# AiPol

## Australasian Institute of Policing

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# BLIND JUSTICE III

## PLEA BARGAINING EFFICIENCY V FACTS

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# Editorial


## DR AMANDA DAVIES

Editor, Senior Researcher at the Charles Sturt University


***Whilst there may appreciatively be many details to which the public is not witness, what the public does see is the outcome and what does this say to our community?***

Welcome to the latest edition of the journal at a time when there was an air of relief that as a country, we had emerged from COVID-19 and the extensive demands on our police officers to be met not only by the regular operational demands on police, also the ever-increasing new criminal activities creating instability in our communities i.e., hacking, scamming, trafficking. As we know, it does not end there, the horrific statistics of our increase in deaths on our roads to date in 2023 and domestic violence deaths and injuries bring to the fore the reality of how much we demand of our police agencies and officers. When we deconstruct these demands and consider the individual officers and the extraordinary dedication, they commit to their work to achieve bringing offenders to trial, it is readily understandable the many negative reactions when plea bargaining, or plea negotiation takes place. Such bargaining and negotiating seeing situations as recounted in the article by Wayne Flowers whereby those who have perpetrated crimes society would reasonably consider abhorrent and unacceptable receive limited or no incarceration sentence. Whilst there may appreciatively be many details to which the public is not witness, what the public does see is the outcome and what does this say to our community? And how does it reflect on the potential attitude and future actions of the criminally minded? As discussed by Dr Asher Flynn in the article *Plea bargains and the efficiencies of justice*, discusses, the process of plea bargaining/negotiating 'is often justified for its efficiency benefits, as it saves money and resources and spares victims and accused persons from prolonged proceedings', it also lacks transparency. Such lack of transparency raises concerns for victims of crime and the wider public as to the balance of whether the *punishment fits the crime*. What about our police officers who may spend months, or years investigating a case, drawing together minute details of evidence which as discussed by AiPOL President when plea bargains are negotiated, these minute critical aspects and processes of the case may be overlooked and yet they have potential to influence the severity of the sentence imposed.

Each of the articles in this addition and the President's forward call for greater transparency in cases of plea bargaining. Undertaking a study of the charges laid and subsequent plea bargaining that results associated with Operation Ironside would have the potential to (a) identify future policy for level/s of transparency in plea bargaining/ negotiating (b) increased regulation of what is included in a plea bargain/ negotiation and (c) how does that relate to the severity of the subsequent court outcome. Through acknowledgement by those in the Australian States and Territories who are involved in the plea bargaining/ negotiation process that there is opportunity to more adequately navigate transparency of the plea bargain/negotiation space in order to address not only court efficiency, also impacts on victims and families, investigating police and the community will there be potential for change.

The first step is to undertake research activities to offer an informed platform from which to determine if the call for change is validated.

The articles in this edition provide excellent background and discussion on this subject for your consideration.

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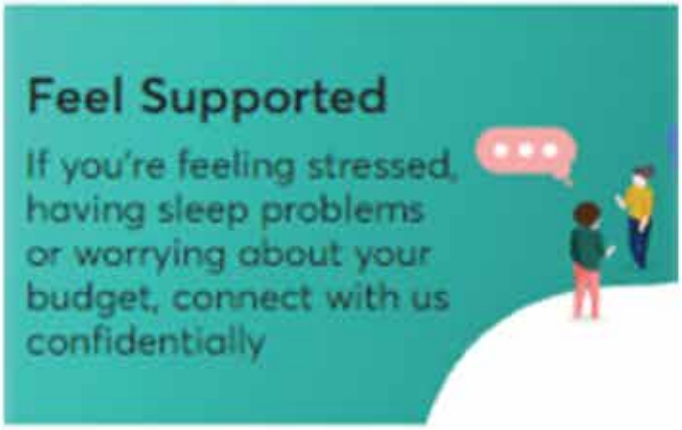


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# President's Foreword


## JONATHAN HUNT-SHARMAN

President, Committee of management, Australasian Institute of Policing


### Is Plea Bargaining Hindering the Fight Against Organized Crime in Australia?

From a policing perspective I was often not comfortable with major crime participants (organised crime involving drug trafficking, manufacture and supply, organised fraud, complex money laundering etc) having their charges downgraded to lesser charges by the DPP to avoid a trial. This downgrading to lesser charges was almost always as a result of *Plea Bargaining*. I felt that the downgrading to lesser charges as a result of *Pleas Bargaining* distorted the truth about organised crime's actual impact on Australian society.

Reducing the true level of criminality of an offender, subsequently distorts their official criminal history record. This in turn, can have a negative impact when criminal history antecedents is considered by the court for sentencing when it involves a repeat offender. It also may distort the outcomes of parole hearings as the Parole Board also considers the criminal history antecedents of a prisoner when considering parole.

This is of particular concern, when dealing with organised crime figures who upon their release from custody or after serving a non-custodial sentence, continue their criminality and subsequently are sentenced for seemingly unrelated offences. In such cases, the distorted criminal history records are considered by the magistrate or judge to determine sentencing, without them being aware of the original, but unproven charges, laid by the police.

As law enforcement practitioners know, and the lay person is aware of, through American TV shows such as Law & Order, the *Plea Bargaining* process is between the prosecution and the defendant's lawyer where the defendant agrees to plead guilty in exchange for a reduced sentence or lesser charge.

In Australia, *Plea Bargaining* is practiced in all states and territories and at the commonwealth level, but there is different terminology used across jurisdictions. It is also officially known as *Plea Negotiation*, *Plea Deal* and *Charge Negotiation*. It broadly falls into four (4) areas:

- *Count Bargaining*, where a defendant may plead guilty to only some of the charges that are made against them with the prosecution agreeing to drop the remaining charges;
- *Charge Bargaining*, where a defendant may plead guilty to a less serious crime than the one they were originally charged with, or the most

*continued on page 8*

serious charge laid against them, to potentially receive a lighter sentence;

- *Sentence Bargaining*, where a defendant agrees to plead guilty to the charges brought against them. However, the prosecution and defence team have already agreed on what sentence the prosecution will recommend to the magistrate or judge. Although this is only a recommendation and does not bind the judiciary, it appears that magistrates and judges normally accept the recommended sentence;
- *Fact Bargaining*, where the defence team bargains with the prosecution over the facts to be presented in court in order for a potentially lighter sentence. The defendant admits to certain facts that led to their conviction, whilst other facts are amended or omitted that likely lead to a harsher sentence being imposed.

It is argued that the main advantage of *Plea Bargaining* is that it can significantly reduce court congestion and save time and resources. By allowing a defendant to plead guilty to a lesser charge or a reduced sentence, *Plea Bargaining* can help clear the court backlog and reduce the number of cases that go to trial. This, in turn, can lead to faster resolutions of cases, less time spent in court, and reduced costs for both the prosecution and the defence.

In addition to reducing court congestion, it is argued that *Plea Bargaining* also increases the efficiency of the justice system. It is argued that allowing defendants to plead guilty to a lesser charge or a reduced sentence, *Plea Bargaining* can help the prosecution focus its resources on more serious cases whilst ensuring that defendants to take responsibility for their actions.

It is also argued that *Plea Bargaining* provides a faster justice outcome for victims and their families which can help victims and their families move on from the trauma of the crime and avoid the stress and uncertainty of a trial.

Of course, the obvious winner of *Plea Bargaining* is the defendant themselves who have the potential to receive reduced charges and/or less severe sentences. By negotiating a plea agreement with the prosecution, defendants can also avoid the risk of a harsher sentence if the matter goes to trial and they are found guilty. And of course, if they commit further offences in the future, they have a distorted criminal record antecedents.

Without sounding too cynical, it also should not be left unsaid, another big winner are the lawyers themselves. By negotiating a guilty plea, defence lawyers are able to deal with more clients and therefore increase the financial reward of quick turn over of cases, as they are not caught up in trial proceedings. Prosecutors also benefit from plea bargains because the guilty pleas allow them to improve their conviction rate, which from a future career promotional perspective, is not to be underestimated. Finally the various governments benefit because there are limited resources for prosecution and public defenders (Legal Aid etc) offices and guilty pleas enable more matters to be handled.

From a policing perspective it should be noted that police officers, detectives and investigators who can spend months and indeed years investigating serious crime, in particular, organised crime syndicates negatively impacting on Australian society, can be very disillusioned as a result of *Plea Bargaining*. It is very disheartening for police officers involved, where it is perceived by them that the plea bargain has resulted in an inadequate sentence that does not reflect the severity of the crime committed.

From a policing perspective, when prosecutors and defence lawyers negotiate *Plea Bargains*, there is also a concern from officers involved that during the process critical aspects of the case may be overlooked, such as aggravating or mitigating factors that could also impact the sentence imposed. It should be remembered that police officers and investigators involved in long term protracted and complex investigations 'live and breath' the case for months and or years and the in-depth knowledge gained can not be replicated by prosecutors upon receiving a final brief of evidence. This can result in some defendants receiving lighter sentences than they deserve and their organised criminal behaviour being ultimately under stated in court records.

Most of the research or papers/ articles that I have found on *Plea Bargaining* in Australia are quite dated. However, the majority of articles praise the high rate of conviction by way of guilty plea achieved through the *Plea Bargaining* process. Research conducted in Australia indicate that *Plea Bargaining* removes up to 85% of all criminal cases as a result of guilty pleas. In fact, it is strongly argued that the removal of *Plea Bargaining* would cause our judicial system to collapse as there would be an overwhelming increase in contested court hearings, placing an impossible workload on DPP officers, police prosecutors, defence lawyers, court staff and of course, magistrates and judges. But is that still the case?

Unfortunately without transparency of current processes and contemporary independent academic research, I respectfully argue that there is too much reliance on historical data. This problem is compounded by researchers not being able to have all the 'negotiation' material available to them, leading to 'knowledge gaps' in important data. The real question is whether the *Plea Bargaining* process is still appropriate. There have been a number of judicial reforms in recent years to encourage defendants to enter into guilty pleas. There has also been legislative amendments to provide incentives for defendants to plead guilty.

Most jurisdictions now offer sentencing discounts for guilty pleas. For example, *NSW Crimes (Sentencing Procedures) Act 1999* has two distinct guilty plea discount schemes. One which applies to an offence dealt with on Indictment. The other deals with offences that are Summarily and Indictable. A maximum discount of 25% is available if the plea is entered in the Local Court. During the Committal and Trial process, graduated discounts apply based on the timing of the guilty plea, ranging from 25% during a Committal Hearing to 10% if the offender pleads guilty at least 14 days before the first day of a Trial and 5% in any other case.

