# Early Guilty Pleas: A New Ball Game

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This paper is periodically updated. The last update was on 4 April 2018

## Introduction

The *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* ("the Act"), which was passed by parliament on 18 October 2017,[1] introduces a legislative scheme ("the scheme") that fundamentally changes the nature of committal proceedings, so that the Magistrate no longer determines the sufficiency of the prosecution evidence. Instead, their role is supervisory, facilitating negotiations between the parties via case conferences and, in certain circumstances, permitting the taking of evidence of a prosecution witness or witnesses, before committing the matter to the higher court for trial, sentence or a fitness hearing.[2] The Act also imposes mandatory caps on sentencing discounts in relation to state offences for the utilitarian value of a guilty plea ("mandatory sentencing discount caps").

The scheme is the culmination of a major report by the NSW Law Reform Commission ("the LRC") published in December 2014 titled "Encouraging Appropriate Early Guilty Pleas"[3] ("the LRC Report"), and consultations undertaken subsequently by the NSW Department of Justice with stakeholders; including the NSW Bar Association, the Public Defenders, the Law Society, Legal Aid NSW and the Aboriginal Legal Service ("the stakeholder negotiations").

The Act is part of a package of three cognate Bills, the other two being the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017* and the *Crimes (High Risk Offenders) Amendment Bill 2017*. It is expected to commence on 30 April 2018, although this is not confirmed. Thus far, the Chief Magistrate has updated the Local Court Practice Note on Committals ("the Practice Note") to include a presumptive timetable for Local Court proceedings and the NSW DPP and the NSW Police Commissioner have released a Protocol ("the Protocol") governing their responsibilities to each other under the legislation. As yet, Regulations have not been published.

This paper summarises and discusses the key aspects of the scheme but is not intended to be a comprehensive summary; it is of course important to read all the statutory provisions thoroughly. More so than is usually the case, it is important to read the new legislation alongside the 2nd Reading Speech.[4] This is because much of the intended operation of the scheme is administrative rather than court-based, so the legislation only tells part of the story. For the same reason, it is also likely that the 2nd reading speech will be an important aid in

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1 The Act amends a number of statutes, including the *Criminal Procedure Act 1986*, the *Children (criminal Proceedings) Act 1987,* the *Crimes (Sentencing Procedure) Act 1999* and the *Mental Health (Forensic Provisions) Act 1990*.

2 The definition of "committal proceedings" in s.3, *Criminal Procedure Act 1986*, which presently is "committal proceedings means 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" will be replaced by: "committal proceedings means proceedings before a Magistrate for the purpose of committing a person charged with an indictable offence for trial or sentence."

3 The Report, No. 141, can be downloaded from the NSW LRC's website, at: http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_completed_projects.aspx

4 Hansard, Legislative assembly, 11.10.17, page 1.

interpreting the legislation.[5] I am occasionally critical of aspects of the material, and trust that in due course there will be a proper assessment of the scheme's operation. It is disappointing that legislation introducing such a significant change to criminal procedure, involving qualifications of fundamental rights of the accused, did not include provision for a review in due course.

## The New Committal Procedure

### Overview

Schedule 1 of the Act introduces a re-drafted Part 2 of Chapter 3 of the *Criminal Procedure Act 1986*, which sets out a new Local Court procedure for the committal of NSW and Commonwealth indictable offences. References in this section, dealing with the new committal procedure are to the new sections of that Act, unless otherwise indicated. Its application to children is considered separately, below.

A statutory outline of the new committal process is provided by s.55:

***55 Outline of committal proceedings steps***

*Subject to this Part, the steps for committal proceedings are generally as follows:*

*(a) committal proceedings are commenced by the issuing and filing of a court attendance notice,*

*(b) a brief of evidence is served on the accused person by the prosecutor,*

*(c) a charge certificate setting out the offences that are to be proceeded with is filed in the Local Court and served by the prosecutor on the accused person,*

*(d) if the accused person is represented, 1 or more case conferences are held by the prosecutor and the legal representative for the accused person,*

*(e) if the accused person is represented, a case conference certificate is filed in the Local Court,*

*(f) the accused person pleads guilty or not guilty to each offence being proceeded with and the Magistrate commits the accused person for trial (if the accused person pleads not guilty) or for sentence (if the accused person pleads guilty).*

A more comprehensive overview of the legislative scheme was provided by the Hon. Mark Speakman SC in his 2nd Reading Speech introducing the Bill,[6] incorporating some of the out-of-court aspects and providing a rationale for the in-court elements:

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5 Interpretation Act 1987 NSW, s.34(2)(f).

6 Hansard, Legislative Assembly, 11.10.17, page 1.

*There are five elements to the legislative reforms.*

*First, the investigating agency that charged the accused person with the offence, usually the NSW Police Force or the Australian Federal Police, will provide a simplified brief of evidence to the Office of the Director of Public Prosecutions [ODPP] or its Commonwealth equivalent, the Commonwealth Director of Public Prosecutions [CDPP].*

*Secondly, a senior prosecutor in the ODPP or CDPP will review the evidence and file a charge certificate with the Local Court that confirms the charges that will proceed to trial and identifies any charges that should be withdrawn. This will reduce the likelihood that the charges will change closer to the trial date and provides certainty to the defence.*

*Thirdly, the prosecutor and the defence lawyer will then be required to have a case conference to discuss the case and to determine whether there are any offences to which the accused person is willing to plead guilty.*

*Fourthly, the bill abolishes the substantive committal decision and committal hearings so that Magistrates will no longer be required to consider the evidence and determine whether there is a reasonable prospect that a jury, properly instructed, would convict the accused person of the offence. Instead, Magistrates will need to be satisfied that the new steps certifying the charges and holding a case conference have been completed before committing the matter to a higher court for trial or sentence. The NSW Law Reform Commission recommended that committal hearings be abolished because Magistrates were exercising the discretion to discharge in only 1 per cent of cases. Under the reform, the prosecutor will perform a gatekeeping role earlier in the process by certifying which charges will proceed.*

*Fifthly, the bill prescribes sentencing discounts given for the utilitarian value of guilty pleas by introducing a statutory sentence discount scheme. This will provide certainty and ensure that large discounts cannot be granted for guilty pleas that are made late in the process.*

**The Chief Magistrate's Practice Note**

The first four of the 2nd Reading Speech elements comprise the Local Court stage of proceedings. They are the subject of an updated Practice Note for committal hearings issued by the Chief Magistrate, Judge Graeme Henson, ("the Practice Note"), which is to commence on 30 April 2018. It is titled: *Local Court Practice Note Comm 2: Procedures to be adopted for committal proceedings in the Local Court pursuant to the Early Appropriate Guilty Plea Scheme*. In a covering letter to affected agencies, Judge Henson noted that the operation of the practice note will be reviewed after 12 months.[7]

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[7] eg letter Judge Henson to Snr Public Defender, 27.3.18.

The Practice Note reproduces some provisions from the earlier version that continue to apply and, in relation to the scheme, sets out a timetable in a sequence of four numbered "steps", meaning mentions. Note that they do not strictly align with the Attorney General's four "elements". The events in the Practice Note at each step, or mention, are:

1. The first mention: to order that the brief be served and the matter be adjourned for eight weeks for that to occur [PN 7];

2. The second mention: to confirm the service of the brief and adjourn the matter for 6 weeks, for the filing of the charge certificate [PN 8];

3. The third mention: the charge certificate is filed [PN 9.1] and, unless a plea of guilty is entered:
    a. if the accused is legally represented, the matter is adjourned for eight weeks (six weeks for a case conference to occur and two weeks for the case conference certificate to be finalised) and the date for the case conference is to be advised. If no date is advised, the matter is adjourned for 7 days to enable the setting of a date [PN 9.2(a)].
    b. If the accused is unrepresented, the matter is adjourned for two weeks to enable toe accused to obtain legal advice and/or representation [PN 9.2(b)].
    c. If an application is made for the examination of a prosecution witness, the matter is adjourned for two weeks for the defence to file and serve submissions in support of its application pursuant to ss. 82 or 84 and a further mention for reply in four weeks and, where necessary, for a hearing date to be set for any contested application. A failure by the defence to comply with the four-week timetable will result in a presumption that the application is abandoned [PN 9.2(c)];

4. The fourth mention:
    a. if the accused is legally represented, the case conference certificate is filed together with any amended charge certificate. The accused enters a plea and is committed for trial or sentence [PN 10.1(a)].
    b. if the accused is not legally represented, he or she is committed for trial or sentence subject to the Magistrate, in compliance with s.98, being satisfied that the accused has had a reasonable opportunity to obtain legal representation for, or advice about, the committal proceedings [PN 10.1(b)]

There is a general provision that permits the court to be flexible in implementing this timetable:

***5. Matters to proceed expeditiously and in accordance with timetable***

*5.1 Committal proceedings are to progress as expeditiously as possible and in accordance with the following timetable unless the Court is satisfied that departure from the timetable is in the interests of justice.*

The Practice Note has a flow chart (Attachment A of the Practice Note), which is attached to this paper (Attachment B).

