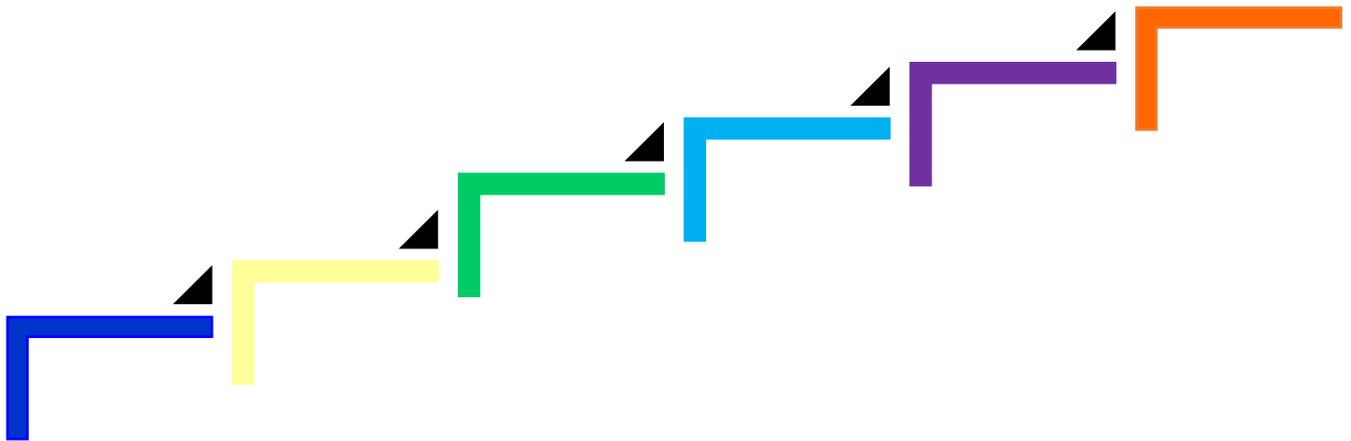


# EARLY APPROPRIATE GUILTY PLEA REFORMS

A GUIDE FOR DEFENCE PRACTITIONERS



**Legal Aid**  
NEW SOUTH WALES

EAGP Implementation Team

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The **Early Appropriate Guilty Plea Implementation Team** is a team comprised of practising solicitors from the Criminal Law Division of Legal Aid NSW, supported by a Project Administrator. The Project Lead is Rob Hoyles who is joined by Project Officers Ron Frankham and Nick Ashby, Training Officers Keppie Waters and Martin Bernhaut and Project Administrator, Roberta Bonora-Wigg. The team would like to acknowledge the significant contribution and support of Annmarie Lumsden, Director of the Criminal Law Division, Her Honour Ms Leanne Robinson LCM, former Deputy Director, Criminal Law Division, His Honour Mr Daniel Covington LCM, former Project Officer and Conor Taylor, former Project Administrator.

#### **DISCLAIMER**

This document is intended to provide its readers with an explanation of the Early Appropriate Guilty Plea reforms to the procedure for indictable matters in NSW. While the document includes tips and suggestions as to how practitioners should approach such matters, it is not intended to be a substitute for a thorough reading of the relevant legislation and related material, nor a case-by-case analysis of such proceedings. All legislative references are to the *Criminal Procedure Act 1986* or *Criminal Procedure Regulation 2017* unless otherwise stated. The law is stated as at 30 April 2018.

**EAGP Implementation Team  
Legal Aid NSW  
April 2018**

# THE CASE FOR CHANGE

## THE CASE FOR CHANGE

The case for change to the committal process was brought about by the findings of the NSW Law Reform Commission (LRC) in its 2014 Report 141, *Encouraging Appropriate Early Guilty Pleas*. The full Report can be found on the LRC website:

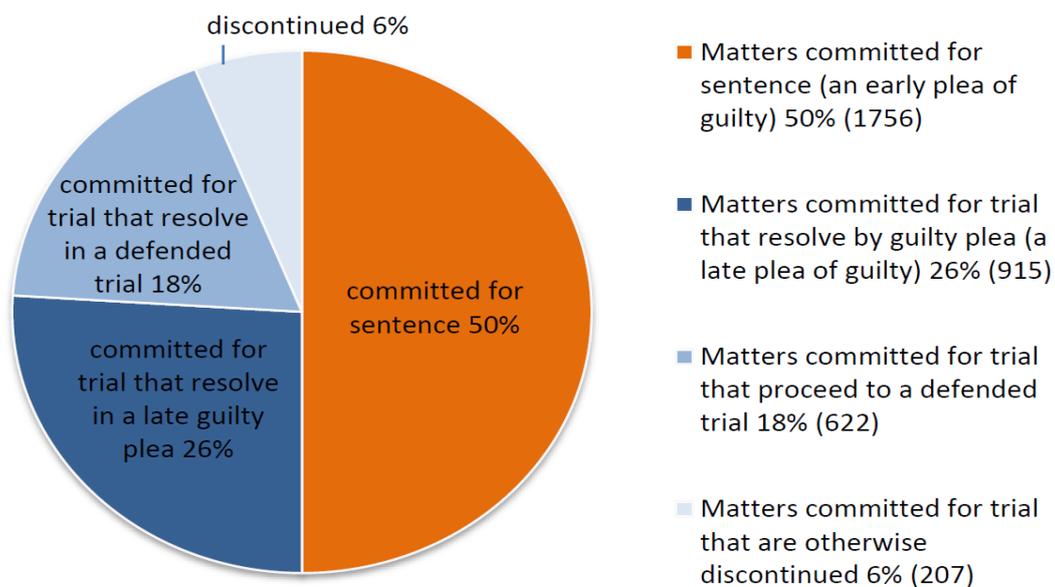
<http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-141.pdf>.

The terms of inquiry were aimed at encouraging early pleas of guilty in all criminal matters dealt with in NSW, and to identify opportunities for legislative and operational reforms to encourage appropriate early pleas of guilty in criminal proceedings for all criminal matters. Ultimately the LRC determined that the appropriate avenue for reform should be limited to strictly indictable and elected Table matters.

The LRC used data from the Bureau of Crime Statistics and Research (BOCSAR), the NSW Office of the Director of Public Prosecutions (ODPP) and the District Court of NSW in its analysis. The following statistics will come as no surprise to those practising frequently in criminal law.

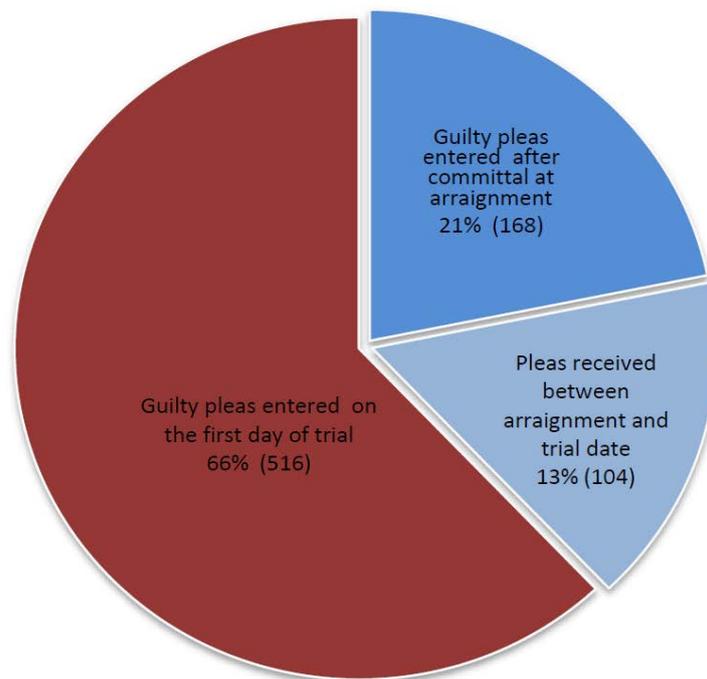
- 83% of all committal matters end in a guilty plea,
- 35% of pleas of guilty are entered after a matter is committed for trial,
- 62-66% of late guilty pleas are entered on the first day of trial or later, and
- 63% of guilty pleas on the first day of trial in the District Court in 2012 were not to the original charge.

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



Source: NSW LRC, Report 141, *Encouraging Appropriate Early Guilty Pleas*

**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)*

*Source: NSW LRC, Report 141, Encouraging Appropriate Early Guilty Pleas*

The LRC examined the obstacles impeding the criminal justice system, which contribute to the delays and backlog with which we are all too familiar. The LRC concluded that in a number of respects, the current system is ineffective.

The ten obstacles identified 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 charge 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.

The reforms introduced are designed with a view to addressing these concerns.

**THE EARLY  
APPROPRIATE  
GUILTY PLEA  
REFORMS**

## THE EARLY APPROPRIATE GUILTY PLEA REFORMS

### Overview

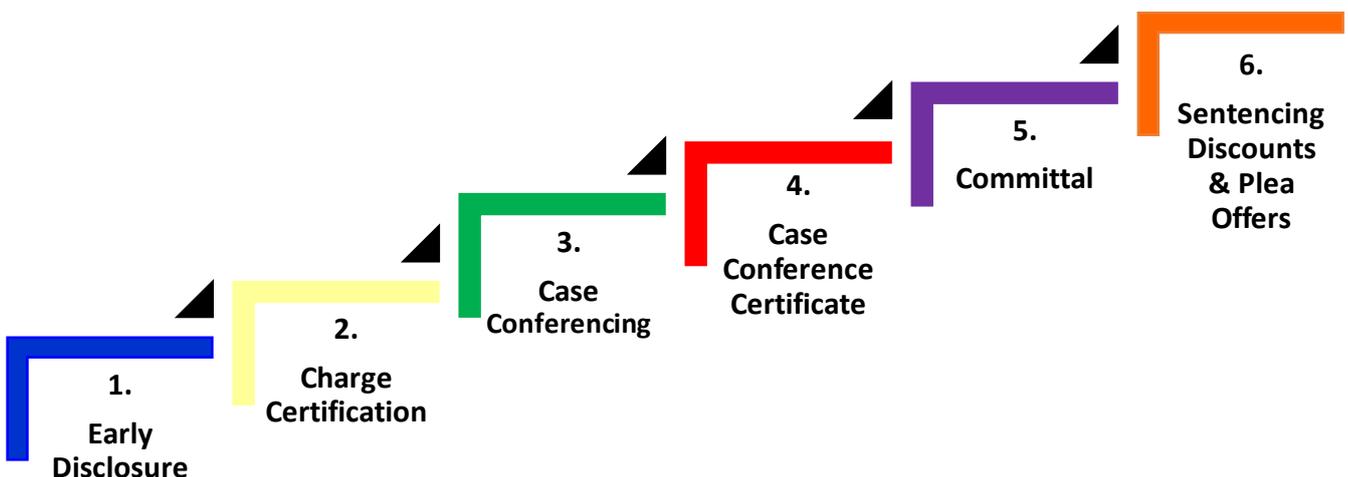
The Early Appropriate Guilty Plea (EAGP) reforms represent significant changes to the NSW criminal justice system. The amending legislation – the [Justice Legislation Amendment \(Committals and Guilty Pleas\) Act 2017](#) was passed by NSW Parliament on 18 October 2017, and given assent on 24 October 2017. The amending Regulation – [Criminal Procedure Amendment \(Committals and Guilty Pleas\) Regulation](#) 2018 was published on 27 April 2018.