Analysis of the NSW scheme by the NSW Bureau of Crime Statistics and Research (BOCSAR) has found that early guilty pleas in District Court matters increased by 6.5 percentage points, rising from 70% to 76.5% (adjusting for other factors) as a result of those reforms. BOCSAR also found that the reforms increased finalisations in the District Court by at least 7 additional matters each week. BOCSAR also identified areas where improvements can be made to maximise the benefit of this scheme.

During the 2021-22 financial year, the Australian Bureau of Statistics found that most judgements resulted in a guilty outcome (97%) with only 3% acquitted.


In the higher courts 90% of defendants with a guilty outcome received a custodial sentence. So there are other effective incentives to plead guilty, not withstanding the use of *Plea Bargaining*.

Through Australian Federal Police (AFP) Operation Ironside, Australian law enforcement was able to infiltrate organised crime operating globally and within Australia. The ANOM app was key to the arrest of more than 390 organised crime figures across Australia and the laying of over 2,350 criminal charges. It is alleged that 'black market' phones installed with the so called "trojan Horse" app were passed around the underworld from 2018 to various criminal syndicates including, Outlaw Motor Cycle Gangs (OMCGs); transnational and domestic drug syndicates, Australian Mafia etc. Millions of texts sent through the app, which could only communicate with other ANOM devices, were copied and fed back to servers monitored by law enforcement for three years. Over 6655kg drugs have been seized, 128 weapons seized and $55.6m cash seized in Australia alone.

The unique nature of Operation Ironside is that the ANOM device was only distributed amongst criminal organisations with devices only able to communicate with each other.

As such, there is clear evidence of criminal association and of criminal organisations through the ANOM devices.

Under the Criminal Code 1995 (Cth) Division 390 Criminal association and organisations covers a number of offences including:-

- *Associating in support of serious organised activity;*
- *Supporting a criminal organisation;*
- *Committing an offence to the benefit of, or at the direction of, a criminal organisation ;*
- *Offence committed for the benefit of an organisation; and*
- *Directing the activities of a criminal organisation.*

The unique nature of Operation Ironside clearly supports the charging of offenders under the Criminal Code 1995 (Cth) Division 390 *Criminal association and organisations* or equivalent state or territory offences.

Bargaining away such serious charges to achieve a guilty plea on a specific charge such as a serious drug offence or a serious fraud offence may achieve efficiency within the judicial system whist still delivering substantial incarceration of the offender, but never less, there is a distortion of the true facts. The true level of organised criminality in Australia is 'hidden'.

Aipol recommends that an excellent case study would be to research:

- charges initially laid by state and federal police during Operation Ironside in comparison with the final charges admitted under guilty pleas;
- where *Plea Bargaining* resulted in that outcome, what was negotiated and what impact did that have on the court result;
- the outcome of any initial charges laid under the Criminal Code 1995 (Cth) Division 390 *Criminal association and organisations* or under equivalent state or territory legislation, such as NSW Crimes Act 1900 s.93T Participation in Criminal Groups;
- any reasons why investigating police or prosecution did not lay charges under the Criminal Code 1995 (Cth) Division 390 *Criminal association and organisations* or equivalent state or territory legislation; and
- the results of any charges laid where *Plea Bargaining* has not occurred, for example the number of contested and uncontested matters, the findings of guilt and sentences imposed.

Such a study would help measure the efficiency of *Plea Bargaining* versus any negative outcome from distorting the facts of evidence.


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# Welcome to the 'plea deal state' where cold-blooded killers have murder charges dropped and get out of jail years earlier. Wayne Flower reports on the disturbing trend of shocking crimes NOT going to trial

## Some of Australia's most serious criminals are serving just a fraction of the jail time that police intended after having their charges dealt away by prosecutors in Victoria.

January 21, 2023


**WAYNE FLOWER**

Melbourne Correspondent, dailymail.co.uk


- **Victoria's Office of Public Prosecutions has made high-profile deals with killers**
- **The deals come to avoid costly trials prosecutors don't believe they can win**
- **One deal saw a triple killer avoid a murder plea despite burning down their home**
- **Another killer was able to make a deal despite executing a stranger on a highway**
- **A woman who organised her 'slave' to attack a man avoided a murder trial**
- **Gangland widow Roberta Williams walked free after securing a deal on assault**

**Killer Jenny Hayes avoided a murder trial because prosecutors were worried the key witness would not be believed by a jury**

Sources told Daily Mail Australia that seasoned detectives have become so frustrated with the prolific use of plea deals they have questioned the point of their job.

High-profile cases at the end of plea deals over the past year include a woman that incinerated an entire family and a bikie who murdered a complete stranger by peppering his moving vehicle with bullets.

Many of the deals will ensure the killers serve many years less than if they had been convicted by juries at trial.

OPP spokesman Louis Andrews told Daily Mail Australia the director would not comment on particular cases.

'However, decisions regarding resolving cases and/or discontinuing charges are never made lightly.
The Director of Public Prosecutions and the Office of Public Prosecutions approach every one of these decisions with two considerations front of mind,' he said.

'In making these difficult decisions, the DPP and the OPP are always mindful of our obligations to consult with victims when making significant decisions.'

### JENNY HAYES

One of the most controversial deals made last year came with the dropping of murder charges against multiple killer Jenny Hayes.

Abbey Forrest, 19, Inda Sohal, 28, and their baby daughter Ivy had no chance of escaping the raging inferno that claimed their lives in December 2020.

But in a plea deal with the OPP, Hayes was permitted to plead guilty to the lesser charge of arson causing death.

So obscure was the charge, it had only been prosecuted three previous times in Victoria's history.

Daily Mail Australia revealed in November that prosecutors were worried a jury would not believe Hayes had been told by Mr Sohal's mate that his friends were sleeping upstairs before she set fire to the property.

The sex worker had got into an argument with the man before threatening to set fire to the town home.

CCTV footage played to the court showed Hayes carry out her threat, stopping to take photos as the downstairs bedroom went up in flames.

'You f**ked with the wrong person,' Hayes bragged.

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**Abbey Forrest's sister, Emily (left) and mother Elizabeth after facing the Supreme Court to deliver their victim impact statements. They have slammed the deal that allowed Hayes to get away with murder**

The court heard the young family were unable to escape out the front door due to the fire, with the only accessible window locked with a chain.

A neighbour who tried to save the family later told police she had seen Mr Sohal crying for help from the window before falling silent.

Baby Ivy's remains would be found later still within her cot, with the body of her mother by her side.

Hayes would have faced life behind bars if found guilty of the murders.

In November, Hayes was sentenced to 13 years in jail, with a non parole period of eight years - just two-and-a-half years per life she stole.

The decision to dump the murder trial had been welcomed by Supreme Court of Victoria Justice Elizabeth Hollingworth.

'I certainly said to my associates when we walked out of court: 'That's a very unimpressive witness'. He was not someone to hang your hat on for a conviction,' she said at the time.

**Abbey Forrest, 19, Inda Sohal, 28, and their baby daughter Ivy. All three were killed by Jenny Hayes, who dealt her way out of a murder trial**

## JOSH RIDER

Josh Rider, along with co-accused Aaron Ong, fired a hail of 11 bullets into the van of Paul Virgona, killing the father of two, on Melbourne's EastLink freeway in November 2019.

Mr Virgona, 46, died from blood loss on the freeway after being hit by seven bullets from a semi-automatic handgun, with evidence pointing to Rider being the shooter.

Rider had been free on the streets after convincing a County Court of Victoria judge he had changed after being charged over a savage assault.

Within days of the sentencing, Rider was planning a brutal murder at the Mongols clubhouse in Port Melbourne, Victoria's Supreme Court heard.

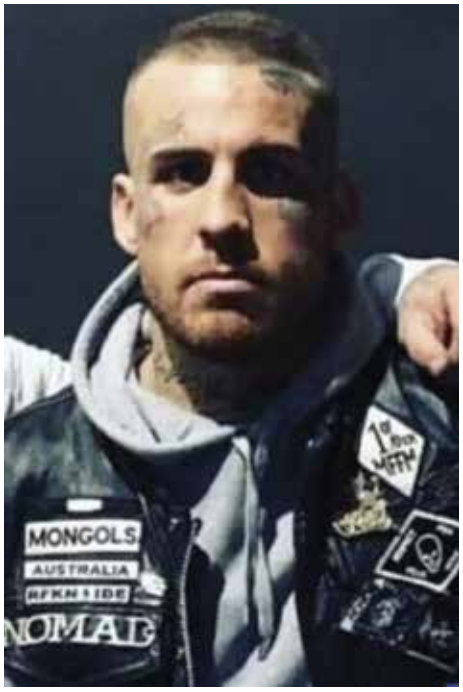
Rider staunchly denied any involvement in the death of Mr Virgona, but with DNA evidence and CCTV footage placing him at the scene, he changed his plea to guilty on the eve of his trial.

Rider pleaded guilty to 'reckless murder' - as opposed to 'intentional murder' - in a deal with the prosecution last month, but Ong fought a murder charge.

A condition of the deal was that the prosecution would not seek a life sentence for Rider.

Ong went to trial and was found guilty of intentional murder.

So concerned about the deal, Supreme Court of Victoria Justice




**Josh Rider managed to secure a deal with prosecutors despite firing almost a dozen bullets into the driver's side of a man's car, killing him. The OPP agreed he had been 'reckless'**

**Paul Virgona had been a victim of mistake identity. His killer Josh Rider was able to cut a deal**

**Dominatrix Heide Victoria Bos ordered her 'willing slave' to attack a man who was brutally beaten to death**

**Bos was able to secure a deal that saw her avoid a murder trial**

Christopher Beale refused to provide Rider with a sentencing indication on the basis of reckless murder, saying the killing 'bespeaks murderous intent'.

'It came as something of a surprise to me that the parties were contemplating settlement based on recklessness, not intent,' Justice Beale said.

'There would be many people in the community who would be possibly shocked at the thought: "Why was this reckless murder, not intentional murder?"

'Were I to grant a sentence indication, the court could be seen to be a party to something contrived, even unjust.'

## HEIDE VICTORIA BOS

Dominatrix Heide Victoria Bos ordered her 'willing slave' to attack a man who was brutally beaten to death.

Bos, 37, of Melbourne's CBD pleaded guilty in the Supreme Court of Victoria in December to killing 39-year-old Nicholas Cameron.

She had originally been charged with murder, but accepted an OPP deal to plead to the lesser charge of manslaughter.

