



ODPP  
New South Wales



# Best Practice Guide

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To Mandatory Criminal Case Conferencing

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## 1 INTRODUCTION

The Early Appropriate Guilty Plea Reform commenced in NSW on 30 April 2018. The reform is designed to ensure cases are actively managed from the start to encourage early resolution and reduce uncertainty and delay in the criminal justice system.

Developed in consultation with key stakeholders, the reform builds on the blueprint recommended in the 2014 NSW Law Reform Commission Report 141: Encouraging Appropriate Early Guilty Pleas.

The amending legislation that introduced the reforms was the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017*, which made significant amendments to the *Criminal Procedure Act 1986*, the *Children (Criminal Proceedings) Act 1987* and the *Crimes (Sentencing Procedure) Act 1999*, among others.

The reform is expected to deliver the following benefits:

- reduce delays in service of the brief of evidence
- provide certainty about the charges that are to proceed from the time the prosecutor certifies the charges
- encourage early and meaningful discussions about the case while it is still in committal proceedings
- a consistent and transparent application of the fixed statutory sentence discounts.

### 1.1 The six elements of the reform

The reform is made up of six key elements:

- early disclosure of the brief of evidence
- the prosecutor certifying the charges that are to proceed
- **mandatory criminal case conferencing**
- removal of the substantive committal decision of the Local Court and Children's Court (with respect to serious children's indictable offences only)
- fixed statutory sentence discounts, with limited exceptions
- continuity of legal representation of both prosecution and defence.

These elements apply to indictable offences, including serious children's indictable offences and Commonwealth indictable offences heard in NSW courts. However, the sentencing element of the reform does not apply to SCIOs and Commonwealth offences.

### 1.2 Introduction to case conferencing

This Best Practice Guide focuses only on the **mandatory criminal case conference** element of the reform. The legislative provisions relating to the mandatory criminal case conference can be found in Division 5, Part 2, Chapter 3 of the *Criminal Procedure Act 1986* (CPA).

Over the course of the reform's development, key stakeholders were closely consulted on how the mandatory criminal case conference (case conference) should run, and all strongly supported formalising the case conference. This was largely based on their experience with the case conferencing trial that operated from 2006 until 2012, where they found lawyers frequently held

superficial telephone case conferences without engaging in proper plea discussions in an effort to simply 'check off' this obligation.

Taking these views into account, under the reform, a case conference is a formal, structured meeting allowing for meaningful discussions about the case, maximising opportunity for early appropriate guilty pleas and narrowing contested issues early in the process.

To support the above, and to the extent possible, reproduce the conditions of the first day of trial, the case conference requires senior lawyers for the prosecution and defence with carriage of the case to participate in these discussions.<sup>1</sup> The accused also plays an important role in the case conference, in that he or she must be available in person, by AVL or telephone (depending on custody status and available facilities) to give instructions during the case conference.<sup>2</sup> Having the accused available to give instructions helps emphasise the importance of the event and allows the accused to be actively involved in the case conference. It also means the defence lawyer can take instructions as required.<sup>3</sup>

### **1.3 Aims of the best practice guide**

This best practice guide has been jointly developed by the Office of the Director of Public Prosecutions and Legal Aid NSW.

The guide aims to inform lawyers about the purpose of mandatory criminal case conferencing, their role in case conferencing, the role of the accused and best practice for managing and participating in a mandatory criminal case conference.

It reflects the views of the agencies involved in developing the reform and what they consider is best practice when preparing for, organising and participating in the mandatory criminal case conference in order to facilitate the aims of the EAGP reform.

This guide is advisory only and does not override any policies, procedures and ethical obligations lawyers are subject to in their organisation or by the Law Society of NSW/NSW Bar Association. The guide should be read in conjunction with the relevant legislation and related materials. A list of other useful resources can be found at Appendix B.

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<sup>1</sup> See chapter 4 for more information about the seniority of lawyers participating in the case conference.

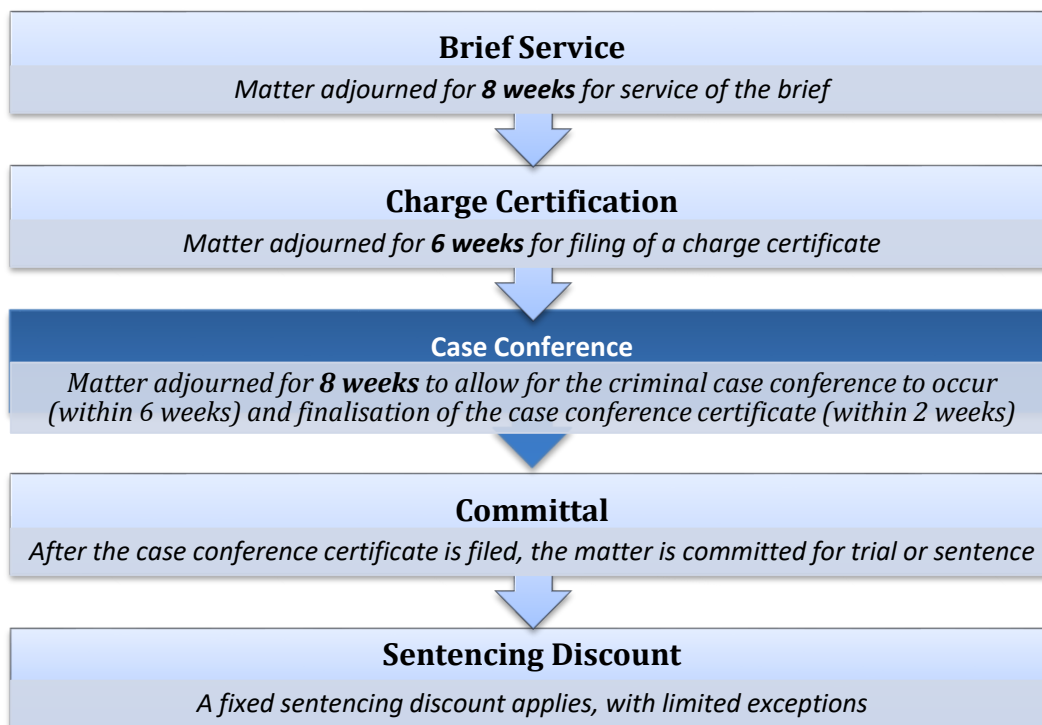
<sup>2</sup> See clauses 9E and 9F of Criminal Procedure Regulation 2017

<sup>3</sup> See Chapter 5 for more details about the accused's involvement.

## 2 Progress of committal proceedings through the Court

There are four key steps in a committal proceeding under the reform.

The timeframes for each step are set out in the Local Court Practice Note Comm 2 and the Children's Court Practice Note 12.