The reforms amend the [Criminal Procedure Act 1986](#) (CPA), the [Children \(Criminal Proceedings\) Act 1987](#), the [Crimes \(Sentencing Procedure\) Act 1999](#) and other Acts, including the [Mental Health \(Forensic Provisions\) Act 1990](#). These amendments commenced on 30 April 2018.

The reforms to the committal process introduces:

- Early disclosure of prosecution evidence, including evidence in alternate forms,
- Prosecutors with delegation involved at an early stage for the purpose of charge certification, and remain in matters to finalisation,
- Structured and mandatory negotiations between defence legal representatives and prosecutors, which will be formally recorded,
- Fixed mandatory sentence discounts for the utilitarian value of guilty pleas, and
- The abolition of a Local Court Magistrate’s power to discharge an accused person upon assessment of the evidence, with the power to direct witnesses to give evidence retained.

The EAGP committal process can be described in six stages:



The legislative reforms are supplemented by the relevant Practice Notes of the Local Court and Children’s Court, and the Agreement between NSWPF and the ODPP Concerning the Content and Service of an EAGP Brief and Charge Certification ([‘the Brief Protocol’](#)) and the Commonwealth Director Of Public Prosecutions Guidelines Concerning The Content And Service Of An Early Appropriate Guilty Plea Brief For The Purposes Of Committal ([‘the CDPP Guidelines’](#)).

## Court Appearance Timeline

The timeline set out below is based upon the timeframes stipulated by the [Local Court Practice Note Comm 2](#) ('the LC Practice Note'). [Attachment A](#) to the LC Practice Note also provides a useful overview of the progress of committal proceedings through the Local Court.

### Early Disclosure

Police prosecutors will appear. Strictly indictable and Table matters where an election has been made at or by first appearance will be adjourned for **eight weeks** for service of the brief of evidence.



Police prosecutors will appear and confirm the brief of evidence has been served. Orders for charge certification will be sought with proceedings adjourned for **six weeks** for filing of the charge certificate. Section 67 allows six months for the filing of the charge certificate.



### Charge Certification

The ODPP will appear. The charge certificate will be filed, and a copy served on the accused. Proceedings will be adjourned for **up to seven days** for defence to a) consider whether a guilty plea will be entered certified charge, b) take the client's instructions in accordance with s 72(1) c) if necessary brief Counsel to match the ODPP allocation d) seek an extension of a Legal Aid grant for approval to brief Counsel and e) organise date for case conference with the Crown representatives.



### Witness Hearing (optional)

Matter adjourned for **four weeks** for, 1. Filing and service of s82/84 submissions by accused in **two weeks**; and 2. An additional **two weeks** for ODPP consideration. Then matter listed at first available opportunity for, 1) Hearing of contested ss 82 / 84 application, or 2) Witness hearing (if there is agreement under s 82).



### Case Conference

If no resolution, the case conference date is confirmed with the Court. Adjourn for **eight weeks** to allow for a case conference to occur within **six weeks** and a further **two weeks** for the finalisation of the case conference certificate. The case conference is to be held by AVL or in person, or if the Court is satisfied there are exceptional circumstances which make it impracticable to do so, by telephone.



### Witness Hearing (optional)

Matter adjourned for **four weeks** for, 1. Filing and service of s82/84 submissions by accused in **two weeks**; and 2. An additional **two weeks** for ODPP consideration. Then matter listed at first available opportunity for, 1) Hearing of contested ss 82 / 84 application, or 2) Witness hearing (if there is agreement under s 82).



### Case Conference (Second or subsequent)

Any second or subsequent case conference can be conducted by telephone.



### Case Conference Certificate

The case conference certificate is filed along with any amended charge certificate and CANs for any new or additional offences to be proceeded with.



### Committal

Matter committed for trial or sentence



### Sentencing Discounts

A mandatory legislated discount of 25%, 10% or 5% will apply on sentence, subject to exceptions, variations and legislated caps set out in the provisions.

### Does the EAGP scheme apply?

The answer to this question is determined by reference to the *Regulations*, by the nature of the alleged offences and the timing of when proceedings are commenced.

The amendments apply to all strictly indictable charges and those charges which are the subject of an election. The reforms have not changed strictly indictable or Table offences, nor the powers of election held by the prosecution or defendant.

For the purposes of the *Act*, 'committal proceedings' are defined as 'proceedings before a Magistrate for the purpose of committing a person charged with an indictable offence for trial or sentence' ([s 3\(1\)](#)).

From 30 April 2018 newly charged strictly indictable offences and those Table matters subject of an election for trial or sentence will be subject to the EAGP committal process. All aspects of the reform apply to these proceedings. By virtue of [s 25A\(1\), C\(SP\)A](#), all aspects of the reform except the statutory sentencing discounts apply to,

- Commonwealth committal offences and
- Offences committed when an accused was under 18 years and charged prior to 21 years of age.

[Clause 119A](#), *Criminal Procedure Regulation 2018* (the *EAGP Regulation*) provides that non-EAGP matters are those proceedings that “deal with one or more offences if proceedings for any of those offences commenced” before 30 April 2018. ‘Committal proceedings’ is not defined in the *Regulation* to specify whether proceedings are those commenced against an individual accused or more than one accused. The *Act* prior to amendment defined ‘committal proceedings’ as “a hearing before a Magistrate for the purpose of deciding whether a person charged with an indictable offence should be committed for trial or sentence”.

It is our opinion that non-EAGP matters or ‘legacy matters’ include:

- Indictable proceedings which commenced prior to 30 April 2018, and
- Indictable proceedings which commenced prior to 30 April 2018, and related sequences which are laid post-30 April 2018.

The table below sets out what are and are not matters to which the EAGP reforms apply.

EAGP Matters	Non-EAGP Matters
<ul style="list-style-type: none"> <li>• Proceedings for strictly indictable offences commenced <u>after</u> 30 April 2018</li> <li>• Proceedings for Table offences the subject of an election commenced <u>after</u> 30 April 2018</li> </ul>	<ul style="list-style-type: none"> <li>• Proceedings for strictly indictable offences commenced <u>before</u> 30 April 2018</li> <li>• Proceedings for Table offences the subject of an election commenced <u>before</u> 30 April 2018</li> </ul>

## Children

The EAGP committal process applies to serious children’s indictable offences only. ‘*Serious children’s indictable offences*’ are defined in [s 3](#), *Children’s (Criminal Proceedings) Act 1987* (‘*C(CP)A*’) and [clause 4](#), *Children (Criminal Proceedings) Regulation 2016*. This *Regulation* includes the form of oral and written explanations to be given to a young person before the commencement of committal proceedings in the Children’s Court. For guidance as to the EAGP process, refer to the Children’s Court [Practice Note No. 12](#) – Criminal Proceedings in the Children’s Court.

There are some operational differences including the ODPP becoming involved in matters pre-charge certification and the possibility of using conference rooms at the specialist Children’s Court for face-to-face case conferences between defence practitioners and the ODPP. Notwithstanding the EAGP provisions applying to these matters, the legislated sentencing discounts do not apply to offences if they were committed when a young person was under 18 years of age and charged prior to turning 21 years of age ([s 25A\(1\)\(b\)](#), *C(SP)A*).

The EAGP committal process does not apply indictable offences (other than serious children's indictable offences) ([s 27\(2B\)](#), *C(CP)A*). will continue to be dealt with summarily in the Children's Court unless a young person elects to have their matter committed to the District Court or the Children's Court exercises its discretion to commit the young person pursuant to s 31, *Children's (Criminal Proceedings) Act 1987* ('*C(CP)A*'). The committal procedures for these matters will be mostly akin to those which currently apply.

# 1. EARLY DISCLOSURE

## 1. EARLY DISCLOSURE

Before the EAGP amendments committal proceedings were ordinarily commenced by the issuing and filing of a Court Attendance Notice (CAN). Following a first appearance or an election, a brief of evidence was compiled by the New South Wales Police Force (NSWPF), which formed the basis of the prosecution case. The contents of that brief of evidence was required to be in 'admissible form'.

This made it time-consuming to compile, due to delays in obtaining brief material. Consequently the provision of the brief of evidence by the NSWPF to the ODPP and service on the defence was often late or incomplete. Where the brief was incomplete, the ODPP would requisition the NSWPF for further brief material, which caused additional delays. In matters which proceeded to trial, the brief material was often served in the weeks preceding the start of trial.

These delays were identified by the LRC as some of the obstacles contributing to the ineffectiveness of the current committal process. The EAGP committal process seeks to remedy this problem by requiring that NSWPF provide an initial brief of evidence including non-admissible material to the ODPP and the defence earlier in the proceedings.

EAGP committal proceedings will continue to be commenced by the issuing and filing of a CAN ([ss 47](#) and [55\(a\)](#)).

### **What is early disclosure?**

The prosecution are required to serve a brief of evidence on an accused ([s 61](#)). Investigating police are subject to a continuing duty to disclose all relevant material to the ODPP throughout proceedings, until they are discontinued, terminated or finalised ([s 15A, Director of Public Prosecutions Act 1986](#)). From a practice perspective, the Magistrate will continue to make orders for the service of the brief.

### **The contents of the brief**

The required contents of a brief of evidence are set out in [s 62\(1\)](#). A brief of evidence must include:

- (a) copies of all material obtained by the prosecution that forms the basis of the prosecution's case,
- (b) copies of any other material obtained by the prosecution that is reasonably capable of being relevant to the case for the accused person, and
- (c) copies of any other material obtained by the prosecution that would affect the strength of the prosecution's case.

This is endorsed in Parts 2 and 3 of the [Brief Protocol](#).