**The NSW DPP/Police Protocol**

The protocol between the NSW Police Commissioner and the NSW DPP, referred to by the Attorney General, was executed on 23 February 2018. It is titled: "*Agreement between NSW Police Force and Office of the DPP (NSW) Concerning the Content and service of an Early Appropriate Guilty Plea Brief and Charge Certification*." ("the Protocol"). Other agencies, such as the NSW Bar Association, the NSW Law Society and Legal Aid NSW, were not party to the consultations leading to the agreement.

The Protocol identifies three areas of agreement, in respect of state offences (indicatable offences and serious children's indictable offences):

*• The content and service of the Early Appropriate Guilty Plea Brief ("the brief') by the NSWPF to the ODPP*
*• Charge certification and*
*• The transfer of the responsibility for prosecution of offences from Police Prosecutors to the ODPP.*

This paper refers to the parts of the Protocol dealing with each stage of the Local Court proceedings in the context of a consideration of the scheme generally. There are some other aspects not considered, dealing with responsibility for communications with victims (Part 8), the resolution of disputes between the police and DPP (Part 9) and the fact that the Protocol will be reviewed in two years (Part 10).

**The Brief of Evidence**

<u>The Extent of Disclosure: The Content and Form of the Brief of Evidence</u>

As noted above at s.55(b), and as set out more fully at s.61, a "brief of evidence" is served on the accused person by the "prosecutor":

***s.61 Requirement to disclose evidence***

*(1) The prosecutor must, after the commencement of committal proceedings and on or before any day specified by order by the Magistrate for that purpose, serve or cause to be served*

*on the accused person a brief of evidence relating to each offence the subject of the proceedings.*

*(2) This Division is subject to, and does not affect the operation of, section 15A of the Director of Public Prosecutions Act 1986 or any other law or obligation relating to the provision of material to an accused person by a prosecutor.*
*Note. Examples of such a law are laws about privilege and immunity in relation to evidence.*

The Protocol confirms the Attorney General's observations on the first element; that in respect of charges laid by the NSW police, they will have carriage of the matter until the brief has been served and a timetable set to file the charge certificate; that is, up to and including the Practice Note's second step. From and including the third step, in respect of state charges, the NSW DPP will appear.[8]

Section 15A of the *Director of Public Prosecutions Act 1986* ("the DPP Act") concerns the continuing duty of Law enforcement officers investigating alleged indictable offences to disclose to the NSW DPP ... *all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person.* It is useful to be aware of the scope of disclosure required by s.15A:[9]

**15A Disclosures by law enforcement officers**

*...*

*(5) The duty imposed by this section is in addition to any other duties of law enforcement officers in connection with the investigation and prosecution of offences.*

*(6) The duty imposed by this section does not require law enforcement officers to provide to the Director any information, documents or other things that are the subject of a claim of privilege, public interest immunity or statutory immunity. The duty of a law enforcement officer in such a case is to inform the Director of:*
*(a) the existence of any information, document or other thing of that kind, and*
*(b) the nature of that information, document or other thing and the claim relating to it.*

*(7) However, a law enforcement officer must provide to the Director any information, document or other thing the subject of a claim of privilege, public interest immunity or statutory immunity, if the Director requests it to be provided.*

*(8) The duty imposed by this section does not require law enforcement officers to provide to the Director any information, document or other thing if to do so would contravene a statutory publication restriction. The duty of a law enforcement officer in such a case is to*

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[8] The Protocol, page 4.

[9] The terms of the Disclosure Certificate are set out in Schedule 1 of the *Director of Public Prosecutions Regulation 2015*, consistent with s.15A of the *DPP Act*.

*inform the Director of the following, but only to the extent not prohibited by the statutory publication restriction:*

*(a) the existence of any information, document or other thing of that kind,*

*(b) the nature of that information, document or other thing.*

The content and form of the brief of evidence is critical for the defence because it constitutes the only version of the prosecution material available to the accused at the only stage of proceedings when a guilty plea could attract the maximum cap of a 25% utilitarian discount. Its contents are set out in s.62:

***s.62 Matters to be disclosed in brief of evidence***

*(1) The brief of evidence must contain the following:*

*(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,*

*(c) copies of any other material obtained by the prosecution that would affect the strength of the prosecution's case.*

*(2) The material contained in the brief of evidence may be, but is not required to be, in the form required under Part 3A of Chapter 6 or in any particular form otherwise required for the material to be admissible as evidence.*

*(3) The regulations may specify requirements for material included in a brief of evidence.*

*(4) The Minister is to consult with the Minister for Police before a regulation is made under subsection (3).*

In the stakeholder negotiations, the form and content of the "brief of evidence" was a contentious issue. As the Attorney General noted in his 2nd Reading Speech (page 7):

*The NSW Law Reform Commission recommended introducing a definition that included only the evidence for the prosecution case. In consultation with stakeholders, this definition was identified as being too narrow to properly support disclosure in the new committal process. New section 62 (1) provides a wider definition that also includes evidence relevant to the defence case and evidence relevant to the strength of the prosecution case, consistent with the current duty of disclosure expressed in the Director of Public Prosecutions' guidelines. The intent of this expanded definition of a brief of evidence is to ensure sufficient disclosure for the prosecution to properly assess a case and to certify the charges, and for the defence to make informed decisions about the case and to determine whether to enter a guilty plea.*

Sub-section 62(2) relieves the police of serving a brief that is in admissible form, which is a fundamental change from current procedure. The Attorney General explained (page 7):

*New section 62 (2) provides that material in the brief need not be in an admissible form. There will not be a less robust investigation, nor will there be changes to best practice for the collection of evidence. The reforms are about ensuring that the brief can be served earlier by reducing some of the formal requirements around how evidence is to be presented that currently contribute to delay in criminal cases. Currently, all material in the brief of evidence must be provided in a form that makes it admissible as evidence in the Local Court. In practice, this means that all prosecution evidence must be provided in written statement form. "Written statement form" means that a number of technical requirements, currently outlined in sections 74 to 90 of the Criminal Procedure Act and the associated Local Court rules, must be complied with.*

This commitment by the Attorney General to a comprehensive brief of evidence, albeit not necessarily entirely in admissible form, is welcomed by the defence. It is clearly in the interests of the prosecution as well. It is a rejection of the LRC's proposal, which was explained in the LRC Report's executive summary in these terms:[10]

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

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

The semantics is important; the legislation has not adopted the term advanced by the LRC of the "initial" brief of evidence, but simply refers to "the brief of evidence", suggesting what is currently understood by the ordinary use of that term as to content, which is relevant if an issue of statutory interpretation should arise.

Part 3A of Chapter 6 is introduced as part of the scheme, although it largely replicates current sections concerning the form of statements. However, it has this significant additional provision:

***s.283H Regulations relating to requirements for statements***

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[10] LRC Report page xxx.

*(1) The regulations may make provision for or with respect to the use of statements to which this Part applies.*

*(2) Without limiting subsection (1), regulations may be made for or with respect to the following:*

*(a) the form of statements,*

*(b) the signing of and endorsements on written statements by statement makers or other persons,*

*(c) the rejection of statements, or parts of statements, that do not comply with provisions made by or under this Part,*

*(d) other requirements for written or other statements,*

*(e) the giving of notice of the use of written or other statements,*

*(f) evidentiary presumptions about the stated age and signature of a person making a statement and other matters relating to any such statement,*

*(g) service of a written or other statement and copies of proposed exhibits identified in the statement (or a notice relating to inspection of them) on the accused person by the prosecutor.*

The Protocol has cast some doubt on the brief's contents (see below) and it remains to be seen how the Regulations, when published, impact on this understanding.

There is a continuing obligation on the DPP to serve any material that subsequently comes into their possession that fits these criteria [s.63].

In his 2nd Reading Speech, the Attorney General said that although admissible form will not always be required, it may still be requested (page 7):

*Given a Magistrate will no longer be considering the evidence before committal, it is no longer necessary that the entire contents of the brief of evidence comply with these requirements to be admissible as evidence. However, the senior prosecutor in the ODPP or the CDPP may require evidence in an admissible form to properly assess the case and to certify the charges. A protocol between the NSW Police Force and the DPP will provide guidance on a case-by-case basis as to when the alternative, simpler form will be sufficient.*

When the defence requires an item in admissible form in order to better assess its weight, so as to appropriately advise their client, the first avenue should be to request the prosecution to acquire it. In many circumstances it will become relevant to the prosecution as well, by virtue of its potential significance to the defence and its subsequent importance in the case conference achieving its statutory purpose.