### 3 QUICK REFERENCE GUIDE – THE MANDATORY CASE CONFERENCE PROCESS

<p><b>OVERVIEW &amp; REQUIREMENTS</b> (Ch. 4)</p>	<p>A case conference takes place after the mention where the charge certificate is filed in the Local Court. Senior lawyers from the prosecution and defence with carriage of the case are required to participate in the discussions. The accused also plays an important role.</p> <p>Chapter 4 sets out the key requirements of the case conference , including its objectives, when it should be held, how it should be held, who should attend, and the exceptions to the process.</p>
<p><b>BEFORE THE CONFERENCE</b> (Ch. 5)</p>	<p>In appropriate cases, negotiating prior to charge certification is best practice and encouraged by all parties. To assist with overall plea discussions, as soon as a defence lawyer assumes carriage of the case, he or she should contact the ODPP or CDPP to advise they appear in the matter. The process for doing this can be found on page 12.</p> <p>This guide also sets out some best practice around participating in plea discussions, depending on the stage of the matter:</p> <ul style="list-style-type: none"> <li>• Before service of the brief (see 5.1)</li> <li>• Before charge certification (see 5.2)</li> <li>• After charge certification, and before the case conference (see 5.3)</li> </ul>
<p><b>ORGANISING THE CONFERENCE</b> (Ch. 6)</p>	<p>The defence lawyer will organise a case conference after liaising about an appropriate date and time for the case conference with the prosecutor. Chapter 6 of the Guide provides further information about organising a case conference ,including:</p> <ul style="list-style-type: none"> <li>• When should it occur and how long should it take?</li> <li>• How do you organise the attendance of an accused?</li> <li>• How do you book a case conference?</li> <li>• How to arrange a case conference by AVL or in person</li> </ul>
<p><b>PREPARING FOR A CONFERENCE</b> (Ch. 7)</p>	<p>Chapter 7 highlights some key considerations when preparing for a case conference. These steps will help ensure the case conference runs as effectively and efficiently as possible.</p>
<p><b>ATTENDING THE CONFERENCE</b> (Ch. 8)</p>	<p>The case conference process, including the defence lawyers taking instructions from the accused, will vary from case to case. Chapter 8 of this guide suggests a reasonable model for attending the case conference, including how to conduct subsequent case conferences.</p> <p>The guide also summarises what happens when either the prosecutor or defence lawyer unreasonably fails to participate in a case conference or file a case conference certificate.</p>
<p><b>AFTER THE CONFERENCE</b> (Ch. 9 &amp; 10)</p>	<p>Chapter 9 provides further information about:</p> <ul style="list-style-type: none"> <li>• the case conference certificate, including how the certificate is created;</li> <li>• the process for filing amended charge certificates;</li> <li>• how to access the case conference certificate after it is filed with the court registry, and</li> <li>• making offers after the certificate is filed.</li> </ul> <p>Chapter 10 summarises the provisions in the legislation relating to the confidentiality of the case conference certificate.</p>

## 4 OVERVIEW & REQUIREMENTS FOR CASE CONFERENCING



The case conference requires senior lawyers for the prosecution and defence with carriage of the case to participate in the discussions.<sup>4</sup>

The accused also plays an important role in the case conference, in that he or she must be available in person, by AVL or telephone (depending on custody status and available facilities) to give instructions during the case conference.<sup>5</sup>

### 4.1 What are the objectives of a case conference?

The legislation sets out the **objectives** of a case conference<sup>6</sup>. These are:

- principally - to determine if there are any offences to which the accused is willing to plead guilty
- to facilitate the provision of additional material or other information
- to narrow contested issues for trial
- to identify any agreed or disputed facts
- to resolve any other issues.

### 4.2 When should a case conference be held?

A case conference takes place after the mention where the charge certificate is filed in the Court. A charge certificate is a document signed by the prosecutor detailing the offences that are to proceed. Experienced senior prosecutors will undertake this task to ensure that the most appropriate charge/s are proceeded with.

As provided in the Local Court Practice Note Comm 2 and the Children's Court Practice Note 12, where a case is proceeding to a case conference, a magistrate will adjourn the proceedings for eight weeks. The expectation is that the case conference will occur within the first six weeks of that adjournment, with the case conference certificate to be filed within the remaining two weeks.

The parties are required to advise the Court of the date set for the criminal case conference at the time the adjournment for the case conference is granted. If a date has not been set, the Court will

<sup>4</sup> See 4.5 for more information about the seniority of lawyers participating in the case conference.

<sup>5</sup> See clauses 9E and 9F of Criminal Procedure Regulation 2017

<sup>6</sup> Criminal Procedure Act 1986, s 70



adjourn the proceedings for a short period (not exceeding 7 days) for the date to be set<sup>7</sup>.



The prosecution and defence should start identifying a suitable date for a case conference *as soon as* the charge certifier and defence counsel are briefed to appear in the case.

### 4.3 How many case conferences should be held?

The prosecution and defence must participate in at least one case conference (the ‘initial’ case conference)<sup>8</sup> unless an exception applies (see 4.8 for exceptions)<sup>9</sup>. The legislation also allows for more than one case conference to be held.<sup>10</sup>

Where a subsequent case conference cannot be held within the first adjournment period, the prosecution and defence should seek a further adjournment to hold the case conference (refer to section 8.7).

### 4.4 How is a case conference held?

The initial case conference must be held **in person or by AVL**.<sup>11</sup> As a matter of policy, the NSW ODPP will participate in the conference via AVL by default. In person conferences may be agreed to in exceptional circumstances.

Where holding a case conference this way is impracticable due to exceptional circumstances, the prosecution and defence may apply to the magistrate to hold the case conference by telephone.<sup>12</sup> Where this is apparent to the parties prior to a case conference being ordered, the application should be made to conduct the conference by telephone at the charge certification mention. Exceptional circumstances making it impractical to hold the case conference via AVL or in person may include where a private practitioner is representing the accused and is located in a regional or remote location where there is no access to AVL facilities.

There are no restrictions on how a subsequent case conference is held, that is, it can be held by telephone or AVL, or in person (refer to 8.7). For information on how to organise an AVL or in person case conferences, refer to 6.8.

The accused must be available to give instructions during the case conference.<sup>13</sup> Further information on how the accused person should be available can be found at 6.5.

### 4.5 Seniority of lawyers attending the case conference

The EAGP reform is changing the approach to managing cases by involving senior prosecutors in the early stages of the case, including certifying the charge once the brief of evidence is served and case conferencing with senior defence lawyers while the case is in the Local Court or Children’s Court.

This early intervention approach will also encourage continuity of representation so that where possible senior prosecutors who certify the charges in the Local Court or Children’s Court, and senior defence lawyers participating in the case conference, remain with the case until it is finalised.

