arraignment and sentencing in the Crown Court.

1. See Cambridge, Peterborough and Huntingdon Crown Court, *Practice Note - Early Guilty Plea Protocol* (March 2012).
2. Cambridge, Peterborough and Huntingdon Crown Court, *Practice Note - Early Guilty Plea Protocol* (March 2012) 1.
3. NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2013) Ch 6.

(3) It creates a presumption that the hearing is "the first available opportunity" the defendant has had to plead, meaning that offenders who participate in the scheme will generally **receive the maximum sentence discount**.[4]

e.5 The EGPS operates within the current legislative framework through practice notes developed across Crown Court localities, although the scheme is planned to be implemented in statute in the near future.[5] There are currently small variations in the procedures adopted by the courts, but some key elements remain constant.

Early identification of matters appropriate for the EGPS

e.6 The scheme operates for matters to be heard on indictment. It allows the Crown Prosecution Service (CPS) and the defence to identify matters where a guilty plea is likely. Cases are determined based on the advocates' experience and judgment, as well as with regard to:

- the strength of the evidence (including corroboration by reliable witnesses and police)
- admissions
- partial admissions
- other evidence (eg CCTV, medical evidence etc), and
- information from the defence as to plea.

e.7 The CPS is generally responsible for identifying indictable cases or "either way" cases (matters that can be heard summarily or on indictment) appropriate for the EGPS,[6] and for requesting that the magistrate send the case to an early guilty plea hearing (EGPH) in the Crown Court. A defendant can also request an EGPH, and defence advocates have a duty to ensure that only appropriate pleas are put to the court.[7]

e.8 The magistrate can list the case even where the defendant does not agree to the EGPH. When this occurs, the magistrate will send the matter to an EGPH and the defence can write to the court and the CPS within a set time to request the hearing be cancelled or state that a guilty plea will be entered at the EGPH.[8] Defendants have a right to opt out of the scheme at any time if they feel a guilty plea is no longer likely.[9]

e.9 Where cases have been identified as appropriate for the EGPS, the prosecution need only to serve the "initial details of the prosecution case". This is the same level

4. As prescribed by the England and Wales, Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007).
5. Information provided by UK, Office of the Senior Presiding Judge (26 November 2013).
6. The CPS review of a case must occur within 72 hours of leaving the Magistrates' Court: UK, Crown Prosecution Service, *Director's Guidance on the Preparation of Crown Court Casework* (September 2012) [17].
7. Information provided by UK, Crown Prosecution Service (3 July 2013).
8. See Wood Green Crown Court, *Early Guilty Plea Scheme: Protocol* (July 2012).
9. Information provided by UK, Crown Prosecution Service (3 July 2013).

of disclosure required for a first hearing in the Magistrates' Courts, and includes key evidence and initial disclosures sufficient to facilitate the expedited disposal of cases.[10] The timeliness of disclosure and service is tightly governed.

The early guilty plea hearing

e.10 The EGPH takes place in the Crown Court. It can occur at a dedicated EGPH 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 guilty would have otherwise undergone arraignment, possible adjournments, and have had a trial date set.[11]

e.11 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, which would then be adjourned for sentencing. Under the EGPS, cases are generally disposed considerably earlier than other case areas.[12]

Applying the sentencing discount

e.12 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 produced by the Sentencing Council.[13] 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 of one third is to be given to a plea entered at this time.[14]

e.13 The discount for a guilty plea decreases on a sliding scale the further into the process that the plea is entered.

EGPS and the abolition of committals

e.14 In 2001, England and Wales abolished committals for all strictly indictable offences, replacing committals with a "sending up" procedure. As of 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 (the

10. UK, Crown Prosecution Service, *Director's Guidance on the Preparation of Crown Court Casework* (September 2012).
11. Cambridge, Peterborough and Huntingdon Crown Court, *Practice Note - Early Guilty Plea Protocol* (March 2012).
12. Information provided by UK, Crown Prosecution Service (3 July 2013).
13. *Coroners and Justices Act 2009* (UK) s 125.
14. 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' Courts. To obtain the maximum reduction a defendant must request the Magistrates' Courts to fix an EGP hearing or agree to a prosecution request for an EGP hearing: see Cambridge, Peterborough and Huntingdon Crown Court, *Practice Note - Early Guilty Plea Protocol* (March 2012) 7.

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' Courts have is sufficient to deal with the offence.

e.15 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]

Status update since the implementation of EGPS

e.16 We have not been able to source any independent evaluation of the EGPS. We have instead reviewed recently published court statistics from the UK Ministry of Justice. It would be reductionist to attribute any change to the proportion of guilty pleas to one program (especially considering the EGPS coincided with other major changes to the criminal procedure such as the abolition of committals). However, statistics indicate that the proportion of guilty pleas entered in the Crown Court has stayed the same since the institution of the EGPS, but, significantly, the proportion of pleas entered on the day of trial has decreased.