The Protocol Parts 2 and 3: the Content and Form of the Brief

It is pertinent that "the brief" is defined differently in the Protocol to how it was referred to by the Attorney General; it is not simply the brief of evidence, but a particular type of brief of evidence; *"the Early Appropriate Guilty Plea Brief".*[11]

The Protocol appropriately distinguishes between content and form. Consistent with the 2nd Reading Speech, there is a commitment to a full investigation in which all "relevant" evidence is obtained, but an acknowledgement that not all the material will be in admissible form (page 1):

*It is not the purpose of the brief to provide all the evidence in the admissible form that may be required should the matter proceed to trial. This Protocol, in allowing for evidence in a brief to be provided in an alternative form does not remove the requirement of NSWPF to fully investigate the matter and obtain all relevant evidence.*

Thereafter, however, are contradictory statements as to the brief's contents, some of which conflict with the legislative requirements.

Part 2 of the Protocol is titled "*Purpose of the Brief*":

*The brief is to provide the evidence necessary to satisfy the elements of the offence to:*
- *Enable the ODPP to certify the charge(s) laid by the NSWPF against an accused and*
- *Inform an accused about the available evidence against them and the available materia1 that is reasonably capable of being relevant to their defence.*

There are differences in the language of the two dot-points from their statutory counterparts which appear to "read down" the disclosure obligation on the police.[12] Section 62(1)(a) requires disclosure of "*copies of all material obtained by the prosecution that forms the basis of the prosecution's case"* (underlining added), whereas the counterpart in Part 2 of the Protocol is limited to: "*the evidence necessary to satisfy the elements of the offence to ... enable the ODPP to certify the charge(s) laid by the NSWPF".*

Similarly, Section 62(1)(b) requires disclosure of *"copies of any other material obtained by the prosecution that is reasonably capable of being relevant to the case for the accused person"*, whereas dot-point 2 is restricted to "available evidence" and "available material". Material "obtained" by the police in that context implies material that has come into the possession of the police that is reasonably capable of being relevant, whereas "available"

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[11] The Protocol, Part 1, page 1.

[12] As noted earlier, statutory references to "the prosecution" in the pre-charge certificate stage are to be understood as references to the police, so that, correctly understood, s.62 stipulates what the police are to include in the brief of evidence.

evidence implies a filtering of that material. Do the police take the view that there may be evidence "obtained" which, although caught by s.62(1)(b), is not, in their opinion "available"?

Whereas the two dot-points approximate s.62(1)(a) and (b), there is no reference in Part 2 to the substance of s.62(1)(c): *copies of any other material obtained by the prosecution that would affect the strength of the prosecution's case.*

The next Part (*Part 3: Contents of the Brief*) lists ten items to be included in the brief in dot-point form, the last three of which clearly relate to s.62(1)(a)-(c):

• *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*

The first and third of these dot-points faithfully state the s.62(1)(a) and (c) obligations, but the second dot-point is a significant "reading down" of s.62(1)(b). The police are required by s.62(1)(b) to disclose all material obtained *"that is reasonably capable of being relevant to the case for the accused"* and by s.61(2) to comply with s.15A of the *DPP Act* (*... all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist ... the case for the accused person),* not material that "*is relevant*". It also contradicts the statement of this aspect in Part 2 of the Protocol, 2nd dot-point.

These inadequate and conflicting statements in Parts 2 and 3 of the Protocol, on the crucial issue of guidance to the police as to the content of the brief, are puzzling. One wonders why s.62(1) was not simply reproduced. Its language is hardly challenging. Clearly the terms of the Protocol cannot override the statutory obligations of s.62(1) and (2).

The Protocol states that:
*The brief need not include the following evidence if it has not been obtained:*
• *Statements from corroborating police officers*
• *Forensic statements*
• *Expert witness statements*
• *Formal custody statements*
• *Continuity statements*

For the purposes of the case conference and other negotiations, in most cases the material in the first and last two dot-points are unnecessary; but was does "Forensic statements" and "Expert witness statements" mean, and in what circumstances can negotiations safely proceed without the police obtaining them? There is no stated criterion, other than whether the police happen to have obtained them. An expert statement obtained by the prosecution in a "dangerous

driving occasioning death" case, examining the contributing factors to a fatal motor vehicle accident is likely to be crucial to an early resolution of the case; an expert statement as to purity of a drug admixture, as opposed to a preliminary analysis, in a drug trafficking case may not be, depending on the client's instructions.

If an expert or forensic report is critical to the prosecution establishing an element of the offence, the prosecution will not certify the charge, thus effectively obliging the police to obtain the report. However, there is a grey area where a report is advisable, to negate a circumstance arising from the evidence that may be inconsistent with guilt; in other words, as part of a "full" investigation as opposed to the need to obtain evidence to establish an element.

The Protocol: Material that is Not Required in Admissible Form

Appended to the Protocol is a table ("Appendix A") listing items which variously must be, or may not be, in admissible form. It is reproduced as Attachment A to this paper. Items that must be in admissible form include "key" police statements, victim's signed statements or interview transcript, material containing admissions by the accused, the accused's ERISP and transcripts of key TIs and LDs. Material not required to be in admissible form includes a hand-written signed statement in a police notebook of a non-key witness, a presumptive drug test result rather than a formal drug analysis and a summary of non-key TIs and LDs together with an explanation of any codes used and key calls identified, rather than transcripts.

Regulations: the Content of the Brief

Section 62(3) provides that the regulations may specify requirements for material included in a brief of evidence. Regulations have not yet been published. When they are, this paper will be updated to consider them.

The Protocol Part 4: Certification by Police of Compliance

Part 4 of the Protocol (page 2) requires the "relevant supervisor" of the OIC of the case to certify that the brief meets the requirements of Parts 2 and 3 of the Protocol, specifying specify some aspects in particular, including:

- *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.*

Whereas Part 2 refers to there being a "full investigation", Part 4 requires something less; confirmation of a "proper investigation".

As noted above, compliance with Parts 2 and 3 does not meet the standard of s.62(1), yet police will be guided by the Protocol in fulfilling their responsibilities, as they understand them. This

is in circumstances where it is not possible for the defence, or prosecution for that matter, to double-check statutory compliance. Without access to the investigative material, it is not possible to know whether, for example, all material "that is reasonably capable of being relevant to the case for the accused" [s.62(1)(b)] has been disclosed.

As to certification, one would think that both the OIC and the supervisor should certify compliance, since the OIC has the relevant direct knowledge of the investigation product, what parts of it has been disclosed and on what criteria.

The Protocol also reiterates the statutory obligation [s.61(2)] to complete the Disclosure Certificate pursuant to s.15A of the *DPP Act*, which requires completion of the certificate by the "*police officer ... who is responsible for [the] investigation*" [s.15A(9) of the *DPP Act*].

The Protocol Part 5: Requests for Further Evidence

Part 5 is brief, and is set out in full:

***Part 5 - Requests for further evidence Further evidence may be requested where:***

*1. The ODPP determines that there is inadequate material to certify the charge/s*

*2. It is necessary to facilitate an early appropriate guilty plea at a Case Conference*

*The ODPP should make requests for further evidence by requisition to the NSWPF.*

*Prior to making a requisition to the NSWPF, the ODPP should 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.*

*The NSWPF will confirm receipt of a requisition within 48 hours of it being sent and agree with the ODPP on a timeframe for answering the requisition.*

The Protocol does not afford an outright power to the DPP to demand additional material. The DPP is required to first consider the significance of the material sought in terms of resolving the matter and the police resources involved, and the police decide the timetable to comply.

Neither the legislation nor the Protocol provides an expressly-stated avenue for the defence to seek further material from the police, for the purposes of the case conference and other pre-committal negotiations, whereas there is for the DPP. In circumstances where the defence are receiving less than a trial brief, certainly in form and perhaps in content, one would think that as a matter of logic and balance, there should be a statutory mechanism for the defence to obtain what, in light of their instructions, it considers to be necessary.

That said, the good offices of the DPP should be engaged, pursuant to Part 5, point 2 of the Protocol, to seek material that the Defence may wish to have.

