

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

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**Aim:** To investigate the impact of publicly funded private versus in-house legal representation on indictable criminal proceedings.

**Method:** Data was obtained from Legal Aid NSW on every indictable criminal law grant of aid in NSW between 2012 and 2016. Legal Aid NSW assigns criminal law cases to either a private or in-house defence lawyer. These data were linked to BOCSAR's criminal courts database to obtain a rich set of information including defendant characteristics, and prior offending history. Focusing on indictable offences only, we compare the probability that cases assigned to private or in-house lawyers are dealt with summarily, are committed for sentencing or result in a late guilty plea.

**Results:** On average, publicly funded cases assigned to private lawyers are less likely to be dealt with summarily or to be committed for sentence even after controlling for a wide range of defendant and case characteristics. In addition, matters assigned to private lawyers are more likely to result in a late guilty plea.

**Conclusion:** Legal Aid NSW indictable matters assigned to private defence lawyers are more likely to be finalised at a later stage in proceedings and are more likely to be finalised in the Higher Court.

**Keywords:** Indictable offence, defence lawyer, criminal proceedings, court delay, Legal Aid NSW.

## INTRODUCTION

In recent years, there has been a dramatic rise in delay in the New South Wales (NSW) Criminal Courts. Between 2013 and 2017, the average number of days from committal to finalisation for cases in the NSW District Criminal Court increased by 25 per cent. In the NSW Local Court the average number of days between first appearance and finalisation for cases proceeding to a defended hearing increased by 16 per cent over the same period. A rise in court delay not only creates a significant strain on court resources but also has wide-ranging consequences for defendants, victims and the broader criminal justice system. Consequently, dealing with court delay is a high priority for justice policy. Given the roughly ten-fold greater cost of an average NSW District Criminal Court case compared to an average Local Court case (Report on Government Services (RoGS) 2018, Table 7A.31, p.222) there is particular urgency for policymakers to identify strategies to reduce the time taken to finalise criminal matters in the NSW District Court.

No strategy to reduce court delay can succeed without the active cooperation of prosecution and defence counsel. In NSW, legal services and assistance are provided by Legal Aid NSW: an independent statutory body established under the *Legal Aid Commission Act 1979 (NSW)*. The criminal law practice at Legal Aid NSW provides legal representation to individuals who cannot afford to retain defence counsel themselves. To obtain a criminal law grant of legal aid, a person must submit an application to Legal Aid NSW and pass a means test based on a number of factors, including the applicant's income and assets. Cases that meet the eligibility criteria for a grant of Legal Aid are then assigned to either a private or an in-house lawyer (see section 11 of the *Legal Aid Commission Act 1979*) depending on the current workload of staff at each Legal Aid NSW office. The key difference between in-house lawyers and assigned private lawyers engaged in Legal Aid matters is that the latter are paid an initial flat fee and then a set hourly rate for additional preparation or time spent in court representing their client. In-house lawyers are employees of Legal Aid NSW and are therefore paid an annual salary.

The 'billable hours' system, and the fact that fees paid by Legal Aid NSW to private lawyers are less than the wages available in the private market, may arguably create an incentive to maximise the number of hours spent on each case. Concerns about this have been raised in NSW (NSW Law Reform Commission 2014, p. 279) but research investigating the extent to which private lawyers unnecessarily prolong the resolution of their cases remains unknown. Direct comparison of outcomes (e.g. time taken to finalise matters, percentage of matters proceeding to trial) for cases conducted by private lawyers (on both a public and private basis) with those conducted by in-house Legal Aid NSW lawyers is complicated by the fact that individuals who retain private defence lawyers (on a private basis) usually possess very different characteristics to those who are publicly defended (most notably their socioeconomic background). To obtain a better understanding of the relative efficiency with which publicly funded private and in-house legal aid lawyers operate, Legal Aid NSW asked the NSW Bureau of Crime Statistics and Research (BOCSAR) to investigate whether cases handled by private lawyers are finalised more expeditiously than those handled by in-house lawyers. This report presents the results of our investigation.

## PREVIOUS RESEARCH

Past research on the effect of legal remuneration rates and arrangements on case outcomes and case processing efficiency has produced mixed results. In one of the earliest studies, Iyengar (2007) compared outcomes for panel (assigned) versus in-house legal aid representation in the US Federal System by exploiting the fact that the two types of counsel split the legal aid (indigent) caseload for the district in a predetermined ratio. Appointment of cases to one of the two types of attorneys is done either through the court clerk's office or through the federal in-house defender's office. In both systems cases are randomly assigned to either a panel lawyer or a lawyer from the in-house defender pool, at which point a specific attorney is also randomly assigned. As in NSW, panel lawyers working on legal aid cases in the US federal system are paid on an hourly basis. In-house defenders are paid a salary. Iyengar (2007) found that defendants with panel lawyers were more likely to be found guilty, received longer sentences and were more likely to proceed to trial and attributed this in large part to the low payment rate for assigned lawyers.

Stephen, Fazio, and Tata (2008) examined the impact of a change in remuneration for publically funded lawyers in Scotland on plea bargaining in criminal matters. Up until 1999, publicly funded defence lawyers appearing in summary cases in Scotland were paid according to the number of hours they spent in court representing their client. However from 1999 onwards a fixed payment was provided for each case assigned. There are four main stages in the Scottish criminal justice system, respectively titled: *the Pleading Diet*, *the Intermediate Diet*, *the Day of the Trial Diet* (before evidence is led) and *Trial Commencement* (after evidence has been led). A key feature of the system is

that a plea of not guilty is required at the *Pleading Diet* for the services of a defence lawyer to be paid by the State. Stephen et al. (2008) found that after the introduction of fixed compensation, the likelihood of a case reaching the *Pleading Diet* significantly increased. They also observed a rise in the proportion of cases being finalised at the *Day of the Trial Diet* state and a corresponding decrease in the proportion of cases being finalised at *Trial Commencement*.