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<sup>7</sup> Local Court Practice Note Comm 2 (third step), pp 3-4 and Children’s Court Practice Note 12 9.4-95

<sup>8</sup> Criminal Procedure Act 1986, s 70 (1)

<sup>9</sup> Criminal Procedure Act 1986, s 69

<sup>10</sup> Criminal procedure Act 1986, s 70(5)

<sup>11</sup> Criminal Procedure Act 1986, s 71 (1)

<sup>12</sup> Criminal Procedure Act 1986, s 71 (3)

<sup>13</sup> Criminal Procedure Regulation 2017, cl 9E(1)

The complexity of the case will guide the level of seniority of the prosecutors and defence lawyers participating in the case conference. Depending on the nature of the case, the case conference may involve senior solicitors or a solicitor advocate for the accused and prosecution. In more complex cases, the case conference may involve counsel for the accused and a Crown Prosecutor.

In most cases, a case conference will involve the attendance of:

- the prosecutor who certified the offences on the charge certificate and the prosecuting solicitor, subject to court commitments
- the defence solicitor and, if briefed, defence counsel



To achieve the most out of a case conference, participating lawyers should have the authority to negotiate and resolve the matter.

#### 4.6 Availability of legal aid to brief counsel for the case conference

Legal Aid will continue to grant legal aid to accused persons facing indictable charges in accordance with existing policies. To support the reform, in a significant proportion of these cases involving indictable charges, Legal Aid will extend this grant of aid to include instructing counsel before committal.

For case conferences, Legal Aid aims to match the seniority of the prosecutor attending so that the lawyers are of equal skill and standing.

The types of cases that may receive an extension of legal aid to instruct counsel include where a Crown Prosecutor is involved in the prosecution. Other circumstances, such as the complexity or seriousness of the case may also result in a grant of legal aid being extended to instruct counsel.



Defence lawyers acting on a grant of legal aid should only brief counsel after the application to extend the grant of legal aid to instruct counsel has been approved. For further information, refer to **Legal Aid Grants Online**.

#### 4.7 Involvement of the accused in the mandatory criminal case conference

The accused plays an important role in the case conference. To emphasise the importance of the case conference to the accused, and encourage meaningful engagement, the regulations specifically set out how the accused is involved in the case conference.



The regulations direct that the accused must be available to give instructions during the case conference.<sup>14</sup>

The regulations prescribe how the accused should be available. This depends on whether the accused is in custody or in the community:

- An accused in custody is taken to be available if he or she is able to give instructions in person or by AVL or, if that is not reasonably practicable, by telephone.<sup>15</sup> The majority of case conferences involving an accused in custody will occur by AVL.
- An accused who is not in custody is taken to be available to give instructions if the accused is able to give instructions in person, or if that is not reasonably practicable or is not appropriate for any other reason, by AVL or telephone.<sup>16</sup>

<sup>14</sup> Criminal Procedure Regulation 2017, cl 9E

<sup>15</sup> Criminal Procedure Regulation 2017, cl 9E(5)

<sup>16</sup> Criminal Procedure Regulation 2017, cl 9E(4)

The regulations also allow the accused to attend part or all of the discussions between the lawyers at the case conference; however, this can only occur if the prosecutor and defence lawyers consent to the accused's attendance.<sup>17</sup>

The regulations further direct that where the accused requires a support person or interpreter, the defence lawyer must ensure that such a person is present to provide assistance or support during the case conference.<sup>18</sup>

#### **4.8 Exceptions to case conferencing**

A case conference is not required to be held where<sup>19</sup>:

- the accused is unrepresented
- the accused pleads guilty to each offence that is being proceeded with and the pleas are accepted by the Magistrate before a case conference is held.

A case conference is also not required where the issue of fitness is raised. If this occurs, the legislation allows the magistrate to commit an accused for trial where<sup>20</sup>:

- the question of the person's unfitness to be tried for the offence is raised by the accused person, the prosecutor or the magistrate, and
- if the question is raised by the accused person or the prosecutor, the Magistrate is satisfied that it has been raised in good faith.

The question of unfitness may be raised at any time in the committal proceedings.<sup>21</sup> However, the accused cannot be committed until after the charge certificate has been filed,<sup>22</sup> and where a case conference has been held, after the case conference certificate is filed.<sup>23</sup>

#### **4.9 Application to children and young people**

Mandatory criminal case conferencing applies to serious children's indictable offences.<sup>24</sup> The Children's Court has issued Practice Note No. 12 which sets out the procedure to be followed for criminal proceedings in the Children's Court, including case conferencing. These procedures mirror the requirements in the Local Court. Like adult accused, a child or young person accused must be available to give instructions to his or her lawyer during the case conference.<sup>25</sup>

#### **4.10 Case conferencing with co-accused**

If the accused's case involves co-accused, a separate case conference should be held for each co-accused. However, a joint case conference may be held for two or more co-accused with the consent of the prosecutor and each of the co-accused.<sup>26</sup> A joint case conference may be held only if a charge certificate has been filed for each of the co-accused.<sup>27</sup>

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<sup>17</sup> Criminal Procedure Regulation 2017, cl 9F

<sup>18</sup> Criminal Procedure Regulation 2017, cl 9E(2)

<sup>19</sup> Criminal Procedure Act 1986, s 69

<sup>20</sup> Criminal Procedure Act 1986, Division 7

<sup>21</sup> Criminal Procedure Act 1986, s 93 (2)

<sup>22</sup> Criminal Procedure Act 1986, s 94 (a) and s 94 (b)

<sup>23</sup> Criminal Procedure Act 1986, s 94 (c)

<sup>24</sup> Children (Criminal Proceedings) Act 1987, s 3

<sup>25</sup> Criminal Procedure Regulation 2017, cl 9E

<sup>26</sup> Criminal Procedure Act 1986, s 73 (1)

<sup>27</sup> Criminal Procedure Act 1986, s 73 (2)

## 5 NEGOTIATING BEFORE THE MANDATORY CRIMINAL CASE CONFERENCE

In appropriate cases, negotiating prior to charge certification is to be encouraged by all parties. Which prosecuting authority the defence lawyer will contact to participate in plea discussions will depend on the stage of the matter.

Information on which prosecuting authority to contact is set out below.



To assist with overall plea discussions, as soon as a defence lawyer assumes carriage of the case, he or she should contact the ODPP or CDPP to advise they appear in the matter.

To do this, the defence lawyer should contact the local ODPP or CDPP office, or if unsure of the location, contact the head office of the relevant agency. Listed below are the contact details for the head office of the ODPP and Sydney Office of the CDPP:

- **ODPP head office – (02) 9285 8606**
- **CDPP Sydney office – (02) 9321 1100, Receptionist.Sydney@cdpp.gov.au**

On the defence lawyer making contact, the relevant prosecuting office will make a record that the defence lawyer has carriage of the case. This information will then remain on the case management system and will be accessible to the prosecutor as soon as the matter is allocated internally.