**Early Briefing of Counsel**

The Attorney General anticipated that there would be continuity of both prosecution and defence counsel, from the Local Court to trial (page 6):

*In addition to the five elements of legislative reform, additional funding is being provided to the Office of the Director of Public Prosecutions and Legal Aid to ensure the continuity of senior lawyers for both the prosecution and the defence from start to finish. Currently, due to the pressures being placed on the entire criminal justice system, senior prosecutors and defence lawyers often become involved in cases only very late. Having the same senior prosecutor and defence lawyer in the case throughout its life will increase certainty about the charges, avoid last-minute changes in charges and pleas at trial and improve communications with victims about the process.*

There is no legislative obligation to, or mention of, continuity of counsel. While it is a sensible policy that would contribute greatly to fair, early resolutions of matters and shortened, focussed trials, it remains an aspirational goal subject to the uncertainties of criminal barristers' diaries and ethical obligations, clients' right to sack counsel and the vagaries of agencies' annual budgets. The Public Defenders fully support this objective, based on our experience over many decades generally, but also as it is proven to be effective by the NSW Bureau of Crime, Statistics and Research in their recently-published assessment of the Rolling List Court, in the Downing Centre.[13]

**The Charge Certificate**

<u>The Purpose of the Charge Certificate</u>

One of the impediments to early guilty pleas, identified by the LRC in its report, was a perception of overcharging by police, with the expectation that in due course the DPP will substitute realistic charges.[14] The LRC recommended certification of charges by the DPP in order to eliminate this issue.[15]

<u>The Legislative Provisions</u>

These provisions are at Division 4, which is sections 65 to 68. Following the service of the brief and no later than six months after the first return date for a court attendance notice ("CAN") [s.67(1), (2)], a "charge certificate", which sets out the offences that are to be proceeded with "in a way that is sufficient under this Act for the purposes of an indictment or an averment in an indictment" and any back-up or related charges [s.66(c)], is filed and served on the accused. Failure by the prosecutor to comply may result in the discharge of the accused

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[13] The NSW Rolling List Court: Final Evaluation, published January 2018, and available at: http://www.bocsar.nsw.gov.au/Pages/bocsar_publication/bocsar_pub_byyear.aspx

[14] The LRC Report, at paras 1.45, 3.22

[15] The LRC Report at Table 3.1.

or an adjournment. In deciding which, the Magistrate is to take into account "the interests of justice" [s. 68(2), (3)].

The charge certificate contains a certification by the prosecutor that the available evidence is capable of establishing each element of the offences and, in the case of non-Commonwealth offences, that the prosecutor has received and considered a certificate under section 15A of the DPP Act 1986 [s.66(2)].

For the purposes of this Division and Division 5 (which relates to case conferences), "prosecutor" is differently defined, so as to exclude police [s.65]. In most cases, the "prosecutor" will be the NSW or Commonwealth DPP's legal representative. The Attorney General underscored the significance of the DPP, CDPP or NSW or Commonwealth Attorneys General certifying the brief's contents at that early stage (page 7):

*Proposed new division 4 outlines the process for senior prosecutors to certify which charges will proceed to committal for trial. New section 65 ensures that only the DPP, the CDPP, the New South Wales Attorney General or the Commonwealth Attorney-General and their legal representatives may perform the functions of certifying charges and participating in a case conference.*

There is provision for an amended charge certificate to be filed and served, at any stage up until committal [s.67(5)]. This would be appropriate, for example, where negotiations have resulted in amended charges, or a witness called to give evidence (see below) has not come up to scratch.

Regulations: the Charge Certificate

The Regulations will prescribe the form of the charge certificate [s.65(d)].

The Protocol: Part 6 Charge Certification

A request by the DPP made of the OIC for additional or different charges to be laid must follow "consultation with the OIC and any victim in accordance with the Director's Guidelines."[16] Other than that, the Protocol acknowledges that this is exclusively a matter for the DPP. Once the charges are certified, the OIC cannot create any further CANs without consultation with the DPP.

**The Accused Receives an Explanation of the Committal Process**

Following the filing of the charge certificate, the Magistrate must provide the accused with an oral and written explanation of the committal process and, if it is a state offence to which Part 3 of the Crimes (Sentencing Procedure) Act 1999 applies, the mandatory sentencing discount

[16] The DPP Guidelines are available at: http://www.odpp.nsw.gov.au/prosecution-guidelines

caps [s.59(1), (4)]. If there is to be a case conference, it must be given between the filing of the charge certificate and the holding of the case conference; otherwise, between the filing of the charge certificate and the day on which the person is committed for trial or sentence [s.59(2(a) and (b)]. The Regulations may prescribe matters to be included in the explanation [s.59(3)].

**Case Conferences**

If the accused is represented and has not entered a plea of guilty to all charges [s.69], after the charge certificate is filed [s.70(4)], one or more [s.70(5)] case conferences are held, arranged by the prosecutor and the accused's legal representative. A joint case conference may be held if there are two or more accused, provided each consents, as well as the prosecutor [s.73].

The purpose of a case conference is explained in the legislation:

***s.70 Case conferences to be held***

*(1) ...*

*(2) The principal objective of the case conference is to determine whether there are any offences to which the accused person is willing to plead guilty.*

*(3) A case conference may also be used to achieve the following objectives:*

*(a) 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,*

*(b) to facilitate the resolution of other issues relating to the proceedings against the accused person, including identifying key issues for the trial of the accused person and any agreed or disputed facts.*

The legislative scheme requires that the case conference is to be held between "the prosecutor and the accused person's legal representative". The initial case conference must be held in person or by AVL, unless there are "exceptional circumstances" making it impracticable, in which case it be held by telephone instead; thereafter, they may be by telephone [s.71(2), (3)].

<u>Regulations: the Case Conference</u>

Regulations may make provision in relation to case conferences, including the attendance of the accused [s.71(4)]. The objective of these provisions was explained in the 2nd Reading Speech (page 8):

*New section 71 provides that the lawyers for the prosecution and the defence must participate either in person or by AVL for the initial case conference. The case conference must have this level of formality because experience from previous case conferencing trials tells us that unless the case conference is a formal, structured, face-to-face event, it is less effective. For this reason, the court may order that the initial case conference be held by telephone only in limited*

*circumstances. Subsequent case conferences may be held flexibly. The accused is expected to be available to give contemporaneous instructions and to participate in the case conference as required to ensure that the accused person understands the seriousness of the event. The Criminal Procedure Regulations will prescribe the details of how, and when, the accused will be required to attend the case conference.*

The accused's legal representative is obliged to *"seek to obtain the accused person's instructions concerning the matters to be dealt with in the case conference before participating in the case conference."* [s.72(1)] The use of the word "seek" implies that the legal representative should not take the view that there is no point to the exercise if he or she is unable to obtain instructions.

If the accused is represented, a "case conference certificate" is filed in the Local Court. Regulations will prescribe the form to be used [s.]75(1)]. It certifies as to a number of matters [s.75], including any offers by the accused to plead guilty to an offence charged or different offences, or any offers by the prosecution to accept pleas to an offence charged or different offences, and the responses thereto. If a plea is accepted, the "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" are recorded, and any other offences the accused wishes taken into account pursuant to s. 33 of the *Crimes (Sentencing Procedure) Act 1999*.

Importantly, it must also certify whether the prosecutor has notified the accused of an intention to submit to the sentencing court that the discount for a guilty plea should not apply or be reduced [s.75(1)(i)].

Section 75(4) casts a wide net on what must be covered in the certificate, including negotiations and communications occurring outside the case conference itself:

***s.75 Contents of Case Conference Certificate***

*…*

*(1) The case conference certificate is to be in the form prescribed by the regulations and is to certify as to the following matters:*

*(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,*

*...*

*(4) A case conference certificate must certify as to all the matters of the kind referred to in subsection (1) that occur before the certificate is filed, including any written offers of a kind referred to in subsection (1) that were made by the accused person or the prosecutor, and served on the prosecutor or accused person, before or after any case conference was held.*

The 2nd Reading Speech underscores this wide ambit (page 8): *The case conference certificate should represent the totality of the negotiations between the prosecution and the defence, whether in a case conference or informal discussions.*

An unreasonable failure by the prosecutor to participate in a case conference or to file the certificate in time may result in either the accused being discharged or the proceedings adjourned [s. 76(2)]. An unreasonable failure by the accused's legal representative to participate in a case conference or to complete the certificate may result in either the accused being committed or the proceedings adjourned [s. 76(3)]. A consideration for the Magistrate is the interests of justice [s. 76(4)].

A post-case conference plea offer by either the accused or prosecutor, if it is made prior to committal, communicated in writing and filed in the registry ("a plea offer"), is treated as if it formed part of the case conference certificate [s. 77].

Following the filing of the case conference certificate, or if a case conference is not required, after the charge certificate is filed, the Magistrate ascertains the accused person's plea and commits the person accordingly for trial or sentence to the relevant court [s.95(1), (4)]. However, a Magistrate may commit the accused person for sentence prior to the charge certificate being filed if the prosecutor consents to that course [s.95(2)].