The Officer in Charge (OIC) will continue to prepare the brief of evidence. The brief of evidence will initially be created via the NSW Police Brief Management System. The relevant supervisor of the OIC will then certify that the brief of evidence meets the requirements set out in Parts 2 – Purpose of

the brief and 3 – Contents of the brief of the [Brief Protocol](#). In accordance with the [Brief Protocol](#), the supervisor will ensure that:

- The investigation is complete as reflected in COPS,
- The matter has been properly investigated,
- All witnesses have been interviewed and statements taken, subject to Part 3,
- All available evidence is contained in the brief, subject to Part 3,
- The ‘Brief Items List and Summary of Evidence’ has been signed by the supervisor to reflect that this review has been completed,
- There is a completed Disclosure Certificate pursuant to [s 15A, Director of Public Prosecutions Act 1987](#) accompanying the copy of the brief served on the ODPP.

In accordance with Part 3 of the [Brief Protocol](#), a brief of evidence must include:

- The Brief Coversheet
- The Brief Items List and Summary of Evidence
- Details of any co-accused who have been charged including names and charges
- Court Attendance Notices
- Police Facts Sheet
- Criminal antecedents of the accused
- Evidence required to satisfy the elements of the offence/s (including the identification of the accused/s)
- All material obtained that forms the basis of the prosecution’s case
- All material obtained that is relevant to the case for the accused
- All material obtained that would affect the strength of the prosecution’s case.

### **What will be served?**

Brief material is no longer required to be in admissible form when it is served ([s 62\(2\)](#)). ‘Admissible form’ is the form required under Part 3A of Chapter 6, *Criminal Procedure Act* or in any other form required for it to be admissible in court.

The [Brief Protocol](#) confirm the purpose of a brief is not “to provide all the evidence in the admissible form that may be required should the matter proceed to trial”. Despite this legislative change, the requirement of the NSWPF to fully investigate the matter and obtain all relevant evidence has not changed.

Acceptable alternative forms of evidence will be served upon the defence and ODPP by the NSWPF. This is an attempt to try to remove some of the current delays in the service of brief material.

In circumstances where further material is received by the prosecution after the brief is served, there remains an obligation on the prosecution to serve this material on the defence ([s 63](#)).

## Alternative forms of evidence

Appendix A of the [Brief Protocol](#) outline what types of evidentiary material may and may not be provided in non-admissible form.

It is important to note that there is some evidence for which there is no Acceptable Alternative Form. This includes, for example, the complainant's signed statement of transcript of a recorded interview or DVEC.

Examples of Acceptable Alternative Forms of evidence set out in Appendix A are:

- Presumptive drug testing results identifying the drug and quantity, *instead of* a Drug Analysis Certificate,
- Result from the Exhibits Forensics Information and Miscellaneous Property System (EFIMS) & Forensic Summary Report, *instead of* fingerprint evidence and an expert statement, and
- Audio of telephone intercepts and listening devices with a detailed synopsis of the contents, a summary of the calls and the key calls identified and transcribed, *instead of* audio and transcripts of telephone intercepts and listening devices.

These and other acceptable alternative forms of evidence will be the only evidentiary material you will be served unless,

1. You consider the admissible form of the evidentiary material is necessary for negotiations following charge certification and requisition it from the ODPP; and / or
2. The matter proceeds to trial.

[Section 70\(3\)\(a\)](#) provides a case conference may also be used "*to facilitate the provision of additional material or other information which may be reasonably necessary to enable the accused person to determine whether or not to plead guilty to 1 or more offences*".

Part 5 of the [Brief Protocol](#) is also relevant, such that it provides further evidence may be requested where, "it is necessary to facilitate an early appropriate guilty plea at a Case Conference". Before requisitioning any additional material from the NSWPF, the ODPP will consider, "(a) whether the requisition is likely to facilitate a resolution of the matter, and (b) the amount of resources required to comply with the requisition".

Accordingly it is advisable to refer to [s 70\(3\)](#) in any requests for the admissible form of any evidentiary materials, and consider whether it would be appropriate to address the Part 5 considerations in each request.

## Who is involved?

Under the EAGP provisions 'the Prosecutor' is responsible for the service of evidentiary material on the defence. The Prosecutor will be either the NSWPF, the ODPP or the Commonwealth Director of Public Prosecutions (CDPP), depending on the nature of the charge and stage of proceedings.

NSWPF will continue to be responsible for collating and serving the brief on both the ODPP / CDPP and an accused. Police prosecutors will appear in the Local Court until the Magistrate orders the filing of the charge certificate. In practice, a police prosecutor will:

- Seek brief service orders,
- Appear at any listings before the brief has been served, including bail applications,
- Appear and confirm that the brief has been served, and
- Seek an adjournment for the charge certificate to be filed (six weeks in accordance with the Practice Note).

[Section 65](#) excludes the NSWPF from exercising the functions of charge certification. The ODPP / CDPP will appear after orders have been made for charge certification. This will include appearances at any mentions after orders for charge certification and before the filing of the charge certificate, for example, a bail application. The ODPP / CDPP have also agreed that they will appear even in circumstances where the ODPP / CDPP consider the brief is insufficient to certify a charge. If there is inadequate material to certify the charge, the ODPP / CDPP will seek a further adjournment to requisition further evidence from NSWPF and file the charge certificate.

There are certain categories of matters that will be allocated immediately upon an accused being charged. These will be the most serious matters, for example, murder. Police prosecutors will appear until orders for charge certification are sought, but the ODPP with carriage will be working behind the scenes from charge.

### **When is the brief served?**

Brief service orders will be made at the first mention of any strictly indictable and elected Table matters. The [LC Practice Note](#) provides an adjournment of **eight weeks** for service of the brief of evidence.

The [Brief Protocol](#) indicates police prosecutors will seek a longer period for the brief to be served if a matter is exceptional or complex, and further adjournments where a brief is not served by the first return date.

It is important to note that partial briefs will continue to be served on the defence, however we do not anticipate a brief will be served on the ODPP until the OIC's relevant supervisor has certified the brief is complete.

### **Practical defence considerations**

At this stage of proceedings, it is important to consider the following:

- Have brief disclosure obligations been complied with? Is the brief "complete"?
- What other evidence may (or may not) assist you
- Notifying the ODPP you are in a matter
- Making an early offer

### **Have disclosure obligations been complied with? Is the brief "complete"?**

If not, you should take it up with the OIC and the ODPP to ensure that you receive the material your client is entitled to, noting [s 62\(1\)](#) and the [Brief Protocol](#).

### **What other evidence may (or may not) assist**

As we do now, consider whether requisitions to the NSWPF would be in your client's interests at this stage. Consider whether subpoenas to the NSWPF and other agencies might be your client's interests or prejudice your client's position, given any material produced would be available to both the prosecution and defence. Consider an application under the *Government (Information and Public Access) Act 2009* to government departments, for example, Corrective Services NSW to obtain records relating to your client's time in custody and / or contact with Community Corrections in the community.

Also give consideration to whether requesting the ODPP provide the admissible form of evidentiary material is necessary, with reference to [s 70\(3\)](#) and the [Brief Protocol](#).

### **Notifying the ODPP you are in a matter**

Even though a police prosecutor will appear until orders are made for charge certification, you should notify the ODPP that you have carriage of the matter before charge certification.

The ODPP case management system (CASES) will have an open file for all strictly indictable charges once they are laid. This file will remain unallocated until after the matter is adjourned for charge certification. Unallocated files will be monitored by a clerk. Defence practitioners can contact the relevant ODPP office and using the 'H' number as the reference, provide their contact details to the clerk responsible. If the matter is not yet allocated (and it is not a matter where early negotiations are appropriate) then your contact details will be entered into the CASES file by the clerk. The ODPP has agreed it will appear at the mention after a police prosecutor seeks orders for charge certification. It is anticipated a file will be allocated within the ODPP approximately three weeks into the six week adjournment for charge certification. When the file is allocated, the ODPP solicitor with carriage will contact you to advise that they now have carriage.

There are certain categories of matters that will be allocated immediately upon an accused being charged. These will be the most serious matters, for example, murder. Police prosecutors will appear until orders for charge certification are sought, but the ODPP with carriage will be working behind the scenes once proceedings are commenced.

### **Making an early offer**

Even though a police prosecutor is still appearing in court, you should consider making an offer to the ODPP in appropriate matters once a brief has been served and before charge certification. A certifying prosecutor can consider your offer whilst determining what charge to certify. If an offer is accepted, the charge/s offered can be certified. Alternatively a guilty plea can be entered to the existing charge if the prosecutor consents to the plea being entered.

Take your client's instructions as to possible offers they might consider. If you consider it appropriate and are properly instructed, you can contact the local office of the ODPP and provide the H number. You will be directed to the clerk responsible for the relevant unallocated file. You can advise that clerk you have instructions to make an early offer and provide your contact details.

The clerk will then refer the matter to the appropriate Managing Lawyer who will then allocate the file. It is anticipated the ODPP solicitor with carriage or the certifier (which anticipated to be a Crown Prosecutor, Trial Advocate or senior ODPP lawyer) who is allocated the file will then make contact

with the defence representative and pre-certification offers can be made. Even though these negotiations can commence police prosecutors will continue to appear until orders for charge certification are sought.

# **2. CHARGE CERTIFICATION**

## 2. CHARGE CERTIFICATION

Under the old system, charges against our clients could change at any time, including as late as the first day of trial. The prosecutor with carriage of a matter could also change many times. Levels 2 and 3 ODPP lawyers were responsible for committal hearings, but a Trial Advocate or Crown Prosecutor would ordinarily assume carriage following committal. Offers rejected pre-committal might have been accepted post-committal. If a trial date was vacated and relisted, the Trial Advocate or Crown Prosecutor appearing might also change.

The EAGP reforms will require a senior prosecutor from the ODPP to review the brief of evidence immediately after it has been served, determine the most appropriate charge(s) and certify the charge(s) in a document filed in the Local Court. Where possible, the same senior prosecutor (and defence representative) will retain carriage until the matter is finalised.

### **What is the purpose of charge certification?**

The primary purposes of charge certification in the EAGP committal process is to:

- Provide earlier charge certainty to defendants to encourage earlier guilty pleas where appropriate, and
- Involve those prosecutors who will remain in matters to finalisation at an earlier stage.

Defendants will be provided with greater certainty of charges they are facing from this point, rather than at a later stage, for example, following committal for trial. Senior prosecutors with the authority to negotiate will be briefed early in proceedings to reduce the numbers of clients holding out for a better result in negotiations closer to trial. The ODPP has been funded to allocate more senior prosecutors in matters, and it is intended that those senior prosecutors will retain carriage of matters until finalisation.