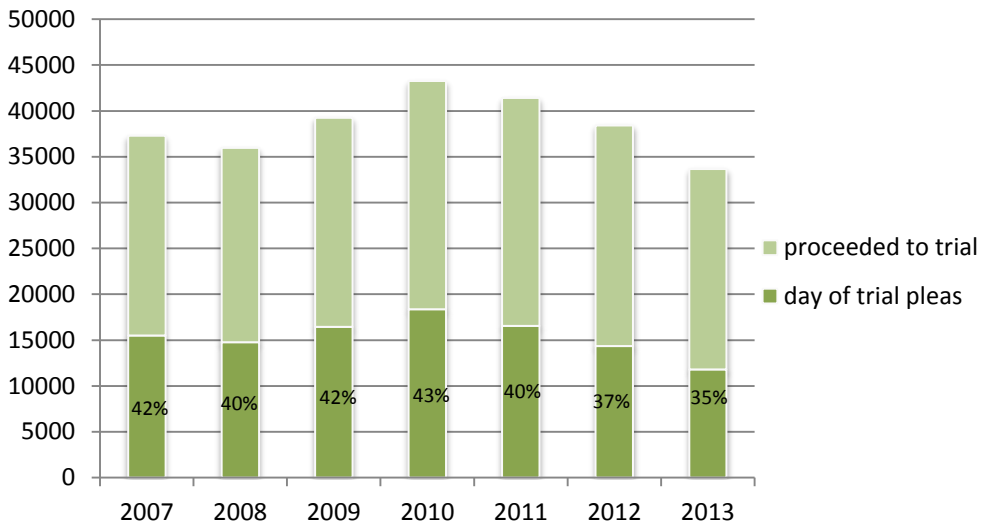
e.17 In 2010, day-of-trial pleas constituted 43% (18 389) of all matters that had proceeded to the first day of trial. In 2013, this was 35% (11 820).[16] To match the proportion of the 2010 figure, in 2013 an extra 2658 guilty pleas would need to have been entered on the first day of trial. These were instead entered earlier in proceedings. It may be concluded then that in England and Wales, a significant amount of guilty pleas that may have otherwise been entered on the day of trial occurred earlier in proceedings. This has occurred since the introduction of the EGPS, and seems likely to indicate that the scheme has assisted in encouraging defendants to enter pleas earlier in Crown Court proceedings.[17]

15. Information provided by UK, Crown Prosecution Service (3 July 2013). See also UK, Crown Prosecution Service, *Director's Guidance on the Preparation of Crown Court Casework* (September 2012).

16. In 2010, 43 261 matters went to trial; in 2013 this was 33 670: see UK, Ministry of Justice, *Court Statistics Quarterly October to December 2013* (2014) Main Table <https://www.gov.uk/government/publications/court-statistics-quarterly-october-to-december-2013>.

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

Figure e.1 Matters that proceeded to first day of trial and then resolved in a guilty plea in the Crown Court 2007-2013



Source: UK, Ministry of Justice, Court Statistics Quarterly October to December 2013 (2014) Main Table (Table 3.5)

e.18 The scheme aims to increase the number of guilty pleas received early in Crown Court proceedings. Accordingly, there is no discernible increase in the number of matters that are sent to the Crown Court for sentence (early guilty pleas).[18] Pleas before allocation or sending up from the Magistrates' Courts have not been affected by the scheme.

Western Australia

e.19 WA has a "fast-track" procedure where defendants who enter a plea of guilty before the committal hearing are transferred to the District Court for sentencing. Defendants who take the fast-track stream generally attract a statutory sentence discount of up to 25%. The discount amount was reduced from the common law maximum of 35% in 2012.

e.20 A fast-track guilty plea to an indictable offence functions as follows:

- At first appearance, 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.[19]
- If the defendant then pleads guilty to the charge, the magistrate will, without convicting the defendant, **commit the defendant for sentencing** to the District

18. See UK, Ministry of Justice, *Court Statistics Quarterly October to December 2013* (2014) Main Table <https://www.gov.uk/government/publications/court-statistics-quarterly-october-to-december-2013>.
19. *Criminal Procedure Act 2004* (WA) s 35(4).

or Supreme Court.[20] The magistrate may order a pre-sentence report at this time. The prosecution may collect further evidence relevant to sentencing.[21]

- The defendant will be remanded to appear before the District or Supreme Court for **sentencing within 6 weeks**.[22]
- A **sentence mention** is then held, and 3 to 6 weeks later the sentencing hearing occurs.[23]
- 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).[24] 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.[25]

Analysis

e.21 The two schemes share a fast-track sentencing stream in the higher courts. In the WA model this is designed to move matters to sentence quickly. It is akin to the NSW current system of committal for sentence.

e.22 The English scheme is much more extensive. It is intended to require the prosecution to consider whether matters are suitable for early resolution and to encourage discussions with the defence about this issue. The twin track approach encourages case management in the Crown Court with a view to encouraging early pleas. While the concepts have application to the NSW system, they are more difficult to apply in NSW, where much more activity occurs in the Local Court. Our blueprint does not propose moving this level of case management activity into the higher courts. It does, however, offer opportunity for greater case management and increased efficiencies in the higher courts.

20. *Criminal Procedure Act 2004* (WA) s 41(3).
21. Office of the Director of Public Prosecutions for the State of Western Australia, *2011/2012 Annual Report* (2012) 14.
22. District Court of Western Australia, *Practice Direction CRIM 2 of 2008 – Criminal Listings*, revised 22 March 2010, 1.
23. District Court of Western Australia, *Circular to Practitioners CRIM 2008/3 – Sentencing Hearings*, revised 24 March 2014, 1-2.
24. Prior to 2012, the sentencing discount under the common law was up to 35%: see *Moody v French* [2008] WASCA 67 [37].
25. *Vagh v WA* [2007] WASCA 17 [76].

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