<u>The Confidentiality of the Case Conference</u>

The contents of a case conference certificate are confidential [s.79]. The case conference certificate, or evidence of what was said, or admissions made, during a case conference or

following it during negotiations concerning a plea or offers to plea ("case conference material"), are inadmissible, except in certain limited circumstances, set out at s.78(2). Publication of case conference material is an offence [s.80]. The confidentiality is intended to encourage accused to make offers, without penalty.[17]

Matters disclosed during a case conference do not qualify for mitigation pursuant to s. 22A of the *Crimes (Sentencing Procedure) Act 1999*; presumably such matters must be separately disclosed, in order to overcome the confidentiality issue and for the offender to qualify for this basis [s. 80].

"Explaining" the Purpose of the Case Conference to the Accused

Section 72 sets out the obligations of the accused's legal representative in preparation for the case conference.

***s.72 Obligations of legal representative of accused***

*(1) The accused person's legal representative is to seek to obtain the accused person's instructions concerning the matters to be dealt with in the case conference before participating in the case conference.*

*(2) The accused person's legal representative must explain the following matters to the accused person before the case conference certificate is completed:*

*(a) 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,*

*(b) the penalties applicable to the offences certified in the charge certificate and to any other offences the subject of offers made by the accused or the prosecutor in the committal proceedings,*

*(c) 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.*

Part 3 of the *Crimes (Sentencing Procedure) Act 1999* ("Part 3") does not apply to accused persons charged with Commonwealth offences or where the charge is in respect of an offence allegedly committed when the accused was aged under 18 and is under 21 at the time that he or she is charged. Accordingly, the statutory obligation in s.72(2)(a) to explain the implications of Part 3 does not apply in respect of such accused, although an explanation would still be required for such clients in relation to s.72(b) and (c).

The statutory obligation to provide an explanation to the accused in respect of Part 3 is similar, although not in identical terms, to that which applies to Magistrates [s.59]. However, Magistrates do not have a counterpart of s.72(2)(c).

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[17] 2nd Reading speech: *New sections 78 to 81 provide that the case conference certificate is to be treated confidentially and will be admissible as evidence only in proceedings relating to the sentence discount or in other limited circumstances. This is to encourage the accused person to make offers to plea.*

The accused's legal representative, and the accused, are statutorily obliged to certify that Part 3, and other matters set out at s.72(2), were "explained":

***s.75 Contents of case conference certificate***

*...*

*(2) A case conference certificate must also contain:*

*(a) a declaration by the legal representative of the accused person that the legal representative has explained to the accused person the matters specified in section 72 (2), and*

*(b) if the accused person does not intend to plead guilty to an offence, a declaration by the accused person that the legal representative has explained to the accused person the matters specified in section 72 (2).*

*(3) A failure by an accused person to make a declaration under this section does not affect the validity of anything done or omitted to be done by any other person in or for the purposes of the committal proceedings.*

In his 2nd Reading Speech, the Attorney General explained the purpose of s.72 (page 8): *This is to ensure that, if the accused does or does not offer to plead to any charges during the case conference, they will do so fully informed of the consequences. This will help to mitigate the risk of late changes of plea after committal.*

The reference to the objective being that the accused is "fully informed" of the consequences implies comprehension by the accused of Part 3. The Australian Oxford Dictionary defines the word "explain" as: "make clear or intelligible with detailed information etc." In the context of a solicitor imparting information to a client, it seems to me that "explain" entails basic steps being taken by the legal representative to ensure comprehension of the information. Similarly, an accused declaring that his or her legal representative has "explained" the matters in s.72(2) surely implies a declaration by the accused that he or she believes that they understand what they have been told.

Legal representatives already routinely explain to accused clients the implications of not pleading guilty. Advocacy Rules 39 and 40 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* provide:

*39. It is the duty of a barrister representing a person charged with a criminal offence:*

*(a) to advise the client generally about any plea to the charge; and*

*(b) to make clear that the client has the responsibility for and complete freedom of choosing the pleas to be entered.*

*40. For the purpose of fulfilling the duty in rule 39, a barrister may, in an appropriate case, advise the client in strong terms that the client is unlikely to escape conviction and that a*

*plea of guilty is generally regarded by the court as a mitigating factor to the extent that the client is viewed by the court as co-operating in the criminal justice process.*

If the accused's legal representative is not convinced their client understands an explanation pursuant to rules 39 and 40, it is likely that there is a question of unfitness; not for that reason alone, but because such a basic incapacity for comprehension would likely affect the accused's ability to provide instructions and follow the proceedings generally, even at a basic level.

However, the requirements of section 72(2)(a), concerning Part 3, go far beyond Bar Rules 39 and 40. Part 3 provisions include:

- The quantum of the utilitarian discount at three junctures in the pre-trial and trial process;
- The need for the accused to consider his or her position in relation to alternative charges;
- The difference between statutory alternatives and, potentially, multiple other possible alternative charges based on the client's instructions;
- The effect of a conviction on an alternative charge that was not the subject of an earlier offer by the accused, or acceptance of an offer by the prosecution;
- The consequences of a dispute as to facts after a plea is accepted (ie that if the dispute is lost by the accused, the discount is forfeited); and
- The effect of a plea to a fresh charge brought by the prosecution, depending on when that fresh charge is accepted and whether it was the subject of an earlier offer by the accused.

These are future conditional abstract concepts. An abstract concept by itself is difficult for a person with an intellectual disability to comprehend. It may well be that the intellectual capacity of some clients would render them genuinely incapable of absorbing the essence of Part 3, although in other respects of the common law fitness test[18] they would be fit.

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[18] The common law test for fitness, set out in *R v Presser*, applies in NSW. See for example *JM v R; R v JM* [2017] NSWCCA 138 *per* Hoeben CJ at CL (Garling and Bellew JJ agreeing) at [133]. *R v Presser* [1958] VR 45 *per* Smith J at [48.5]: *And the question, I consider, is whether the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him. He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in Court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have*

What are the consequences of a legal representative not declaring that they have "explained" s.72(2), or an accused that it has not been "explained"? Section 76 stipulates that:

***s.76 Failure to complete case conference obligations***

*(1) This section applies where the Magistrate is satisfied that a case conference certificate has not been filed by the day set by the Magistrate.*

*…*

*(3) If a Magistrate is satisfied that the case conference certificate has not been filed because of an unreasonable failure by the legal representative of the accused person to participate in a case conference or complete a case conference certificate, the Magistrate may:*

*(a) commit the accused person for trial or sentence as if a case conference were not required to be held, or*

*(b) adjourn the committal proceedings to a specified time and place.*

*(4) In determining whether to take action under this section, the Magistrate is to consider the interests of justice.*

Failing to make a s.75(2)(a) declaration because the accused lacks the capacity to understand the explanation of s.72(2) matters is hardly "unreasonable". If the magistrate, pursuant to s.76(3)(a), commits the person to trial nevertheless, then the accused has been deprived of an opportunity to make an informed decision as to whether to plead guilty at a juncture when they would likely receive a 25% sentence discount, through no fault of their own.

The section equips the magistrate with a discretionary power to not do so *("the magistrate may commit … the Magistrate is to consider the interests of justice")*, but provides no guidance as to what alternative measures, in such a circumstance, might be taken. This discretionary power could provide a basis for counsel to seek an adjournment in order to utilise professional services to assist with the accused's comprehension. However, if that is not possible, for example, due to the nature of the accused's disability, in my view this then becomes a fitness issue and that procedure should be followed; see below.

**Hearing of Evidence in the Local Court**

Although the Magistrate will no longer rule on the sufficiency of the prosecution evidence, the sections of the *Criminal Procedure Act 1986* permitting the examination of prosecution witnesses are retained in their essence at Division 6, sections 82 to 92. The purpose is unexplained in the legislation, and although it adopts a recommendation in the LRC Report (Recommendation 8.2), in my view its purpose is poorly explained there, as well.[19]

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*sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.*

[19] Page 214 of the Report.

The Attorney General explained the rationale for it in his 2nd Reading Speech (pages 8-9):

*The new division 6 restructures existing provisions about calling a prosecution witness to give evidence in committal proceedings. These hearings may assist the parties to assess better the case against the accused and to facilitate further negotiations about the charges and possible offers to plead guilty. However, it is rare for a Magistrate to grant these applications currently, and it is expected that this will continue under the reform. Parties that wish a witness to be called to give evidence will still have to apply to a Magistrate for a direction, and the Magistrate will still apply the same tests that currently apply to different kinds of witnesses in determining those applications.*

The mechanism may be useful in circumstances where, for example, as an aid to negotiations, it is agreed between the parties that a trial may stand or fall on the credibility of a particular witness, such as an identification eye-witness to an armed robbery. A party, or both parties, may see merit in testing that witness's evidence in the Local Court, with a view to a No-Bill or plea, depending on the witness's evidence.