### **What is charge certification?**

A prosecutor will be required to certify the charges being proceeded with in committal proceedings. The charge certificate will certify that the evidence available to the prosecutor is capable of establishing each of the offences that are to be the subject of the proceedings against the accused person ([s 66](#))<sup>1</sup>.

When the ODPP receive a brief they will also assess whether the brief is 'sufficient' and this will be recorded on the ODPP case management system. If the brief is considered not sufficient to certify the charge, the ODPP will issue requisitions to the NSWPF for further material.

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<sup>1</sup> In the case of an offence other than an offence under the law of the Commonwealth, the prosecutor must also certify that they have received and considered a certificate under section 15A of the Director of Public Prosecutions Act 1986 relating to that offence: s 66(2)(b)

A Charge Certificate must,

1. Relate to the offences specified in a CAN for the committal proceedings,
2. Specify the offences that are to be proceeded with to trial,
3. Identify any charges that will no longer be proceeded with and withdrawn,
4. Specify any back up or related offences (within the meaning of [s 165](#)) that are proposed to be included on a [s 166 \(1\)](#) certificate, noting that these charges will not be certified as such,
5. Contain any other matters prescribed by the regulations, and be in the form prescribed by the *Regulations*, and
6. Where the charge/s to be proceeded with change after the completion of the original charge certificate, an amended charge certificate must be completed by the Prosecutor: [s 67\(5\)](#).

Section 166 certificates will still continue to be filed at committal for back up and related offences, to enable the related CANs to be transferred to the higher court and dealt with at sentencing.

### **Who certifies a charge?**

The Prosecutors who will be able to certify offences are set out in [s 65](#). These do not include the NSWPF. They are:

- the Director of Public Prosecutions or the Attorney General,
- any of the following in the case of committal proceedings to which this Division applies because of *s 79, Judiciary Act 1903* (Cth):
  - a person holding an equivalent office under the Commonwealth,
  - a special prosecutor appointed under an Act of the Commonwealth,
  - a person authorised under Commonwealth legislation to exercise the functions of the Commonwealth DPP or Commonwealth Attorney General or special prosecutor appointed under an Act of the Commonwealth,
  - a person authorised by an arrangement made with the Commonwealth DPP or Commonwealth Attorney General or special prosecutor appointed under an Act of the Commonwealth to exercise their functions,
  - a legal representative of any of the above, and
  - any other person prescribed by the *Regulations* ([clause 9C](#))

The Prosecutor who exercises the charge certificate functions in each matter will sign the charge certificate ([s 66\(1\)](#)).

The ODPP have advised that the signatory of the charge certificate will be person who is expected to attend the case conference. It is important to pay particular attention to the capacity of the signatory. It is intended that the resources Legal Aid NSW attaches to matters will match those allocated by the ODPP. Therefore if a Crown Prosecutor signs the charge certificate, you should seek an extension to the grant of Legal Aid immediately and defence Counsel should be briefed. In some matters, such as murder, it will be obvious from the outset that Counsel should be briefed.

## How is a charge certified?

A prosecutor will complete and sign the charge certificate. A charge certificate will be in Form 1A of the *Regulations* ([s 66\(1\)](#); [clause 9D](#)). The prosecutor will then file it with the Local Court Registry and serve a copy on the accused ([s 67\(1\)](#)).

<b>Form 1A</b>				
<b>Charge certificate</b>				
(Criminal Procedure Act 1986; section 66 (1))				
Case name:				
Case number:				
Prosecutor's reference number:				
<b>Part 1 Offences</b>				
The following offences are to proceed as set out below (court attendance notices for each offence are attached):				
<b>Offences</b>				
Reference number	Offence details (legislation reference/common law)	Law part code	Description (sufficient for indictment or averment) and date of offence	How offence will proceed (indicate if for committal/back up or related offence/withdrawn/summary offence)
<b>Part 2 Declarations by prosecutor</b>				
This is to certify that:				
(a) the evidence available is capable of establishing each element of the offences that are to be the subject of the proceedings against the accused person, and				
(b) [if the offence is not an offence under the law of the Commonwealth] a certificate under section 15A of the Director of Public Prosecutions Act 1986 relating to the offence has been received and considered.				
Signature:				
Title of prosecutor:				
Location of office of prosecutor:				
Date:				

A charge certificate must be filed for:	A charge certificate is not filed:
<ul style="list-style-type: none"> <li>All strictly indictable matters proceeded with by the ODPP / CDPP</li> <li>All matters elected upon referred to the ODPP / CDPP</li> </ul> <p>(See next column for exceptions)</p>	<p>If the following apply, before any charge certificate has been filed:</p> <ul style="list-style-type: none"> <li>When all charges laid by NSWPF are withdrawn</li> <li>When charges are un-elected or replaced by alternative summary charges and which will return to NSWPF for prosecution</li> </ul>

### When is a charge certified?

Charge certification will occur after the brief of evidence has been served ([s 67\(2\)\(b\)](#)). The LC Practice Note stipulates that this will occur approximately **six weeks** after the brief has been served.

The Magistrate must make orders for the filing of the charge certificate by the prosecutor ([s 67\(1\)](#)). That date must not be later than six months after the first return date of the CAN ([s 67\(2\)\(b\)](#)). The two exceptions to this six month timeframe are:

1. If the accused consents to a later filing date ([s 67\(3\)\(a\)](#)), or
2. If it is in the interests of justice to order a later filing date, considering (at least) the complexity of the matter(s) ([ss 67\(3\)\(b\) and 67\(4\)](#)).

If the charge certificate is not filed and served by the prosecutor within six months or the later filing timeframe, a Magistrate must consider the interests of justice as to what step is to be taken next ([s 68\(3\)](#)). In accordance with [s 68\(2\)](#), a Magistrate has the power to either:

- Discharge an accused person, or
- Adjourn the proceedings.

The Magistrate has the power under [s 67](#) to extend the time for filing a charge certificate.

If a client fails to appear and a warrant is issued for their arrest in committal proceedings, a Magistrate does not need to make a decision as to what step to take under [s 68](#) until the client is brought before the Court ([s 68\(4\)\(a\)](#)). The days between the warrant being issued and executed do not count towards the six month period and extend the six months by the relevant number of days ([s 68\(4\)\(b\)](#)).

### Amended Charge Certificates

Any amended charge certificate must also be filed and served ([s 67\(5\)](#)). Any CANs for any new charges will also be served at the same time as the amended charge certificate.

An amended charge certificate must be filed:	An amended charge certificate is not required to be filed
<ul style="list-style-type: none"> <li>• The charges set out in the original charge certificate have changed as a result of case conferencing</li> <li>• The charges certified originally change due to a change in circumstances, for example, the complainant of an assault dies</li> </ul>	<ul style="list-style-type: none"> <li>• When there is no election on charges which will return or remain with the NSWPF for prosecution</li> <li>• When the charges are replaced by alternative summary charges which will return to the NSWPF for prosecution</li> </ul>

### Practical defence considerations

- Ensure you have been served with the charge certificate as required by [s 67\(1\)](#).
- Once the charge certificate is filed and the ODPP appear, the Practice Notice requires you to notify the court of the date scheduled for the case conference. This is a very tight timeframe given you will need to,
  - Consider the certified charge/s, noting that the ODPP will consider this to be their first offer and obtain a client's instructions as to a plea,
  - Seek an extension to any grant of aid for approval to brief Counsel where appropriate to match the ODPP allocation,
  - Brief Counsel, and
  - Organise a date for the case conference with ODPP if you are not instructed to plead guilty to the certified charge.
- Refer to clause 5.1 of the [LC Practice Note](#) which permits the departure from the timeframes where it is in the interests of justice to do so.
- In accordance with [s 72\(2\)](#), explain to your client before the case conference the following,
  - The operation of the mandatory sentence discount scheme,
  - The penalties applicable to the offences certified in the charge certificate,
  - The penalties applicable to any other offences the subject of offers, and
  - The effect on the applicable penalty if your client was to plead guilty to any offence at different stages of the proceedings.
- Obtain instructions about any offers your client wishes to make to the prosecution.
- If there is an issue of fitness to be raised, consider raising it with the Court but only if you intend to seek having your client committed for trial on the basis of fitness under [s 93](#).
- Consider whether to apply to have any witnesses called, noting [ss 82, 83](#) and [84](#).

- Consider issuing any requisitions to the ODPP or subpoenas, and the pros and cons of both options, noting the ongoing disclosure obligations of the certifying prosecutor to serve any additional material.

### **Briefing Counsel**

Briefing Counsel pre-committal where appropriate represents a significant shift brought about by the EAGP reform. The key indicator as to whether Counsel ought to be briefed will be the seniority of the signatory of the charge certificate. The ODPP has been funded to provide for the earlier involvement of senior prosecutors from the point of charge certification. Where a Crown Prosecutor is the signatory, Legal Aid will fund the briefing of Counsel.

# **3. CASE CONFERRNCING**

### 3. CASE CONFERENCING

[Division 5](#) sets out the provisions relevant for this next step in EAGP committal process.

#### What is the purpose of case conferencing?

The primary purpose of a case conference is, 'to determine whether there are any offences to which the accused person is willing to plead guilty' ([s 70\(1\)](#)).

The secondary purposes are similarly directed towards reducing court time, even in circumstances where a matter is likely to proceed to trial. These are set out in [s 70\(2\)](#) and include:

- The provision of additional material or other information which may be reasonably necessary to enable an accused to determine whether or not to plead guilty to one or more offences, and
- To facilitate the resolution of other issues relating to the proceedings against an accused, including identifying key issues for the trial and any agreed or disputed facts.

#### When is a case conference held?

Case conferencing occurs only after the charge certificate is filed by the Prosecutor: [s 70\(4\)](#). A case conference will not be required if a guilty plea is entered and accepted before a case conference is held, or if an accused is committed for trial on the issue of fitness ([s 69\(b\) and \(c\)](#)). If an accused person is not legally represented, a case conference is also not required ([s 69\(a\)](#)). Consequently, if you cease acting for your client prior to a case conference, any scheduled case conference will not proceed.

If your client does not wish to plead guilty to the certified charge(s), a date for the case conference will need to be arranged with the ODPP / CDPP. At the next court appearance, the date for the case conference will be confirmed. It is important at this time to consider the manner in which the case conference will be held. The initial conference is to be held in person or by AVL ([s 71\(2\)](#)). If a Magistrate is satisfied there are exceptional circumstances that make it impracticable to hold the conference in that manner, an order that the initial conference be held by telephone can be made ([s 71\(3\)](#)).