### 5.1 Plea discussions before service of the brief of evidence

#### *ODPP cases*

In most cases, the ODPP will only assign a prosecuting solicitor to a case after the brief of evidence is served. However, there are some circumstances where the ODPP will assign a prosecuting solicitor before the brief of evidence, which are where:

- the accused is charged with a matter deemed of special interest
- the accused is charged with a matter involving death or a child sexual offence where the complainant is under 16 years at the time of charging
- a co-accused has already been charged or the matter is otherwise related to an existing prosecution already allocated to a prosecuting solicitor
- the accused has other prosecutions on foot that have already been allocated to a prosecuting solicitor
- the accused is a serving police officer
- the accused's legal representative has indicated in writing that the accused will plead to the charged offence.

The ODPP may also consider expediting the allocation of a case to a prosecutor before the brief of evidence has been served where the defence lawyer requests that to take place and it is in the interests of justice to do so, for example, the defence lawyer has received instructions from the accused to enter pleas of guilty to an alternative charge, or where a referral to the Drug Court is made.<sup>28</sup> In these cases, the defence lawyer should contact the relevant ODPP office and ask to be put in contact with the Managing Solicitor, who will contact the informant to ascertain if the brief of evidence can be expedited. Once the brief of evidence is served, and the prosecuting solicitor is satisfied the plea is appropriate, the matter may proceed as expeditiously as possible.

#### *CDPP cases*

For matters commenced following an arrest, the CDPP will generally assign a prosecutor shortly after the first mention date. For matters commenced other than by arrest, a prosecutor will have been

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<sup>28</sup> Criminal Procedure Act 1986, s 60

assigned prior to the proceedings being commenced. The defence lawyer should contact the CDPP prosecutor with carriage of the case.

## 5.2 Plea discussions after service of the brief but before the charge certificate is filed

### ODPP cases



Once the brief is served, the prosecution and defence lawyers are encouraged to actively engage in plea discussions

The ODPP will allocate a solicitor to the case once a brief is served. If the defence lawyer has already advised the ODPP office that he or she has carriage of the case, the ODPP solicitor with carriage of the case will contact the defence lawyer as soon as the case is allocated so that plea discussions can commence. At the same time, the ODPP solicitor can give an indication of the level of the likely charge certifier.

Three weeks prior to the Charge Certification Mention, the ODPP will have confirmed the level of the charge certifier, that is, whether it is a senior solicitor, solicitor advocate or Crown Prosecutor. Knowing the identity and level of the charge certifier will assist defence lawyers to determine whether counsel may be required in the matter and to facilitate discussions between parties about a suitable date for the case conference (see below). Lawyers are encouraged to inform each other as to the seniority of representatives briefed in the matter as soon as practicable.

### CDPP cases

The defence lawyer can contact the CDPP prosecutor with carriage of the case on the case commencing in the Local Court.

### All cases

The Practice Note requires the prosecution and defence to inform the court of the date of the case conference at the mention where the charge certificate is filed.<sup>29</sup>

To meet this requirement, the prosecution and defence should start identifying a suitable date for the case conference *as soon as* the charge certifier and defence counsel are instructed to appear in the case.

## 5.3 Plea discussions after charge certification but prior to case conference

### All cases

After the charge certificate is filed and orders are made for case conferencing, prosecution and defence lawyers are encouraged to continue plea discussions leading up to the case conference.

Good faith discussions **well in advance** of the case conference will allow:

- the prosecutor to comply with his or her obligations to consult with victims and police, and consider any alternative charges
- the defence lawyer to obtain detailed instructions from the accused on matters relating to the case conference, including whether the accused wishes to plead guilty to the offences on the charge certificate, or any other offences.

It will also maximise the time available during the case conference, increasing the likelihood that all issues can be resolved.

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<sup>29</sup> Local Court Practice Note Comm 2, 9.2 (third step); Children's Court Practice Note 12, 9.5

## 6 ORGANISING THE MANDATORY CRIMINAL CASE CONFERENCE

### 6.1 Who organises the case conference?

The defence lawyer will organise the case conference after liaising about an appropriate date and time for the case conference with the prosecutor.

### 6.2 When should the case conference occur?



A case conference should occur within the first six weeks of the adjourned period after the filing of the charge certificate.<sup>30</sup>

At the mention where the filing of the charge certificate is confirmed, the Court must be advised of the date for the case conference. If the prosecution and defence are unable to provide a date at this mention, the proceedings are to be adjourned for a period not exceeding 7 days to enable the setting of a date for the case conference.<sup>31</sup>

### 6.3 How long is the case conference?

It is anticipated that most cases conferences will take approximately one hour, however this will vary from case to case.

### 6.4 How should the lawyers participate in the case conference?

Whether the initial case conference occurs in person or via AVL will depend on which prosecuting authority is involved.

The ODPP default position is that they will participate in the case conference via AVL. Only in exceptional circumstances will a prosecutor from the ODPP agree to attend a case conference in person.

In cases involving the CDPP, how participation occurs will be discussed with the defence.

Meeting rooms with AVL facilities are available at all Legal Aid offices for case conferencing (refer to the sections 6.8 and 6.9).

### 6.5 Organising the attendance of an adult accused

The accused must be available to give instructions during the case conference.<sup>32</sup> How an accused will be available to give instructions will depend on whether they are in custody or not in custody.

Note: The accused can only attend part or all of the discussions of the case conference if the prosecution and defence consent.

#### ***Accused in custody***

Most correctional centres will have dedicated case conference studios that will prioritise case conference bookings over professional legal bookings. Other correctional centres will prioritise case conference bookings on certain days. Refer to Appendix A for information on which correctional centres will have dedicated case conference studios.

Private lawyers without access to AVL facilities can use Legal Aid AVL facilities to conduct the case conference and take instructions from the accused (refer to sections 6.8 and 6.9).

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<sup>30</sup> Local Court Practice Note Comm 2 (third step), pp 3-4, Children's Court Practice Note 12 para 9.4

<sup>31</sup> Local Court Practice Note Comm 2 (third step), pp 3-4, Children's Court Practice Note 12 para 9.5

Where an adult accused is in custody, the prosecution and defence should organise the case conference during correctional centre operating hours. At most correctional centres, this is between 9am and 3pm.

For a young person accused in custody, the prosecution and defence should organise the case conference during juvenile justice centre hours. At most juvenile justice centres, this is between 9am and 1pm or 3pm and 5pm.

### ***Accused not in custody***

Meeting rooms are available at Legal Aid to take instructions from the accused during the case conference.

Private lawyers without AVL facilities can use Legal Aid meeting rooms during the case conference, and AVL facilities to conduct the case conference and take instructions from the accused (refer to sections 6.8 and 6.9).

### ***Support person/interpreter***

Where an accused requires a support person or interpreter, the defence lawyer should ensure such a person is available to assist during the case conference.<sup>33</sup>

## **6.6 Organising the attendance of a child or young person**

In most cases, the young person will attend in the same way as an adult accused depending on whether he or she is in custody or in the community (see section 6.5).