It may also be useful where an accused intends to plead not guilty, and there is a reasonable argument for a key witness's evidence to be tested so that necessary investigations and inquiries may be made by the defence, in order to prepare for trial. The alternative would be an application for a *Basha* inquiry in the superior court. The LRC Report appears to accept that it makes sense for there to be a means to facilitate the giving of evidence in these circumstances in the Local Court, instead.[20]

Sections 82, 83 and 84 essentially replicate current sections s. 91 to 94, stating that an application to examine a prosecution witness (termed "an application for a direction that a prosecution witness attend") may be made after the filing of the charge certificate, by either party. If the other party consents, the direction must be given [s.82].

The court "may not" require the attendance for examination of a complainant in a prescribed sexual offence matter if he or she is "cognitively impaired", or if a child sexual assault offence complainant is aged under 18 years and was under 16 on the earliest date or at the beginning of the earliest period during with the offence was allegedly committed [s.83].

Similarly, s. 84 replicates ss. 93 and 94, concerning whether an alleged victim of an offence involving violence can be so directed.

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[20] pps 214-5.

Formal Statements are Required if a Prosecution Witness is to give Evidence

Part 3A of Chapter 6 is introduced into the *Criminal Procedure Act 1986*, largely replicating current provisions concerning the form and content of statements. It is confined to the purposes of giving evidence under Division 6 and as required in regulations [s.283A(1)]; in other words, if a prosecution witness is to give evidence pursuant to Division 6, these provisions, presently set out at ss.76, 76A, 79, 79A, 88, and 95, apply. They are retained at ss 283A to 283G. As well, s. 289 is retained, albeit modified [s.289(1)], to comply with the new scheme. The Attorney General noted that these provisions: "… *will also be necessary to provide guidance on the admissible form of statements where that form of evidence is to be included in the brief of evidence*."[21]

**The Act of Committal**

The procedure that applies to the act of committal by the Magistrate and the status of a committal thereafter, as is presently set out in sections 99 to 108 of the *Criminal Procedure Act 1986*, is essentially preserved in sections 96 to 104.

**Fitness to be Tried**

If at any point during the committal proceedings, either party (or the Magistrate) raises a question of the accused's fitness and it is raised "in good faith", then once the charge certificate is filed, the Magistrate "may" commit the person for trial [ss.93, 94. See also s.69(c)]. There is no need for a case conference [s.69(c)]. The circumstances where one would be appropriate would be confined to the rare cases where a client's possible unfitness for trial did not impact on their capacity to give instructions for the purposes of a case conference, or where instructions are not required, such as where the defence believes there is a defect in the prosecution material on an element of the charge.

Clearly this is in anticipation of a fitness hearing to be conducted in the higher court, pursuant to the relevant provisions of the *Mental Health (Forensic Provisions) Act 1990* ("the MHFPA"). A new section, 13A, is introduced into that Act. If the accused is found fit, then on the application of the accused the Court must remit the matter to the Local Court for the holding of a case conference, unless it is satisfied that it is not in the interests of justice to do so [s.13A(2), (3)]. The Court may do so of its own motion if the accused is found fit, or at any time if satisfied that the question of unfitness is not going to be raised [s.13A(2), (4)]. Otherwise, the matter is dealt with pursuant to s.13 of the MHFPA; that is, by proceeding to trial.

Consistent with the legislation, the Practice Note states:

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[21] This observation reflects a note to s.283A: *Material that is included in a brief of evidence for committal proceedings under Division 3 of Part 2 of Chapter 3 may be, but is not required to be, in the form required under this Part (see section 62 (2)).*

***6. Fitness for Trial***

*6.1 If the question of the accused's fitness for trial is properly raised pursuant to section 93 of the CPA, the Court may, in its discretion, suspend the operation of this Practice Note pending resolution of this issue.*

*6.2 NOTE: Although the question of the accused's fitness to be tried can be raised at any time in committal proceedings (section 93(2) of the CPA), a magistrate may only commit a person for trial in such circumstances after the charge certificate has been filed (section 94 of the CPA).*

There may also be merit in the defence, in spite of a question of unfitness, delaying the request for the magistrate to commit the accused to the higher court for a fitness hearing, to first test the evidence of a critical witness pursuant to the power in Division 6. An example is where the only, or critical, evidence against the accused is that of an eye-witness, whose reliability is questionable. It may be that the evidence stands alone, in the sense that an attack on its reliability by cross-examination would not depend on the client's instructions. If a successful testing of the evidence may lead to the charge being withdrawn, it would be appropriate for the defence to pursue that avenue first.

There is a power for the Magistrate to "require a psychiatric or other report relating to the accused to be supplied to the magistrate by the accused person or the prosecutor before committing a person for trial under this section." [s.93(3)] At first glance, this might be understood as a power intended to assist the Magistrate to determine whether there is a fitness issue if the accused is unrepresented, or if it is raised by one of the parties "in good faith".

However, the 2nd Reading speech suggests a different, somewhat curious, purpose (page 9): *It is expected that this power may be used where obtaining a report earlier would assist in reducing the delay caused by waiting for reports to be prepared for the fitness inquiry in the higher court.*

The delay is the same, whether in the Local or higher court. The parties obtain reports as to fitness and doubtless will do so as soon as a question of fitness arises. The superior court already has a power to independently order a report [s.10(3)(e), MHFPA] but does so rarely, if ever.

## Mandatory Sentence Discount Caps

### Limited Application to Commonwealth Matters and Offences of Young Persons

The mandatory sentencing discount caps do not apply to Commonwealth matters,[22] although such matters are subject to the procedure of charge certificates, case conferences and the taking of evidence. The legislation tailors some procedures accordingly.[23]

As well, the mandatory sentencing discount caps do not apply to an offence committed by a person aged under 18 at the time of the offence, who is under 21 when charged with the offence [s.25A(1)(b) of the *Crimes (Sentencing Procedure) Act 1999*].

### Generally

For certain matters, the legislative scheme limits the maximum discount that a sentencing court may apply for a guilty plea on the utilitarian basis; it does not limit the discount for a guilty plea on any other basis, such as for remorse. Subject to certain exceptions summarised below, the discounts are 25% for a plea in the Local Court (that is, before committal); 10% for a plea made less than 14 days before the first day of the trial, and 5% thereafter.

The legislative scheme does not alter the upper range of the utilitarian discount at common law. In the guideline judgement of *R v Thomson and Houlton* (2000) 49 NSWLR383, Spigelman CJ said [160]: "*The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25 per cent discount on sentence. The primary consideration determining where in the range a particular case should fall, is the timing of the plea. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing judge.*"

However, significantly, it caps the discretion a sentencing court currently has as to the quantum of the discount on the utilitarian basis and at a rate which is at odds with common law practice. Currently, for example, a court may allow a utilitarian discount for a late plea in excess of 5%. See for example *Blackwell v R* [2012] NSWCCA 227, in which Garling J (McClellan CJ at CL and McCallum J agreeing) at [88] - [96], approved a utilitarian discount of 13% where the accused had offered on the first day of trial to plead to a statutory alternative charge and was subsequently convicted of that charge.

On a sentence hearing in the higher court, the prosecution is constrained from submitting that the sentence utilitarian discount should not apply, either at all or to the maximum permitted,

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[22] The *Crimes (Sentencing Procedure) Act 1999* is amended to include S.25A(1), which provides that Division 1A of that Act, which establishes the mandatory sentencing discount caps for the utilitarian value of a guilty plea, does not apply to an offence under a law of the Commonwealth, unless the regulations provide otherwise, in the case of a particular offence or class of offences.

[23] For example, the Act relieves the Magistrate of the obligation to explain to the accused the scheme of sentence discounts in a case concerning an offence under a law of the Commonwealth [s.59(4)].

unless, where a case conference certificate has been filed, it records that the prosecutor notified the offender's legal representative, at or before the conference, of the intention to make such an application [s.25F(2), (3)].

A dispute as to facts which is lost by the offender may also be a basis for reducing or eliminating a utilitarian discount:

***(4) Exception to application of discount—disputed facts***
*The court may determine not to apply the sentencing discount, or to apply a reduced sentencing discount, if the court determines that the discount should not be applied or should be reduced because 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.*

In any dispute as to whether there should be a sentencing discount, the offender has the onus of proof, on the balance of probabilities [s.25F(5)].

