

# The Impact of Private versus Public Legal Representation on Criminal Proceedings

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Dramatic and persistent rise in NSW court delay, which represents a considerable policy challenge:

- A rise in court delay leads to an increase in costs, but also negatively impacts victims and defendants.

Substantial savings when cases are finalised earlier in criminal proceedings, particularly for indictable offences:

- Typically, the cost of a NSW District Criminal Court case is roughly ten-times greater than a Local Court case (RoGS, 2018).

## Indictable offences in NSW:

- Table 1 and Table 2 Offences (e.g.: Common assault).
  - Can be finalised in the Local ('dealt with summarily') or District Court (if elected).
- Strictly Indictable Offences (e.g.: Murder).
  - Most serious offences and must be dealt with by the Higher (i.e. District or Supreme) Court.

# Introduction

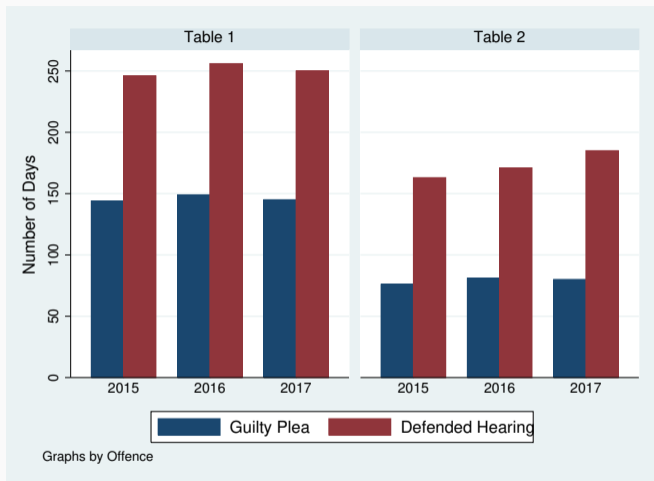


Figure 1. Average Days between First and Final Appearance between 2015 and 2017 for Table Offences (NSW Local Court)

# Introduction

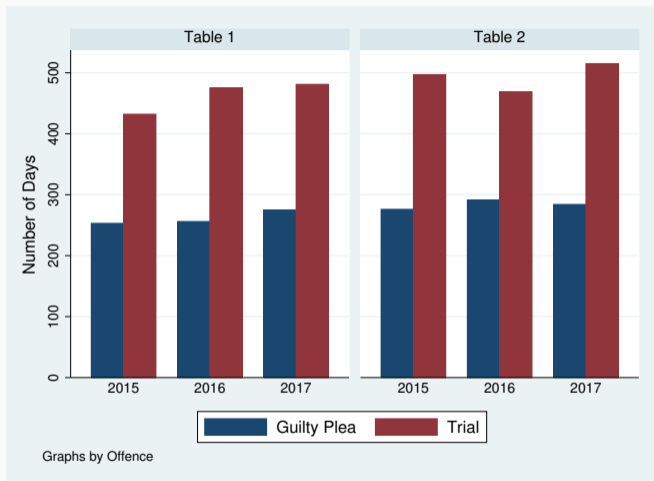
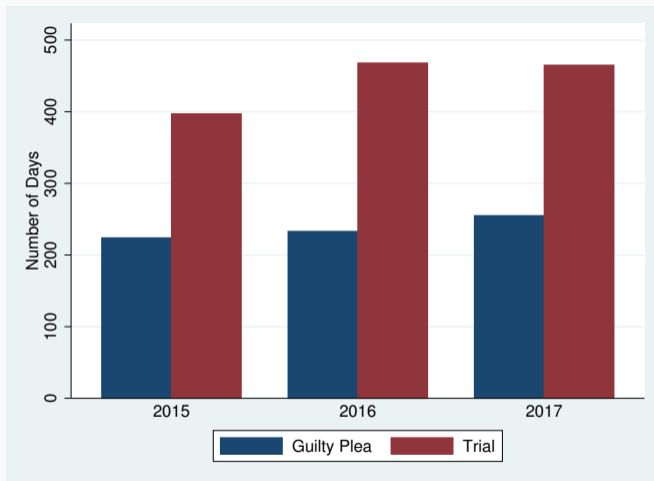