At the time, seasoned homicide squad detective Sol Solomon described the attack against Mr Cameron as 'extremely brutal'.

Bos' guilty plea came after she asked Justice Michael Croucher for a sentence indication.

Upon her arrest, Bos told police she had never meant the attack on Mr Cameron to go that far.

Her co-accused, Stuart Lindsay Heron, remains behind bars and is expected to face his own Supreme Court of Victoria murder trial next year.

Bos convinced prosecutors while she understood there would be 'some violence' against Mr Cameron, he would be alive at the end of the confrontation.

The court heard Bos claimed she was oblivious to the fact that weapons would be used in the attack.

The court heard the pair had met on 'FetLife' – a social media site for the BDSM and fetish community.

The couple had been together for just on six weeks when the alleged murder took place.

The court heard Heron was a committed slave, paying for his dominatrix's rent.

In messages between the pair, Bos told Heron 'you will please your queen' and 'you will prove your loyalty'.

Under the OPP deal, Bos will serve as little as three-and-a-half years behind bars.

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**Gangland grub Roberta Williams managed to secure a deal that saw her walk free from court**

Bos had only agreed to the deal after being told by Supreme Court of Victoria Justice Michael Croucher that he would sentence her to just six years in jail, meaning she could walk free with good behaviour after three-and-a-half years.

With time already served behind bars, Bos will be back on the streets in just over two years time.

## ROBERTA WILLIAMS

Gangland widow Roberta Williams was allowed to walk free to continue her OnlyFans gig after securing a deal from the OPP.

Williams is best known for being the jilted wife of Melbourne gangland killer Carl Williams, who had dumped her by the time he was bludgeoned to death in April 2010 by prison enforcer Matthew Johnson.

She had been charged over the brutal assault of her one-time tv producer Ryan Naumenko in 2019.

Williams pleaded guilty in May to charges of blackmail and recklessly causing injury to Naumenko.

'Kill the c**t, he has no money,' Williams had shrieked as her mate bashed Naumenko.

Tied to a chair, Williams demanded he transfer money and told him he was lucky she had not killed his mother and children.

While Williams was initially accused of choking Naumenko with an electrical cord during the attack, she pleaded guilty to the assault charge on the basis she took no part in any physical attack on him after securing a deal with the OPP.

**Ryan Naumenko claimed Roberta Williams had bashed him**

Blackmail in Victoria carries a maximum jail sentence of 15 years, while the assault charge tops out at five.

Williams walked free in August on a community corrections order where she was not even ordered to perform a single minute of community work.

## CHARLES McKENZIE EVANS

Charles McKenzie Evans walked free from a Victorian jail in 2021 after serving a minimum two-and-half year sentence over the killing of Alicia Little.

While police initially charged Evans with Alicia's murder, he struck a deal with prosecutors to plead guilty to dangerous driving causing death and failing to render assistance.

**Roberta and daughter Dhakota have both taken to OnlyFans**

Late last year, the Coroners Court of Victoria heard Alicia had been unwilling to report to police instances of domestic violence against her and her four children after she was charged herself following a brutal attack against her by Evans.

The revelations had remained a secret even to Alicia's family - who attended the court en masse - until now.

Alicia told the officers' she was petrified of Evans and feared for her life.

She had bitten Evans in self defence after he had pinned her to the ground and bashed her.

Despite Evans having a shocking history of domestic violence against his former partner in New South Wales,

**Alicia Little's family (pictured) slammed the OPP for making a deal with her killer**

**Jonathan Ewington smashed in a man's head with a sack of stubbies. The OPP agreed his actions were reckless rather than intentional**

**Tyson St Jacques sustained shocking injuries in the 'reckless' attack**

**Charles McKenzie Evans, 46, was released from a Victorian prison after serving two years and eight months for ramming and killing his fiancee Alicia Maree Little**

Victoria Police charged Alicia with intentionally and recklessly causing injury and common assault.

In Victoria, intentionally causing serious injury carries a head sentence of 20 years in jail.

Lauren Osborne, Alicia's sister-in-law, told Daily Mail Australia the OPP had refused to run a murder trial against Evans.

'The OPP gave him a really good deal. The OPP met with our family and told us we were able to ask a bunch of questions, so we went in and asked a lot of questions,' Ms Osborne said.

'They said right from the get-go, just before we start this, we need you to know that it's not going to change any decisions that have already been made and that they were merely here to appease our family. '

## JONATHAN EWINGTON

Jonathan Ewington, 39, of New Zealand, was sentenced in the County Court of Victoria in May to a community corrections order for his savage 2019 attack on gatecrasher Tyson St Jacques.

Mr St Jacques, aged 21 at the time, had gone to the Rancho Relaxo music festival at Hastings on the Mornington Peninsula with a group of friends - but they were quickly asked to leave because they didn't have tickets to the private event.

The court heard the Melbourne-born Ewington, who had travelled to the event from New Zealand, jumped a fence to attack his victim on the mistaken belief he had stolen his sack of beers from the party.

Ewington had scaled a fence to remonstrate with the rejected party goers.

'What's in the f**king bag,' he shouted while charging at Mr St Jacques.

While Mr St Jacques' mate dropped his bag and ran, he stopped and held out his bag to allow Ewington to inspect what was inside.

The court heard Ewington grabbed the bag and continued to chase down the fleeing gatecrasher.

When Mr St Jacques attempted to retrieve his sack of beers, Ewington cracked him in the face with it.

The impact caused catastrophic injuries to Mr St Jacques face, breaking his jaw and sending at least one tooth flying.

Over the next three days he was treated at hospital for his fractured jaw and the dislocation of at least seven other teeth.

The court heard Mr St Jacques would likely require years of ongoing treatment, with three more teeth at risk of coming out.

Ewington maintained for years he had acted in self defence before accepting a plea deal to a lesser charge on the eve of his trial.

The deal saw charges of intentionally causing serious injury downgraded to recklessly causing serious injury - cutting any potential sentence in half.

Ewington walked free and was allowed to stay in Australia.

The OPP was contacted by Daily Mail Australia before publication of this article.

It did not respond.

# Plea bargains and the efficiencies of justice

In 2007, the infamous underworld figure pleaded guilty to one count of conspiracy to commit murder and three counts of murder, on the basis of a plea deal struck with the Victorian Office of Public Prosecutions (OPP).


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This deal involved drug trafficking and murder charges being withdrawn and investigations into his involvement with another five murders being concluded. Almost five years later, another infamous crime figure in Victoria's gangland wars, Tony Mokbel, was sentenced to drug trafficking offences, after having pleaded guilty to a deal struck with the OPP, which allegedly included the withdrawal of eight additional drug-related charges and his involvement in up to three murders.

### Plea bargaining across Australia

Victoria is not alone. Examples of plea bargaining and contentious deals can be found across all Australian jurisdictions. In NSW, Karl Koch was charged with the attempted murder of his former girlfriend Nanette May, who was beaten so severely that she has ongoing motor co-ordination problems.

In reaching a deal with the NSW Department of Public Prosecutions (DPP), Koch was able to plead to the lesser offence of malicious injury with intent in 2009, despite significant evidence suggested he stalked and planned to murder May.

In South Australia, the somewhat renowned Nemer plea deal resulted in a challenge in the Full Court of the Supreme Court in 2003, to allow the Government to intervene and force a Crown appeal against the inadequacy of a sentence imposed, which was the primary result of a favourable plea deal struck between Paul Nemer and the DPP. In this case, Nemer had shot and severely injured a newspaper-delivery man, after mistakenly believing the victim was stalking two of his female friends.

### How plea bargaining works

Plea bargaining essentially involves a private negotiation between the prosecution and defence lawyer on the charges, case facts and/or prosecution's sentencing submission. For example, reducing murder to manslaughter, or withdrawing one charge to allow a guilty plea to fewer charges.

Its primary aim is to arrive at a mutually acceptable deal between the prosecutor and the defence, which results in the accused pleading guilty.

This process is often justified for its efficiency benefits, as it saves money and resources and spares victims and accused persons from prolonged proceedings.

## Transparency?

Although offering these benefits, plea bargaining is a largely non-transparent process to those outside the bargaining room. Across most Australian jurisdictions, plea bargaining is not recognised in or controlled by any legislation, and no external data is kept as to when or why plea bargaining occurs, which limits public understanding of the process and can raise doubts over the motivations underpinning the deals and the subsequent legitimacy of the agreements made.

This is largely because plea bargaining falls under the discretionary powers of the prosecution, which means the public is left to trust that the parties involved in the process have upheld the same judicial principles that would apply to a conviction reached after trial.

When a matter is resolved by a guilty plea, the full circumstances surrounding the offence are generally not publicly available – even in the Mokbel and Williams cases, the number of charges withdrawn and investigations concluded in order to gain their guilty pleas are based on partial information and conjecture.

## A question of justice?

The absence of disclosure is concerning, because it means in many instances where plea bargaining is used, it is impossible to tell if a more or less serious conviction may have been appropriate. This raises the risk that offenders' convictions may not match their culpability, and that the public cannot then determine if these offenders were convicted and sentenced appropriately.

This is concerning from the perspective of the victim and the accused, given that plea agreements can alter the seriousness of the conviction and sentence imposed, and can remove the opportunity for the victim to provide testimony or for the prosecution to prove its case within the confines of the rules of evidence applied at trial.

The key issue at play thus becomes the factual guilt of the accused, "in the sense that the accused probably committed the criminal act", as opposed to proving guilt beyond reasonable doubt.

## We need plea bargaining, just done better

Without question, there is a place for plea bargaining. Indeed, our justice systems would grind to a halt if all cases proceeded to trial. However because the plea bargaining process is not transparent to those not directly involved in the deal, criminal matters, some involving the most serious form of misconduct, are being resolved in secrecy.

Consideration should be given to greater external transparency of plea bargaining, even simply introducing a register to keep track of when these deals occur. In accordance with Charlie Bezzina's discussion of the Mokbel plea bargain in Victoria, "these deals are an essential tool in saving court time and costs, but … closer scrutiny needs to be applied to these matters". It would be a significant achievement to see informed and considered changes to plea bargaining across Australian criminal jurisdictions.

# Representation reduces number and severity of charges, new research shows

**Between 87 and 100 per cent of all guilty pleas in Victoria are the result of plea deals, according to new research from Monash University.**

September 3, 2018

## MONASH UNIVERSITY

The research forms the basis of a recently published book, Plea Negotiations: Pragmatic Justice in an Imperfect World (2018, Palgrave MacMillan) by Dr Asher Flynn (Senior Lecturer in Criminology, Faculty of Arts) and Emeritus Professor Arie Freiberg (Faculty of Law) which reveals new information about the use of plea negotiations in Victoria.

