

Response to Consultation Paper 15
Encouraging appropriate early guilty pleas: Models for discussion

Legal Aid NSW submission to the
New South Wales Law Reform Commission

January 2014

Introduction

Legal Aid NSW agrees there is a case for reform of the criminal justice system in NSW to encourage appropriate early guilty pleas. In particular we note that of matters in which guilty pleas were entered in the District Court after committal for trial in 2012, 61% were on the first day of trial, and 63% of day of trial pleas were to a changed charge.

This submission is made on the premise that systemic change is required to bring about sustainable and efficient criminal justice processes and in the context of a broader examination of possible models to reform the NSW criminal justice system to encourage appropriate early guilty pleas.

The response to the questions in the Consultation Paper should be read in the light of the preliminary comments below.

To give an overall context to our response, this introduction includes an overview of the elements of the model for reform of the NSW criminal justice system proposed by Legal Aid NSW.

Legal Aid NSW appreciates the opportunity to provide this written response. For further information, please contact Anmarie Lumsden on (02) 9219 6324 or by email at Anmarie.Lumsden@legalaid.nsw.gov.au.

Preliminary comments

In our initial submission we outlined what we considered to be essential pre-requisites to encouraging appropriate early pleas in indictable matters, including:

- charge certainty
- full prosecution brief of evidence served early (while the matter is in the Local Court), with sanctions for late service
- early involvement of a prosecutor with authority to negotiate
- sufficient time to negotiate in the Local Court
- a graduated discount for guilty pleas.

Aspects of criminal justice system models in other jurisdictions are specifically designed to address many of these pre-requisites. For example, statutory charging in the United Kingdom aims to achieve charge certainty and a brief of evidence that supports the charge at the time the proceedings commence through early prosecution involvement in the criminal process.

As contemplated in the Consultation Paper, various elements of models in other jurisdictions can be selected to create a package of reforms for the NSW criminal justice system. The package of reforms could include, for example, early charge advice from the prosecuting authority, early prosecution disclosure, case management and sentence discounts for early pleas. However, in considering what elements of the package are appropriate to NSW, it is important to bear in mind that:

- while an aspect of a model from another jurisdiction may appear to present a solution, it may not work and/or may have unintended consequences in NSW because there is no cultural fit
- the reform package should allow flexibility because not all cases are the same and the system should enable matters to be dealt with on a case by case basis
- processing indictable cases in the Local Court is a far less expensive than in the Higher Courts
- it is important to move cautiously where criminal justice system reform:
 - may infringe on the rights of accused to liberty and a fair trial, and
 - involves radical structural changes that have potential adverse cost impacts on significant players in the criminal justice system.

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.

Flaws in criminal justice models in other jurisdictions are demonstrated where there is insufficient resourcing. For example, in the UK there are too many people are on pre-charge bail because of the long waiting times for pre-charge advice arising as a result of insufficient prosecution resources.

Reform will only make the criminal justice system more effective and efficient if the prosecution and defence are properly resourced.

In addition, Legal Aid NSW is of the view that the model for reform of the NSW criminal justice system must provide for sufficient time to negotiate in the Local Court because it is a far less expensive jurisdiction than the District or Supreme Court.

For many years, in excess of 40% of matters which were commenced as committals in NSW have been finalised in the Local Court. In our solicitors' experience, the primary reason why charge negotiation results in the matter being disposed of in the Local Court is over charging. To an extent this could be remedied by early charge advice from the prosecuting authority.

However, as demonstrated in the Consultation Paper, there is still a place for plea negotiations even in jurisdictions with early charge advice schemes, such as the UK and Canada. Apart from over charging, there may be other considerations relevant to the decision about the appropriate disposition of the matter that cannot be known to the prosecuting authority until representations are made by the defence.

That said, while Legal Aid NSW recognises the role of committal proceedings in allowing the defence to test the evidence in a small number of cases, overall we concede that the efficacy of current system of committals is questionable, and that there are other mechanisms which, in combination, can achieve greater efficiency without compromising the rights of the accused. Legal Aid NSW is of the view that committals proceedings in NSW should be abolished and replaced with a case management system.

Contrary to the view expressed in the Consultation Paper, this submission details how the current NSW system provides for court review of a plea agreement or transparency. However, we argue that charge negotiations could be made more transparent in NSW through the adoption of published guidelines. In addition, plea agreements would increase the number of early appropriate guilty pleas if they incorporated sentencing outcomes but only if the court usually imposed a sentence within the agreed range and was required to give "clear and cogent reasons" where it rejected that outcome.

Finally, and although not an issue canvassed in the Consultation Paper, Legal Aid NSW is of the view that reform of the NSW criminal justice system must include:

- greater use of centralized committal courts, and
- clarification of table offences under the *Criminal Procedure Act 1986*.

Model for reform proposed by Legal Aid NSW

Pre-charge bail and statutory charging

- a pre-charge bail regime for the purpose of police seeking early charge advice from the prosecuting authority, but only where there is sufficient evidence to support a charge.
- pre-charge bail should not aim to facilitate ongoing police investigation. A person should not be subject to bail conditions for an offence which is not supported by the evidence.
- pre-charge bail should lapse after a specified time and should be subject to review by the court.