Figure 2. Average Days between Committal and Finalisation between 2015 and 2017 for Table Offences (NSW District Court)



**Figure 3.** Average Days between Committal and Finalisation between 2015 and 2017 for Strictly Indictable Offences (NSW District Court)

*Aim:* In this study, we investigate the impact of private versus public defence lawyers on the progression of indictable criminal proceedings in NSW.

We study criminal law cases assigned by Legal Aid NSW to either a legally aided private or public (i.e.: in-house) lawyer.

- Do not include privately retained lawyers.

# Presentation Structure

1. Legal Aid NSW and the assignment of criminal law cases.
2. Method.
3. Results:
  - 3.1 Table 1 and Table 2 Offences.
  - 3.2 Strictly Indictable Offences.
4. Robustness Check.
5. Concluding remarks and acknowledgements.



# Legal Aid NSW and the Assignment of Criminal Law Cases

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# Legal Aid NSW and the Assignment of Criminal Law Cases

To obtain a grant of legal aid, an individual must submit an application, which is means tested.

- “Criminal law matters will be assigned to the Legal Aid NSW in-house legal practice wherever possible...”
- “Where an in-house practitioner is unable to act, the matter will be assigned to a private practitioner.”

Assignment to a private lawyer is based on various factors including **client disability, convenience for the client, conflict of interest**, etc (available online).

Legal Aid pays private lawyers based on a fee schedule (available online).

# Method

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## Data:

- Legal Aid NSW provided every successful application for a criminal law grant of aid between Jan 2012 and Dec 2016 for indictable offences.
- Linked to BOCSAR's Re-Offending Database (ROD).
  - Criminal proceedings outcomes.
  - Various defendant and case characteristics.
- Do not include Indigenous defendants.

	(1) Full Sample	(2) Private
Table 1 and Table 2 Offences	7,734	42.4
Table 1 Offences	4,085	43.6
Table 2 Offences	3,649	41.1
Strictly Indictable Offences	8,169	49.9

**Table 1:** Number of Grants by Offence and Proportion Assigned to a Private Lawyer

*What is the impact of private versus in-house lawyers on criminal proceedings outcomes among otherwise comparable cases?*

## **Empirical Approach:**

$$Y_{ijt} = \alpha + \delta Private_{ijt} + \beta X_{ijt} + \gamma_j + \varphi_i + \tau_t + \varepsilon_{ijt} \quad (1)$$

$Y_{ijt}$ : criminal proceedings outcome for case  $i$  assigned by Legal Aid office  $j$ , in month and year  $t$ .

*The coefficient of interest:*

$\delta$ : average difference in the outcome for cases assigned to private lawyers compared to in-house lawyers.

Case-related characteristics ( $X_{ijt}$ ), and Legal Aid office ( $\gamma_j$ ), court ( $\varphi_i$ ), and time fixed effects ( $\tau_t$ ).

*How do we measure criminal proceedings outcomes?*

For Table 1 and Table 2 Offences:

- The probability a case will be dealt with summarily (i.e.: the Local Court).
- The probability a case will be dealt with summarily after a guilty plea.
- Among cases committed for trial, the probability a defendant will enter a guilty plea (a 'late guilty plea').