The authors interviewed 48 judges, magistrates, prosecutors, defence lawyers and legal aid practitioners and had unprecedented access to 50 Victoria Legal Aid case files.

The book finds that unrepresented accused persons are at a disadvantage in attempting to negotiate with police prosecutors, and are at greater risk of succumbing to pressures to make agreements without fully understanding the implications of their guilty plea.

With reductions in funding and tightening of eligibility criteria for Victoria Legal Aid service provision leading to an increased number of self-represented accused persons, the issue of plea deals is more important than ever.

### Key Findings

- Between 87 and 100 per cent of all guilty pleas in Victoria are the result of plea deals
- On average, 3 charges were withdrawn per case in order to facilitate a guilty plea – meaning the offender pleaded guilty to fewer charges.
- Evidence of mental illness among accused persons was presented in 60 per cent of the case files, and the interview data suggested the rates are even higher.
- Reductions in funding and tightening of eligibility criteria for Victoria Legal Aid service provision has increased the number of self-represented accused persons. This affects the role of the magistrate and the police prosecutor (who are inappropriately being forced to become quasi-defence practitioners) and has created more delays in the system.
- Unrepresented accused persons are at a disadvantage in attempting to negotiate with police prosecutors, and are at greater risk of succumbing to pressures to make agreements without fully understanding the implications of their guilty plea.
- Mandatory sentencing regimes (such as the mandatory four-year minimum for gross violence offences) put pressure on accused persons to accept an agreement to plead guilty to a lesser offence that does not carry a mandatory penalty, even where there may be a strong case that the accused is not guilty of that lesser offence. These regimes also sometimes place pressure on prosecutors to negotiate a plea of guilty to an offence that does not carry a mandatory sentence, in order to avoid going to trial.

- The most common forms of plea negotiation used in Victoria are:

1. Withdrawing charges (removing charges)
2. Substituting charges (a less serious charge)
3. Rolling up counts (combining like offences into one charge or fewer charges)
4. Representative counts (representing a course of conduct)
5. Negotiating the summary of facts (fact bargaining)
6. Agreement as to what the prosecutor will submit as part of their sentencing submission (for example, whether a non-custodial sentence is within range)

- The offences most commonly negotiated are where multiple alternative charges exist, for example:
- Intentionally or recklessly causing serious injury
- Intentionally or recklessly causing injury
- Gross violence offences (which carry a mandatory minimum non-parole period)
- Aggravated burglary
- Assaults
- Armed robbery
- Drug offences
- The offences least likely to be negotiated are:

1. Homicide offences: due to the seriousness of the crime and the high level of public interest in the prosecution.
2. Sex offences: 66 per cent of participants identified these as the most challenging offences to negotiate, given the high acquittal rate, which participants said provided an incentive to 'risk' a trial The study also found that the sex offender registration scheme is a key limitation in encouraging guilty pleas, with participants describing it as one of the biggest hurdles to successful negotiations.
3. Family violence: because there is a perceived 'public interest' in matters being seen to be treated with the utmost seriousness, there has been a change in police charging practices and approaches to prosecuting family violence cases. The study also found participants were generally concerned about the potential for the escalation of violence in these cases (which may even lead to a fatality), and the repercussions for Victoria Police if this were to occur.

## Background

Plea deals involve a discussion between the prosecutor and defence practitioner (or the accused), where certain concessions are made, such as withdrawing charges and reducing the severity of charges and case facts.

Plea Negotiations: Pragmatic Justice in an Imperfect World is authored by Dr Asher Flynn (Senior Lecturer in Criminology, Faculty of Arts) and Emeritus Professor Arie Freiberg (Faculty of Law).

Public Release. This material from the originating organization/author(s) may be of a point-in-time nature, edited for clarity, style and length. The views and opinions expressed are those of the author(s).


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Trends & issues in crime and criminal justice

# Plea negotiations: An empirical analysis

Across Australian criminal jurisdictions, the most frequent method of case finalisation is not a contested trial, but rather by an accused entering a plea of guilty.

April, 2018

**ASHER FLYNN AND ARIE FREIBERG**

aic.gov.au

**No. 544**

**Abstract** | Negotiating guilty pleas ('plea bargaining') is a central element of criminal justice processes in Australia, yet little is known outside the legal community about the frequency and outcomes of plea negotiations. This study addresses this important knowledge gap through qualitative and quantitative analysis of cases that were resolved through negotiated guilty pleas in Victorian courts.

The study found that negotiations are used in almost all cases of guilty pleas across all court levels and often involve an extensive negotiation process. The study highlighted differences in the way negotiations play out in summary and indictable courts and identified 14 different forms of plea negotiation.

In this context, negotiated guilty pleas, commonly referred to as 'plea bargaining', 'plea negotiations', 'settlements' and 'early resolutions', have taken on a more prominent and significant role in the delivery of modern day justice. Negotiated guilty pleas are the result of an agreement reached between the prosecutor and the accused (usually through their legal representative) that may involve—among other outcomes—alterations to the charges (number, severity and structure), an agreement as to the case facts to be put before the court, and/or an agreement on the Crown's sentencing submission, in exchange for the accused forgoing their right to a contested trial and entering a guilty plea. These agreements are justified on the grounds of court efficiency and reducing court backlogs through the speedier resolution of cases, while still ensuring that the public interest is served through a timely conviction—albeit this conviction may not reflect the full extent or severity of the offending conduct.

In Australia, plea negotiations are an under-examined topic resulting in a partial and often distorted understanding of the process by those outside the legal community. Across Australian jurisdictions, no official data are available that detail the frequency and outcomes of plea negotiations. While it is possible to monitor the rates of guilty pleas—although this is becoming increasingly more difficult—there is a limited capacity to ascertain what role plea negotiations may have played in facilitating these pleas. In addition, little information is publicly available about negotiations, including: what is discussed, what the outcomes may entail, how and why negotiations occur, and the processes involved. As a consequence, criminal matters—including those involving serious misconduct—are resolved with limited external understanding of the process.

This paper is drawn from a multi-methods study documenting current plea negotiation practices in the state of Victoria—the Negotiating Guilty Pleas Project. The project was funded by a Criminology Research Grant (53/13–14) and is the first Australian study to develop a dataset of negotiated guilty pleas through a comprehensive analysis of de-identified Victoria Legal Aid (VLA) case files, in-depth interviews, group discussions and stakeholder consultations with members of the Victorian legal community across six locations (Melbourne, Shepparton, Gippsland, Geelong, Ballarat and Dandenong). Specifically, this paper focuses on the findings of the study that shed light on the frequency, timing, processes and outcomes of plea negotiations. It is hoped this paper will improve understanding of plea negotiations in Victoria and contribute to any reform process that may eventuate from this or other reports informed by the study.

## Aims and method

The Negotiating Guilty Pleas Project aimed to provide new information about plea negotiations in Victoria, and Australia more broadly, building on the small body of Australian research on negotiated guilty pleas. The project sought to do this by providing an empirical account of current plea negotiation practices in Victoria, including documenting the frequency of plea negotiations, identifying the different forms of plea negotiations and the common outcomes of negotiations, as well as discussing the processes involved in counsel reaching an agreement.

The study involved a three phase qualitative and quantitative methodology. Phase 1 involved developing a dataset of negotiated guilty pleas through a comprehensive mixed qualitative and quantitative analysis of 50 de-identified VLA case files which had been resolved by guilty plea.

One of the most significant contributions of the study came from the ability to access and analyse de-identified case files. To date, there is no Australian-based research that has documented or accessed guilty plea case files for this purpose.

The de-identified files were collated from VLA's indictable and sexual offence divisions for cases resolved between 1 July 2012 and 30 June 2014. The research was conducted under s 6(2)(b) and s 7(1)(j) of the Legal Aid Act 1978 (Vic). Section 6(2)(b) of the Legal Aid Act 1978 (Vic) states:

VLA may…(b) enter into arrangements from time to time with a body or person with respect to any investigation, study or research that, in the opinion of VLA, is necessary or desirable for the purposes of this Act…

Section 7(1)(j) of the Legal Aid Act 1978 (Vic) states:

In performing its duties, VLA must… (j) encourage and permit law students to participate, so far as VLA considers it practicable and proper to do so, on a voluntary basis and under professional supervision in the provision of legal aid…

The case files were analysed using a case file analysis schedule prepared in consultation with VLA staff. Each file was assigned a pseudonym comprising three numbers and two letters, for example 005-BD. The analysis process involved extracting data systematically, searching the files and recording relevant responses to each issue/question listed in the schedule. This enabled the collection of both quantitative and qualitative datasets with the assistance of NVivo 10 and Statistical Package for the Social Sciences (SPSS) software.

Phase 2 involved conducting 48 qualitative in-depth interviews of an average 65 minute duration with police prosecutors (n=5), Office of Public Prosecutions (OPP) solicitors and Crown prosecutors (n=5), defence practitioners—including VLA employees (n=12) and those in private practice (n=13)—and judicial officers (n=13). The interviews took place in six locations in Victoria—Melbourne, Geelong, Shepparton, Gippsland, Ballarat and Dandenong. These sites were selected to obtain a variety of perspectives on plea negotiations across city, rural and regional environments. This allowed the study to capture the nuances specific to city, rural and regional areas, and identify common approaches and themes across varying prosecution offices and defence practices over the three Victorian court levels (Magistrates, County and Supreme).

All interviews were audiotaped and transcribed verbatim. Participants were assigned pseudonyms which comprised their occupation, a randomly assigned sequential number, gender (M/F) and whether they were from a rural or regional location (R). For example, a male prosecutor based in Melbourne may be assigned the pseudonym 'Prosecutor04M'. A female magistrate from a rural or regional location may be assigned the pseudonym 'Judge09FR'. The transcripts were then systematically coded to allow for thematic analysis of the data. Once key themes were identified, the interview data were analysed to compare factors such as: occupation of the participant; rural,

regional or city-based participant; and the level of experience in their current role. Emerging themes in the interview data were examined against the case file analysis to compare and contrast the findings.

Phase 3 involved a two-hour consultation workshop with key legal and policy stakeholders

(n=15, eight of whom had been interview participants) in a roundtable focus group setting. Participants were asked to respond to specific questions pertaining to 15 key themes identified in the interview and de-identified case file analyses, and to identify any considered flaws or issues of importance that did not appear in the findings—for example, whether the offences present in the case files were representative of the types of offences most commonly negotiated. This allowed the accuracy of the findings to be tested with those directly involved in the negotiation process.