Before adjourning for the case conference the Magistrate will give the accused the oral and written explanation required by [s 59](#). This explanation is of the committal process, including charge certification, case conferences, committal for trial or sentence and the statutory sentence discount scheme. Clauses [9A](#) and [9B](#) set out the oral and written explanations respectively. There is a distinction between the explanations given to an accused who is legally represented and an accused who is unrepresented.

In accordance with the [Practice Note](#), the matter will then be adjourned for **eight weeks** for the case conference to occur and the case conference certificate (CCC) to be finalised. It is expected that the case conference will be held in the first **six weeks** of the adjournment period, and that the further

**two weeks** will be used for the finalisation of the CCC. The Magistrate will order the date for filing the CCC ([s 74\(1\)](#)).

The legislation provides for the possibility of more than one case conference being held ([s 70\(5\)](#)). The Practice Note does not refer to a second case conference.

In circumstances where an amended charge certificate is filed, an additional case conference *may* be held ([s 70\(6\)](#)).

## **Your section 72 obligations**

Before you participate in the case conference remember your obligations under [s 72](#). These are that you have explained to your client before the case conference the following:

- The operation of the mandatory sentence discount scheme,
- The penalties applicable to the offences certified in the charge certificate,
- The penalties applicable to any other offences the subject of offers, and
- The effect on the applicable penalty if your client was to plead guilty to any offence at different stages of the proceedings.

The legislative duty upon practitioners extends to requiring practitioners to sign a declaration, which forms part of the case conference certificate, that the above has been explained to the accused person. Signing the declaration should not be a substitute for the provision of detailed advice in accordance with rule 7, [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#) and separate, detailed and signed written instructions from a client in any EAGP matter.

Legal Aid NSW, the Public Defenders, the Law Society Criminal Law Committee and members of the Bar Association have collaborated to develop three of documents to assist practitioners to discharge their s 72 obligations. These are,

1. [Note to Practitioners About Explanation to legally represented accused](#),
2. [Explanation to legally represented accused if statutory utilitarian discount caps apply](#), and
3. [Explanation to legally represented accused if statutory utilitarian discount caps do not apply](#).

## **Who attends a case conference?**

The prosecution representative(s) with carriage and an accused's legal representative(s) attend a case conference ([s 71\(1\)](#)). The ODPP has agreed that the prosecutor who signs the charge certificate will be the prosecutor participating in the case conference.

If you are representing a client in a matter where there are co-accused, you will be required to participate in a separate case conference with the prosecutor ([s 73](#)). A joint case conference may only be held if you, the co-accused's legal representative and the prosecutor agree and a charge certificate has been filed for each co-accused ([s 73\(1\) and \(2\)](#)).

## How to conduct a case conference?

An initial case conference must be held in person or by audio visual link (AVL) ([s 71\(2\)](#)). However, initial case conferences by telephone may be ordered where a Magistrate is satisfied that there are exceptional circumstances that make it impracticable to hold the conference in person or by AVL ([s 71\(3\)](#)). Notwithstanding these provisions allowing for the conference to be held in person, the ODPP intends to have all their prosecutors participate in conferences by AVL. The CDPP intends to conduct case conferences in person.

In matters where there is an additional case conference these may be conducted by telephone.

## Does my client participate?

Your client may attend all or part of the case conference by AVL or telephone. This can only occur in circumstances where the defence legal representative and the relevant prosecutor both consent to this occurring ([clause 9F\(1\)](#)). The ODPP has advised that it is unlikely any of their representatives will consent to accused persons attending case conferences for reasons relating to the safety and security of their prosecutors.

In accordance with [clause 9E](#), an accused person is to be available to provide instructions during a case conference. The onus rests upon a defence legal representative to ensure a support person or interpreter is available to the accused when they are providing these instructions.

A duty to ensure a client on remand is available for this purpose, “so far as is reasonably practicable” rests on the client’s legal representative and “any person in whose custody any such accused person is kept” ([clause 9E\(3\)](#)).

A client is taken to be available if:

- They are on remand, if they can give instructions in person or by AVL or if that is not reasonably practicable, by telephone, and
- They are not in custody, if they can give instructions in person or if that is not reasonably practicable or not appropriate for any reason, by AVL or telephone.

Significantly, [clause 9E\(6\)](#) provides, “A failure by a person to comply with this clause does not affect the validity of anything done or omitted to be done in or for the purposes of the committal proceedings.”

It will not be the norm for instructions to be taken on the case conference date and defence practitioners should take instructions well before the case conference date. It is likely that in most cases your client will not sit in or be connected to the conference between you and the prosecutor.

## Arranging a case conference

The accused’s legal representative is responsible for arranging the case conference and notifying the parties of the date, time and location. Practitioners will need to liaise with the ODPP about the date of the case conference via telephone or email.

In-house Legal Aid solicitors and other practitioners who have access to JustConnect can use it to book their conferences, regardless of whether the client is on remand or on bail. JustConnect will automatically notify by email the parties of the time, date and location of the case conference.

For other practitioners including private practitioners with private client matters, Legal Aid NSW's Case Conferencing Hub will be available to book case conferences on their behalf. Private practitioners will be able to contact the Hub and request a case conference be booked, regardless of whether there is a Legal Aid grant in place. Administrative staff members attached to the Hub will then book the case conference through JustConnect on the private practitioner's behalf.

Case conferences will be able to be held in person or by AVL from the Hub facilities at Legal Aid's Central Sydney offices, or from any regional office of Legal Aid. Most regional offices prefer that practitioners contact the local office to make the booking.

It is anticipated that the standard case conference booking will be one to two hours, with some case conferences taking more or less time than that, as required. Case conferences will be held during business hours, including court hours. If your client is on remand, practitioners can conduct the case conference by AVL. If your client is in custody, the times for Case Conferences will be limited to the hours when Correctional Centre AVL studios are available. This is generally between 9:00 am and 3:00 pm, except for the MRRC, where AVL facilities are available 9:00 am to 6:00 pm.

### **Information to Come**

Case conferences are unlikely to be held before late August / early September 2018. At Legal Aid NSW's Criminal Law Conference, scheduled for 1-3 August 2018 we intend to elaborate on the best practice approach to conduct case conferences and the logistics of arranging case conferences. We welcome your suggestions for information to be included in these presentations.

A number of agencies are collaborating to prepare a Best Practice Guide for Case Conferencing. Once the Guide is finalised it will be uploaded to the Legal Aid NSW website and intranet.

# **4. CASE CONFERENCE CERTIFICATE**

## 4. CASE CONFERENCE CERTIFICATE

### What is a case conference certificate?

A case conference certificate (CCC) is a formal record of any offers made by the prosecution and defence before, during and after the case conference.

It represents the final opportunity before committal to include relevant offers, including late offers and preserve your client's 25% discount on sentence.

### Contents of the CCC

In accordance with [s 75](#), the CCC will certify the following:

- (a) the offence or offences with which the accused person had been charged before the case conference and which the prosecution had specified in the charge certificate as offences that will be proceeding or are the subject of a certificate under section 166,
- (b) any offers by the accused person to plead guilty to an offence specified in the charge certificate or to different offences,
- (c) any offers by the prosecution to the accused person to accept guilty pleas to an offence specified in the charge certificate or to different offences,
- (d) whether the accused person or prosecution has accepted or rejected any such offers,
- (e) the offence or offences for which the prosecution will seek committal for trial or sentence,
- (f) any back up or related offence or offences (within the meaning of section 165) that are proposed to be the subject of a certificate under section 166 (1) relating to charges against the accused person,
- (g) if an offer made to or by the accused person to plead guilty to an offence has been accepted—details of the agreed facts on the basis of which the accused person is pleading guilty and details of the facts (if any) in dispute,
- (h) any offences with which the accused person has been charged to which the accused person has offered to plead guilty and agreed to ask the court to take into account under section 33 of the *Crimes (Sentencing Procedure) Act 1999*,
- (i) whether or not the prosecutor has notified the accused person of an intention to make a submission to the sentencing court that the discount for a guilty plea should not apply or should be reduced in relation to a particular offence with which the accused person is charged,
- (j) any other matters prescribed by the regulations for the purposes of this section.

The CCC must be in Form 1B as set out in the *Regulations* ([s 75\(1\)](#); [clause 9G](#)).

## Form 1B

### Case conference certificate

(Criminal Procedure Act 1986; section 75))

Case name:

Case number:

Prosecutor's reference number:

Title of prosecutor attending:

Defence reference number:

Name, title and firm/organisation of accused person's legal representative:

Name and date of birth of accused person:

Date/s of case conference/s:

### Part 1 Offences shown in charge certificate

The following offences are as shown in the charge certificate (court attendance notices for each offence are attached):

Charge certificate offences				
Reference number	Offence details (legislation reference/common law)	Law part code	Description (sufficient for indictment or averment) and date of offence	How offence will proceed (indicate if for committal/back up or related offence/withdrawn/summary offence)

### Part 2 Offers by accused person and prosecutor

The following offers have been made to or by the accused person and the prosecutor (and are listed in chronological order of the making of the offers):

Offers made by accused person or prosecutor			
Offer made by	Details of offer	Acceptance/Rejection	Date of acceptance/rejection

### Part 3 Offences

The offences that are being proceeded with are set out below (court attendance notices for each offence are attached), as well as the offences that have been withdrawn:

Offences					
Reference number	Offence details (legislation reference/common law)	Law part code	Description (sufficient for indictment or averment) and date of offence	How offence will proceed (indicate if for committal/back up or related offence/withdrawn/summary offence)	Type of committal (trial or sentence)

### Part 4 Agreed facts for offences

#### Where guilty plea accepted

The facts on the basis of which the accused person is pleading guilty are agreed and attached/The agreed facts on the basis of which the accused person is pleading guilty are attached with the disputed facts identified. *[delete the statement that is not applicable]*

### Part 5 Declaration by prosecutor

*[Not to be completed for offences against a law of the Commonwealth or other offences to which the sentencing discount under Division 1A of Part 3 of the Crimes (Sentencing Procedure) Act 1999 does not apply]*

I, *[insert title]*, have not notified the accused person that it is intended to make a submission to the sentencing court that the discount for a guilty plea should not apply or should be reduced in relation to the following offence or offences:

*[delete if not applicable]*

I, [insert title], have notified the accused person that it is intended to make a submission to the sentencing court that the discount for a guilty plea should not apply or should be reduced in relation to the following offence or offences:

[delete if not applicable]

Signature:

Date and place:

#### **Part 6 Declaration by legal representative of accused person**

[Not to be completed for offences against a law of the Commonwealth or other offences to which the sentencing discount under Division 1A of Part 3 of the Crimes (Sentencing Procedure) Act 1999 does not apply]

I, [insert name], the legal representative of the accused person, have explained to the accused person the matters specified in section 72 (2) of the *Criminal Procedure Act 1986*, that is, the following:

The effect of the scheme for the sentencing discount applied under Part 3 of the *Crimes (Sentencing Procedure) Act 1999* for a plea of guilty to an offence.