- details of the features of an early charge advice scheme are set out in response to question 3.2 2)a) below, including the steps to be taken by the police and the prosecuting authority, published guidelines relevant to those steps, and the process for advice on an appropriate presumptive charge where the person is arrested at the scene of a crime and refused bail, and it will take some time for police to obtain evidence in support of the charge.
- for all offences, with a staged approach, subject to resources.

Plea negotiations

- development of published guidelines that set out the principles and procedures for charge negotiation, and provide practical assistance for both the prosecution and the defence.
- Crown prosecutors have full authority to enter into binding plea agreements with the defence that incorporate sentencing outcomes.
- Judges are not bound by recommendations on sentence in a plea agreement, and may reject it but must give “clear and cogent reasons”. This requires a legislative amendment aimed at encouraging judges to impose a sentence within range of the joint submission, to maintain the utility of plea bargaining.
- details of the types of sentencing outcomes that could be incorporated in plea agreements are set out in response to question 4.2 2) below.

Criminal Case Conferencing

- a modified case conferencing model – administrative, voluntary and encouraged as part of a case management process, as under the WA VCCC program – to assist in encouraging the parties to communicate about appropriate pleas and factual issues in dispute.
- facilitates complementary early prosecution disclosure requirements.
- explore the use of retired judges as conference facilitators for more complex or serious matters, subject to resources.

Differential case management (Abolishing Committals)

- a program of differential case management in the Local Court, which replaces committal proceedings
- three mechanisms for the defendant to be 'sent up' to the higher court from the Local Court being:
 - a fast track scheme, for cases likely to be resolved by guilty plea
 - a case management scheme to encourage the parties to communicate about appropriate pleas and factual issues in dispute, and facilitate prosecution disclosure (with a disclosure hearing), and
 - an administrative referral, where the prosecution has complied with the disclosure requirements and the defendant consents.
- Criminal Case conferencing may be a step in both the fast track scheme and the case management scheme.

Fast-tracking scheme

- for cases likely to be resolved by guilty plea, a fast-track scheme involving streamlined case management from summary jurisdiction to a specialised sentence hearing in the higher court.

- details of the elements of a fast-track scheme are set out in response to question 6.1 2) below, including presumptive certificates (e.g. drug or DNA) should generally be sufficient evidence, the hearing includes both sentence and arraignment where possible, and the Courts may apply the maximum sentence discount, subject to legislative exceptions..

Case management scheme

- details of the elements of a case management scheme are set out in response to question 6.2 2)b) below.
- where the defendant pleads not guilty or does not enter a plea in the Local Court and is 'sent up' for trial, the first listing in the District or Supreme Court should be for a preliminary case management hearing and arraignment. The List Judge will list the matter for trial, and make orders for further case management, as appropriate to the particular case.

Sentence indication scheme

- pilot for non-violent serious offences with a maximum penalty of at least 10 years imprisonment where there is little incentive for accused to plead guilty because of the possible length and uncertainty of sentence.
- sentence indication includes the maximum sentence (type and quantum) if a plea of guilty was entered immediately.
- Judge should be bound by a sentence indication if there is no further evidence or facts which effect the indication.
- Crown should not have a right of appeal.
- Defendant should be able to withdraw a plea of guilty if the indication changes at sentence.

Statutory regime of sentence discounts

- comprehensive legislation on sentence discounts expressly codifying the proposition "the earlier the plea, the greater the discount".
- The highest discount available should apply where the defendant pleads guilty at the earliest opportunity, that is, 40% (subject to legislative exceptions) for defendants who enter a plea of guilty in the fast-track scheme.
- Details of the suggested hierarchy of discounts available for indictable offences dealt with in Higher courts are set out in response to question 9.1 2)b) below.
- The legislative scheme should also ensure no disadvantage to defendants who enter a late guilty plea through no failure of their own.

Local Court

- Case conferencing should not be introduced as part of Local Court case management processes, but if it is the preferred model is the two-stage Victorian model.
- If a sentence indication scheme were to be introduced in the Local Court there would be a greater danger of a convenience plea than in the higher courts, and it should only be available for the more complex and lengthy matters dealt with in a magistrate managed case conference. It should be an indication as to the type and quantum of sentence.

Response to Questions

3 Pre-charge bail and statutory charging

Pre-charge bail

3.1 1) Should a pre-charge bail regime be introduced in NSW?

Legal Aid NSW supports the introduction of a pre-charge bail regime in NSW for the purpose of police seeking early charge advice from the prosecuting authority.

In common with the "statutory charging" scheme in the UK, a pre-charge bail regime should only operate where there is sufficient evidence to support a charge: police arrest the person for an offence and, before they are charged, detain or bail the person, conditionally or unconditionally, for the purpose of obtaining charge advice from the prosecuting authority.

Legal Aid NSW is opposed to a pre-charge bail regime to facilitate police investigation.

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

Advantages of pre-charge advice

There are significant advantages in a more extensive scheme of early charge advice between the police and prosecuting authority in NSW which operates within a pre-charge bail framework.

The process of selecting the appropriate charge involves prosecution review of the brief of evidence before charge, and the opportunity to identify what material should be obtained and provided by the police.

A more extensive scheme of early charge advice in NSW would, therefore, go a long way in achieving charge certainty and a brief of evidence that supports the charge, two essential pre-requisites to encouraging appropriate early guilty pleas.