Note: Most juvenile justice centres operate between 9am and 1pm or 3pm and 5pm.

## **6.7 Booking the mandatory criminal case conference**

Most Case Conferences will be booked through JUST Connect, which is a web-based system enabling video conferencing collaboration that is used to book correctional centre AVL Studios. JUST Connect must be used in all circumstances where an accused is in custody.

Defence lawyers with access to *JUST Connect* can schedule the case conference directly.

Defence lawyers without access to *JUST Connect* and using Legal Aid facilities to participate in the case conference can contact the Central Sydney Case Conference Hub or their nearest Legal Aid office to organise a case conference.

Defence lawyers without access to JUST Connect who do not wish to use Legal Aid facilities to participate in the case conference can contact the ODPP or CDPP to book the case conference through JUST Connect or, if the accused is on bail, book the conference using another means (ie. through outlook).

### **Private practitioners booking with Legal Aid NSW**

Defence lawyers without JUSTConnect access can organise a mandatory case conference for their client (legally aided or not) at a Legal Aid office by submitting an electronic booking request form, which can be found on Legal Aid's [website](#).

Lawyers will receive a *JUST Connect* system notification by email confirming their conference appointment ("the Confirmation"). Where a client is not in custody, practitioners should determine the client's location and availability prior to submitting the booking request form.

Practitioners should also indicate interpreters attendance in the booking request form, and book their interpreters directly (Legal Aid will not book the interpreters).

Practitioners must notify Legal Aid of any changes subsequent to their Confirmation (for example: additional/alternative participants, longer/shorter duration, interpreter). Where such change is possible, the practitioners will receive a *JUST Connect* system notification confirming the change, or a Legal Aid email advising why the booking cannot be changed as requested.

Legal Aid will endeavour to rebook conferences cancelled due to inmate movement, subject to availability.

Practitioners will attend the Case Conferencing Hub or a Legal Aid office of their choice on the date, time and duration indicated in the Confirmation. To participate in the conference, the parties must have been listed in the Confirmation.

### **Private practitioners booking through the ODPP / CDPP**

If the defence lawyer is not acting pursuant to a grant of legal aid, and they do not wish to use Legal Aid's facilities, they may contact the relevant DPP directly to book the case conference through JUST Connect. They should contact the prosecuting solicitor who will make the necessary arrangements. If the accused is on bail, the defence lawyer may rely on other means to book the case conference, like Outlook.

## **6.8 Organising a case conference where the lawyers meet by AVL**

### **Attending via own device**

Where the prosecution and defence lawyers agree to meet by AVL, there are various ways to facilitate the meeting depending on the technology available. Defence lawyers with AVL technology on their own devices can participate in the case conference with the prosecution lawyers directly via AVL using those devices.

### **Attending via AVL studios**

Defence lawyers can also use Legal Aid meeting rooms, which are equipped with AVL facilities and soundproofing. There will also be separate areas where an accused can wait when not providing instructions for the case conference.

Private lawyers wishing to access Legal Aid facilities should contact the Central Sydney Case Conference Hub or their nearest Legal Aid NSW office to make a booking. These facilities are available to all private lawyers, including lawyers appearing for accused without a grant of Legal Aid. The Central Sydney Case Conference Hub team can be contacted by phone on 9134 9355 or via email [AVL.Sydney@legalaid.nsw.gov.au](mailto:AVL.Sydney@legalaid.nsw.gov.au)

## **6.9 Organising a case conference where the lawyers meet in person**

Where the prosecution and defence lawyers agree to meet in person they can book meeting rooms with AVL facilities at all Legal Aid offices. Legal Aid meeting rooms can accommodate up to 4 – 6 persons and are equipped with AVL facilities and soundproofing. There will also be separate areas where an accused can wait when not providing instructions for the case conference. At the Central Sydney Legal Aid office, there is a dedicated Case Conferencing Hub.

Private lawyers wishing to access the Legal Aid facilities should contact the Central Sydney Case Conference Hub or their nearest Legal Aid office to make a booking. These facilities are available to all private lawyers, including lawyers appearing for accused without a grant of Legal Aid.



For lawyers in regional and remote areas where there is no Legal Aid office, lawyers may be able to use Local Court meeting rooms. Depending on the location, some of these meeting rooms will have AVL facilities.

It may also be possible to use a Local Court meeting room for a case conference. Arrangements will need to be made with the Local Court Registrar at the location where the prosecution and defence wish to hold the case conference about a suitable date and time. If the accused person is in custody, arrangements may also need to be made with the correctional centre directly to have the accused person available during the case conference. This may be through the JUSTConnect system, or contacting the correctional centre directly.

## 7 PREPARING FOR A MANDATORY CRIMINAL CASE CONFERENCE

### 7.1 Defence lawyers



The defence lawyer must obtain instructions from the accused about the matters to be dealt with before the formal case conference occurs.<sup>34</sup>

To foster an environment of early and meaningful plea discussion, the defence lawyer should aim to do this as early in the case as possible.

Where it is impossible for the defence lawyer to obtain instructions before the day of the case conference, they should contact the ODPP and provide an estimate as to how long it will take to obtain instructions. The ODPP will then confirm whether the case conference may proceed that day, or whether an alternative case conference date will need to be fixed.

### 7.2 Prosecution lawyers

#### **ODPP**

The ODPP has an obligation to consult with victims and informants in accordance with its Prosecution Guidelines. Details of these obligations may be found on the ODPP's [website](#). In addition, the prosecutor may need to arrange for the Officer in Charge to be on standby for consultation during the case conference.