Further evidence of the way in which financial factors can influence case outcomes can be found in Roach (2014). A novel feature of his study is that, in addition to comparing case outcomes for assigned versus salaried legal aid lawyers, the author examined the impact of changes in the market for fully private legal representation. Following Iyengar (2007), Roach (2014) exploited the fact that cases were assigned to private lawyers in the courts he examined only when there was a conflict of interest or when the number of cases was too large to be handled by the in-house counsel — two factors that Roach (2014) argued were unrelated to characteristics of the case or the defendants. Four outcomes were examined in the study: *guilty* (whether the defendant was convicted), *most serious* (whether the defendant was found guilty of the most serious offence), *sentence* (the sentence length in months) and *duration* (the time between arrest and adjudication in months). Roach (2014) found that defendants whose cases were handled by assigned counsel were significantly more likely to be convicted on the most serious offence category, received longer sentences and took longer to finalise. He also found that when external market wage rates for poorer quality assigned lawyers were low, case outcomes for legally aided defendants were adversely affected.

In a more recent study, Agan, Freedman, and Owens (2018), used court records from Bexar County in Texas, to compare outcomes for indigent defendants who had been assigned a private lawyer by the court with defendants who retained defence counsel. There are three features of the study that make it particularly powerful. Firstly, in Texas where the study was conducted, cases are randomly allocated to judges, so differences in case outcomes can't be attributed to the judge dealing with the case. Secondly, most lawyers in the study dealt with a mix of both privately funded and assigned cases. This made it possible to compare outcomes in private versus assigned cases involving the same lawyer. Lastly, the researchers were able to control for a very wide range of factors of relevance to case outcomes. Agan et al. (2018) found that, on average, defendants who had a court appointed private lawyer were more likely to be found guilty, more likely to be imprisoned and received longer prison terms than other defendants. Cases assigned to private lawyers, however, were also finalised more quickly. Agan et al. (2018) suggest that this latter finding is due to the fee structure private lawyers are paid. Specifically, in their study, most private lawyers are compensated via a flat payment, which incentivizes them to resolve cases early; while hourly fees are available, they are comparatively lower than the wages available in the private market.

## CURRENT STUDY

It is obvious from the studies just discussed that the impact of in-house versus private legal aid representation is likely to depend on a range of situational factors, including the daily fee paid to assigned lawyers, the quality of the legal counsel employed in legal aid work and the fees able to be earned by defence counsel in providing privately funded legal representation. These situational factors are likely to vary from jurisdiction to jurisdiction and country to country. The current study, therefore, is designed to address the question of whether legal aid representation provided by private lawyers generates poorer outcomes (in terms of case processing efficiency) than legal aid representation provided by in-house lawyers in NSW.

In NSW, criminal offences are divided into four groups: Summary Offences, Table 1 Offences, Table 2 Offences and Strictly Indictable Offences. Summary Offences are less serious than the remaining categories of offence and must be dealt with by a magistrate in the Local Court. Table 1 and Table 2 Offences are indictable offences that can be finalised in either the Local or Higher (District or Supreme) Court. A Table 2 offence is one that must be dealt with by a magistrate in the Local Court (i.e.: 'dealt with summarily') unless the prosecution elects to have the matter dealt with in the District or Supreme Court. Table 1 Offences are generally more serious than Table 2 Offences and are dealt with in the Local Court unless the prosecution or the defence elect to have the matter dealt with in the District or Supreme Court.<sup>1</sup> Strictly Indictable Offences are the most serious class of offence and in all circumstances must be dealt with by the Higher Criminal Courts.

As can be seen from Table 1, cases dealt with summarily (in the Local Court) are finalised much more expeditiously than cases dealt with in the District Court. It is also clear that cases finalised on a plea of guilty in either court are dealt with more quickly than cases proceeding to a defended hearing before a magistrate in the Local Court or a trial before a judge in the District Court.<sup>2</sup>

**Table 1. Average Court Delay in NSW**

<i>Panel A. Average Days between First and Final Appearance (Local Court)</i>		
	(1) Guilty Plea	(2) Defended Hearing
Table 1 Offence	134	253
Table 2 Offence	79	190
<i>Panel B. Average Days between Committal and Finalisation (District Court)</i>		
	(1) Guilty Plea	(2) Trial
Table 1 Offence	293	516
Table 2 Offence	283	445
Strictly Indictable Offence	248	503

In this study, therefore, we focus on five outcomes relevant to efficiency. For Table 1 and Table 2 Offences, the outcomes are:

- A. The probability a case managed by a private lawyer will be dealt with summarily.
- B. The probability a case managed by a private lawyer will be dealt with summarily after a guilty plea (a plea of guilty entered in the Local Court yields the maximum gain in terms of the efficient progress of criminal proceedings).
- C. Among cases that have been committed for trial, the probability a defendant represented by a private lawyer will enter a guilty plea (hereafter referred to as a 'late guilty plea').

Among Strictly Indictable Offences:

- D. The probability the defendant represented by a private lawyer will be committed for sentence.
- E. The probability the defendant represented by a private lawyer will enter a 'late guilty plea'.