For Strictly Indictable Offences:

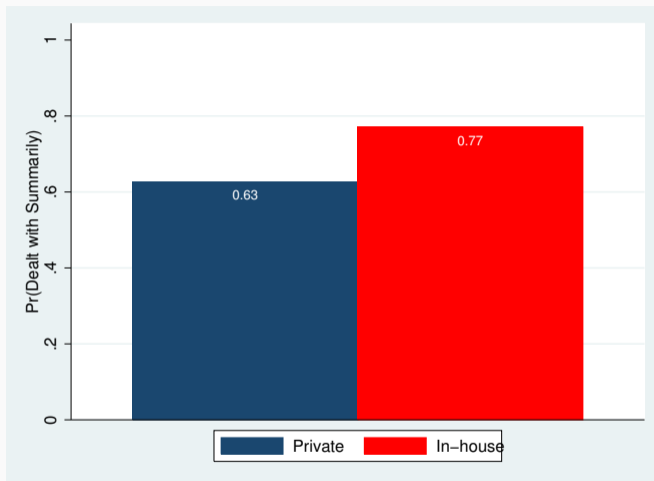
- The probability the defendant will be committed for sentence.
- The probability the defendant will enter a 'late guilty plea'.

## Results: Table 1 and Table 2 Offences

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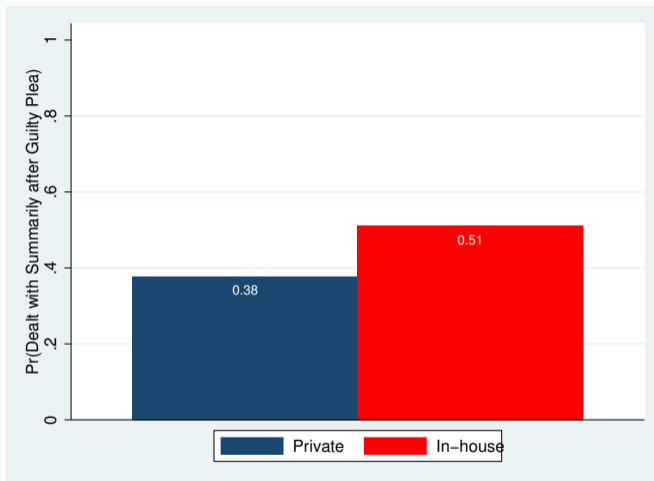
## Results: Table 1 and Table 2 Offences



Difference = -14 p.p \*\*\*

Figure 4. Table 1 and Table 2 Offences: Probability Dealt with Summarily

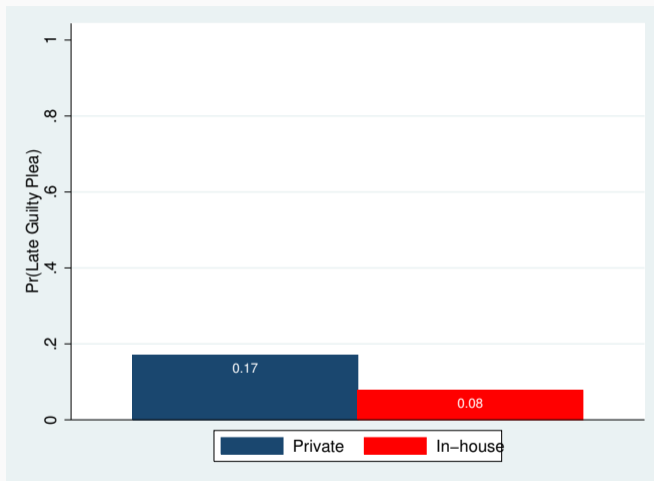
## Results: Table 1 and Table 2 Offences



Difference = -13 p.p \*\*\*

Figure 5. Table 1 and Table 2 Offences: Probability Dealt with Summarily after a Guilty Plea