#### **CDPP**

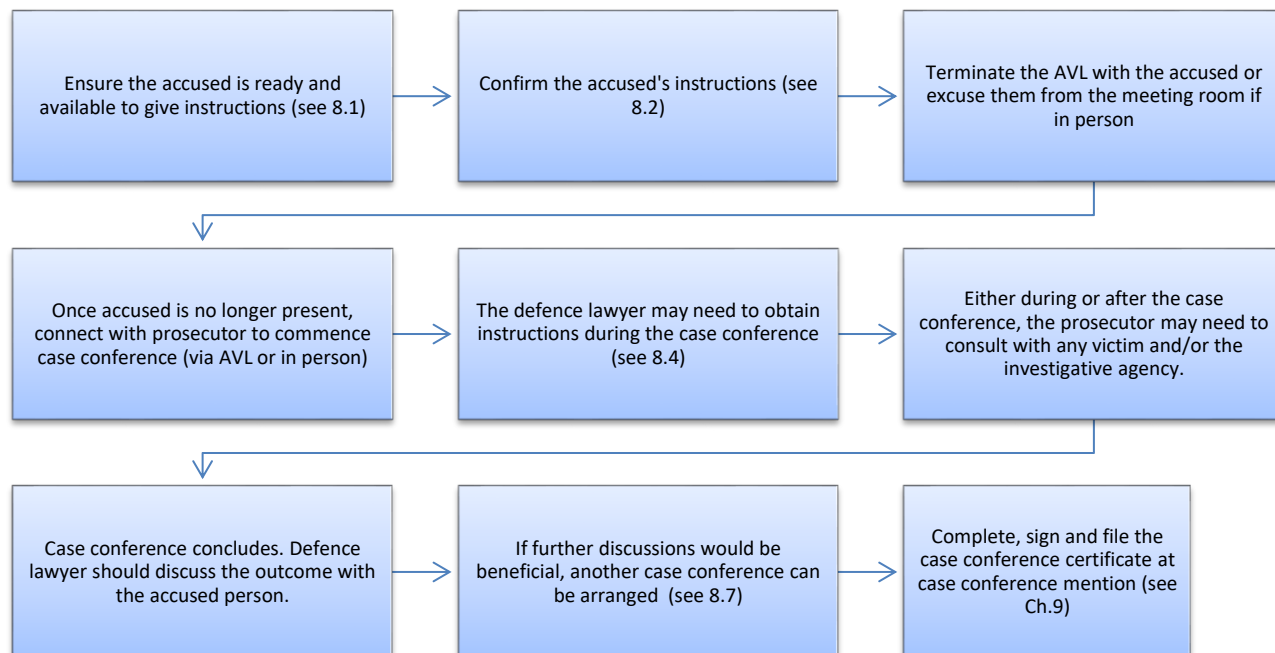
The CDPP has an obligation to consult with victims and investigative agencies in accordance with their policies. Details of these obligations are on the CDPP [website](#). The CDPP encourages the defence to engage in early plea discussions with them so the CDPP can consult early with any victim and/or investigative agency, thereby increasing the efficiency and effectiveness of the case conference.

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<sup>34</sup> Criminal Procedure Act 1986, s 72 (1)

## 8 ATTENDING THE MANDATORY CRIMINAL CASE CONFERENCE

The case conference process, including the defence lawyers taking instructions from the accused, will vary from case to case due to criminal cases differing in seriousness and complexity. The following process is suggested for the majority of case conferences:



### 8.1 Before the case conference commence

The defence lawyer should ensure the accused is ready and available to give instructions. Where the accused is in custody, the defence lawyer should contact the relevant correctional centre AVL staff member and have the accused moved into the AVL studio. The staff member will be aware of the case conference through the booking made on *JUST Connect* and should have the accused ready. The defence lawyer should also ensure any interpreter and/or support person is ready.

### 8.2 Confirm the accused's instructions

In most cases, the defence lawyer should spend the first 10 - 15 minutes of the case conference speaking with the accused to answer any last minute questions about the process and to confirm their instructions. In particular, the defence lawyer should explain to the accused that there may be a number of points during the case conference where he or she will be contacted to confirm instructions. If, after 15 minutes, the defence lawyer still requires more time with the accused before commencing the case conference, they should contact the prosecution lawyer to advise them how much more time they require, and to confirm if the conference can still proceed on that day.

### 8.3 Commencing the case conference

After the case conference process has been explained to the accused, the defence lawyer should terminate the AVL link with the accused (if in custody) or excuse the accused from the meeting room (if present in person). Once the accused is no longer present on the AVL or in the meeting room, the defence lawyer should commence the case conference by connecting to the prosecution lawyer via AVL. If the prosecuting lawyer is attending in person, the defence lawyer should contact them by phone to advise them that they are ready to proceed.

#### **8.4 Taking instructions from the accused during the case conference**

The defence lawyers will inform the prosecution when instructions are required from the accused and an estimate of how long this will take. When this occurs in the case conference, in instances where the prosecution are participating by AVL, they will disconnect the AVL link. Otherwise, the prosecution will exit the meeting room.

The defence lawyers will then take instructions from the accused. When the defence lawyers have finished taking instructions, they will ensure the AVL link is terminated if the accused is in custody, or ensure the accused is moved to a waiting area. The defence lawyer will then contact the prosecution so the case conference can resume.

In some cases, this may occur multiple times. The defence lawyer should advise the prosecution about how long taking instructions may take, and keep the prosecution informed, particularly if the delay is longer than expected.

For CDPP cases, if necessary and where possible, the prosecutor will use this time to consult with any victim and/or the investigative agency.

While the accused is in physical attendance and in another room, it is encouraged that the defence lawyer pauses the case conference and briefly updates the accused on the discussions for a few minutes every half hour of the case conference, where the conference is likely to be lengthy. This is to ensure the accused feels appropriately included in the process and to mitigate the risk that the accused leaves before the case conference is complete.

#### **8.5 Concluding the case conference**

Where an accused is in custody, the case conference should conclude early enough to permit the accused's legal representative to discuss the outcome of the conference with their client within the scheduled time.

Where further discussions would be beneficial, the prosecution and defence lawyers can arrange another case conference.

#### **8.6 Confidentiality of the case conference**

Discussions at the case conference are confidential and not admissible in any proceedings before a court, tribunal or body.

The legislation also prohibits the publication of case conference discussions. For more information on the confidentiality of discussions had at the case conference and the certificate (refer to section 10).

#### **8.7 Subsequent case conferences**

A subsequent case conference can be held in person, audio visual link or by telephone.<sup>35</sup>

Another case conference may be needed where:

- further discussions are needed to settle a plea
- there is a real prospect of narrowing the issues for trial
- there are others issues capable of resolving the case
- following a further examination of witness hearing.

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<sup>35</sup> Criminal Procedure Act 1986, s 71 (2)

Further conferences are encouraged where there is a real prospect that it could help to resolve issues between the prosecution and defence, and facilitate a guilty plea to appropriate charges in the Local Court.

Note: All case conferences should be held before a case conference certificate is finalised and filed.<sup>36</sup>

## **8.8 Failure to attend the mandatory criminal case conference or prepare the certificate**

The legislation sets out what happens when either the prosecutor or the defence lawyer unreasonably fails to participate in a case conference or file a case conference certificate.<sup>37</sup>

### ***Unreasonable failure on the part of the prosecutor***

If a magistrate is satisfied that there has been an unreasonable failure on the part of the prosecutor to participate in a case conference or file a case conference certificate, and it is in the interests of justice to do so, the magistrate may discharge the accused or adjourn the committal proceedings.<sup>38</sup>

### ***Unreasonable failure on the part of the defence lawyer***

If a magistrate is satisfied that there has been an unreasonable failure on the part of the defence lawyer to participate in a case conference or file a case conference certificate, and it is in the interests of justice to do so, the magistrate may commit the accused for trial or sentence without a case conference, or adjourn the committal proceedings.<sup>39</sup>

Note: If the matter is committed for trial without filing a case conference certificate and the accused later pleads guilty, this may have an impact on the application of the fixed statutory sentence discount.