## LEGAL AID NSW AND THE ASSIGNMENT OF CRIMINAL LAW CASES

To obtain a grant of legal aid for a criminal matter, an individual must submit an application, which is typically means tested. If the application is successful, section 11 of the Legal Aid Commission Act 1979 allows Legal Aid NSW to assign the case to either a private or an in-house lawyer.

The criminal law practice manager at each Legal Aid NSW office is responsible for assigning cases. According to the grant allocation guidelines stipulated by Legal Aid NSW, practice managers are instructed to assign cases to a Legal Aid NSW in-house lawyer wherever possible.<sup>3</sup>

If an in-house lawyer is unable to represent the client due to workload capacity constraints, cases are assigned to a private lawyer according to the following criteria:

1. A particular private lawyer has a current case grant of legal aid and/or an extensive history of representing the legally aided client,
2. A particular private lawyer is already appearing at the relevant court on the relevant date for another legally aided client,
3. The legally assisted person has profound difficulties dealing with the legal system due to a psychiatric condition, development or intellectual disability, or a physical disability, and a particular private lawyer is able to assist in addressing the client's disability,
4. It is more convenient for the client to be assigned a private lawyer due to the geographic remoteness of the client's residence or a lack of transport,
5. A private lawyer specialises in a particular area of criminal law,
6. There is an irretrievable breakdown in the relationship between the client and the in-house lawyer,

- 7. There is a conflict of interest, or;
- 8. If the client has expressed a preference for a particular private lawyer.

Furthermore, according to advice from Legal Aid NSW, practice managers are instructed to retain a wide range of cases of varied complexity to allow for a diverse criminal law practice, which can enhance the professional development of in-house lawyers.

In general, to be eligible to represent a legally aided client, a private lawyer must first successfully be appointed to the Legal Aid NSW private practitioner panel. To be considered for appointment to the Indictable Criminal Law Panel, a private lawyer must first submit an application to Legal Aid NSW that outlines their experience practicing criminal law in indictable matters in the NSW Lower and Higher Courts, demonstrates their ability to prepare court documents and other related materials, and indicates that the applicant possesses the relevant knowledge of criminal law. Private lawyers must also possess a minimum two years of experience appearing in criminal law cases. Private lawyers who are successfully selected to the Indictable Criminal Law Panel are appointed for a period of 5 years.<sup>4</sup>

Private lawyers are able to choose the legally aided clients they represent; a private lawyer is not required to take on every criminal law case assigned to them by Legal Aid NSW. In contrast, in-house lawyers do not have the option to select from the cases they are assigned.

## METHOD

### DATA

For this study, Legal Aid NSW provided data on every successful application for a criminal law grant of aid during the period 1 January 2012 to 31 December 2016.<sup>5</sup> This dataset included details on whether the case was assigned to an in-house lawyer, the number of extensions to a case granted by Legal Aid NSW,<sup>6</sup> and whether the case was transferred between a private and an in-house lawyer. Only grants for indictable offences (Table 1 and Table 2 Offences) and Strictly Indictable Offences were included in these data (see the *Criminal Procedure Act* 1987 for more detailed definitions of these offences).

We linked these criminal law grants data to the NSW Bureau of Crime Statistics and Research (BOCSAR) Re-offending Database (ROD) to obtain data on the court outcomes for each matter. ROD includes information detailing the various aspects of criminal court proceedings, including the plea entered, and the principal offence. ROD also contains a rich set of information on defendant characteristics, such as age, gender, Indigenous status and previous criminal history.

Between January 2012 and December 2016, Legal Aid NSW approved approximately 34,218 grant applications, of which approximately 89 per cent were successfully matched with BOCSAR’s ROD. Among the Legal Aid NSW grants that were

**Table 2. Assignment of Grants by Offence and Lawyer Assignment**

	(1) Full Sample	(2) Private
Table 1 and Table 2 Offences	7,734	0.424
Table 1 Offences	4,085	0.436
Table 2 Offences	3,649	0.411
Strictly Indictable Offences	8,169	0.499

successfully matched, Indigenous applicants were excluded from the final analysis sample because a significant proportion of such applicants are represented by the Aboriginal Legal Service.

Table 2 displays the distribution of Legal Aid matters included in the analysis sample, broken down by type of indictable offence and lawyer assignment. Column 1 includes the total sample size for each offence type and column 2 shows the proportion assigned to a private lawyer. In the analysis sample, there were 7,734 Table 1 and Table 2 Offences, of which approximately 42 per cent were assigned to a private lawyer. Within Table 1 and Table 2 Offences, slightly more than half are Table 1 Offences and among these, 43.6 per cent were assigned to a private lawyer. Similarly, among the Table 2 offences in the analysis sample, slightly more than 41 per cent were assigned to a private lawyer. In the sample, there are 8,169 Strictly Indictable Offences and approximately half of these were assigned to a private lawyer.

### EMPIRICAL APPROACH

To measure the impact of legal representation on the progression of criminal proceedings, we estimate the following equation separately for Table 1 and Table 2 Offences and Strictly Indictable Offences:

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

Where  $Y_{ijt}$  is the outcome of interest for case  $i$  assigned representation by Legal Aid office  $j$ , in month and year  $t$ . The variable of interest in equation (1) is *Private*, which is a binary variable equal to one when a grant matter is dealt with by a private lawyer and zero when dealt with by an in-house lawyer. Consequently, the coefficient  $\delta$  measures the average difference for each outcome of interest for cases assigned to private lawyers compared with those assigned to in-house lawyers.