## Results: Table 1 and Table 2 Offences



Difference = 9 p.p \*\*\*

Figure 6. Table 1 and Table 2 Offences: Probability Late Guilty Plea

## Results: Table 1 and Table 2 Offences

	(1)	(2)	(3)	(4)	(5)	(6)
<i>Panel A. Dealt with Summarily</i>						
Private	-12.4*** (0.029)	-12.3*** (0.029)	-12.4*** (0.027)	-12.4*** (0.028)	-12.5*** (0.029)	-11.4*** (0.026)
$R^2$	0.298	0.304	0.309	0.314	0.330	0.377
<i>Controls</i>						
Demographics	X	Yes	Yes	Yes	Yes	Yes
Location	X	X	Yes	Yes	Yes	Yes
Prior offending history	X	X	X	Yes	Yes	Yes
Bail status at finalisation	X	X	X	X	Yes	Yes
Extensions	X	X	X	X	Yes	Yes
Principal Offence	X	X	X	X	X	Yes
Legal Aid Office	Yes	Yes	Yes	Yes	Yes	Yes
Court	Yes	Yes	Yes	Yes	Yes	Yes
Month and year	Yes	Yes	Yes	Yes	Yes	Yes
$N$	7,734	7,734	7,734	7,734	7,734	7,734

\*\*\* $p < 0.01$ , \*\* $p < 0.05$ , \* $p < 0.1$ .

Standard errors in brackets.

**Table 2:** Table 1 and Table 2 Offences: Regression Estimates of the Impact of Legal Representation on Criminal Proceedings

## Results: Table 1 and Table 2 Offences

	(1)	(2)	(3)	(4)	(5)	(6)
<i>Panel B. Dealt with Summarily after a Guilty Plea</i>						
Private	-14.0*** (0.018)	-13.9*** (0.017)	-13.9*** (0.017)	-14.0*** (0.017)	-14.0*** (0.017)	-13.2*** (0.017)
$R^2$	0.153	0.164	0.166	0.167	0.171	0.196
<i>Panel C. Late Guilty Plea</i>						
Private	8.7*** (0.021)	8.8*** (0.021)	8.7*** (0.021)	8.6*** (0.020)	8.6*** (0.021)	8.2*** (0.019)
$R^2$	0.113	0.114	0.116	0.117	0.119	0.129

\*\*\* $p < 0.01$ , \*\* $p < 0.05$ , \* $p < 0.1$ .

Standard errors in brackets.

**Table 3:** Table 1 and Table 2 Offences: Regression Estimates of the Impact of Legal Representation on Criminal Proceedings

## Results: Table 1 and Table 2 Offences

### *Table 1 and Table 2 Offences.*

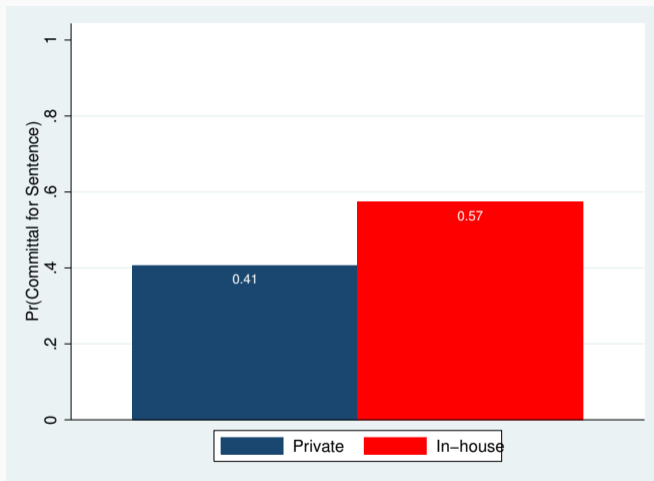
Compared to in-house lawyers, criminal law cases assigned to a legally aided private lawyer are:

- Less likely to be dealt with summarily (11-13 p.p);
- Less likely to be dealt with summarily after a guilty plea (13-14 p.p), and;
- Defendants are more likely to enter a late guilty plea (8-9 p.p).