The roundtable was audiotaped and transcribed. Participants were assigned pseudonyms mirroring those assigned to interview participants (occupation, a randomly assigned sequential number and gender). The roundtable transcript was systematically coded to allow for thematic and comparative analysis of the data against the findings from the interview and de-identified case file analyses.

Finally, a draft of the study's final report was provided to VLA, Victoria Police and the OPP for feedback. This offered an opportunity to discuss and reflect upon the key findings with the three main legal organisations involved in plea negotiations in Victoria.

## Results

### Frequency

The study found that between 87 and 100 percent of guilty pleas entered at all levels of Victorian courts were the result of a negotiated agreement between the prosecutor and the defence.

As reflected in the following comments, the interview data produced higher estimates of the rate of plea negotiations, sitting at between 90 and 100 percent of guilty pleas entered by an accused:

'Every case is negotiated.' (Judge02MR)

'I don't think there's a file that you wouldn't negotiate on.' (Defence02F)

'There's always room for a discussion in any case.' (Defence15M)

'Every case.' (Defence18M)

'Occurs in every single case—9.5 out of 10.' (Defence11M)

'I can't think of any situation where you can't really engage in negotiations.' (Defence12FR)

Eighty-seven percent of the de-identified case files (n=41 of 47) that had sufficient information to determine the charges before and after the entering of a guilty plea involved some form of negotiation leading to a withdrawal of charges and usually a reduction in both the number and seriousness of the remaining charges. Of these cases, 89 percent (n=42) had charges withdrawn, which usually resulted in the accused pleading guilty to fewer, and less serious, offences than those originally charged. The mean number of charges per case prior to a resolution was 6.42. The mean number of charges to which an accused pleaded guilty post resolution was 3.18. The mean number of charges withdrawn was 3.24. The highest number of charges withdrawn in an individual case was 11 (the accused had originally been charged with almost 30 offences).

Fifty-one percent of the de-identified case files with sufficient details to

*continued on page 24*

determine charges before and after resolution (n=24 of 47) also included specific details of the case facts (the agreed summary) being negotiated to present a particular version of events, although it is worth noting that discussions alluding to the amendment of the agreed summary were evident in the majority of the files.

### The process

The study found that the negotiation process is quite extensive, often with multiple interactions between the parties before an agreement is reached. In cases where the plea offer presented by the defence was not immediately accepted by the prosecution, the response generally addressed the defence arguments and outlined reasons why the offer was rejected. In addition, the majority of these responses included the OPP proposing a counteroffer. It was rare for the prosecution to simply dismiss a plea offer out of hand without explanation, although it did occur in at least three of the case files.

The interactions between the negotiating parties occurred by phone, email, letter and face to face, with the most common communication method being email (74% of files). There were four main considerations framing the plea negotiation process for prosecutors and defence practitioners which affected the likelihood of engaging in discussions, the likelihood of agreeing to a resolution, and the type of resolution agreement reached. These included: (1) the strength of the evidence, (2) the public interest (for prosecutors), (3) the personality of the opposing party, and (4) the client's interests

(for defence practitioners).

### Timing

Across the de-identified case file data, all guilty pleas were entered prior to trial, with the majority

(81%) entered prior to the pre-trial committal hearing. It was clear from the files and interviews that both the prosecution and defence were actively engaging in plea negotiations, and generally resolved matters to a plea of guilty at the earliest opportunity. The interview and de-identified case file data confirmed that the defence are more likely to initiate discussions (91% of files), although it is becoming more common for prosecutors to commence discussions, and this is encouraged through internal policy (OPP Victoria nd).

There are various levels of internal authorising and accountability mechanisms operating within the OPP and Victoria Police in relation to accepting a guilty plea to lesser charges, suggesting that while plea negotiations are not officially recognised in legislation, they are part of the legal process and a widely accepted criminal justice procedure. This study found that a strong early resolution culture has permeated the courts, VLA, Victoria Police and the OPP, which may in part contribute to the high rate of guilty pleas entered in Victorian courts each year.

### Summary and indictable courts

There are significant differences in the way plea negotiations are conducted in the summary jurisdiction, compared to the manner with which indictable cases are handled. This is partly due to the nature of the offences heard in the summary stream, the fast pace of the Magistrates' Court compared to the higher courts, and the different approaches defence practitioners adopt when dealing with police prosecutors, as opposed to when negotiating with OPP solicitors and Crown prosecutors. The study found that the early resolution focused pre-contest hearings that operate in the summary jurisdiction (the summary case conference and the contest mention hearing) strongly facilitate plea negotiations at an early stage. However, the success of the contest mention is highly dependent on the magistrate involved, which can lead to inconsistencies in the effectiveness of this hearing:

'The problem with contest mentions is it's very dependent on the magistrate.' (Judge02MR)

'It comes down to practicality and different magistrates.' (Defence05M)

'It depends upon the magistrate who you've got and how open they are to resolution.'

(Defence13FR)

'If they put someone in there that has no interest in resolving matters, they do not care and so everyone ends up going off to [a] contest[ed hearing], because there's no incentive and for that process to work there really has to be incentive.' (Defence03F)

The study also identified some limitations to the out-of-court summary case conference process which arise from the lack of resourcing, the high workload of police prosecutors, and the absence of specific funding for VLA practitioners to prepare and engage in summary case conference work:

'The police prosecutors aren't properly resourced to prepare for them [summary case conferences]. I feel sorry for those prosecutors, because their loads are so high.' (Defence16F)

'They [prosecutors] can't be answering any phone calls or negotiating things out of court, so you've just got a whole lot of wasted adjournments which is just unnecessary churn through the court system which is the most expensive bit.' (Judge04FR)

'You can end up sending things to contest mention maybe prematurely, because you're funded then to turn up for that one appearance.' (Defence03F)

'Opportunities for negotiation, genuine negotiation are lost as part of the regrettable way that Legal Aid's [funding is] structured.' (Defence06MR)

These limitations hinder the effectiveness of what could potentially be a highly successful early resolution focused process.

### Offences

The most common offences negotiated are those where there are multiple alternative charges available, such as intentionally or recklessly causing serious injury or intentionally or recklessly causing injury. This includes gross violence offences (which carry a mandatory minimum non-parole period) and aggravated burglary. Assault offences are also commonly the subject of plea negotiations, and these offences featured in the data partly due to police charging offenders with multiple offences covering the same course of conduct (sometimes referred to as 'overcharging') which provides a foundation for negotiations. Armed robbery and drug offences were also common subjects of negotiations.

The offences least likely to be negotiated included sexual offences, family violence and homicide. Homicide offences were identified as difficult primarily due to the seriousness of the crime and the high level of public interest in the prosecution. This reflects the findings of the Sentencing Advisory Council's (2015: 19) analysis of guilty plea outcomes between 2004 and 2014, where they found that murder had the lowest guilty plea rate of all proven offences (48%) during the reporting period.

The study found that sex offences were considered the most difficult to resolve, with 66 percent of participants identifying these as the most challenging offences to negotiate. This is supported by data obtained from the County Court which show that between 2008 and 2015 there was a noticeable difference between the guilty plea rate in general offences, which averaged to 72 percent over seven years, and the guilty plea rate in sex offences, which averaged to 45 percent. It is perhaps unsurprising that sex offences do not commonly feature in plea negotiations, given the number of sex offence matters that proceed to trial in the County Court and the high acquittal rate, which participants said provided an incentive to 'risk' a trial. The study also found that the sex offender registration scheme is a key limitation in encouraging guilty pleas and negotiations in sex offence cases, with participants describing it as 'one of the biggest hurdles to successful negotiations'

(Defence21M) and 'a significant impediment to any kind of resolution' (Defence20M). For more information on the effect of the sex offender registry on guilty pleas, please see the project's final report (Flynn & Freiberg 2018).

Interestingly, and perhaps as an unexpected consequence of the recent focus on family violence in Victoria (and Australia more generally), the study found there are minimal negotiations in family violence matters because there is a perceived 'public interest' in the matters being seen to be treated with the utmost seriousness. As a result, there has been a change in police charging practices and approaches to prosecuting family violence cases. The study also found that participants were generally concerned about the potential for the escalation of violence in these cases (which may even lead to a fatality), and the repercussions for Victoria Police if this were to occur. Such concerns are supported by the report of the Royal Commission into Family Violence (2016: 41), which states 'There is a demonstrable link between family violence [and] homicide,' noting that of the 250 murder cases prosecuted by the Victorian OPP in the last three reporting years, approximately 10 percent (n=23) 'were related to family violence' (Royal Commission into Family Violence 2016: 55).

### Forms of plea negotiations

The study identified 14 forms of plea negotiation across the interview and de-identified case file datasets, eight of which (marked with an asterisk below) were identified as 'everyday' outcomes arising from discussions. The study found it was not uncommon for several of these forms to appear in the one agreement. This is a significant expansion on previous research which identified three main forms of plea negotiation:

- 'charge bargaining' (Manikis 2012: 411)—which incorporates withdrawing charges and substituting charges (Flynn 2016; Fox & Deltondo 2015; Johns 2002; Mackenzie, Vincent & Zeleznikow 2015; Wren & Bartels 2014; Yang 2013);
- 'fact bargaining' (Manikis 2012: 411)—which incorporates discussions on which facts will form the basis of the agreed summary presented to the court from which the accused is sentenced
- (Flynn 2016; Johns 2002; Mackenzie, Vincent & Zeleznikow 2015); and

*continued on page 26*

- 'sentence bargaining' (Manikis 2012: 411)—which incorporates discussions on the prosecutor's sentencing submission, agreements as to what stage in proceedings the accused indicated an intention to plead guilty and which jurisdiction the offence should be heard in (Flynn 2016;
- Fox & Deltondo 2015; Mackenzie, Vincent & Zeleznikow 2015).
- The 14 forms of negotiations identified in this study include:

1. Withdrawing charges* (removing a charge(s) from the indictment)—evident in 44 files and identified by 95 percent of participants;
2. Substituting charges* (accepting a guilty plea to a less serious charge)—evident in 20 files and identified by 95 percent of participants;
3. Rolled up counts* (combining like offences into one charge or fewer charges)—evident in 14 files and identified by 100 percent of participants;
4. Representative counts* (having one offence represent a course of conduct)—evident in 10 files and identified by 95 percent of participants;
5. Fact bargaining* (agreement on the summary of facts)—evident in 24 files and identified by 100 percent of participants;
6. Agreement as to what the prosecutor will submit as part of their sentencing submission* (eg a non-custodial sentence is within range)—evident in five files and identified by 97 percent of participants;
7. Diversionary programs* (eg agreement to plead guilty if the matter is accepted on a diversion program)—evident in six files and identified by 76 percent of participants;
8. Agreement on costs* (eg an outcome that includes an agreement not to apply for costs against the opposing party)—identified by 67 percent of participants;
9. Agreement to change jurisdiction (eg allow the indictable offence to be sentenced in the Magistrates' Court)—evident in nine files and identified by 92 percent of participants;
10. Accused to provide information on another matter (this may also involve the accused acting as a prosecution witness and/or confidential police informant)—evident in four files and identified by 89 percent of participants;
11. Agreement for the police/prosecution not to pursue charges/investigation into other offences involving another person known to the accused—identified by 44 percent of participants;
12. Agreement not to pursue charges/investigation into other offences involving the accused—identified by 47 percent of participants;
13. Agreement to provide protection or financial support in some form to the accused and/or their family (eg pay school fees or relocation fees)—identified by 29 percent of participants; and
14. Bail as a point of negotiation (eg agreement to plead guilty if bail is granted before the plea hearing)—identified by 49 percent of participants.