To my mind, the quantum of the discount when the prosecution does not certify to seek a non-application or a reduced rate, is unclear. On the one hand, the sentencing court, on its own motion, may apply a reduced discount or not apply the sentencing discount at all, "because 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 a penalty with no allowance for, or a reduction of, that discount." [s.25F(2)]

On the other hand, in his 2nd Reading Speech, the Attorney General said (page 9): *These discounts are fixed, meaning that where they apply, the full discount must be given. This certainty about the discount that will apply is fundamental to creating a strong incentive for early guilty pleas.*

It is difficult to correlate this emphatic assertion with s.25F(2) of the *Crimes (Sentencing Procedure) Act, 1999.*

**The Amendments to the *Crimes (Sentencing Procedure) Act 1999***
Schedule 2 of the Act amends the *Crimes (Sentencing Procedure) Act 1999* in the following ways (unless otherwise stated, references in this section are to that Act):

Section 22, which requires a sentencing court to take a guilty plea into account, together with its timing and circumstances, is restricted by the addition of a further sub-section:

*(5) This section applies only to a sentence for an offence that is dealt with summarily or to a sentence for an offence dealt with on indictment to which Division 1A does not apply.*

Division 1A, titled *Sentencing discounts for guilty pleas to indictable offences*, is a new Division added to *Part 3 Sentencing Procedures Generally*:

The key provision is s. 25D, in particular sub-sections (1) and (2), which provide:

***25D Sentencing discounts for guilty plea for offences dealt with on indictment***

*(1)* ***Mandatory nature of sentencing discount***

*In determining the sentence for an offence, the court is to apply a sentencing discount for the utilitarian value of a guilty plea in accordance with this section if the offender pleaded guilty to the offence at any time before being sentenced.*

*(2)* ***Amounts of sentencing discounts***

*The discount for a guilty plea by an offender (other than an offender referred to in subsection (3) or (5) or section 25E) is as follows:*

*(a) a reduction of 25% in any sentence that would otherwise have been imposed, if the plea was accepted by the Magistrate in committal proceedings for the offence,*

*(b) a reduction of 10% in any sentence that would otherwise have been imposed, if the offender was committed for trial and the offender:*

*(i) pleaded guilty at least 14 days before the first day of the trial of the offender, or*

*(ii) complied with the pre-trial notice requirements and pleaded guilty at the first available opportunity able to be obtained by the offender,*

*(c) a reduction of 5% in any sentence that would otherwise have been imposed, if paragraph (a) or (b) does not apply.*

The "first day of the trial" is defined as 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)]. As practitioners know, in both the District and Supreme Court, typically this happens at arraignment. The 2nd Reading Speech provides some guidance on how this should be interpreted and applied (pages 9-10):

*The first day of trial is defined in new section 25C as the first day that the trial is listed. This provides a clear deadline from which a defendant can count back the 14 days to the day by which a guilty plea must be entered in order to be eligible for a 10 per cent discount. This definition will apply even where the actual commencement of the trial is delayed for a short period—for example, where the trial is listed on a Monday but does not proceed until the Wednesday because a judge was not available on the Monday when the trial was listed to commence. However, if the listing date is vacated—for example, where one of the parties is not ready to proceed and makes an application for vacation—and the trial is subsequently re-listed at a later date, the new listing date will be the relevant date for the purpose of the definition of "first day of trial".*

A similar cap applies to fresh counts, charged after committal; 25% if an offer is made and recorded in a negotiations document as soon as practicable after the *ex officio* indictment is filed, or the indictment amended [s.25D(3)(a)]; 10% if the plea is at least 14 days before the first trial date or pre-trial notice requirements have been complied with and the plea was at "the first available opportunity" [s.25D(3)(b)]; and 5% thereafter [s. 25D(3)(c)]. However, the 25% discount for a new count does not apply if either of the following conditions apply:

***s.25D Sentencing discounts for guilty plea for offences dealt with on indictment***

*...*

*(4) However, the discount in subsection (3) (a) does not apply if:*

*(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 by the prosecutor in committal proceedings relating to 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.*

If an accused has been committed to trial following a question of fitness and is subsequently found fit to be tried, and the matter not remitted to the Local Court for continued committal proceedings, a similar cap scheme applies as if it is a new count [s.25D(5)]; the maximum of 25% applies if the offender pleaded guilty "as soon as practicable" after being found fit to be tried.

In determining whether, pursuant to s.25D(3) or (5), an offender pleaded guilty "as soon as practicable", the court is required to take into account whether the offender had a reasonable opportunity to obtain legal advice and give instructions [s.25D(6)].

**A "Different Offence"**

If an offender is found guilty of a "different offence" which was the subject of an offer made by him or her, recorded in negotiations, rejected and not later withdrawn, then the sentencing court is to "apply a sentencing discount in accordance with this section" [s.25E(1)].

This sentencing discount also applies in two other circumstances; firstly, if the offender is found guilty "… of an offence that is reasonably equivalent to a different offence", that is, where the facts of the offence are capable of constituting the different offence, and the maximum penalty for the offence is the same or less than the different offence [s.25E(1)(e)], and secondly, if the prosecutor has refused the offer in relation to the "different offence" but

following the offender being committed for trial, accepts the offer and the offender pleaded guilty at the "first available opportunity able to be obtained by the offender." [s.25E(2)].

The "sentencing discount in accordance with this section" is set out at s.25E(3): 25% if the offer had been made before committal, 10% if made after committal but at least 14 days before the first day of the trial and 5% if after that period.

A Table of Alternative Offences

These provisions pose real difficulties for counsel for the accused at the case conference in the Local Court. They effectively require defence counsel before that stage to turn their mind to all possible alternative charges ("different offences") with the same or a lesser penalty; not only statutory alternatives, but charges that could apply in the sense that the facts that are alleged of the offence charged "are capable of constituting the different offence". The counsel then needs to advise the client accordingly.

The 2nd Reading Speech offered a degree of comfort to defence counsel, but ultimately a comprehensive advice to clients at the pre-case conference stage is preferable (page 10):

*The effect of new section 25E is that where the accused person made an offer to plead guilty to an offence, or a reasonably equivalent offence, which either the prosecution refused but then later accepted, or the accused is later found guilty of that offence, or a reasonably equivalent offence, the accused may be eligible for up to a 25 per cent discount. This is important because there are multiple offences that have similar elements and penalties. An accused person should not be required to offer to plead guilty to exactly the right charge, or to every possible variation of an offence, in order to obtain the discount.* (underlining added)

The Public Defenders are working on a table that legal representatives for the defence may consult as a non-exhaustive "check-list" of possible alternative charges alongside primary charges, which of course, would be subject to the alleged facts of the particular case.

**Amendment of Other Legislation**

Schedule 3 of the Act amends other legislation, including that concerning criminal charges against children, and the Drug Court.

**Children**

The new committal procedure applies to children (persons under the age of 18) who are charged with serious children's indictable offences[24] and thus dealt with according to law; 27(2B) of

[24] The term "serious children's indictable offence" is defined at s.3(1) of that Act and cl.4 of the *Children (Criminal Proceedings) Regulation 2005.*

the *Children (Criminal Proceedings) Act 1987* ("the *CCPA*"). References in this section are to that Act, unless otherwise indicated. A new procedure is introduced for children who are charged with non-serious children's indictable offences but whose matter is not dealt with summarily, pursuant to sections 27 and 31, both of which are amended.

Section 31 is amended so that, if a person charged before the Children's Court with a non-serious children's indictable offence elects to be dealt with according to law, or if the Magistrate determines that the charge may not properly be disposed of in a summary manner, they must be dealt with as committal proceedings in accordance with Division 3A (a new Division) of the *CCPA*. This Division, comprising sections 31A to 31L, sets out a committal procedure not unlike that which currently applies in the *Criminal Procedure Act 1987*. There is no requirement for a charge certificate, a case conference and there are not mandatory sentencing discount caps.

The amendments to s.31 include what the Attorney General described as "gatekeeping provisions" [ss.31(2A) and (2B)], whereby "… *if the accused person requests to be dealt with at law during the summary trial, the prosecution evidence must first be completed, to avoid duplication of evidence, and if the Children's Court is of the view at the conclusion of summary proceedings that the accused person would be discharged, rather than committed, it may discharge at this stage rather than move into committal proceedings*."

**Impact on the Drug Court**

Legislative provisions integrate the scheme with the Drug Court's operation.

Section 60 of the *Criminal Procedure Act 1986* states that an accused may be dealt with under the *Drug Court Act 1998* at any stage of committal proceedings, despite any requirement of the Act (ie, the new Part 2 of Chapter 3 of the *Criminal Procedure Act 1986*).

Section 25 F (6) of the *Crimes (Sentencing Procedure) Act 1999* states that the sentencing discount applicable to a person who is sentenced for an offence under the *Drug Court Act 1998* applies to a person who indicates an intention to plead guilty to an offence before being referred to the Drug Court, and who subsequently pleads guilty to that offence, as if they had pleaded guilty before being committed for sentence in committal proceedings.