We include a wide range of controls in our models to deal with potentially confounding factors. These are represented in (1) by  $X_{ijt}$ , which is a vector of case characteristics. Specifically, these include defendant demographics, such as the age, gender and location of residence. We also include the defendant’s prior offending history, as measured by the number of prior court appearances and prison sentences, as well as a dummy variable equal to one if the defendant was a juvenile at first contact with the criminal justice system. Furthermore, in order to account for different levels of matter complexity, we also control for the principal offence type, the defendant’s bail status at finalisation

and the number of grant extensions. Additional variables are Legal Aid NSW office and court fixed effects, which are captured by  $\gamma_j$  and  $\varphi_k$ , respectively. Finally, the variable  $\tau_t$  accounts for month and year effects. Throughout the analysis, the standard errors are clustered at the office level because cases are assigned by the criminal law practice manager within each Legal Aid NSW office.

## RESULTS

### SUMMARY STATISTICS

Table 3 displays the descriptive statistics for the analysis sample separated by Table Offences and Strictly Indictable Offences. Column 1 presents the summary statistics for the full sample. Columns 2 and 3 summarises the various characteristics of cases assigned to a private or in-house lawyer respectively. Column 4 calculates the difference in characteristics between cases assigned to private or in-house lawyers.

Beginning with the Table Offences shown in panel A, we see that defendants are approximately 39 years of age and only 12.4 per cent are female. We do not find a statistically significant difference in the age and gender of the defendants assigned to private or in-house lawyers. Over half of all the defendants in the sample reside in the city. Private lawyers are 12.6 percentage points less likely to be assigned a defendant that lives in the city and the difference is statistically significant at 1 per cent.

With respect to the nature of the principal offence, we consider 'Serious Violent', 'Other Violent', 'Drug' and 'Other' offence types. In general, the differences in principal offence type are small and statistically insignificant between private and in-house lawyers. The exceptions are 'Serious Violent' and 'Property' offences. Specifically, private lawyers are 5.4 percentage points more likely to be given cases where the principal offence is a 'Serious Violent' offence. In contrast, private lawyers are 6.1 percentage points less likely to be assigned cases with a property offence as the principal offence. Both these differences are highly statistically significant.

On the other hand, private lawyers are less likely to be given cases involving defendants who were bail refused at finalisation, who were juveniles at first contact with the criminal justice system, who have more prior court appearances and/or more prior prison sentences. On average, there is one extension among cases with a Table Offence in the full sample and the difference in extensions between private and in-house lawyers in column 4 is small and statistically insignificant.

Panel B in Table 3 describes the data for Strictly Indictable Offences. On average, defendants are roughly 39 years old and slightly fewer than 10 per cent are female. Defendants assigned to a private lawyer are slightly younger but the difference is very small. We do not find any difference in the gender of the defendants assigned to private or in-house lawyers. Nearly 60 per cent of the defendants reside in the city. Private lawyers are 6.9 percentage points less likely to represent a legal aid client who

lives in the city and this difference is highly statistically significant.

In terms of the principal offence, we find statistically significant differences between private and in-house lawyers for cases where the principal offence is 'Serious Violent', 'Other Violent', and 'Drugs'. Specifically, private lawyers are 3.3 percentage points more likely to be given cases where the principal offence is a 'Serious Violent' offence. In contrast, private lawyers are 3.8 and 2.8 percentage points less likely to be assigned cases where the principal offence is an 'Other Violent' or 'Drugs' offence, respectively.

Defendants with an extensive criminal history are less likely to be assigned a private lawyer, as indicated by the statistically significant results in column 4 for bail refused at finalisation and the number of prior prison sentences. Finally, there is approximately one extension among Strictly Indictable Offences in the full sample, and the difference reported in column 4 is statistically indistinguishable from zero.

### TABLE 1 AND TABLE 2 OFFENCES

In this section, we present the results for the impact of legal representation on criminal proceedings for Table 1 and Table 2 Offences. We begin with a simple mean comparison of outcomes, followed by the results from the regression specifications.

#### Simple Mean Comparison of Outcomes

Before presenting the regression results, we briefly discuss a simple mean comparison of the outcomes of interest for the Table 1 and Table 2 Offences. The results are presented in Table 4. Column 1 presents the average for the full sample for each outcome, columns 2 and 3 are the results for private and in-house lawyers respectively, and column 4 calculates the simple mean difference for each outcome.

Approximately 71 per cent of all cases with Table 1 and Table 2 Offences in the analysis sample are dealt with summarily. However, as indicated in column 4, cases handled by a private lawyer are 14.6 percentage points less likely to be dealt with summarily compared to cases handled by an in-house lawyer and the difference is statistically significant at 1 per cent. Similarly, cases assigned to a private lawyer are 13.4 percentage points less likely to be dealt with summarily after a guilty plea, and the difference is statistically significant at 1 per cent.

The results also indicate that defendants committed for trial for a Table Offence are more likely to enter a late guilty plea if they have a private lawyer. That is, among Table 1 and Table 2 Offences, defendants represented by private lawyers are 9.2 percentage points more likely to enter a late guilty plea relative to in-house lawyers. Again, the difference is highly statistically significant.