## Most common forms

Across the interview and de-identified case file data, there were three forms of plea negotiation that emerged as 'most common'. Informed by the interview data and stakeholder consultations, a fourth 'most common' form also emerged. Based on the data, the study determined that the most common forms of plea negotiation in Victoria (in no particular order) include the following.

### 1. Withdrawing and substituting charges

In almost every file, the accused faced multiple charges arising from the one incident which were either: alternative charges (eg armed robbery and robbery; intentionally causing serious injury and recklessly causing serious injury); or duplicitous, lesser included charges (eg armed robbery and possession of a controlled weapon). In each of these circumstances, the plea offer always involved identifying which charge(s) the accused would plead guilty to and which charges would be withdrawn.

The interview participants identified withdrawing charges as being somewhat of an administrative task, as a way to 'simplify' and 'clarify' matters moving forward. As Prosecutor03F noted, 'Most cases you would probably withdraw some charges, just purely for simplifying matters in the end.' Similarly, Prosecutor01F observed that the criminality of the offending conduct can be represented in fewer counts, or even less serious charges: 'You don't need 10 charges when two of the more serious ones may reflect the criminality.'

It was also very common for the accused to plead guilty to a substituted charge, whereby the OPP or police prosecutor would accept a guilty plea to an alternative charge, usually one that reduced the severity and aggravation of the original charge/s. In the interviews, participants referred to the substituting of charges as 'very common' (Defence19M; Defence22M) and 'a matter of course' (Defence02F). In fact, Judge09M described it as 'the most common form of plea negotiations', while Defence11M suggested, 'You'd be negligent if you didn't pursue it.'

#### Case study 1

The accused was charged with burglary with intent to assault, intentionally causing serious injury, intentionally causing injury and recklessly causing serious injury. The accused offered to plead guilty to recklessly causing serious injury on the basis that there were reliability issues with the victim's evidence. The OPP initially rejected this offer but eventually accepted the guilty plea, on the condition that the accused also plead guilty to criminal damage. This was accepted by the defence and guilty pleas were entered to recklessly causing serious injury and criminal damage, as a substitute for intentionally causing serious injury and intentionally causing injury. It also resulted in the burglary with intent to assault being withdrawn (case 019-TD).

### 2. Rolled up and representative counts

A rolled up charge can comprise:

> …a number of separate offences against the same statutory provision, even where they do not amount to a 'single transaction' (eg where the acts occurred on different occasions).
>
> (Victorian Government Solicitor's Office 2014)

Many participants described rolled up charges as being 'extremely sensible' (Judge05M).

As Judge01M maintained, 'Rolling up charges is a perfectly sensible way of resolving a number of matters.' Judge13F identified the rationale for this form of negotiation as being 'to avoid having what is often described as an overloaded presentment or an overloaded indictment'. In this regard,

the rolling up of charges was commonly identified as a way to 'simplify everything' (Defence07M).

One of the main reasons participants identified this form of negotiation as 'administrative' is that, while the number of charges an accused pleads guilty to is reduced when the counts are rolled up, the agreed summary of facts presented to the court to inform the sentence should explain that the charge encompasses a number of distinct offences, so the sentence takes into account there has been more than one offence committed. This means that the sentence is likely to be similar, regardless of the fact the accused is pleading guilty to fewer charges and having fewer convictions recorded. For this reason, participants tended to identify this form of negotiation as a 'tool' (Prosecutor08M) or 'technique' (Judge08M) used by the prosecutor in acquiring a guilty plea, which may not necessarily have the same level of benefit for the accused.

**Case study 2**

The accused faced almost 30 charges of obtaining financial advantage by deception arising from his fraudulent use of money owned by various investors to conduct trades. The resolution included the prosecution withdrawing charges which were not supported by evidence and, where there were multiple instances of fraud using money owned by one investor, rolling up these multiple incidents into one charge (case 009-SA).

Representative counts are used to reduce the number of charges to which an accused will plead guilty, purportedly without reducing the criminality of their conduct. For example, the accused may plead guilty to one count of rape that is representative of several charges of rape against the same individual. Participants pointed to historical sexual offences as commonly being charged as representative counts, usually because it can be difficult for the victim to identify exact dates and times, making the prosecution complex. Prosecutor05M identified these difficulties, noting:

Often you have statements that say 'he did this to me once a week', or something, but we don't have exact dates and so it may be appropriate to have a representative count on the base.

In these circumstances, the offender can still be sentenced on a history of misconduct, and the punishment will be 'on the basis that this is not an isolated event' (Prosecutor05M).

Similar to rolled up counts, the fact the offence is representative should be specified in the summary of facts presented to the court to inform the sentence, to ensure that the penalty acknowledges the offence is representative of a course of conduct, not simply one offence. However, unlike rolled up counts where participants suggested it 'doesn't make a lot of difference' to the sentence

(Judge05M), representative counts were identified as both a 'tool to minimise the number of charges on the indictment' (Judge08M) and a way to generate a 'lesser sentencing outcome than if you have specified charges for each of the alleged forms of behaviour' (Judge08M). While Defence02F stated that 'The sentence itself does not actually change; the client is still being sentenced on, for example, a 10 year period of offending,' most judicial participants said the sentence would be lower, because 'There's a particular way the court looks at representative counts and it generally would result in a lesser sentencing outcome' (Judge08M). For these reasons, Defence05M identified representative counts as being 'more advantageous to an accused than a rolled up count,

*continued on page 28*

because it will get rid of a number of different offences that would be used for accumulation'.

### 3. Negotiating the agreed summary of facts ('fact bargaining')

There were 24 files where the negotiated outcome included a specific agreement on the entirety or part of the facts to be put before the court at the plea and sentencing hearing. Even in the absence of a specific written agreement, the facts were almost always discussed during plea negotiations in the case files as part of the process, whereby one or both parties contended that certain charges were supported (or not) by the evidence. All interview participants identified the agreed summary as a key element of negotiations. As Judge02MR observed:

> That happens in every case, that there is a form of agreement, there is always some form of negotiation, particularly when you've got an offence against the person and in terms of words perhaps spoken, or actions pre or post the offence.

Judge13F maintained that 'The settled summary is very significant and it's a very major part of whether a case resolves or not.'

#### Case study 3

The accused was charged with armed robbery on the basis that he was armed with both an imitation firearm and a knife. The defence offered to plead guilty to armed robbery if the reference to the knife was removed from the summary of facts. This was agreed to by the prosecution (case 010-CD).

### 4. Agreements on the prosecution's sentencing submission

Prosecutors in Victoria cannot enter into agreements relating to a specific quantum or type of punishment in exchange for a guilty plea because the sentencing decision is that of the court, which is not bound by any agreement. As Flynn (2016: 565) explains, prosecutors can:

> …agree to present case facts to fit a particular sentence range, based on standard sentencing practices and outcomes, and/or recommend a sentence type…to the court. Such recommendations are not binding, but generally influential.

In 2008, in R v MacNeil-Brown [2008] VSCA 190, the Court of Appeal of the Supreme Court of Victoria obliged prosecutors to make a submission on sentencing range if:

> (a) the court requests such assistance; or (b) even though no such request has been made, the prosecutor perceives a significant risk that the court will fall into error regarding the applicable range unless such a submission is made. [at 3]

In 2014, this decision was overruled by the High Court of Australia in Barbaro v The Queen; Zirilli v The Queen [2014] HCA 2, where the court stated:

> Contrary to the view of the majority in MacNeil-Brown, the prosecution's conclusion about the bounds of the available range of sentences is a statement of opinion, not a submission of law. … [at 42]
>
> To the extent to which MacNeil-Brown stands as authority supporting the practice of counsel for the prosecution providing a submission about the bounds of the available range of sentences, the decision should be overruled. The practice to which MacNeil-Brown has given rise should cease. The practice is wrong in principle. [at 23]

The de-identified case file data and interviews indicate that prosecution sentence recommendations still form part of the negotiation process, even post Barbaro, although they are less specific as a result of the High Court's decision. While the plea negotiation process in Victoria in no way resembles that of the United States, where prosecutors can offer specific sentences in exchange for a guilty plea, it appears that when MacNeil-Brown was operating, discussions ventured into this area for a period of time, at least until the Director of Public Prosecutions formally prohibited this type of discussion (although a few defence practitioner participants indicated it occurred beyond MacNeil-Brown).

Ultimately, the study found that the High Court's decision in Barbaro has changed, but not eliminated, negotiations on sentence submissions. While the decision has appeared to halt negotiations on the length of the prison sentence that the prosecutor may submit to the court, they still occur in relation to the prosecutor's sentencing submission about the amount of time already served in custody that should be taken into account by the court in sentencing, and the appropriateness of a community correction order or its combination with a prison sentence.

#### Case study 4

The defence offered to plead guilty to one aggravated burglary charge and one assault in exchange for the withdrawal of two aggravated burglary charges and an agreement that the Crown's position on sentence would be for a partially suspended sentence (case 025-NS).

## Conclusion

Plea negotiations in Victoria are a fact of life, and have been so for many years. These negotiations are not of the kind depicted in fictionalised American television dramas, in which plea deals are done and presented as fait accompli to the court, but are part of everyday legal life in a semi-adversarial criminal justice system. The stark reality is that the majority of convictions in Victoria are the result of a guilty plea and a majority of those pleas are the product of some form of negotiation between the prosecution and defence.