In addition to encouraging appropriate early guilty pleas to properly investigated and charged prosecutions, early involvement of the prosecution should also provide:

- a better understanding by police of the evidentiary test governing decisions to prosecute
- more strategic police investigation facilitated by prosecution direction about what material should be included in the brief
- a general increase in the speed with which a case proceeds to trial because a brief is available at the time the proceedings commence, and
- greater confidence of victims, witnesses and the general public in the process as a result of fewer cases being discontinued after charge or continuing on reduced charges.

Early charge advice should also improve the prospects of bail because the bail decision will be based on the appropriate charge. Currently, police often charge higher than is supported by the evidence and this diminishes the defendant's prospect of bail.

Disadvantages of a pre-charge bail regime

The UK pre-charge bail regime has numerous disadvantages, primarily where it is used to facilitate police investigation.

The primary disadvantage is that a person's liberty can be curtailed notwithstanding that the offence which they are suspected of committing is not supported by the evidence. As indicated in the Consultation Paper, before there is sufficient evidence to charge a person can be:

- arrested for the offence of failing to submit to pre-charge bail, with or without conditions
- subject to pre-charge bail conditions including non-association orders, not going to specified locations and curfews, and
- arrested for breaching pre-charge bail conditions, and detained.

In addition, as noted in the Consultation Paper, critics have observed the misuse of pre-charge bail in the UK, as follows:

- pre-charge bail can facilitate a fishing expedition for offences other than those for which the suspect was arrested, as well as where there is not enough evidence to support a belief that a person is guilty
- pre-charge bail can be applied inappropriately, resulting in overuse caused by insufficient quality in initial investigations and demands on limited custody space.

In the context of statutory charging critics have observed there are too many people on pre-charge bail because of the long waiting times for pre-charge advice.

3.1 3) If a pre-charge bail regime were introduced, should it aim to facilitate:

a) ongoing police investigations and the finalisation of the police brief of evidence, and/or

b) ODPP early charge advice?

3.1 3)a) Ongoing police investigations

A pre-charge bail regime should not aim to facilitate ongoing police investigation. We have grave concerns about increasing the power of police to make a person subject to bail conditions for an offence which is not supported by the evidence.

Legal Aid NSW notes the academic criticism of the misuse of pre-charge bail in the context of ongoing investigation referred to in the Consultation Paper.

3.1 3)b) ODPP early charge advice

As indicated above, Legal Aid NSW supports the introduction of a pre-charge bail regime in NSW to facilitate ODPP early charge advice.

3.1 4) What limits should be applied to any pre-charge bail regime?

Pre-charge bail should lapse after a specified time and should be subject to review by the court.

Statutory charging

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

Legal Aid NSW supports the introduction of a more extensive scheme of early charge advice between the police and the ODPP in NSW.

As noted in the Consultation Paper, the 2001 Review of Criminal Courts of England and Wales (the Auld Report) recommended early prosecution involvement in the criminal process. The Auld Report noted that a "significant contributor to the delays in the entering of pleas of guilty and the prolonged and disjointed nature of many criminal proceedings is 'over charging' by the police and failure by the Crown prosecutor to remedy it at an early stage." This resulted in the defence tendering, and the prosecution accepting, last minute changes of plea to lesser offences.

This reflects the criminal justice system in NSW. In 2012, 82% of all matters dealt with on indictment in the District Court of NSW resolved in a guilty plea. Of these 35% were entered after committal to the District Court for trial. Alarming, of those late guilty pleas, 61% were entered on the first day of trial, and 63% of day of trial pleas were to a changed charge.

These figures do not include the very high proportion of committal matters which were dealt with to finality in the Local Court, primarily as a result of overcharging.

The rationale in the Auld Report which led to the introduction of statutory charging in the UK is indisputably applicable to the NSW context.

We refer to the response to question 3.1.2 above.

3.2 2) If such a scheme were introduced:

a) what features should be adopted

b) how could it interact with a pre-charge bail regime, and

c) what offences should it relate to?

3.2 2)a) What features should be adopted

An early charge advice scheme should include the following features:

1. Police determine whether there is sufficient evidence to charge.
2. If there is sufficient evidence to charge, police:
 - decide whether the person should be detained or bailed either unconditionally or conditionally
 - prepare the pre-charge report (with the available evidence), and
 - send the pre-charge report to the ODPP seeking charge advice.

There should be published guidelines for police about:

- the criteria for referral to the ODPP for charge advice
- standards for the type of evidence to be included in the brief to be submitted to the ODPP so that the Crown Prosecutor can make an effective decision. An evidence review officer should review the evidence, and
- advising the arrested person about avenues of legal assistance from Legal Aid NSW and the Aboriginal Legal Service, both in circumstances where the person is detained (e.g. the ALS hotline and the availability of a duty lawyer at court) and released.

3. Crown Prosecutors are to:

- make the decision on the most appropriate charge/s within a specified time
- identify evidential deficiencies and requisition police to obtain that material, or
- close cases where there is insufficient evidence to support a charge within the specified time or where the public interest does not require a prosecution.

The ODPP should publish concrete guidelines for Crown Prosecutors about making charging decisions and specified time standards.