## Specific Issues

**What if a matter is complex?**

The legislative scheme basically takes a "one size fits all" approach to the committal process, with minimal reference to the fact that some matters are more complex, and may require far more time in the Local Court, than others. That said, there are legislative provisions providing

a basis to submit to the Magistrate that the timetable be expanded to accommodate complex matters, as indeed there has to be; there is a fundamental difference between a straightforward break and enter, and most murder matters, for example. Usually there is a relationship between complexity and the seriousness of the charges; if the accused is charged with an offence carrying 25 years or a life sentence, additional months, or even a year in the Local Court if necessary, is a relatively minor inconvenience, particularly if it delivers an appropriate guilty plea or minimises court time in what would otherwise be a lengthy Supreme Court trial.

The Brief of Evidence

The legislation does not specify a time by which the brief of evidence should be served by police [s.61(1)]. For complex matters, it may take considerable time for police to complete their investigations so that the brief of evidence is complete and ready to be served, which is a necessary step if negotiations are to be meaningful and if the accused is to have time to consider his or her position. Although it is in the accused's interest that a brief be complete in the sense of containing pro-defence as well as pro-prosecution evidence, the instructions to encourage more time for that to occur may be difficult to obtain if the accused is bail refused or subject to onerous bail conditions, either of which are often the case with complex (serious) matters.

Section 70(3)(a) recognises that a purpose of the case conference is: "*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."* This provision may be relied upon when requesting further material from police and/or the DPP. If that approach fails, although the Magistrate's role is supervisory, it is arguably within the supervisory functions of the Magistrate's role to accede to an application for a direction to the same effect. Failing that, a subpoena would be appropriate. If that fails and it is necessary to consider an appeal from the Local Court, some assistance may be derived from a paper by (then) NSW Crown Advocate Natalie Adams SC, titled "*Appeals from the Local Court to the Supreme Court*", at our annual conference in 2015, which is available from the Public Defenders Website.[25]

The Charge Certificate

The next step, the filing and serving of the charge certificate, is required to be done no later than 6 months after the first return date for a CAN in the committal proceedings [s.67(2)]. However, the magistrate may set a later date either with the accused's consent or if it is in the interests of justice to do so [s.67(3)]. One of the matters that Magistrate is to consider in determining if it is in the interests of justice, is "the complexity of the matters the subject of the proceedings" [s.67(4)].

[25] www.publicdefenders.nsw.gov.au

The Case Conference Stage

There is no legislative cap on the number of case conferences that are held; indeed, sections 55(d) and 70(5) expressly acknowledge there may be more than one case conference. As well, s.70(6) contemplates that there may be a further case conference if the prosecutor files an amended charge certificate. It may be appropriate for the defence to seek a series of conferences if the matter is complex, to focus on separate issues in each. This is especially so if the defence anticipates that the matter will proceed to trial and wishes to avail itself of the case conference mechanism as a means of sorting out evidentiary issues at trial, consistently with s.70(3)(b): *(3) A case conference may also be used to achieve the following objectives:… (b) to facilitate the resolution of other issues relating to the proceedings against the accused person, including identifying key issues for the trial of the accused person and any agreed or disputed facts.*

The Committal Stage

Section 95, which stipulates when the Magistrate may commit the accused for trial or sentence, has this note: *The Magistrate may, at any time, adjourn the proceedings where it appears to the Magistrate to be necessary or advisable to do so (see sections 40 and 58 (a)).*

Section 40, as its title suggests ("Adjournments generally") provides a general power to adjourn matters, "if it appears to the court necessary or advisable to do so." Section 58(a) identifies specific sections in other parts of the Criminal Procedure Act which expressly apply. Section 40 is one of these.

**What if time is needed to obtain Defence Evidence?**

Whether a matter is complex or not, the Defence may need time to obtain expert or other reports, to aid its negotiations. For example, if the accused is charged with murder and there is an issue of the accused's mental state at the time in order to possibly negotiate a manslaughter outcome, the defence may need to obtain a forensic psychologist or psychiatric report to determine whether a partial defence of substantial impairment is available. If the report is favourable, the prosecution will want to obtain its report, as well. Typically, such reports take two to three months, so the time lapse between the serving of the brief of evidence and the case conference could easily, and quite reasonably, be six months. Similarly, in relation to any charge, there may be an issue of fitness or the insanity defence (or both) that needs to be explored by one or both parties.

These are issues which, pursuant to the scheme, need to be explored at this early stage. There may well be a cultural issue in persuading Magistrates who are accustomed to keeping their committal matters relatively brief, that there is no problem in having a committal matter in the Local Court for a year.

**Can an unwilling Accused Avoid a Case Conference?**

As noted earlier, an unrepresented accused, or an accused who ceases to be represented, is not required to partake in a case conference [s.69(a)]. Likewise, if the accused pleads guilty s.69(b)] or where there is a question of fitness [s.69(c)], a case conference is not held. There is little for the accused to lose by having a case conference and potentially much to gain, but what if the accused instructs that he or she refuses to partake, for whatever reason, sensible or otherwise; can it be avoided?

Section 70 states that with those three exceptions, "a case conference is to be held" [s.70(1)]. The 2nd Reading Speech refers to them as "mandatory". However, pursuant to s. 76, if there has been "*an unreasonable failure by the legal representative of the accused person to participate in a case conference or complete a case conference certificate, the Magistrate may: (a) commit the accused person for trial or sentence as if a case conference were not required to be held ...*"

The legal representative would have to comply with s.72 and explain the matters therein required, but sensibly, the legislation appears to contemplate that not all accused will co-operate, by only requiring the lawyer to "*seek* to obtain the accused person's instructions concerning the matters to be dealt with in the case conference …" [s.72(1)].

Accordingly, case conferencing can be avoided with no penalty (additional, that is, to the loss of the opportunity of a 25% discount for the utilitarian value), but it may be necessary to go through the mechanics of one being organised, and the legal representative attending. A dilemma for non-legally-aided legal representatives may be that they would have difficulty justifying to their client charging for attending a case conference as their representative when they have instructions not to partake. In these circumstances, the sensible course may be to withdraw beforehand, in which case, as an unrepresented accused, the case conference is automatically avoided.

**Mark Ierace SC**
**Senior Public Defender**
4 April 2018

## Attachment A (NSW DPP/Police Protocol): Evidence Not Required in Admissible Form

**APPENDIX A:**

| Evidence to be included in the Brief | Acceptable Alternative Forms of Evidence (where not yet obtained in admissible form) |
|---|---|
| Key[2] police statements, including from the Officer in Charge | Not applicable |
| Victim/s signed statement or transcript of recorded interview/ DVEC | Not applicable |
| Witness statements and/or transcript of interview | For non-key witnesses handwritten signed statements in police notebook |
| Other Evidence containing admissions by a accused | Not applicable |
| Photographs or documentary evidence | Statement producing it not required provided photographs contain captions explaining their origin |
| Identification Parade[3] | Statement producing it not required<br><br>DVD recording of parade required |
| Electronic Recorded Interview of a Suspected Person (ERISP) transcript | Not applicable |
| CCTV footage | Statement producing it not required provided synopsis is included and video can be played without additional software |
| Other Audio Visual Material (eg Body worn video, Search Warrant Video) | Provide all relevant recordings, property seizure form and exhibit list (EFIMS) |
| Police scientific evidence (includes DNA, fingerprint, ballistics, drug and chemical analysis) | Result from EFIMS or Forensic Summary Report<br><br>Short form statement/ certificate with expert opinion<br><br>Presumptive drug testing results which identifies drug and quantity |
| Telephone Intercepts and Listening Devices Audio and Transcripts | Audio of all relevant recordings with a detailed synopsis of the contents. All calls should be summarised with explanation of any code/s used and key calls identified. Key calls will need to be transcribed. |

[2] The word 'key' is to emphasise that where there are important police or witness statements, there is no alternative inadmissible form

[3] Identification Parade includes photograph parade

| | |
|---|---|
| Visual and other Surveillance Evidence | Surveillance Log and relevant footage/ photos |
| Telephone records | Download from IASK but with a synopsis |
| Expert Medical | Photos, discharge summary, clinical notes or short opinion from doctor, SAIK |
| Expert Evidence | Short form opinion |
| Digital Device Downloads | Digital evidence download report<br><br>(eg. Cellebrite)* |
| Financial Evidence | Business records relied upon with a synopsis (eg. Statement of Account) |
| Evidence obtained overseas including Mutual Assistance Evidence. | Evidence about Mutual Assistance formalities not required. |

# Attachment B (Local Court Practice Note): Committal Proceedings Flow Chart

**Attachment A**

## Progress of Committal Proceedings through the Local Court