Guilty pleas and the associated negotiation processes have long been recognised as being essential to the effective and efficient functioning of the criminal justice system. All parties—courts, prosecution, defence and police—work within legal, administrative and ethical guidelines. This is not a lawless system, but nor is it perfect.

This paper has provided an overview of some of the findings from the Negotiating Guilty Pleas Project highlighting the frequency of plea negotiations, identifying the most and least common offences featured in negotiations and discussing some of the different forms and outcomes of negotiations.

It is hoped that the findings presented in this paper will improve understanding of plea negotiations in Victoria. For more information on the project, please see the final report (Flynn & Freiberg 2018).


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# Negotiating about charges and pleas – balancing interests and justice

**GERALDINE MACKENZIE, ANDREW VINCENT & JOHN ZELEZNIKOW**

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**Abstract** | There is a worldwide movement towards alternatives to judicial decision-making for legal disputes. In the domain of criminal sentencing, in Western countries more than 95% of cases are guilty pleas, with many being decided by negotiations over charges and pleas, rather than a decision being made after a judge or jury has heard all relevant evidence in a trial.
Because decisions are being made, and people incarcerated on the basis of negotiations, it is important that such negotiations be just and fair. In this paper we discuss issues of fairness in plea-bargaining and how we can develop systems to support the process of plea and charge negotiation.
We discuss how we are using Toulmin's theory of argumentation and Lodder and Zeleznikow's model of Online Dispute Resolution to develop just plea bargaining systems. A specific investigation of the process of charge mentions is discussed.

## 1. Introduction

The mantra '*two legs bad, four legs good*', taken from Orwell's Animal Farm (Orwell 1945) is similar to the statement '*negotiation good, conflict bad*'. This mantra, often accepted by courts and governments is that negotiation is preferable to litigation in almost all circumstances.

However, as Mnookin (2003) argues, knowing when to negotiate and when to refuse to negotiate is vital. For example, On September 30 1938, Neville Chamberlain, the prime minister of the United Kingdom, returned from Munich saying '*we have peace for our time*'. Within twelve months, Kristallnacht had occurred[1], the Molotov-Ribbentrop pact was signed[2] and World War Two[3] had commenced.

Even now supporters (or apologists) of Chamberlain rationalise that he was correct, and that his actions in Munich won the United Kingdom vital time to prosecute the war[4]. So how can we measure when to negotiate and when to conduct conflicts, especially when knowledge is not transparent. Rather than solely focusing upon resolving conflicts, should we possibly concentrate on just managing the conflict? Condliffe (2008) argues that some conflicts cannot be resolved at all, and certainly not easily.

Blum (2007) argues that protracted armed rivalries are often better managed rather than solved, because the act of seeking full settlement can invite endless frustration and danger, whilst missing opportunities for more limited but stabilising agreements. She examines in detail enduring rivalries between India and Pakistan, Greece and Turkey and Israel and Lebanon. She notes that in each of these conflicts, neither party is willing to resolve the core contested issues but both may be willing to carve out specific areas of the relationship to be regulated – what she calls *islands of agreement.*

Similarly, rather than resolve a family dispute, should we just manage it so that minimal conflict or disruption occurs? Eventually, the dispute might be more easily resolved or due to the progress of time, the dispute may no longer exist – such as when dependant children become adults.

In both Australian and United States criminal law jurisdictions, a defendant can appeal a decision if they believe the judicial process was flawed. However, when negotiating about pleas – known as plea bargaining, a participant cannot challenge the decision.

*continued on page 33*

1 On a single night, November 9-10 1938, more than 2,000 synagogues were destroyed and tens of thousands of jewish businesses were ransacked. It marked the beginning of the systematic eradication of the Jewish people – the Holocaust - see Gilbert (2006).

2 The pact, signed on August 23 1939, was a non-aggression pact between Germany and the Union of Soviet Socialist Republics that included a secret protocol for dividing the then independent countries of Estonia, Finland, Latvia, Lithuania, Poland and Romania into Nazi and Soviet spheres of influence – see Taylor (1961)

3 On September 1 1939, when Germany invaded Poland.

4 As did the former Australian Prime Minister Sir Robert Gordon Menzies in the twenty-second Sir Richard Stawell Oration 'Churchill and his contemporaries' delivered at the University of Melbourne on 8 October 1955 – see www.menziesvirtualmuseum.org.au/transcripts/Speech_is_of_Time/202_ChurchillContemp.h tml last accessed 23 July 2008

The reason for this situation is that unlike in a trial, the defendant has pleaded guilty and thus admitted that he or she committed the crime. This situation becomes problematic in the admittedly few cases where a person accepts a plea bargain even though they did not commit the crime. The defendant may plead guilty because he or she was offered a heavily reduced sentence, or he or she felt the probability that they would be found guilty is reasonably high (Mackenzie 2007; Henham 1999).

Thus, it is very difficult to undo an '*unfair plea negotiation*'. But it is also essential that it be possible to reverse unfair decisions.

Hence, especially in criminal sentencing, it is vital that we develop '*fair*' and '*just*' negotiation support systems. Indeed, one of the barriers to the uptake of Online Dispute Resolution relates to user concerns about the fairness and consistency of outcomes achieved by any Online Dispute Resolution approach. Pierani (2005), in discussing Online Dispute Resolution in Italy, argues that as with Alternate Dispute Resolution models, Online Dispute Resolution systems need to be impartial, transparent, effective and fair.

This is especially so in criminal law, because of the different proof requirements in civil and criminal law and the fact that criminal law cases involve the state prosecuting an individual, it is vital that issues of fairness be addressed.

### 1.1. Plea Bargaining in general

Negotiation between defence advocates and prosecutors about charges and pleas usually leads to a plea of guilty. Conviction rates by way of guilty plea in western jurisdictions, run in the order of 90-95%. This is particular so in the US (Colella 2004). In lower courts the rate of conviction by guilty pleas is usually higher than 95%. Where charges are more serious the rate of conviction by guilty plea is lower. Plea bargaining is the one of the most contentious processes in the criminal justice system, its most vehement opponents are usually those who are not involved in the day to day activity of either prosecuting or defending offenders. Despite judicial ambivalence to the practice in the most part, plea bargaining continues to function because discretion about the nature, number and severity of charges is granted to prosecuting authorities by statues. Plea bargaining can benefit the prosecution by ensuring a conviction and achieving greater certainty, and the defence by negotiating fewer or reduced charges (Mackenzie 2007).

There are a range of criticism that are made concerning plea bargaining, perhaps most significant is the lack of transparency and the public's perceived lack of fairness which ultimately translate in to complete lack of trust in the efficaciousness of the entire system. In this paper we first examine the phenomena of plea bargaining in general and then look at the particularities of its practice in Victoria. In the next section of the paper we expose similarities between plea bargaining and alternative dispute resolution (ADR) and then move on to the role that sentence indication plays in the process. In the fourth part of the paper we discuss ideas of justice and fairness and the role systems have in constructing accountability. In the fifth section we discuss online dispute resolution (ODR) and a possible method of facilitating plea bargaining within the constraints of current practice. In the final section of the paper we discuss the problems with validating this type of system and the future research directions including the construction of a prototype system.

The introduction to a recent plea bargaining symposium held at the Law School at Marquette University in Milwaukee, Wisconsin, suggests that although plea bargaining would seems to be a natural area for collaboration between criminal law and dispute resolution there has been very little "cross-fertilization" between the two fields ((O'Hear and Kupfer Schneider, 2007)). Indeed research has progressed in the two areas utilising theories and methods developed in other areas, not solely limited to, for example, psychology. Plea bargaining research could gain for example from the large amount of work conducted in negotiation and mediation on fairness and procedural justice (Lind and Tyler, 1988), (Törnblom and Vermunt, 2007).

Plea bargaining is the process where the prosecution and defence advocates negotiate or bargain or haggle over the nature, number and severity of the charges to be brought and the offenders plea of guilty.[i] It usually involves the reduction in the number, nature and severity of the charges by the prosecutor in order to secure a guilty plea from an offender. Plea bargaining is only concerned with one thing and the defendant can only ever offer their guilt as the benefit to the prosecutors. This definition follows that offered by Alschuler (Alschuler, 1979) who also indicates that plea bargaining omits all forms of other concessionary bargaining, such as reductions in charges because of other cooperation. In the United States, plea bargaining is a ubiquitous practice and its occurrence is gaining strength in other jurisdictions (Ma, 2002). There has been a tremendous amount of criticism in academic circles of the practice of plea bargaining, many scholars argue that aside from the obvious lack of transparency and accountability of the procedure, prosecutors have become the primary adjudicators of guilt in the criminal justice system (see for example Bibas (2004) and Wright and Miller (2002)). By offering substantial reductions to defendants who cooperate with them, prosecutors strongly influence issues of guilt and innocence through the various methods of charge and plea negotiations. In most cases judges merely rubber stamp the negotiated arrangement.

As alluded to above, the practice of plea bargaining is common in the United States, and increasingly so in Australia (Mackenzie 2007; Seifman and Freiberg 2001). Even though the practice is very wide spread there are few figures available on the extent of the practice. It is usually inferred from the amount of convictions by way of guilty plea recorded in official court statistics. Indeed, the number of felony convictions in US state courts for 2004 was estimated to be 1,078,920 of which approximately 95% were disposed of by guilty pleas.[ii] The figures for the US Federal Court, even though the numbers are considerably lower, track very similarly, albeit for the year 2007. Of the 88,014 convicted felons, 96% were by way of guilty plea.[iii] The truly remarkable aspect of the statistical compilation is the complete lack of information on the number of guilty pleas affected by way of plea bargaining. There have been very few studies to determine the actual numbers of guilty pleas that have been brought about by negotiation or bargaining. A 1977 study on plea bargaining practices in the Birmingham Local Court in the United Kingdom, suggested that while up to

90% of cases in the US are disposed of by way of guilty plea the number that are the result of bargains remains unknown ((Baldwin and McConville, 1977)). The same study reported the researcher's surprise to find that 70% guilty pleas in their sample were negotiated. Hollander-Blumoff ((Hollander-Blumoff, 1997)[5]) suggests that, "[b]y most accounts, plea bargaining disposes of approximately 90% of all criminal cases in the US." Hollander-Blumoff cites the guilty plea rates as evidence for her conclusion. The lack of empirical data is understandable given the difficulty in accessing offenders and prosecutors. Notwithstanding this difficulty it is clear that more empirical evidence is required.