4. When the charging decision is made with sufficient evidence to support the charge, the ODPP should be required to:

- file the charge in the Local Court
- notify the accused (and their legal representative) of the court date, and
- serve the brief of evidence on the accused's legal representative, when known.

If the ODPP are responsible for laying the charge, this should encourage police efficiency in responding to requisitions.

Where the arrested person is refused bail

In NSW a high proportion of defendants arrested for strictly indictable offences and table offences are refused police bail. We expect this would continue to be the case if an early charge advice scheme was introduced in NSW. People who are arrested and detained would need to be brought before the court for review of the bail decision within 24 hours. In most cases, and especially where the person is arrested at the scene of a crime, it will take some time for the police to obtain all of the evidence in support of the charge, particularly where forensic material is required.

In these cases, the police should be required to seek advice from the ODPP on the appropriate presumptive charge in the light of the evidence contained in a preliminary charge report. The preliminary charge report should contain all investigative material obtained by the police, including the documents currently prepared when a person who has been arrested and detained is first brought before the court, as well as other preliminary investigative material such as note book entries.

Resourcing

The ODPP will require significant resources to implement an early charge advice scheme.

Advice during the course of an investigation

Subject to resourcing, Crown Prosecutors should also supply advice during the course of an investigation of a serious, sensitive or complex matter (for example, cases involving a death or serious sexual offence) and for any case where a police supervisor considers it would assist either to decide on the evidence required or to support a prosecution or to decide if a case can proceed to court.

3.2 2)b) How could it interact with a pre-charge bail regime

We refer to the response to question 3.2 above.

3.2 2)c) What offences should it relate to

We would support charge advice for all offences.

Subject to resources, there could be a staged approach, starting with all offences to be dealt with on indictment in the District or Supreme Court. This would include all strictly indictable offences and all table offences the police refer to the prosecuting authority for advice as to whether they should be dealt with in the District Court.

The second stage could include all table offences. The third would be summary only offences.

3.2 3) How could such a regime encourage early guilty pleas?

An early charge advice scheme in NSW would achieve a greater level of charge certainty. In addition, as the process of selection of the appropriate charge involves review of the brief and the opportunity for the prosecution authority to requisition evidence, it should result in a brief of evidence that supports the charge at the time the proceedings commence.

Charge certainty will mitigate the defence expectation that the charge will be changed later in the proceedings through negotiation or as a result of the late participation of senior counsel. Armed with the prosecution brief of evidence, defence lawyers will be able to provide advice to the accused based on evidence on which the prosecution intend to rely. These factors, together with a guaranteed highest available discount on sentence, should encourage appropriate early guilty pleas.

In addition to an increase in early pleas of guilty, an early charge advice scheme should also achieve the following court efficiencies:

- an increase in conviction rates
- a decrease in the number of cases that are discontinued
- a decrease in matters where a pleas entered on the day of trial
- a decrease in matters where a plea entered on the day of trial is to a different charge, and
- a decrease in the time from charge to completion.

4 Plea negotiations

Need for plea agreements with early charge advice

In jurisdictions with early charge advice schemes, there is still a place for plea negotiations. As noted in the Consultation Paper, the Ministry of Justice (UK) attributes the encouragement of early negotiations, among other things, to the rise in guilty pleas. In Canada about 90% of matters are resolved by a guilty plea and the majority of these involve plea negotiations.

Court review and transparency of plea agreements in NSW

It is not correct to say that the current NSW system does not provide for court review of a plea agreement or transparency.

Where the plea negotiation results in a change of charge, the prosecution are required to file a fresh charge or indictment. This is read to the accused in open court. Where an offender pleads guilty, an agreed statement of facts, sometimes negotiated between the accused and the prosecution, is placed before the sentencing judge: *The Queen v Olbrich* (1999) 199 CLR 270 per Kirby J at [52].

In *GAS v The Queen* (2004) 217 CLR 198 at [27]–[32], the High Court said that plea agreements are affected by five fundamental principles:

1. It is the prosecutor alone who has the responsibility of deciding the charge to be preferred against an accused person.
2. It is the accused person, alone, who must decide whether to plead guilty to the charge preferred.
3. It is for the sentencing judge, alone, to decide the sentence to be imposed. For that purpose, the judge must find the relevant facts. In the case of a plea of guilty, any fact beyond what is necessarily involved as an element of the offence must be proved by evidence, admitted formally (as in a Statement of Agreed Facts) or admitted informally (as in a statement from the bar table that is not contradicted).
4. There may be an understanding, between the prosecution and the defence, as to evidence that will be led, or admissions that will be made, but that does not bind the judge, except in the practical sense that the judge's capacity to find facts will be affected by the evidence and the admissions. In deciding the sentence, the judge must apply to the facts as found, the relevant law and sentencing principles.
5. An erroneous submission of law may lead a judge into error and, if that occurs, the usual means of correcting the error is through the appeal process.

Plea agreement does not bind the judge

The judge must be satisfied that the elements of the charge can be proved beyond reasonable doubt and therefore is not bound to accept the plea of guilty to a charge.

Agreement about sentence does not bind the judge

In *GAS v The Queen*, the purported part of the plea agreement “that each offender should receive a lesser sentence than a principal” breached the fourth principle. The court said at [39] that “[i]t was an inappropriate subject for any kind of agreement between counsel.”