#### Regression Results: Legal Representation and Criminal Proceedings

Table 5 displays the regression results for the impact of legal representation on criminal proceedings among Table 1 and

**Table 3. Summary Statistics by Indictable Offence Type**

	(1) All	(2) Private	(3) In-house	(4) Difference
<i>Panel A. Table 1 and Table 2 Offences</i>				
Age	39.020 (0.132)	39.171 (0.209)	38.908 (0.170)	0.263
Female	0.124 (0.003)	0.125 (0.006)	0.123 (0.004)	0.002
City	0.564 (0.005)	0.491 (0.008)	0.617 (0.007)	-0.126***
Serious Violent	0.333 (0.005)	0.364 (0.008)	0.310 (0.006)	0.054***
Other Violent	0.040 (0.002)	0.041 (0.003)	0.040 (0.003)	0.001
Property	0.203 (0.004)	0.168 (0.006)	0.229 (0.006)	-0.061***
Drugs	0.026 (0.001)	0.027 (0.002)	0.026 (0.002)	0.001
Other	0.075 (0.003)	0.077 (0.004)	0.073 (0.003)	0.004
Bail Refused at Finalisation	0.286 (0.005)	0.262 (0.008)	0.304 (0.007)	-0.042***
Juvenile at First Contact	0.322 (0.005)	0.306 (0.008)	0.334 (0.007)	-0.028**
Number of Prior Court Appearances	7.028 (0.079)	6.458 (0.116)	7.449 (0.108)	-0.991***
Number of Prior Prison Sentences	1.910 (0.037)	1.628 (0.052)	2.119 (0.052)	-0.491***
Extensions	1.072 (0.026)	1.107 (0.040)	1.046 (0.035)	0.061
<i>N</i>	7,734	3,282	4,452	
<i>Panel B. Strictly Indictable Offences</i>				
Age	38.648 (0.137)	38.454 (0.194)	38.988 (0.201)	-0.534*
Female	0.099 (0.003)	0.100 (0.004)	0.098 (0.004)	0.002
City	0.581 (0.005)	0.546 (0.008)	0.615 (0.007)	-0.069***
Serious Violent	0.207 (0.004)	0.223 (0.006)	0.190 (0.006)	0.033***
Other Violent	0.179 (0.004)	0.160 (0.005)	0.198 (0.006)	-0.038***
Property	0.154 (0.004)	0.156 (0.006)	0.152 (0.005)	0.004
Drugs	0.299 (0.005)	0.285 (0.007)	0.313 (0.007)	-0.028***
Other	0.005 (0.001)	0.005 (0.001)	0.005 (0.001)	0
Bail Refused at Finalisation	0.403 (0.005)	0.383 (0.007)	0.424 (0.007)	-0.041***
Juvenile at First Contact	0.292 (0.005)	0.303 (0.007)	0.288 (0.007)	0.015
Number of Prior Court Appearances	5.122 (0.067)	5.169 (0.093)	5.075 (0.096)	0.094
Number of Prior Prison Sentences	1.284 (0.029)	1.231 (0.039)	1.334 (0.044)	-0.103*
Extensions	1.141 (0.026)	1.181 (0.037)	1.101 (0.038)	0.080
<i>N</i>	8,169	4,083	4,086	

Standard errors in parentheses.

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

Serious Violent offences include aggravated assault, aggravated sexual assault, and aggravated robbery. Other Violent includes non-aggravated assault, sexual assault, and robbery offences.

Property includes break and enter, theft, and fraud. Drug offences include all drug offences. Other offences are driving, traffic, and breach of order (ABS, 2011).

**Table 4. Simple Mean Comparison of Outcomes for Table 1 and Table 2 Offences**

	(1) All	(2) Private	(3) In-house	(4) Difference
Dealt with Summarily	0.709 (0.005)	0.625 (0.008)	0.771 (0.006)	-0.146***
Dealt with Summarily after Guilty Plea	0.453 (0.005)	0.376 (0.008)	0.510 (0.007)	-0.134***
Late Guilty Plea	0.117 (0.003)	0.170 (0.006)	0.078 (0.004)	0.092***
<i>N</i>	7,734	3,282	4,452	

Standard errors in parentheses.

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

**Table 5. Table 1 and Table 2 Offences: Estimates of the Impact of Legal Representation on Criminal Proceedings**

	(1)	(2)	(3)	(4)	(5)	(6)
<i>Panel A. Dealt with Summarily</i>						
Private	-0.124*** (0.029)	-0.123*** (0.029)	-0.124*** (0.027)	-0.124*** (0.028)	-0.125*** (0.029)	-0.114*** (0.026)
$R^2$	0.298	0.304	0.309	0.314	0.330	0.377
<i>Panel B. Dealt with Summarily after a Guilty Plea</i>						
Private	-0.140*** (0.018)	-0.139*** (0.017)	-0.139*** (0.017)	-0.140*** (0.017)	-0.140*** (0.017)	-0.132*** (0.015)
$R^2$	0.153	0.164	0.166	0.167	0.171	0.196
<i>Panel C. Late Guilty Plea</i>						
Private	0.087*** (0.021)	0.088*** (0.021)	0.087*** (0.021)	0.086*** (0.020)	0.086*** (0.021)	0.082*** (0.019)
$R^2$	0.113	0.114	0.116	0.117	0.119	0.129
<i>Controls</i>						
Demographics	No	Yes	Yes	Yes	Yes	Yes
Location	No	No	Yes	Yes	Yes	Yes
Prior offending history	No	No	No	Yes	Yes	Yes
Bail status at finalisation	No	No	No	No	Yes	Yes
Extensions	No	No	No	No	Yes	Yes
Principal Offence	No	No	No	No	No	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
<i>N</i>	7,734	7,734	7,734	7,734	7,734	7,734

Standard errors are clustered at the Legal Aid office.

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

Demographics include defendant gender and age. Location includes whether the defendant lives in an urban or regional area, and the socioeconomic index of the defendant's postcode.

Prior offending history includes the defendant's prior court appearances and prison sentences, and whether they were a juvenile at first contact.