## Results: Strictly Indictable Offences

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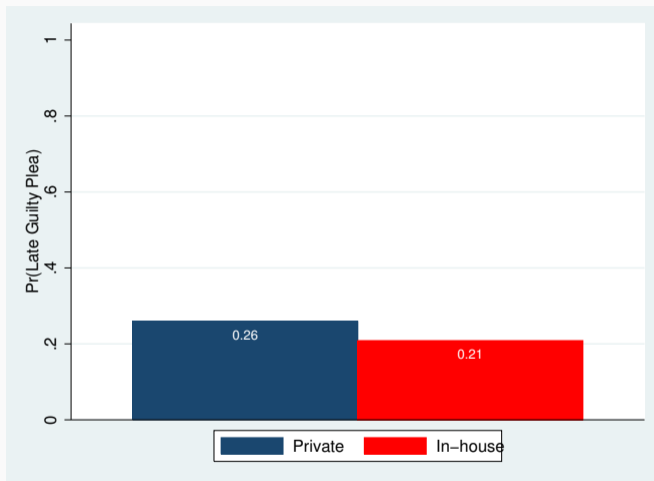


Difference = -16 p.p \*\*\*

Figure 7. Strictly Indictable Offences: Probability Committal for Sentence



## Results: Strictly Indictable Offences



Difference = 5 p.p \*\*\*

Figure 8. Strictly Indictable Offences: Probability Late Guilty Plea

## Results: Strictly Indictable Offences

	(1)	(2)	(3)	(4)	(5)	(6)
<i>Panel A. Committal for Sentence</i>						
Private	-16.5*** (0.009)	-16.9*** (0.009)	-17.0*** (0.009)	-17.0*** (0.008)	-16.3*** (0.009)	-14.7*** (0.008)
$R^2$	0.090	0.110	0.115	0.116	0.158	0.225
<i>Panel B. Late Guilty Plea</i>						
Private	4.9*** (0.008)	4.9*** (0.008)	4.9*** (0.007)	4.9*** (0.007)	4.8*** (0.008)	4.6*** (0.008)
$R^2$	0.022	0.023	0.024	0.025	0.027	0.031
$N$	8,169	8,169	8,169	8,169	8,169	8,169

\*\*\* $p < 0.01$ , \*\* $p < 0.05$ , \* $p < 0.1$ .  
Standard errors in brackets.

**Table 4:** Strictly Indictable Offences: Regression Estimates of the Impact of Legal Representation on Criminal Proceedings

### *Strictly Indictable Offences.*

Compared to in-house lawyers, criminal law cases assigned to a legally aided private lawyer are:

- Less likely to be committed for sentence (14-17 p.p), and;
- Defendants are more likely to enter a late guilty plea (4-5 p.p).

## Robustness Check

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### *Transfer of Cases between Private and In-house Lawyers.*

A case may be initially assigned to a private or in-house lawyer, but could be transferred before it is finalised for various reasons (e.g.: a breakdown in the relationship).

If a case was transferred, it is possible that a different lawyer was assigned when the outcome was determined.

- Table 1 and Table 2 Offences: 15% cases transferred.
- Strictly Indictable Offences: 16% cases transferred.

Excluding transferred cases does not change the results meaningfully.

## Concluding Remarks

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*What could potentially 'explain' these results?*

1. Financial Incentives. According to the *NSW Law Reform Commission* (2014):

“The fee structure of Legal Aid NSW may be a contributing factor to the late submission of guilty pleas because:

- It does not explicitly include payment for pre-trial negotiations.
- First day of trial or court appearance rates are higher than guilty plea/sentence rates.
- The pay scale is generally quite low for the profession and there is incentive to ‘spin matters out.’”

## Concluding Remarks

2. In-house lawyers are able to build more cooperative relationships with prosecutors, which could result in earlier and more transparent negotiations between the defence and prosecution (Stover & Eckart, 1974; Burns & Reid, 1981).
3. Private lawyers who are attracted to legal aid work in NSW are comparatively less skilled and/or experienced.
  - For example, to be eligible to represent a legally aided client, a private lawyer must submit a nomination to be appointed to the Legal Aid NSW private practitioner panel.
4. A defence lawyer may extend criminal proceedings to obtain superior outcomes for their client.

We do not discount any of these possibilities.



# Acknowledgements

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Thank you!

Comments or questions?