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<sup>36</sup> Criminal Procedure Act 1986, s 74 (2)

<sup>37</sup> Criminal Procedure Act 1986, s 76

<sup>38</sup> Criminal Procedure Act 1986, s 76 (2) and s 76 (4)

<sup>39</sup> Criminal Procedure Act 1986, s 76 (3) and s 76 (4)

## 9 AFTER THE CASE CONFERENCE - THE CASE CONFERENCE CERTIFICATE

Section 75(1) of the *Criminal Procedure Act* requires the case conference certificate to be in the form prescribed by the regulations. The form of the case conference certificate is prescribed at Form 1B of the Criminal Procedure Regulation 2017.

### 9.1 What is a case conference certificate?

After all case conferences are completed the prosecution and defence will file a case conference certificate.<sup>40</sup> The certificate will record any offers made by the prosecution or the defence.<sup>41</sup> The certificate will be filed with the court and will only be admissible at the time of sentencing, in relevant appeals, reversal of plea applications, and in professional misconduct proceedings.<sup>42</sup>

All relevant plea discussions from the case conference/s and during the case conferencing period should be recorded on the case conference certificate. The case conference certificate will also include a declaration by the accused's lawyer that they have given the accused advice on the operation of the fixed statutory sentence discount scheme, if it applies in their case (refer to section 9.3).<sup>43</sup>

### 9.2 Purpose of the case conference certificate

The sentencing judge will refer to the case conference certificate to understand the utilitarian value of the plea and, for applicable offences, determine the application of the fixed statutory sentencing scheme outlined in Division 1A of Part 3 of the *Crimes (Sentencing Procedure) Act 1999*.

Where applicable, to ensure the accused receives the benefit of the fixed statutory sentencing scheme, which drops significantly on the case being committed to a higher court, any offers to plead guilty made during the case conference must be recorded on the case conference certificate. The case conference certificate can also include other details such as agreed or disputed facts to help with a disputed facts hearing or assist with narrowing the issues for trial.

### 9.3 Contents of the case conference certificate

To help guide prosecution and defence lawyers, the legislation carefully sets out the matters that should be recorded on the case conference certificate<sup>44</sup>, which are:

- the offences on the charge certificate before the case conference
- any offers by the accused to plead guilty to an offence specified in the charge certificate or to different offences
- any offers by the prosecution to the accused to accept guilty pleas to an offence specified in the charge certificate or to different offences
- whether the accused or prosecution has accepted or rejected any such offers
- the offences for which the prosecution will seek committal for trial or sentence
- any back up or related offence or offences relating to charges against the accused

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<sup>40</sup> Criminal Procedure Act 1986, s 74; Local Court Practice Note Comm 2 (fourth step); Children's Court Practice Note 12, 9.10

<sup>41</sup> Criminal Procedure Act 1986, s 75

<sup>42</sup> Criminal Procedure Act 1986, s 78

<sup>43</sup> Criminal Procedure Act 1986, s 75

<sup>44</sup> Criminal Procedure Act 1986, s 75

- if an offer made to or by the accused 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
- any offences that will be dealt with under s 33 of the *Crimes (Sentencing Procedure Act) 1999*
- whether or not the prosecutor has notified the accused 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.

The case conference certificate will also include a declaration from the defence lawyer confirming the following matters have been explained to the accused<sup>45</sup>:

- the operation of the fixed statutory sentence discount scheme (where applicable)
- the penalties applicable to the offences certified in the charge certificate and to any other offences that are the subject of offers
- the effect of the applicable penalty if the accused were to plead guilty to any offence at different stages of the proceedings.

Where the accused maintains pleas of not guilty, the accused should sign the case conference certificate declaring that his or her lawyer has explained the following matters<sup>46</sup>:

- the operation of the fixed statutory sentence discount scheme (where applicable)
- the penalties applicable to the offences certified in the charge certificate and to any other offences that are the subject of offers
- the effect of the applicable penalty if he or she were to plead guilty to any offence at different stages of the proceedings.

The accused failing to make this declaration will not invalidate the case conference certificate.

The prosecutor and defence lawyer must sign the case conference certificate before it can be filed.<sup>47</sup>

#### 9.4 Creating the case conference certificate

A case conference certificate should only be finalised by prosecution and defence lawyers after all case conferences are held.<sup>48</sup>

After the final case conference, the prosecutor will finalise the case conference certificate and liaise with the defence lawyers to ensure it accurately reflects the content of plea discussions leading up to and including the case conference. Following agreement about the contents of the case conference certificate, the lawyers will sign it.

The accused is only required to sign the case conference certificate if they intend to plead not guilty. If the accused needs to sign the certificate and he or she is in custody, the defence lawyer will need to consider on a case by case basis whether it is appropriate to fax, post or hand deliver the case conference certificate for signing. In some instances, faxing the entire case conference certificate to the accused may endanger his or her safety if the certificate contains sensitive information.

Where more appropriate, the declaration can be placed on a separate page and faxed to the accused in custody.

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<sup>45</sup> Criminal Procedure Act 1986, s 72 (2)

<sup>46</sup> Criminal Procedure Act 1986, s 75 (2)

<sup>47</sup> Criminal Procedure Act 1986, s 74 (3)

<sup>48</sup> Criminal Procedure Act 1986, s 74 (2)



Lawyers should aim to settle the content of the case conference certificate before the mention for filing in the Local Court.<sup>49</sup> The certificate may be signed on the day the case conference certificate is filed in court.

## 9.5 Filing the case conference certificate

After the case conference certificate is finalised, the prosecutor will file it with the Court. On filing it with the court the case conference certificate will be placed in a sealed envelope and retained on the court file.

## 9.6 Filing an amended charge certificate

If the charges change as a result of plea discussions at the case conference, the prosecutor must file an amended charge certificate together with any new CANs.<sup>50</sup> The amended charge certificate and the attached CANs should be filed with the court before the case conference certificate is filed. This can occur on the same day.

Note: Procedurally, the prosecutor should file the amended charge certificate first as this will outline any new charges that the accused has agreed to plead guilty to in the case conference certificate.

## 9.7 Accessing the case conference certificate after it is filed with the court registry

Only the prosecution and defence lawyers involved in the case are allowed to access the case conference certificate from the court registry. Granting access to these lawyers is limited to exceptional circumstances, including:

- where an accused changes legal representation, or
- if the case conference certificate is lost or misplaced
- for the purposes of limited proceedings listed under section 78(2) of the CPA.

Before requesting a copy of the case conference certificate from the court registry, the lawyer must make all reasonable efforts to obtain a copy from other lawyers involved in the proceeding. In a situation involving a change in lawyer, the new lawyer should approach the accused's previous lawyer for a copy.

Limiting when a lawyer can access a case conference certificate from the court registry will help protect the confidentiality of the document.