Table 2 Offences. Each panel in Table 5 presents the regression estimates for the various outcomes of interest. Controls are progressively added to the empirical specification from column 1 through to column 6. The standard errors are clustered at the Legal Aid NSW Office level.

Panel A presents estimates for the impact of legal representation on the probability a case is dealt with summarily. The findings indicate that, among Table 1 and Table 2 Offences, a case assigned to a private lawyer is roughly 12 percentage points less likely on average to be dealt with summarily compared to a case handled by an in-house lawyer. In column 6, which includes the full set of controls, a case assigned to a private lawyer is 11.4 percentage points less likely to be dealt with summarily, compared to cases dealt with by an in-house lawyer. All of the estimates in panel A are statistically significant at the conventional levels.

Similarly, as indicated in panel B, cases assigned to a private lawyer are less likely to be dealt with summarily after entering a guilty plea. Specifically, the regression estimates across columns 1 to 6 in panel B indicate that a case assigned to a private lawyer is approximately 13 to 14 percentage points less likely on average to be dealt with summarily after entering a guilty plea compared to an in-house lawyer. The coefficients in panel B are relatively insensitive to the inclusion of additional controls. Each estimate in panel B is statistically significant at the 1 per cent level.

Finally, panel C in Table 5 presents the findings for the impact of legal representation on the probability of entering a late guilty plea for matters that are committed for trial. Private lawyers are between 8 to 9 percentage points more likely on average than in-house lawyers to enter a late guilty plea and the estimates do not change dramatically as controls are added to the model. Each of these estimates is statistically significant at 1 per cent.

Overall, the findings in Table 5 indicate that cases assigned to a private lawyer are substantially less likely to be dealt with summarily, and further, that defendants in cases managed by private lawyers are more likely to enter a late guilty plea, in comparison with in-house defence lawyers. The estimates presented in both panels A and B are all large and statistically significant at the conventional levels.

### STRICTLY INDICTABLE OFFENCES

Next, we discuss the findings for the impact of legal representation on criminal proceedings for Strictly Indictable Offences.

#### Simple Mean Comparison of Outcomes

Before we present the regression results for the Strictly Indictable Offences, we first discuss a simple mean comparison of outcomes. The results are presented in Table 6. Column 1

**Table 6. Simple Mean Comparison of Outcomes for Strictly Indictable Offences**

	(1) All	(2) Private	(3) In-house	(4) Difference
Committal for Sentence	0.489 (0.005)	0.405 (0.008)	0.572 (0.007)	-0.167***
Late Guilty Plea	0.234 (0.005)	0.259 (0.007)	0.209 (0.006)	0.050***
<i>N</i>	8,169	4,083	4,086	

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

displays the average for the sample of Strictly Indictable Offences, columns 2 and 3 separate the results by private and in-house lawyers respectively, and column 4 reports the mean difference.

Slightly more than half of all cases with Strictly Indictable Offences in the sample are committed for sentencing. Cases assigned to a private lawyer are 16.7 percentage points less likely to be committed for sentencing than cases dealt with by in-house lawyers, which is statistically significant at 1 per cent. Among Strictly Indictable Offences committed for trial, private lawyers are also 5 percentage points more likely to enter a late guilty plea. Again, this difference is highly statistically significant.

#### Regression Results: Legal Representation and Criminal Proceedings

In Table 7, we present the regression results for Strictly Indictable Offences. The outcomes of interest are the probability a case is committed for sentencing and the probability of entering a late guilty plea for trial committals. The regression estimates are presented in panels A and B, respectively. Controls are progressively added to the empirical specification from column 1 through to column 6. The standard errors are clustered at the Legal Aid NSW Office level.

Beginning with panel A, we find that cases assigned to a private lawyer are less likely to be committed for sentence compared with cases handled by an in-house lawyer. Once the full set of controls is included in column 6, we find that a case assigned to a private lawyer is 14.7 percentage points less likely to be committed for sentencing. The estimates throughout panel A are statistically significant at 1 per cent. In addition, when matters are committed for trial, private lawyers are more likely to enter a guilty plea. The estimates in panel B of Table 7 indicate that a private lawyer is approximately 5 percentage points more likely to enter a guilty plea and the difference is statistically significant at 1 per cent.

#### ROBUSTNESS CHECK

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

In this section, we present additional results of a robustness check of the main findings. A case may be initially assigned to a private or in-house lawyer but could be transferred to another defence lawyer before it is finalised. A case can be transferred



**Table 7. Strictly Indictable Offences: Estimates of the Impact of Legal Representation on Criminal Proceedings**

	(1)	(2)	(3)	(4)	(5)	(6)
<i>Panel A. Committal for Sentence</i>						
Private	-0.165*** (0.009)	-0.169*** (0.009)	-0.170*** (0.009)	-0.170*** (0.008)	-0.163*** (0.009)	-0.147*** (0.008)
R <sup>2</sup>	0.090	0.110	0.115	0.116	0.158	0.225
<i>Panel B. Late Guilty Plea</i>						
Private	0.049*** (0.008)	0.049*** (0.008)	0.049*** (0.007)	0.049*** (0.007)	0.048*** (0.008)	0.046*** (0.008)
R <sup>2</sup>	0.022	0.023	0.024	0.025	0.027	0.031
<i>Controls</i>						
Demographics	No	Yes	Yes	Yes	Yes	Yes
Location	No	No	Yes	Yes	Yes	Yes
Prior offending history	No	No	No	Yes	Yes	Yes
Bail status at finalisation	No	No	No	No	Yes	Yes
Extension	No	No	No	No	Yes	Yes
Principal offence	No	No	No	No	No	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	8,169	8,169	8,169	8,169	8,169	8,169

Standard errors are clustered at the Legal Aid office.