The penalties that apply to the offences that are proceeding and for any extra offences about which the accused person made offers or the prosecutor made offers for guilty pleas.

The effect on the penalty for an offence if the accused person pleads guilty to the offence at different stages of proceedings for the offence.

Signature:

Date and place:

#### **Part 7 Declaration by accused person**

[Only to be completed if the accused person does not intend to plead guilty to an offence, the case is to be committed for trial and the matter involves offences to which the sentencing discount under Division 1A of Part 3 of the Crimes (Sentencing Procedure) Act 1999 applies]

I intend to plead not guilty to some/all of the offences that I have been charged with. I understand that my case will be sent to the District Court/Supreme Court [specify correct court] for trial for those offences.

My legal representative has explained to me the matters specified in section 72 (2) of the *Criminal Procedure Act 1986*, that is, the following:

The effect of the scheme for the sentencing discount applied under Part 3 of the *Crimes (Sentencing Procedure) Act 1999* for a plea of guilty to an offence.

The penalties that apply to the offences that are proceeding and for any extra offences about which I made offers or the prosecutor made offers for guilty pleas.

The effect on the penalty for an offence if I plead guilty to the offence at different stages of proceedings for the offence.

I understand and acknowledge the effect of the matters set out above in my case.

Signature:

Date and place:

#### **Part 8 Obligations relating to confidentiality**

The matters specified in this certificate must be treated as confidential (see section 79 of the *Criminal Procedure Act 1986*).

It is an offence to publish, or permit another person to publish, this certificate or evidence of anything said during a case conference or during subsequent negotiations relating to plea offers (see section 80 of the *Criminal Procedure Act 1986*). This certificate and evidence of those things cannot be used in court proceedings, other than relevant sentencing or appeal proceedings or disciplinary proceedings against a lawyer (see section 78 of the *Criminal Procedure Act 1986*).

#### **Part 9 Signatures of prosecutor and legal representative of accused**

This case conference certificate was signed by the prosecutor and the legal representative of the accused.

Prosecutor

Signature:

Title of prosecutor:

Location of office of prosecutor:

Date and place:

Legal representative of accused person

Signature:

Name of legal representative:

Date and place:

It is important to note that the CCC is intended to record and certify any written offers made by your client and the prosecutor that have been made before, during and after the case conference ([s 75\(4\)](#)). Accordingly an offer made before charge certification should be included in the CCC.

## **Signed declarations**

Both the prosecution and defence legal representatives will have to sign the CCC ([s 74\(3\)](#)). This will include a declaration by you that you have complied with your obligations set out in [s 72\(2\)](#).

If your client pleads not guilty, they will also need to sign the certificate declaring that you have explained these things. It is important to note that the validity of the CCC will not be affected if your client's signature is not on the CCC ([s 75\(3\)](#)).

Whilst the validity of the CCC is not affected, it is advisable that defence practitioners take all reasonable steps to have their client sign the declaration if they are pleading not guilty. Practically, defence practitioners will need to consider on a case by case basis whether it is appropriate to fax or post the CCC to clients in custody. When both faxing and posting the CCC to a Correctional Centre confidentiality will be a relevant issue, particularly if the CCC contains sensitive or potentially damaging information. While your client can receive the CCC as privileged material, they cannot send it back to you as privileged material and the contents of anything they post can and will be read by Correctional Centre staff. Posting the CCC may also cause delays.

It is anticipated that the CCC will be signed on the day of court following the case conference being held, when it is due to be filed.

## **Filing**

The prosecutor will file the signed CCC in accordance with orders made by the Magistrate ([s 74\(1\) and \(4\)](#)). If more than one case conference is held, the CCC must be filed after the final case conference ([s 74\(2\)](#)). A CCC will be filed whenever a case conference has been held, irrespective of the outcome. If an amended charge certificate is to be filed and served, it should be also filed and served with the CCC and any additional CANs.

The CCC will be filed with the Court in a sealed envelope and retained on the Court file. The Court will provide the envelope. To ensure that the contents of the CCC are an accurate reflection of the negotiations and are agreed upon, it is best practice that both parties be present when the CCC is filed and the envelope containing the CCC is sealed. Both parties can also retain copies of the CCC.

If the CCC is not filed by the Court ordered date, [s 76](#) sets out what action a Magistrate may take. The Magistrate must consider the interests of justice ([s 76\(4\)](#)). An unreasonable failure by the prosecutor to participate in the conference or to complete or file the CCC enables a Magistrate to either discharge the accused or adjourn the proceedings. An unreasonable failure by a defence representative to participate in the conference or complete the CCC enables a Magistrate to either commit an accused for trial or sentence as if the conference was not required or adjourn the proceedings.

Furthermore, any non-compliance by either party could result in the sentencing court or a court determining a sentence appeal refusing to admit evidence of the CCC, “unless it is satisfied that it is in the interests of justice to admit the evidence” ([s 78\(4\)](#)).

## Late offers

[Section 77](#) provides for circumstances where after a CCC is filed and before committal your client provides instructions to make an offer to the prosecution. These are described as “late offers” and will be treated as part of the CCC. They will be annexed to the CCC, provided the offer is,

- Made after the CCC filed and before committal,
- Of the kind that would have been included in the CCC,
- Made in writing and served on other party, and
- Filed in the Local Court registry.

These offers do not have the signature requirements of the CCC. If a late offer is made, the old envelope containing the case conference certificate will be placed inside a new envelope with the later offer.

## Restrictions

The legislation sets out the restrictions surrounding the use, access and publication of the CCC as well as any other ‘case conference material’. Case conference material is defined in [s 78\(5\)](#) to include:

- the CCC,
- Evidence of anything said between the parties during a case conference, or during negotiations after a case conference concerning a plea to be made by, or offers made to or by, an accused, and
- Any admission made during a case conference, or during negotiations after a case conference concerning a plea to be made by, or offers made to or by, an accused person.

Specifically, a CCC will be confidential ([s 79](#)). This will include any late offers made pursuant to [s 77](#).

*Case Conference Material* is not admissible in any proceedings before a court, tribunal or body ([s 78\(1\)](#)). The CCC will not be required to be produced under a subpoena or a request issued in any proceedings ([s 78\(3\)](#)).

Notwithstanding these provisions, subsection (2) declares that a CCC is ‘not inadmissible’ in the following proceedings:

- (b) in relevant sentencing proceedings in accordance with Part 3, *Crimes (Sentencing Procedure) Act 1999*,
- (c) in relevant sentencing proceedings for an offence under Commonwealth law,
- (d) in proceedings for an appeal against a sentence under the *Criminal Appeal Act 1912*,
- (e) in proceedings for an appeal under the *Crimes (Appeal and Review) Act 2001* on a question of law arising from an order made by a Magistrate in committal proceedings or an appeal under s 5 or Division 2 or 3 of Part 7 of that Act,

- (f) in proceedings after committal for sentence relating to an application by an accused to reverse their plea to not guilty,
- (g) in proceedings brought by a designated local regulatory authority against a lawyer under s 300, *Legal Profession Uniform Law (NSW)*.

There will also be a prohibition on any party from publishing the case conference material ([s 80](#)). Penalties will apply. 'Publish' means to disseminate or provide public access to one or more persons by the internet, radio, television or other media.

[Section 81](#) will provide that any information disclosed during or in relation to a case conference or a plea offer will not be considered as pre-trial disclosure for the purposes of [s 22A](#) and [s 21A\(3\)\(l\)](#), *C(SP)A*.

# 5. COMMITTAL

## 5. COMMITTAL

Historically the majority of committal matters proceeded by waiver of committal. At committal a Magistrate had the power to determine whether or not there is sufficient evidence for an accused to be committed for trial, either on the papers or by hearing the oral evidence of prosecution witnesses. **This process is abolished by the EAGP reforms. The power of a Magistrate to discharge an accused person is also abolished under the EAGP reforms.** A Magistrate will perform a case management role in committal matters, retain the power to direct the attendance of prosecution witnesses at 'witness hearings' and will still commit an accused for trial or sentence.

### Witness Hearings

#### What is a witness hearing?

[Division 6](#) will retain the power of a Magistrate to direct the attendance and examination of prosecution witnesses.

Without the power to discharge, it is envisaged that the function of a witness hearing may be to:

- Assess the strength of the Crown case,
- Resolve a factual dispute, or
- Narrow the issues for trial.

A witness hearing may result in an amended charge certificate being filed or the withdrawal of charges. It may also persuade a defendant to not proceed to trial and instead enter a guilty plea and preserve their 25 % discount on sentence.

#### Applying for a witness hearing

An application for a direction for a witness to attend can be made by either a prosecutor or an accused ([s 82\(1\)](#)). It is anticipated these will be oral applications before the court.

Where the other party consents to the application, a Magistrate must give the direction ([s 82\(4\)](#)).

If the other party does not consent a Magistrate may:

- Hold a hearing to determine the application ([s 82\(2\)](#)), and
- Require a party to make submissions in relation to the application ([s 82\(2\)](#)).

#### The tests

The substantial and special reasons tests will be retained in determining whether to direct a witness to attend or not. The Magistrate must be satisfied of the following:

- **Substantial** reasons why, in the interests of justice, any witness should attend (the former s 91 test) ([s 82\(5\)](#)), and
- **Special** reasons why, in the interests of justice, an alleged victim of an offence involving violence should attend (the former s 93 test) ([s 84](#)). [Section 84\(3\)](#) lists *offences involving violence*.

[Section 83](#) provides that the following witnesses may not be directed to attend:

- A complainant in proceedings for a prescribed sexual offence who is a cognitively impaired person ([s 83\(1\)](#)), note:
  - A *cognitively impaired person* means a person who has a cognitive impairment as per [s 306M](#).
  - A *prescribed sexual offence* is defined by [s 3](#).
- A complainant in proceedings for a child sexual assault offence if the complainant was under 16 at earliest date when the offence was allegedly committed and is under 18 at time of the proceedings ([s 86\(2\)](#)), noting *Child sexual assault offence* and *complainant* are both defined ([s 83\(3\)](#)).

[Sections 85 to 92](#) and [clauses 9H-L](#) set out the evidentiary requirements in these proceedings.