Similarly, in *Ahmad v R* [2006] NSWCCA 177 at [23]–[26], although the Crown Prosecutor had agreed with the defence as to an appropriate sentence, this did not bind the judge. The agreement carried no greater weight than any other Crown submissions made in the sentencing process.

Plea agreements should ordinarily be recorded in writing

The High Court in *GAS v The Queen* added the following general observations about plea agreements at [42]:

“It is as well to add some general observations about the way in which the dealings between counsel for the prosecution and counsel for an accused person, on subjects which may later be said to have been relevant to the decision of the accused to plead guilty, should be recorded. In most cases it will be desirable to reduce to writing any agreement that is reached in such discussions. Sometimes, if there is a transcript of argument, it will be sufficient if an agreed statement is made in court and recorded in the transcript as an agreed statement of the position reached. In most cases, however, it will be better to record the agreement in writing and ensure that both prosecution and defence have a copy of that writing before it is acted upon. There may be cases where neither of these courses will be desirable, or, perhaps, possible, but it is to be expected that they would be rare.”

4.1 1) How could charge negotiations in NSW be more transparent?

Charge negotiations could be made more transparent in NSW through the adoption of published guidelines that set out the principles and procedures for charge negotiation, and provide practical assistance for both the prosecution and the defence. This document should be developed following broad consultation with prosecution and the defence representatives. This would be preferable to the rigidity of statutory rules which prescribe the conduct of plea negotiations.

The current system following a successful charge negotiation of presenting a fresh charge or indictment and an agreed statement of facts in open court provides transparency. We do not think it should be necessary for a written agreement to be filed in court.

However, there may be greater justification for a written agreement to be filed in court if it incorporated sentence outcomes.

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

For defendants, successful charge negotiations can result in reduced cost, certainty of outcome and the prospect of a reduced sentence.

However, it is difficult to imagine how increased transparency of charge negotiations would impact on the likelihood that defendants will seek out a plea agreement.

We do not accept that increased transparency of charge negotiations will result in consistent outcomes for similar offences, and nor should it. A sentence should reflect the particular circumstances of the offence and the individual circumstances of the offender, as well as the timing of the plea.

4.2 1) Should NSW Crown prosecutors be able to incorporate sentencing outcomes into plea agreements?

Crown prosecutors should have full authority to enter into binding plea agreements with the defence that incorporate sentencing outcomes.

We note that in the Canadian federal jurisdiction Judges are not bound by recommendations on sentence, and a sentencing Judge may reject a joint sentencing recommendation but must give “clear and cogent reasons”. The Consultation Paper notes that, to maintain the utility of plea bargaining, judges usually impose a sentence within range of the joint submission.

This approach could sit well with the current approach in NSW where a Judge is not bound by a plea agreement. However, a realignment to encourage judges to impose a sentence within range of the joint submission by requiring a Judge to give “clear and cogent reasons” for rejecting it could only be achieved through a legislative amendment.

This would provide greater certainty for the accused that the court would impose a sentence in accordance with the terms of the plea agreement, and to that extent encourage the use of plea agreements to achieve appropriate early pleas of guilty.

4.2 2) How could NSW Crown prosecutors incorporate sentencing outcomes into plea agreements?

We are attracted to adoption in NSW of the sentencing outcomes that may be incorporated in plea agreements in the Canadian federal jurisdiction, as follows:

- the prosecution undertakes to recommend a sentence range or a specific sentence
- the prosecution and defence agree to submit a joint recommendation for a range of sentences or a specific sentence
- the prosecution undertakes not to oppose a sentence recommendation by defence counsel which has been disclosed in advance
- the prosecution agrees not to seek additional optional sentencing measures
- the prosecution agrees not to seek a more severe punishment
- the prosecution agrees not to oppose the imposition of an intermittent sentence rather than a continuous sentence
- agreement as to the types of conditions to be imposed on sentence.

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

Legal Aid NSW expects that incorporating sentencing outcomes into plea agreements would increase the number of early appropriate guilty pleas but only if the court usually imposed a sentence within the range set out in the plea agreement.

4.3 Should the courts supervise/scrutinise plea agreements?

As indicated above, Legal Aid NSW supports plea agreements with the defence that incorporate sentencing outcomes, with the court having the discretion to reject that outcome where “clear and cogent reasons” are given.

5 Case Conferencing

5.1 1) Should NSW reintroduce criminal case conferencing? If so should case conferencing be voluntary or compulsory?

Legal Aid NSW solicitors continue to engage in informal criminal case conferencing with the prosecution which is, perhaps, more in the nature of plea bargaining. "Conferences" between the defence and the prosecution often occur over the telephone, and this was the case under both the statutory and administrative models which previously existed in NSW.

Legal Aid NSW is of the view that a modified case conferencing model should be reintroduced in NSW. We would prefer an administrative as opposed to a statutory model. Participation should be voluntary, and encouraged as part of a case management process. We are attracted to aspects of the voluntary criminal case conferencing (VCCC) program in Western Australia.

We note that although WA VCCC is voluntary it has become an “accepted part of the criminal trial process in the Supreme Court.”

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

The advantages of reintroducing criminal case conferencing are that it assists in encouraging the parties to communicate about appropriate pleas and factual issues in dispute, and in facilitating disclosure of additional material by the prosecution.