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

Demographics include defendant gender and age. Location includes whether the defendant lives in an urban or regional area, and the socioeconomic index of the defendant's postcode.

Prior offending history includes the defendant's prior court appearances and prison sentences, and whether they were a juvenile at first contact.

for various reasons, such as a request from the defendant or a breakdown in the relationship between defendant and the lawyer.

If a case was transferred, it is possible that a different lawyer was assigned to a case after the outcome of interest was determined. For example, a Strictly Indictable Offence may be initially allocated to an in-house lawyer and transferred to a private lawyer only after the defendant has been committed for trial. In this case it would be incorrect to associate the committal outcome with private legal representation. To discount this possibility, we repeat the empirical exercises from the main analysis for only cases that were not transferred between a private or in-house lawyer.<sup>7</sup>

Table 8 displays the results for criminal proceedings for Table 1 and Table 2 Offences excluding transfers. In panel A, we present the coefficients for cases dealt with summarily, panel B displays the results for cases dealt with summarily after a guilty plea, and panel C includes the findings for late guilty plea. Once again, the standard errors are clustered at the Legal Aid NSW office level and we compare each outcome for private and in-house lawyers.

Overall, the results in each panel throughout Table 8 do not differ meaningfully from the main findings in Table 5. For example, the coefficient in column 6 of panel A indicates that, among cases that were not transferred, cases assigned to a private lawyer are 10

percentage points less likely to be dealt with summarily compared to those represented by an in-house lawyer. The difference is statistically significant at 1 per cent.

Further results in panels B and C of Table 8 are also similar to the findings presented in the main results. That is, focusing on cases that were not transferred, cases assigned to a private lawyer are less likely to be dealt with summarily after a guilty plea, and furthermore, are more likely to result in a late guilty plea. The coefficients throughout panels B and C are large and highly statistically significant.

Table 9 shows the findings of the impact of legal representation on criminal proceedings among Strictly Indictable Offences excluding transfers. Broadly speaking, the estimates presented in Table 9 do not differ meaningfully from the main findings in Table 7. Panel A presents the coefficients for cases committed for sentencing. As the estimate in column 6 indicates, cases assigned to a private lawyer are 14.9 percentage points less likely to be committed for sentencing, on average, compared to a public lawyer after the full set of controls is included.

In panel B, we present the findings for the probability of entering a guilty plea after committal for trial excluding transfers. Once again, these results are very similar to the coefficient estimates in

**Table 8. Table 1 and Table 2 Offences: Estimates of the Impact of Legal Representation on Criminal Proceedings excluding Transfers**

	(1)	(2)	(3)	(4)	(5)	(6)
<i>Panel A. Dealt with Summarily</i>						
Private	-0.107*** (0.028)	-0.106*** (0.027)	-0.107*** (0.026)	-0.107*** (0.027)	-0.110*** (0.028)	-0.100*** (0.025)
R <sup>2</sup>	0.296	0.302	0.306	0.311	0.325	0.375
<i>Panel B. Dealt with Summarily after a Guilty Plea</i>						
Private	-0.135*** (0.016)	-0.133*** (0.015)	-0.134*** (0.015)	-0.134*** (0.015)	-0.136*** (0.015)	-0.128*** (0.014)
R <sup>2</sup>	0.155	0.167	0.169	0.170	0.179	0.199
<i>Panel C. Late Guilty Plea</i>						
Private	0.075*** (0.017)	0.076*** (0.017)	0.075*** (0.018)	0.074*** (0.017)	0.075*** (0.017)	0.070*** (0.016)
R <sup>2</sup>	0.114	0.115	0.117	0.118	0.121	0.299
<i>Controls</i>						
Demographics	No	Yes	Yes	Yes	Yes	Yes
Location	No	No	Yes	Yes	Yes	Yes
Prior offending history	No	No	No	Yes	Yes	Yes
Bail status at finalisation	No	No	No	No	Yes	Yes
Extensions	No	No	No	No	Yes	Yes
Principal offence	No	No	No	No	No	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	6,544	6,544	6,544	6,544	6,544	6,544

Standard errors are clustered at the Legal Aid office.

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

The results presented in this table do not include cases that were transferred.

Demographics include defendant gender and age. Location includes whether the defendant lives in an urban or regional area, and the socioeconomic index of the defendant's postcode.

Prior offending history includes the defendant's prior court appearances and prison sentences, and whether they were a juvenile at first contact.

panel B of Table 7. Specifically, in column 6, we find that private lawyers are 4.3 percentage points more likely to enter a guilty plea in trial committals compared with in-house lawyers. The coefficients throughout panel B are insensitive to the inclusion of additional controls. Hence, we conclude that, among Strictly Indictable Offences, the main results for criminal proceedings are robust to the exclusion of transferred cases.

## DISCUSSION

In this study, we investigate the impact of private or in-house legal representation on the progression of criminal proceedings in NSW Criminal Courts using data on every criminal law grant of legal aid in NSW between 2012 and 2016.

The results indicate that the type of legal representation provided for a Legal Aid NSW criminal law case substantially impacts the progression of proceedings in NSW Criminal Courts. Cases

assigned to a private lawyer are finalised at a later stage in criminal proceedings and are more likely to be finalised in a Higher Court. That is, on average, cases assigned to private lawyers are less likely to be dealt with summarily or to be committed for sentence, and the results are robust to a rich suite of controls. Defendants represented by private lawyers are also more likely to enter a late guilty plea. We performed robustness checks of the main findings by excluding cases that have been transferred between private and in-house lawyers before finalisation, and the results did not meaningfully change.