### **When can I apply for a witness hearing?**

The prosecution or defence may apply to cross examine a witness at any time after the filing of the charge certificate, and any amended charge certificate ([s 82\(3\)](#)). Accordingly, it appears the *Act* allows for a witness hearing to be held after an initial case conference. The Local Court Practice Note however suggests that if an application for a witness hearing is not made after charge certification, it is taken to be abandoned.

The timeframes required by the Practice Note provide for an adjournment of four weeks if a witness hearing is sought. This period will provide two weeks for submissions to be made, and two weeks of consideration by the ODPP. If no submissions are filed, the application will be presumed to be abandoned. There will be no further adjournments for the filing of the submissions unless the Magistrate is satisfied it is in the interests of justice to do so.

### **Committal**

[Section 95](#) requires that a Magistrate must be satisfied that certain steps under the EAGP reform have been completed, and ascertain whether or not an accused pleads guilty before committing a matter to the District or Supreme Court.

An accused will be committed for trial unless a guilty plea accepted ([s 96](#)). An accused can plead guilty to an offence at any time ([s 97\(1\)](#)). A Magistrate will be able to accept or reject a guilty plea ([s 97\(2\)](#)).

The guilty plea cannot be accepted before the time a person can be committed for sentence ([s 97\(3\)](#)). An accused can be committed for sentence:

- Before the charge certificate is filed, if the Prosecutor consents to an accused being committed for sentence for that offence ([s 95\(2\)\(a\)](#)),
- After the charge certificate is filed (if no case conference required) ([s 95\(1\)\(b\)](#)),
- After the charge certificate is filed but no case conference has been held yet ([s 95\(2\)\(b\)](#)), or
- After the CCC is filed ([s 95\(1\)\(a\)](#)).

If a guilty plea is rejected, the case may be adjourned for further negotiations or legal advice. The plea can be entered at a later stage ([s 97\(4\)](#)). If the guilty plea is rejected by a Magistrate, the proceedings continue will as if the accused has not pleaded guilty.

If a guilty is accepted, the accused will be committed for sentence to the District or Supreme Court ([s 97\(6\)](#)).

If a charge certificate is filed but a case conference is not required or held, a Magistrate is required, before the day of committal for trial or sentence, to give to an accused the oral and written explanation contained in [s 59](#). The Magistrate must explain the committal process, including charge certification, case conferences, committal for trial or sentence and the statutory sentence discount scheme.

A Magistrate will not be prevented from committing an accused for trial where unfitness to be tried is raised. This is discussed below.

## **Fitness**

[Division 7](#) (ss 93- 94) contains the circumstances in which an accused may be committed for trial where fitness to be tried is raised.

The question of fitness can be raised at any time during the committal proceedings ([s 93\(2\)](#)). However [s 94](#) only permits committal for trial regarding the issue of fitness:

- After a charge certificate is filed, or
- If a case conference has been held, after the case conference certificate is filed.

Fitness can be raised by an accused or the ODPP, though the Magistrate must be satisfied unfitness has been raised in good faith. A Magistrate can also raise fitness of their own volition.

The 'good faith' test is the same as that applied under the *Mental Health (Forensic Provisions) Act 1990*. This does not require a substantive consideration of whether the accused is in fact unfit.

The Magistrate has the discretion to require a psychiatric report or other report from an accused or a prosecutor before committing the accused for trial ([s 93\(3\)](#)). The provision does not specify whether the report can only be requested from the party who raises the issue, nor does it provide any guidance as to what "other reports" might be required.

[Section 13A](#), *Mental Health (Forensic Provisions) Act 1990* has been amended to set out the procedure following committal for trial on the issue of fitness.

### **Section 13A Committal proceedings following finding of fit to be tried**

- (1) This section applies to an accused person who was committed for trial for an offence under Division 7 of Part 2 of Chapter 3 of the [Criminal Procedure Act 1986](#).
- (2) The Court may, on the application of the accused person or on its own motion, make an order remitting the matter to a Magistrate for the holding of a case conference under Division 5 of Part 2 of Chapter 3 of the [Criminal Procedure Act 1986](#), if the accused person has, following an inquiry, been found fit to be tried for an offence.
- (3) The Court must make the order on the application of the accused person unless it is satisfied that it is not in the interests of justice to do so or that the offence is not an offence in relation to which a case conference is required to be held under that Division.
- (4) The Court may, on its own motion, make an order remitting the matter to a Magistrate for the holding of a case conference under Division 5 of Part 2 of Chapter 3 of the [Criminal Procedure Act 1986](#) at any time, if it is satisfied that the question of the accused person's unfitness to be tried for an offence is not going to be raised in proceedings for the offence.
- (5) If a matter is remitted to a Magistrate, the matter is to be dealt with as if the accused person had not been committed for trial and the proceedings are taken to be a continuation of the original committal proceedings.
- (6) If no application is made or the matter is not remitted to a Magistrate, the matter is to be dealt with in accordance with section 13.

If a matter is remitted in either of these circumstances, the proceedings are taken to be a continuation of the original proceedings as if the person had not been committed for trial ([s 13A\(5\)](#)). If no application is made or the matter is not remitted, s 13 will be applied, in other words, the Court may retain the case for trial or sentence.

# **6. SENTENCING DISCOUNTS & PLEA OFFERS**

## 6. SENTENCING DISCOUNTS & PLEA OFFERS

One major aspects of the EAGP reform will be the introduction of legislated discounts on sentence. [Division 1A, Crimes \(Sentencing Procedure\) Act 1999](#) will set out the relevant discounts. These discounts will be mandatory, and will be for the utilitarian value of a guilty plea ([s 25D\(1\)](#)).

All references in this chapter are to the *Crimes (Sentencing Procedure) Act 1999*, unless otherwise stated.

### What is the utilitarian value of a guilty plea?

A useful starting point to understand the meaning of the utilitarian value of a guilty plea is the principles of 'general application' set out in *R v Borkowski* [2009] NSWCCA 102 (2009) 195 A Crim R 1 at [32] per Howie J (McClellan CJ at CL and Simpson J agreeing). These principles include,

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: *Thomson* at [119] to [123]; nor is it affected by post-offending conduct: *Perry* [2006] NSWCCA 351.
4. The utilitarian discount does not take into account the strength of the prosecution case: *Sutton* [2004] NSWCCA 225.

### Application

The discounts are mandatory and will apply to all offences dealt with on indictment ([s 25A\(1\)](#)). The only exceptions to this will be:

- Commonwealth offences, unless prescribed for by the regulations ([s 25A\(1\)\(a\)](#)), or
- Offences committed when the client was under 18 years and under 21 years when charged with the offence ([s 25A\(1\)\(b\)](#)).

The onus of establishing grounds for a sentencing discount will rest on the defence ([s 25F\(5\)](#)). The standard of proof will be the balance of probabilities ([s 25F\(5\)](#)). Any offers recorded in a 'negotiations document' will become particularly relevant in determining what discount will apply.

A negotiations document is defined to include:

- a case conference certificate (including any later offer), or
- 'any other document, served on the prosecutor in proceedings for the offence following committal for trial or sentence, that records an offer made by the offender to plead guilty to an offence specified in the document' ([s 25B\(a\)\(ii\)](#)). This is likely to include a notice served on the prosecutor offering to plead guilty to an offence, in compliance with pre-trial notice requirements (as defined in [s 25C\(2\)](#)).

## Important Definitions

- A **'new count offence'** is
  - An offence the subject of an ex-officio indictment ([s 25B\(a\)](#)), or
  - An offence for which a count is inserted by amending an indictment ([s 25B\(b\)](#)).
- Whether a guilty plea is entered **'as soon as practicable'** to a new count offence or after being found fit is determined by reference to whether "an offender had a reasonable opportunity to obtain legal advice and given instructions to his or her legal representative (if any) ([s 25D\(6\)](#)).
- An **'offence is reasonably equivalent to a different offence'** (**'REO'**) if '(a) the facts of the offence are capable of constituting the different offence, and (b) the maximum penalty for the offence is the same or less than the different offence' ([s 25E\(1\)](#)).
- **'First day of trial of an offender'** is 'the first day fixed for the trial of the offender, or if that day is vacated, the next day fixed for the trial that is not vacated' ([s 25C\(1\)](#)).
- Compliance with pre-trial notice requirements occurs when 'the offender serves a notice on the prosecutor at least 14 days before the first day of trial of the offender accepting an offer by the prosecutor to plead guilty to the offence or offering to plead guilty to the offence' ([s 25C\(2\)](#)).

## The General Rule

The discount you get for the utilitarian value of a guilty plea is set out in [s 25D\(2\)](#) of the legislation which provides that you get a reduction in any sentence that would otherwise have been imposed of:

If plea of guilty entered prior to committal	<b>25%</b>
If plea of guilty entered after committal for trial but more than 14 days before the first day of trial	<b>10%</b>
If plea of guilty entered after committal for trial but <i>complied with pre-trial notice requirements</i>	<b>10%</b>
For any other guilty plea	<b>5%</b>

## Variations to the general rule

There are three variations to the general rule relating to the making of offers.

	<b>25% Discount</b>	<b>10% Discount</b>	<b>5% Discount</b>	<b>Example</b>
<b>Refused Offer Later Accepted</b> <a href="#">(s 25E(2))</a> Accused offers to plead guilty to an offence, offer recorded in a negotiations	Offer made in Local Court	Offer made more than 14 days before the first day of trial	Offer made later	An accused is charged with Aggravated Robbery. The accused offers to plead guilty to Robbery Simpliciter in the Local Court and that offer is recorded on the CCC. If that offer is later accepted in the District Court, on a plea of guilty to

document, refused by the prosecutor but later accepted AND the offender pleaded guilty to the offence they offered at the first available opportunity				Robbery Simpliciter the accused is entitled to a 25% discount.
<p><b>Offer to Reasonably Equivalent Offence (s 25E(1))</b></p> <p>Accused offers to plead guilty to a different offence, the offer is recorded, the prosecutor rejects the offer, client is found guilty of that different offence or an offence that is 'reasonably equivalent' to the different offence</p>	Offer made in Local Court	Offer made more than 14 days before the first day of trial (or pre-trial notice requirements complied with)	Offer made later	An accused is charged with Aggravated Robbery. The accused offers to plead guilty to Robbery Simpliciter in the Local Court and that offer is recorded on the CCC and rejected by the Crown. The Crown amends the indictment on the day of trial to a charge of Steal from the Person. The accused runs the trial and is found guilty of Steal from the Person. That offence is arguably a reasonably equivalent offence if based on the same facts – both Robbery Simpliciter and Steal from the Person carry 14 years imprisonment, pursuant to s97 of the Crimes Act. The accused is entitled to the benefit of making an earlier reasonably equivalent offer and receive a 25% discount, despite running a trial.
<p><b>New Count Offences (s 25D(3))</b></p> <p>Where the accused pleads guilty to a 'new count offence'</p>	If offered as soon as practicable after 'new count' available (unless proviso in s25D(4) applies – see below*)	Not as soon as practicable but at least 14 days before the first day of trial (or pre-trial notice requirements complied with) or proviso in s25D(4) applies – see below*)	Any other plea of guilty	An accused person is charged with Aggravated Robbery. The original brief of evidence has not mention of a stolen car. In the week before the trial, the Crown produces evidence that the accused stole a car on the same evening. The Crown amends the indictment to add those fresh charges. The accused pleads guilty to the fresh offences as soon as practicable. As the proviso in s 25D(4) does not apply, the accused receives a 25% discount to that charge.