As a consequence, where case conferencing occurs at an early stage of the criminal proceedings, it can operate to reduce delay by streamlining proceedings, reducing the number of cases that proceed to trial, reducing the length of trial and encouraging appropriate early guilty pleas.

5.1 3) If criminal case conferencing were introduced, how could it be structured to improve efficiency?

Case conferencing will succeed better if it is part of a package of reforms including statutory charging, early prosecution disclosure, case management and sentence discounts for early pleas.

We note that in WA VCCC is encouraged as part of a case management process. In addition, VCCC and early disclosure are complementary measures used to enforce the disclosure requirements of the *Criminal Procedure Act 2004* (WA).

We are attracted to the use of retired judges as conference facilitators, but note that this could be a resource issue in NSW. The use of facilitators could be limited to the more complex or serious matters.

We are of the view that criminal case conferencing will be most effective where it occurs as early as possible following service on the defence of adequate evidence in support of the charge.

Criminal case conferencing should be confidential and without prejudice to the court proceedings.

6 Fast Tracking

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

For cases likely to be resolved by a guilty plea, NSW should adopt a fast-track scheme involving streamlined case management from summary jurisdiction to a specialised sentence hearing in the higher court.

The success of a fast-track scheme should be dependent on the defence being served with sufficient evidence to support the charge at the time the proceedings commence, a feature of the early charge advice model.

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

A fast-track scheme should have a legislative base and have the following elements:

- Prosecution identifies cases where the defendant is likely to plead guilty. The prosecutor may seek to refer the matter to criminal case conferencing to further explore the likelihood of a plea, and before referral to the fast-track scheme. This process should also include consideration by the prosecutor of whether the jurisdiction of the Local Court is sufficient to deal with the matter.
- Prosecution or defence request the magistrate to order likely guilty plea matters into the fast-track scheme.
- Magistrate orders likely guilty plea matters into the fast-track scheme, and sets a date for sentence hearing (or mention in the higher court, for fixing the date of the sentence hearing).
- Defendant can advise the court within a set time of the decision to either:
 - opt out of the a fast-track scheme, or
 - confirm a plea will be entered.This time should also be used by the prosecution and the defence to discuss what additional evidence might be sufficient for the defence to appropriately advise the client on their plea.
- Presumptive certificates (e.g. drug or DNA) should generally be sufficient evidence.
- Where possible, the hearing includes both sentence and arraignment.
- Courts must apply the maximum sentence discount, subject to legislative exceptions.

6.1 3) How would sentence discounts apply to a fast-track scheme?

Courts should be required to apply the highest possible sentence discount for people whose matters are dealt with under the fast-track scheme, subject to legislative exceptions.

6.2 1) Should NSW adopt a program of differential case management?

NSW should adopt a program of differential case management in the Local Court. This should replace committal proceedings.

Where the defendant enters a plea of not guilty or does not enter a plea in the Local Court and is 'sent up' to the District or Supreme Court for trial, the first listing in the District or Supreme Court should be for a preliminary case management hearing as well as for arraignment.

2) If a program of differential case management were introduced

a) what categories should be created

b) how should each of these categories be managed?

6.2 2) a) What categories should be created

There should be two main categories of differential case management in the Local Court: the fast-track scheme and the case management scheme to facilitate prosecution disclosure for all other matters.

The case management scheme should include the option of an administrative referral where the prosecution complies with the disclosure requirements and the defendant consents.

6.2 2) b) How should each of these categories be managed

The fast-track scheme should be managed as indicated in response to question 6.1.

The case management scheme should have the following elements:

- The Magistrate may seek to refer the matter to criminal case conferencing to encourage the parties to communicate about appropriate pleas and factual issues in dispute, and facilitate disclosure of additional material by the prosecution.

This process should also include consideration by the prosecutor of whether the jurisdiction of the Local Court sufficient to deal with the matter.

- If:
 - the prosecutor considers that jurisdiction of the Local Court is not sufficient to deal with the matter, and
 - the defendant pleads not guilty or does not enter a plea (and the matter is not identified as a fast-track matter),

the Magistrate orders full prosecution disclosure within a set time limit, and lists the matter for a disclosure hearing.

- At the disclosure hearing, the Magistrate determines whether the prosecution has complied with the disclosure requirements.
- If the Magistrate determines the prosecution has not complied with the disclosure requirements, the Magistrate may:
 - adjourn the matter to a new date that allows a reasonable time for the prosecutor to comply, based on advice from the prosecutor, and
 - if the prosecutor does not comply by the second hearing date, dismiss the matter for want of prosecution.
- If the prosecution complies with the disclosure requirements before the date set for the disclosure hearing, the defendant can consent to an administrative referral where the court commits the accused for sentence or trial without disclosure hearing.

The administrative committal could be based on the WA model.

- If the Magistrate is satisfied that the prosecution has complied with the disclosure requirements, the Magistrate will require the defendant to enter a plea and the defendant will be 'sent up' to the District or Supreme Court:
 - for sentence, if the defendant entered a plea of guilty, or
 - for a preliminary (case management) hearing and arraignment, if the defendant entered a plea of not guilty.
- Following the preliminary hearing and arraignment, the List Judge will list the matter for trial, and make orders for further case management, as appropriate to the particular case.