While the results presented in this study find that Legal Aid NSW criminal law cases assigned to private lawyers are more likely to be finalised at a later stage in criminal proceedings than cases managed by in-house lawyers, there are a number of reasons why this could occur. One obvious possibility and the motivation for the current study, is that publicly funded private lawyers may prolong proceedings to increase their financial return. This

**Table 9. Strictly Indictable Offences: Estimates of the Impact of Legal Representation on Criminal Proceedings excluding Transfers**

	(1)	(2)	(3)	(4)	(5)	(6)
<i>Panel A. Committal for Sentence</i>						
Private	-0.162*** (0.010)	-0.167*** (0.010)	-0.168*** (0.010)	-0.168*** (0.010)	-0.162*** (0.010)	-0.149*** (0.010)
R <sup>2</sup>	0.094	0.113	0.118	0.119	0.161	0.225
<i>Panel B. Late Guilty Plea</i>						
Private	0.045*** (0.009)	0.045*** (0.009)	0.046*** (0.010)	0.046*** (0.009)	0.045*** (0.009)	0.043*** (0.010)
R <sup>2</sup>	0.025	0.026	0.027	0.028	0.029	0.033
<i>Controls</i>						
Demographics	No	Yes	Yes	Yes	Yes	Yes
Location	No	No	Yes	Yes	Yes	Yes
Prior offending history	No	No	No	Yes	Yes	Yes
Bail status at finalisation	No	No	No	No	Yes	Yes
Extension	No	No	No	No	Yes	Yes
Principal offence	No	No	No	No	No	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	6,818	6,818	6,818	6,818	6,818	6,818

Standard errors are clustered at the Legal Aid office.

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

The results presented in this table do not include cases that were transferred.

Demographics include defendant gender and age. Location includes whether the defendant lives in an urban or regional area, and the socioeconomic index of the defendant's postcode.

Prior offending history includes the defendant's prior court appearances and prison sentences, and whether they were a juvenile at first contact.

possibility was considered at length in the NSW Law Reform Commission enquiry into early and appropriate guilty pleas (NSW Law Reform Commission 2014). In that report the Commission noted (at page 280) that:

“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’.”

Another possibility is that in-house lawyers are able to build more cooperative relationships with prosecutors (Stover & Eckart, 1974; Burns & Reid, 1981). This represents a considerable advantage as it is likely to result in comparatively early and more transparent negotiations between the defence and prosecution. Similarly, a defence lawyer may extend criminal proceedings to obtain superior outcomes for their client. In the current study, we are not

able to discount any of these potential explanations for the pattern of results presented here.

A third possibility is that the private lawyers performing legal aid work in NSW are less skilled and/or experienced than in-house lawyers. It is important to remember in this context that lawyers in the private market are able to refuse Legal Aid NSW criminal law cases. As noted earlier, Roach (2014) found evidence in the United States that the remuneration rates for lawyers in the private market affected the skill levels of private lawyers performing legal aid work (measured in terms of quality of law school the lawyer attended and subsequent years of experience). We have no evidence that this is occurring in NSW but the possibility cannot be dismissed.

The problem of how to structure fees for private lawyers conducting publicly funded cases is not unique to NSW. The NSW Law Reform Commission (2014, p. 280-281) notes in its report that Scotland has introduced a one-off fee for service of criminal proceedings heard without a jury, with further payments after 30 minutes. Victoria has lump sum fees for indictable criminal procedures that are paid per procedure, with additional fees

payable for 'substantial' pre-trial negotiation. New Zealand has canvassed the possibility of bulk funding for firms or groups of lawyers who provide legal aid services. To date, only the Scottish system has been evaluated. As we saw earlier (see Stephen et al. 2008), the results of that evaluation indicate that changes to fee structures for legal representation can have unexpected and undesirable consequences. It is to be hoped that any reform to the provision of legal aid in NSW is also accompanied by rigorous evaluation.

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## NOTES

- 1 Generally, the punishments available to a Higher Court judge are harsher. For example, a Local Court magistrate is limited to imposing a gaol sentence of a maximum of two years. As such, a prosecutor would usually elect to have a Table 1 or Table 2 Offence dealt with on indictment if the charges against the defendant are considered sufficiently severe.
  - 2 Results for the NSW Supreme Court are not shown due to the small number of cases.
  - 3 The guidelines are available at the Legal Aid NSW website. Retrieved 18 December, 2018, from: <https://www.legalaid.nsw.gov.au/for-lawyers/panels-audit-and-practice-standards/panels-information/grants-allocation-guidelines>
  - 4 For additional information outlining the selection process for appointments to the Legal Aid NSW Indictable Criminal Law Panel, please see the Legal Aid NSW website. Retrieved 18 December, 2018, from: [https://www.legalaid.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0010/27775/Indictable-Criminal-Law-Panel-Information-for-Applicants.pdf](https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0010/27775/Indictable-Criminal-Law-Panel-Information-for-Applicants.pdf)
  - 5 The dataset does not include Drug Court, Children's Court and Adult Summary Crime State matters in NSW.
  - 6 In general, an extension to a grant may be sought because further legal work is required, or if additional disbursements are sought, beyond those covered by the existing grant. Legal Aid NSW decides whether or not to approve an extension.
- 7 Overall, the number of cases that were transferred is small. Among Table 1 and Table 2 Offences (Strictly Indictable Offences), 1,190 cases (1,351 cases) were transferred.

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