**\*Proviso in s 25D(4)**

An accused cannot get 25% discount in either of these circumstances:

- a) The facts or evidence that establish the elements of the new count offence are substantially the same as those contained in the brief of evidence or other material served on the offender in the original indictment and the penalty for the new count offence is the same as, or less than, the offence set out in the original indictment, **OR**

- b) The offender refused an offer to plead guilty to the new count offence that was made by the prosecutor in the committal proceedings relating to the original indictment and the offer was recorded in a negotiations document.

This provision can mean that an accused can lose a 25% discount by not offering to plead guilty to an offence available on the brief of evidence in the Local Court, even if that offence is not offered to the accused until a much later time.

## Fitness

- Where an accused who found to be fit after committal for trial and is not remitted to the Local Court, if a guilty plea was not entered 'as soon as practicable' after the accused is found fit but at least 14 days before the first day of trial ([ss 25D\(5\)\(a\), \(5\)\(b\)\(i\) and \(6\)](#)).
- Where an accused who found to be fit after committal for trial and is not remitted to the Local Court, if a guilty plea was not entered 'as soon as practicable' after the accused is found fit but they complied with the pre-trial notice requirements and a guilty plea was entered at the first available opportunity able to be obtained by them ([ss 25D\(5\)\(a\), \(5\)\(b\)\(ii\) and \(6\)](#)).

## Exceptions

Despite the mandatory application of these discounts, there are exceptions. A sentencing Judge retains the discretion to refuse or lessen a mandated discount in the following circumstances:

- The level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can be met only by imposition of no discount or a lesser discount ([ss 25F\(2\)-\(3\)](#)). This principle has been applied in previous cases, for example, *Milat v R* [2014] NSWCCA 29 at [92], or
- The utilitarian value of the plea of guilty has been eroded by a dispute as to facts that was not determined in favour of the offender ([s 25F\(4\)](#)).

No discount is to be applied if a life sentence is imposed ([s 25F\(9\)](#)).

The application of no discount or a reduced discount due to extreme level of culpability can be sought by the prosecutor or raised by the sentencing Judge of their own motion ([s 25F\(2\)](#)). However when a case conference certificate has been filed, the prosecutor can seek it only when it has been raised at the case conference and recorded in the case conference certificate ([s 25F\(3\)](#)).

Sentencing judges will be required to record how the discount was calculated as well as reasons for not applying the mandated discount or reducing ([s 25F\(7\)](#)).

The mandatory application of these sentencing discounts means considering the application of other factors relevant to mitigation on sentence is even more important. These will include factors such as remorse, a client's prospects of rehabilitation, and the duration and conditions of their imprisonment. Sections [21A](#), [22A](#) and [23](#) will continue to apply.

It is important to note that any information disclosed during or in relation to a case conference or a plea offer will not be considered a pre-trial disclosure for the purposes of [s 22A](#) and [s 21A\(3\)\(l\)](#).

For other factors relevant to sentencing, a useful starting point is her Honour Judge Dina Yehia SC's paper, [Sentencing Checklist](#) which can be found on the Criminal CPD website, under the topic of Sentencing.

## **Plea Offers**

There are three broad opportunities to make offers to the prosecution:

- Pre-certification offers
- Offers in a case conference
- Late offers (Post case conference offers)

The stage at which an offer is made determines which mandatory discount your client will receive on sentence for the utilitarian value of their guilty plea.

### **Pre-certification offers**

Once the brief of evidence has been received, consider making an offer before the charges are certified. This is essentially a fast tracking of the committal process. Benefits of fast tracking include:

- Focusing the prosecutor's consideration upon the charge the defendant would accept, and
- Early identification of the issues in dispute

Consider what defences, or classes of offences, are available on the brief of evidence. They should all be made clear to your client and instructions taken as to what they will and will not plead to.

Once a charge certificate has been served:

- Considering all reasonable offers that could be made on the part of your client and any anticipated possible prosecution offers you discuss with your client.
- Obtain instructions from your client regarding:
  - any prosecution offers already made,
  - defence offers to be made,
  - any anticipated possible prosecution offers and making an offer in advance of the case conference.

### **Offers in a case conference**

- Before participating in the case conference, you will need to seek to obtain your client's instructions 'concerning the matters to be dealt with in the case conference' (s 72(1)).
- In accordance with s72(2), before the case conference you will also have to explain to your client:
  - The sentencing discount scheme applicable to guilty pleas,
  - The penalties applicable to the offences certified in the charge certificate,
  - The penalties applicable to any other offences the subject of offers made by your client,
  - The penalties applicable to any other offences the subject of offers made by the prosecutor, and

- The effect on the applicable penalty if the accused person were to plead guilty to any offence at different stages of proceedings for the offence.
- Offer whatever you are instructed to offer. Ensure that you have offered **everything** your client has instructed that they would be prepared to plead guilty to. This is essential given the mandatory applicable sentence discounts.
- Put those offers in writing to ensure that it is included in the CCC. While there are restrictions on the use of the case conferencing material, which includes the case conference certificate, offers are made and accepted will determine the sentencing discount applicable in your client's matter. It may be prudent to draft the offer in manner that enables the ODPP to copy and paste into the case conference certificate.
- If the prosecution will not accept an offer, do not settle or include the facts in the formal offer but still make the formal offer to plead to the charge(s).
- Find out what, if anything, the prosecution is offering, noting that the prosecution will consider what they have certified as the first offer.
- Find out what the prosecution will not accept.
- Ensure that any offers made or received have been accurately documented in the CCC.
- If an offer is accepted, consider whether to draft amend facts for consideration or to simply identify facts which are agreed and not agreed in the CCC
- Ensure that any pre-case conference offers are included in the CCC, if those offers have not been withdrawn on instructions from your client.

## Late offers

As discussed above, offers made after a case conference certificate is filed will be treated as part of that certificate and will be annexed to the certificate ([s 77\(2\) and \(3\)](#)). If an offer to plead has not been accurately recorded in the case conference certificate, this is final opportunity to make the offer and have it dealt with as if the offer had been made in the case conference.

## Negotiating with the prosecution

Negotiating with the prosecution is a process that any criminal lawyer is likely to have undertaken at some level. This aspect of the materials is not intended to be comprehensive, rather it is intended to provide a reminder of the broad principles which apply to negotiation.

In his 2011 paper, "Negotiating with the Police & Prosecutors", barrister Stephen Lawrence noted that the proper principles that apply to negotiation,

include the legal rules (including the offence creating provisions and the rules of evidence that govern whether offences can be proven), the prosecution policy of the prosecuting authority and the ethical constraints governing both parties.

In the context of the EAGP reforms, it is important to note the specific defence obligations you must discharge **before** a case conference that are contained in [s 72](#). This is in addition to the other ethical obligations on solicitors when advising clients which include, for example, rule 7 of the Solicitor's Rules (see below).

Listed below are links to some of the relevant policy and rules applicable to negotiations:

- [The ODPP Prosecution Guidelines](#);
- The [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#) (NSW) (the Solicitor's Rules), noting:
  - [Rule 4.1.2](#) – to 'be honest and courteous in all dealings in the course of legal practice' which is a fundamental ethical duties
  - [Rule 7](#) – Communication of advice
  - [Rule 22](#) – Communication with opponents
  - [Rule 29](#) – Prosecutor's duties
- The [Legal Profession Uniform Conduct \(Barristers\) Rules 2015](#) (NSW) (the Barrister's Rules), noting:
  - Rules 39-41 – Criminal Pleas
  - Rules 49-56 – Duty to Opponent
  - Rules 57-59 – Efficient administration of justice
  - Rules 60-68 – Responsible use of court process and privilege
  - Rules 83-95 – Prosecutor's Duties
- The Legal Aid NSW Code of Conduct for all in-house solicitors.

For further discussion of the principles and guidance on negotiation, refer to:

- "Negotiating with the DPP" – Nick Cowdery AM QC, Legal Aid Commission of NSW Criminal Law Conference, 3 August 2006: <http://www.netk.net.au/Prosecutions/Pleabargaining.pdf>; and
- "Negotiating with the Police & Prosecutors" – Stephen Lawrence, ALS Annual Conference, 2 June 2011: [http://criminalcpd.net.au/wp-content/uploads/2016/09/Negotiating\\_with\\_Prosecutors1.pdf](http://criminalcpd.net.au/wp-content/uploads/2016/09/Negotiating_with_Prosecutors1.pdf).

**INFORMATION TO  
COME**

## INFORMATION TO COME

At this stage there are a number of aspects to the reform that are yet to be settled. Legal Aid NSW will continue to distribute information regarding the following in the lead up to and after the commencement of the EAGP reforms:

### **ODPP business processes**

The ODPP is currently reviewing its delegations and developing guidelines regarding charge certification by the delegation and offence.

### **Case Conferencing**

Legal Aid NSW will elaborate on the best practice guidelines for participating in a Case Conference at the Legal Aid NSW Criminal Law Conference scheduled in August 2018. This will include material regarding the Legal Aid NSW Case Conferencing Hub and conferencing software.

### **Best Practice Guide for Case Conferencing**

The Department of Justice is currently preparing in consultation with relevant Justice agencies, including Legal Aid NSW and the ODPP a Best Practice Guide regarding case conferencing. Once this Guide is complete, it will be uploaded to EAGP webpage on Legal Aid NSW's website.

### **Offence Ready Reckoner**

To assist in the consideration of 'reasonably equivalent offences' and the formulation of appropriate offers, a number of Justice agencies including the Public Defenders, Legal Aid NSW and the ODPP are compiling a 'ready reckoner' of offences.