Case management in the District or Supreme Court

The purpose of the preliminary hearing in the District Court or Supreme Court would be for the Court to determine what case management is required to encourage the parties to communicate about appropriate pleas and factual issues in dispute, and to facilitate further prosecution disclosure.

There should be active case management by the List Judge where the prosecution or defence indicate ongoing plea negotiations or a conference would assist resolution of the matter.

The *Criminal Procedure Act 1986* provides the legislative basis for case management. The Court should have the power to determine pre-trial applications and make binding determinations on the evidence.

For complex and lengthy matters, there should be early allocation to the trial judge, which would allow the early allocation of the Crown prosecutor who would conduct the trial.

From the perspective of Legal Aid NSW it is crucial for the matter to be listed for trial at the time of first listing in the District or Supreme Court to ensure continuity of defence counsel up to and including the trial.

7 Abolishing Committals

7.1 1) Should NSW maintain, abolish or change the present system of committals?

Legal Aid NSW recognises the role of committal proceedings in allowing the defence to test the evidence in a small number of cases. However, we note that that vast majority of committals (85%) occur on the 'papers' and that it is rare that evidence does not reach the standard to commit. Overall, we concede that the efficacy of current system of committals is questionable, and that there are other mechanisms which, in combination, can achieve greater efficiency without compromising the rights of the accused.

Legal Aid NSW is of the view that committals proceedings in NSW should be abolished and replaced with a case management system as set out in response to question 6.2.

However, Legal Aid NSW would not support the total abolition of proceedings in the Local Court for matters to be dealt with on indictment. That is, we would not support these matters commencing in the higher courts.

While early charging advice, if adopted in NSW, will go a long way in achieving charge certainty, the experience of other jurisdictions including the UK and Canada indicate that there is still a place for plea negotiations, including negotiations in relation to the appropriate charge and the possibility of summary disposal. It would be a matter of concern to Legal Aid NSW if the defence did not have an opportunity to negotiate while the matter was in the Local Court, and instead had to do this in the District or Supreme Courts, which are higher cost jurisdictions with increased sentencing powers.

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

The case management system would have three mechanisms for the defendant to be 'sent up' to the higher court from the Local Court being:

- a fast track scheme for where a guilty plea is likely
- a case management scheme to facilitate prosecution disclosure (with a disclosure hearing), and
- an administrative referral, where the prosecution has complied with the disclosure requirements and the defendant consents.

The fast track scheme, the case management scheme and the administrative referral are described in response to question 6.

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

The extent of prosecution disclosure will depend upon the category of differential case management which the case falls under.

It is accepted that for fast-track scheme matters the extent of the evidence which the prosecution should be required to disclose could be less than the full brief of evidence which the prosecution would rely on if the matter went to trial.

For case management scheme matters full prosecution disclosure should occur before the matter is 'sent up' to the higher court. Defence disclosure should occur once the matter is in the higher court, in accordance with orders made by that court.

8 Sentence Indication

8.1 1) Should NSW reintroduce a sentence indication scheme?

There are divided views within Legal Aid NSW about whether NSW should reintroduce a sentence indication scheme.

There are lawyers who appeared for clients on sentence indication hearings when the scheme existed in the NSW District Court who see the value of the scheme. They say a sentence indication provides a real figure which can help clients who are having difficulty making the decision to plead guilty, and where appropriate, take that step. A sentence of a specified length provides much greater incentive than advising the client that, if they plead guilty, they will get a 10 to 25% discount on a sentence which can only be based on an educated guess.

Equally, there are lawyers who are philosophically opposed to sentence indication who see it as placing undue pressure on an accused to plead guilty where it is not appropriate.

In addition, a sentence indication scheme could be counter-productive to encouraging appropriate pleas of guilty earlier when the matter is in the Local Court. Having this option in the higher court may reduce the incentive to resolve the matter by negotiation in the lower court, particularly if it achieves a similar sentencing outcome.

However, we see the benefit of piloting a sentence indication scheme. This could be done for non-violent serious offences, with a maximum penalty of at least 10 years imprisonment, which more often than not proceed to a long and complex trial. These offences include major fraud, and major drug supply and importation where there is little incentive for accused to plead guilty because of the possible length and uncertainty of sentence. For these matters it may be useful to have certainty of sentence as an incentive to encourage appropriate early pleas of guilty, with a discount which recognises the significant utilitarian value these pleas bring to the criminal justice system.

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

A sentence indication scheme for non-violent serious offences would invariably apply to custodial sentences. We are attracted to the UK model where a sentence indication includes the maximum sentence (type and quantum) if a plea of guilty was entered immediately. A judge should be bound by a sentence indication if there is no further evidence or facts which effect the indication. The Crown should not have a right of appeal against a sentence passed following a sentence indication.

8.2 Once a defendant accepts a sentence indication, in what circumstances should it be possible to change it?

The defendant should be able to withdraw a plea of guilty if the indication changes at sentence.

9 Sentence Discounts

9.1 1) Should NSW introduce a statutory regime of sentence discounts?

Legal Aid NSW supports introducing a statutory regime of sentence discounts in NSW.

2) If a statutory regime of sentence discounts were introduced:

a) what form could it take, and

b) to what extent should it be a sliding scale regime?