## 9.8 Making offers after the case conference certificate is filed



If a further offer is made after the case conference certificate is filed but before committal, this offer will need to be filed with the court and annexed to the case conference certificate

If a further offer is made, the old envelope containing the case conference certificate will be placed inside a new envelope with the further offer.

Further offers will be treated as if they formed part of the case conference certificate.<sup>51</sup> Further offers do not have the same signature requirements but should be in writing and record the response to this offer.<sup>52</sup>

<sup>49</sup> Local Court Practice Note Comm 2 (fourth step), p 4

<sup>50</sup> Criminal Procedure Act 1986, s 67 (5)

<sup>51</sup> Criminal Procedure Act 1986, s 77

<sup>52</sup> Criminal Procedure Act 1986, s 77



## 10 CONFIDENTIALITY OF THE CASE CONFERENCE AND CERTIFICATE

The legislation deals with three areas relating to confidentiality:

- confidentiality of the case conference certificate
- admissibility of case conference material
- prohibiting publication of case conference material

### 10.1 Confidentiality of the case conference certificate

The legislation directs that the matters that are specified in a case conference certificate are to be treated as confidential.<sup>53</sup> This includes further offers, which should be treated as if they formed part of the case conference certificate.<sup>54</sup>

Note: the case conference certificate may be admissible in certain proceedings (refer to section 10.2).

### 10.2 Admissibility of case conference material

Case conference material means<sup>55</sup>:

- a case conference certificate and any further offers annexed to that certificate
- evidence of anything said between the parties or of any admission made during a case conference, or
- evidence of anything said between the parties or of any admission made during plea discussions after a case conference (but before the case conference certificate is filed) concerning a plea to be made by, or offers made to or by, an accused person.

As a general rule case conference material is inadmissible. However, there are some exceptions to this, and case conference certificate may be admitted in the following proceedings<sup>56</sup>:

- relevant sentence proceedings
- relevant appeals proceedings
- where the accused changes his or her plea
- professional misconduct proceedings.

The disclosure of any information during or in relation to a case conference will not be considered a pre-trial disclosure for the purposes of s 22A of the *Crimes (Sentencing Procedure) Act*.<sup>57</sup>

### 10.3 Prohibition on publication

The legislation prohibits any person from publishing case conference material including the case conference certificate. Publish means disseminate or provide access to one or more persons by means of the internet, radio, television or other media. A fine applies to this provision.<sup>58</sup>

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<sup>53</sup> Criminal Procedure Act 1986, s 79

<sup>54</sup> Criminal Procedure Act 1986, s 77

<sup>55</sup> Criminal Procedure Act 1986, s 78 (5)

<sup>56</sup> Criminal Procedure Act 1986, s 78

<sup>57</sup> Criminal Procedure Act 1986, s 81

<sup>58</sup> Criminal Procedure Act 1986, s 80

This prohibition is in addition to the statutory non-publication provisions that apply to the publication of information that is likely to identify a child involved in criminal proceedings<sup>59</sup>.

## 11 GLOSSARY OF TERMS

**ALS:** Aboriginal Legal Service NSW/ACT.

**Amended charge certificate:** Created and filed in circumstances where the charges are amended, changed or withdrawn after the filing of the original charge certificate.

**Briefing agency:** agency who has prepared the brief of evidence for the prosecution. This can include the NSW Police Force, Australian Federal Police, Border Force, etc.

**CAN:** Court Attendance Notice, which is a formal notice to a person charged with a criminal or traffic offence to attend court to answer the charges.

**CDPP:** Commonwealth Director of Public Prosecutions.

**Charge certificate:** A document that is signed by the prosecutor that:

- relates to the offences specified in the court attendance notice for the committal proceedings, and
- specifies the offences that are the subject of the proceedings against the accused person, and
- sets out the details of the offences in a way that is sufficient for the purposes of an indictment or an averment in an indictment, and
- specifies any back up or related offences, and
- if applicable, confirms that proceedings against the accused person for other specified offences are no longer being proceeded with, and
- contains any other matters prescribed by the regulations for the purposes of this section.

**Charge certification:** Charge certification occurs after the brief of evidence is served and involves the prosecutor reviewing the charges and filing a charge certificate confirming, changing or withdrawing the charges. The seniority of the prosecutor responsible for certifying the charges in any particular case will depend on its complexity.

**Charge certifier:** the senior lawyer within the ODPP/CDPP who is responsible for the process of charge certification.

**CSNSW:** Corrective Services NSW.

**JUST Connect:** A web-based video conferencing and collaboration system that includes the coordination and booking of a wide range of AVL and face to face meetings types, including legal conferences, court appearances and mandatory criminal case conferences. It will be used by Courts and Tribunal Services, NSW Police Force, ODPP, CDPP, Legal Aid, the ALS, Corrective Services NSW, Juvenile Justice. *JUST Connect* will be used to book mandatory criminal case conferences using Legal Aid and ODPP meeting rooms and CSNSW AVL suites, as well as desk-top AVL applications.

**Legal Aid:** Legal Aid NSW.

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<sup>59</sup> Children (Criminal Proceedings) Act 1987, Part 2 Division 3A

**Mandatory Criminal Case Conference (case conference):** A formal meeting between senior lawyers for the defence and the prosecution (refer to section 3 – Overview of the mandatory criminal case conference. Throughout this document, it is also referred to as a ‘case conference’).

**Mandatory Criminal Case Conference Certificate (case conference certificate):** a document confirming the outcome of the case conference (refer to section 10 – Completing the case conference certificate).

**ODPP:** Office of the Director of Public Prosecutions NSW.

**Prosecutor:** A collective term covering solicitors for the ODPP and CDPP, and trial advocates and Crown Prosecutors for the ODPP. Where necessary, these roles are distinguished in some sections of the guide.

**Prosecuting authority:** A collective term to describe various prosecution agencies, which includes NSW Police Force, ODPP, CDPP and other investigative agencies.

## Appendix A

### Correctional centres with dedicated case conference studios

- 1 Bathurst Correctional Centre
- 2 Cessnock Correctional Centre 250 max
- 3 Dillwynia Correctional Centre
- 4 John Morony Correctional Centre (JM 1)
- 5 Junee Correctional Centre
- 6 Kariong Correctional Centre
- 7 Lithgow Correctional Centre
- 8 Long Bay Hospital 2
- 9 Metropolitan Special Programs Centre
- 10 Mid North Coast
- 11 Parklea Correctional Centre (TBC)
- 12 Silverwater Women's Correctional Centre
- 13 Wellington Correctional Centre

## Appendix B – Other useful resources

- *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017*
- *Criminal Procedure Act 1986*
- Criminal Procedure Regulation 2017
- *Crimes (Sentencing Procedure) Act 1999*
- Local Court Practice Note Comm 2
- Children’s Court Practice Note 12
- Brief Protocol between ODPP and NSW Police
- Legal Aid – Guide for Defence Practitioners
- JUSTConnect Booking Guide