9.1 2)a) Form of statutory regime of sentence discounts

Legal Aid NSW preliminary submission – an 'immediate solution'

The Consultation Paper notes the Legal Aid NSW preliminary submission suggested a statutory gradated three-stage approach to discounts for guilty pleas, as follows:

- The highest discount is to be for a guilty plea entered in the Local Court for an indictable offence (in cases where the charge is not later changed by the ODPP).
- An intermediate discount is to be for a guilty plea entered after committal.
- The lowest discount is to be for a guilty plea that is entered on or near the first trial date.

Our preliminary submission went on to say that we were reluctant to accept any further discount "being available to an accused without a full brief being served and the charge reflecting the available evidence." It suggested this approach as a component of an 'immediate solution' to encouraging appropriate early guilty pleas. The approach was proposed in the context of current 'roadblocks and efficiencies' that need to be addressed to find a longer term solution.

By contrast, this submission is made on the premise that systemic change is required to bring about sustainable and efficient criminal justice processes and in the context of a broader examination of new models which may be introduced in NSW to encourage appropriate early guilty pleas.

Statutory regime of sentence discounts in the context of reform

We would support comprehensive legislation on sentence discounts expressly codifying the proposition "the earlier the plea, the greater the discount", similar to the legislation in South Australia. This legislation should prescribe the maximum discounts available for guilty pleas made in specific stages of proceedings, with one system for the Magistrates Court and another for the District and Supreme Courts.

The highest discount available should apply where the defendant pleads guilty at the earliest opportunity. Under the components of the model proposed by Legal Aid NSW this should apply to defendants who enter a plea of guilty in the fast-track scheme. The discount should be substantial at up to 40%. This would recognise that the plea is made before the full brief of evidence has been prepared and served on the defence.

There should be a discount for a plea entered after arraignment but some time before the first day of trial, say the date the defendant is required to serve the prosecution with the Notice of Defence Response (s141(1)(b) *Criminal Procedure Act 1986*).

The legislative scheme should also ensure no disadvantage to defendants who enter a late guilty plea through no failure of their own.

9.1 2)b) A sliding scale regime

As indicated above, Legal Aid NSW is of the view that a statutory regime of sentence discounts should be a sliding scale regime, subject to ensuring no disadvantage to defendants who enter a late guilty plea through no failure of their own.

The hierarchy of discounts available for indictable offences in Higher Courts could include the following:

Stage of proceedings	Discount available
Fast track scheme	40%, subject to legislative exceptions
Day of committal following disclosure hearing/administrative committal	Up to 30%
At arraignment	Up to 25%
Day of committal to first day of trial – where sentencing court is satisfied defendant could not reasonably have pleaded guilty at earlier stage because of circumstances outside the defendant's control.	Up to 25%
Arraignment to 'a time fixed before first day of trial' (e.g. date of Notice of Defence Response (s141(1)(b) <i>Criminal Procedure Act 1986</i>)	Up to 20%
'A time fixed before first day of trial' to first day of trial'	Up to 10%
Any other circumstance where sentencing court sees fit to impose a discount.	Up to 10%

10 Summary case conferencing

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

The Consultation Paper states that late entry of guilty pleas in summary proceedings in the Local Court is not an issue that causes delay or consumes resources as it does in the District Court.

It is possible that case conferencing could create even greater efficiencies.

It is also possible that the introduction of case conferencing as part of its case management processes in the Local Court of NSW may produce perverse incentives that delay appropriate early guilty pleas.

On balance, Legal Aid NSW is of the view that given late entry of guilty pleas in summary proceedings in the Local Court is not an issue, it is not worth the risk, and that other measures could be introduced to create efficiencies in the Local Court.

If case conferencing were to be introduced as part of Local Court case management processes, Legal Aid NSW's preferred model is the two-stage Victorian model:

- The Summary Case Conference (SCC), a mandatory unmediated criminal case conference, and
- The Contest Mention System (CMS), a magistrate managed in court case conference which may follow an unsuccessful SCC.

For both stages, the defendant must be legally represented.

A magistrate managed case conference is generally reserved for the more lengthy cases listed for half a day or more.

10.1 2) Should the Local Court of NSW incorporate a summary sentence indication scheme?

As indicated in response to question 8 above, there are divided views within Legal Aid NSW about whether NSW should reintroduce a sentence indication scheme.

In the Local Court there would be a greater danger of a convenience plea than in the higher courts, particularly if the indication was a non-custodial sentence.

10.1 3) If a summary sentence indication scheme were introduced:

a) what form should it take; and

b) what type of advance indication would be appropriate?

10.1 3) a) Form of summary sentence indication scheme

In line with the Victorian model, if a summary sentence indication scheme was introduced, it should only be available for matters dealt with in a magistrate managed case conference, and should be reserved for the more complex and lengthy of those matters.

10.1 3)b) Appropriate type of advance indication

For complex and lengthy matters in the Local Court, the appropriate type of advance sentence indication would be an indication as to the type and quantum of sentence because an accused charged with most of these offences may receive a custodial sentence if convicted.

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

It is not possible to predict the effect case conferencing would have on the Local Court's efficiency and guilty plea rate. We refer to the response to question 10.1 1) above.