The high rate of conviction by way of guilty plea has led commentators to suggest that the criminal justice system would grind to a halt if all offenders exercised their rights to trial (Ward and Birgden 2007). However, guilty pleas would still be tendered without the explicit process of plea bargaining. There are still many incentives for defenders to plea guilty besides the reduction in the number and severity of charges. Most jurisdictions offer sentencing discounts for guilty pleas and the Federal Sentencing Guidelines allowing for downward departures based on guilty pleas.

In the US, much has been made recently regarding the prosecutors ability to in effect coerce defendants to plead guilty. Langer (Langer, 2007) distinguishes between two different types of plea bargaining, the first is where the prosecutor unilaterally decides who is innocent and guilty and for which offence, by using coercive plea proposals. The second type of plea bargaining is where the prosecutor and defence jointly determine guilt via voluntary agreement.

In jurisdictions where there are mandatory minimum sentences, the possibility of coercive bargaining is greater because in effect prosecutors have a direct impact on the sentence available to a judge. The success of the plea bargaining process "depends on [the] prosecutor's ability to make credible threats of severe post-trial sentences (Stuntz, 2004)[6]." Credible threats concerning sentence severity are enhanced in jurisdictions that have determinate sentencing regimes. Thompson (Guerra Thompson, 2005) indicates that by the end of the 1990s, fifteen States introduced sentencing guidelines, while seven were in the process of enacting relevant legislation. Most States in the United States have some form of mandatory minimum sentences for specific crimes (Reitz, 2001). Reitz suggests that even though there has been an impressive shift in determinate sentencing structure across the United States, most jurisdictions continue to maintain a high-discretion model of indeterminate sentencing for the majority of their punishment decisions. The majority of punishment decisions to which Reitz refers may very well be the majority of less common crimes that litter statute books. Most mandatory penalties

5 At pp 116-117

6 At p2560

*continued on page 36*

are reserved for common crimes, especially relating to drugs, robbery and theft, and assaults (Frase, 2005).

In Australia, the concept of plea negotiation is widely practised in all States but practitioners and academics alike prefer different terminologies. The practice is usually known as charge negotiation (Cowdery, 2005) or, more commonly, plea negotiation (Seifman and Freiberg, 2001)

A major difference between the American and Australian plea bargaining practice is that in Australia, the prosecutor is only able to influence the minimum sentence that may be delivered by a judge by manipulating the number of charges, this is known as overcharging. It seems that the greatest amount of overcharging occurs in lower courts (Mack and Anleu, 1995). In the higher courts, where Offices of Public Prosecution and not the police handle prosecution, there is a tendency not to overcharge. Mack and Anleu (1996) suggest several reasons for this overcharging, but the most important one is that it gives the police a better bargaining position. The police propose high charges in order to end up with what they see as a "correct" or reasonable set of charges for a particular set of facts.

The high percentage of cases disposed of by guilty pleas is not seen in Victoria. In 2003 and 2004, approximately 70% of cases were disposed of by guilty pleas[7]. There is a 25% difference between this rate and the rate of guilty pleas in the US. The difference is probably attributable to the determinate sentencing regimes that are prevalent in most United States jurisdictions and the fact that defendants often spend a long time on remand awaiting final disposition of their cases. The resultant plea bargain is often for a sentence of time served (Bibas, 2004).

But the practice of plea bargaining, while enhancing the efficiency of court administration, can result in many injustices. As in most aspects of negotiation, the parties in dispute do not generally have equal bargaining power. For example, defendants often have limited legal knowledge and sometimes a very limited ability to understand the charges of which they are accused. They do not have the time, money, or resources for protracted conflict. Thus, they may plead guilty to the commission of a crime, even when they know they are not guilty of committing the crime. There has been considerable judicial and academic debate in Australia over the nature and justification for the guilty plea discount ((Mack and Anleu, (1997), Mack and Anleu (1998), Field (2002) and Bagaric and Brebner (2002)). Seifman and Freiberg (2001) claim that plea bargaining is inherently useful to the criminal justice system, not just because of administrative efficiency; as it enables the accused, if properly advised, to negotiate concessions in the form of reduced charges or which facts are to be put before the court. It is critical however that the accused has as certain as possible an indication of the sentence which will be imposed (Mack and Anleu 1995), and this is where the current system is lacking.

### 1.2. Plea Bargaining and Alternative Dispute Resolution

Because plea bargaining requires some type of negotiation or bargaining, some scholars treat plea bargaining according to the classic observation in negotiation literature that negotiation occurs in the shadow of the law. The shadow of trial concept was introduced by Mnookin and Kornhauser (1979). By examining divorce law, they contended that the legal rights of each party could be understood as bargaining chips that can affect settlement outcomes. Plea bargaining in the United States, even though it has had the support of the Supreme Court for more than thirty years,[8] has been heavily criticized because of the power of the prosecutor to selectively utilize the bargaining process. Bibas (2004) gives a very detailed exposition of the factors that affect plea bargaining and how they impact the fair allocation of punishment. He claims that trials in the United States already allocate punishment unfairly and that plea bargaining adds another layer of distortion. The idea put forward by Bibas is that the shadow cast by law is very much diminished and because of the fact that very few trials are conducted, plea bargaining occurs under the influence of other factors. Both Bibas and (Stuntz, 2004) have at the heart of their respective discussions the claim that the Mnookin-Kornhauser model is not really applicable to the plea-bargaining process because of the great number of other influences on the actors and players in plea bargaining than exist in divorce negotiations.

There are possible negative consequences of negotiating about pleas. Bibas (2004) argues that many plea bargains diverge from the shadow of trials. He claims that rather than basing sentences on the need for deterrence, retribution, incapacitation or rehabilitation, plea bargaining effectively bases sentences in part on wealth, sex, age, education, intelligence and confidence.

Adelstein and Miceli (2001) develop a general model of plea bargaining, embed it in a larger framework that addresses the costs of adjudication, the value of punishing the guilty and the costs of false convictions, and then link the desirability of plea bargaining and compulsory prosecution to the weights given these costs and benefits in the objective function.

Gazal-Ayal (2006) investigates the economics of plea bargaining. He proposes having a partial ban on plea bargains, which prohibits prosecutors from offering substantial plea concessions. He argues that such a ban can act to discourage prosecutors from bringing weak cases and thus reduce the risk of wrongful convictions. Tor, Gazal-Ayal and Garcia (2006) conducted experiments in which they determined that defendants' willingness to accept a plea bargain is substantially reduced when defendants feel that the offer is unfair, either because they are not guilty or because other defendants received better offers.

Wright and Miller (2003) believe that pervasive harm stems from charge bargains due to their special lack of transparency. They argue that charge bargains, even more than sentencing concessions, make it difficult after the fact, to sort out good bargains from bad, in an accurate or systematic way.

Although it may be possible to suggest that plea bargaining is a form of dispute resolution is a unique form. Any attempt to apply generic lessons of negotiation theory in criminal law should be undertaken with great care.

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7 OFFICE OF PUBLIC PROSECUTIONS ANNUAL REPORT 2003-2004 (Vict., Austl.), at 21 app. A, available at http://www.opp.vic.gov.au/wps/wcm/connect/Office+Of+Public+Prosecutions/resources/file/eb62ed006698fd0/O PP_Annual_Report_2003-04.pdf Last accessed October 28 2008.

8. Brady v. United States, 397 U.S. 742 (1970). Here, the Court stated: [W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

As indicated by O'Hear and Kupfer Schneider (2007) dispute resolution involves the allocation of limited material resources between two parties of roughly equal and moral status. The transaction in plea bargaining is between parties of a different sort (the citizen and state). There is a major asymmetry between the status, power and objective of the two sides that marks out plea bargaining in significant ways from other forms of negotiation commonly studied by dispute resolution scholars. (Freiberg, 2007) discusses ADR in the criminal justice system and suggests that ADR should be understood as appropriate dispute resolution rather alternative dispute resolution. He further indicates that rather concentrating upon dispute resolution, the focus of the criminal justice system should be on problem solving. Plea bargaining should be viewed through the lens of problem solving in the same space as sentence indication. All efforts should be made to identify guilty pleas early in the process and then move to the next stage in the criminal justice system, namely the therapeutic phase.

Hollander-Blumoff (1997) concentrates on Fisher and Ury's notion of BATNA (Fisher and Ury 1981). In the process of negotiating about pleas it is vitally important that the defence has an accurate indication of the sentence that might be expected: a) as a result of trial and b) as the result to a plea of guilty. A recent discussion of sentence indication in Victoria highlights the importance of scheme where judges indicate a likely outcome in terms not necessarily of sentence but whether or not a conviction or jail time for example maybe warranted for a particular charge or set of charges[9]. It is contingent on certain disclosures by both the prosecution and the defence.

## 2. Sentencing Information Systems And Negotiation Support Systems

Achieving consistency and fairness is critical in the sentencing process (Mackenzie, 2002). Hall et al (2005) argue that one of the central and perennial questions of sentencing law and scholarship is how lawmakers should strike an appropriate balance between consistency and individualization in punishment. They believe that their technology-based solutions can help to maximize consistency of process in bounded discretion-sentencing regimes. They use decision trees[10] and Toulmin argument trees[11] to model reasoning about sentences in the Victorian County Court. Such solutions enable greater flexibility to achieve consistency in complex cases where large numbers of interdependent factors need to be taken into consideration by the sentencing judge. This is in contrast to most Sentencing Information Systems, which use statistical techniques to advise upon a range of issues (Schild and Zeleznikow 2008).

Structured sentencing laws create a more pressing need for information systems that allow prosecutors to monitor the selection of charges and resolution of plea negotiations, since those decisions now influence more directly the sentences that the judge ultimately imposes. Wright and Miller (2003) and Wright (2005) point out the powerful influence of prosecutor office policy and data monitoring in creating reasonably consistent outcomes in plea negotiations. Hall et al (2005) stress that they are not concerned with considering the vexed issue of consistency of outcomes, but rather, they are concerned with the consistency of approaches to decision-making (procedural consistency) and the presentation of arguments to support decision-making.

Traditional Negotiation Support Systems have focused upon providing users with decision support on how they might best obtain their goals. Zeleznikow and Bellucci (2006) and Zeleznikow and Vincent (2007) have considered the problem of incorporating justice into interest-based negotiation support systems. Zeleznikow et al (2007) considered the development of computer tools for Bargaining in the Shadow of the Law in plea-bargaining and family mediation, as well as examining how to measure and evaluate consistency and justice in negotiation.

Building systems to support the various parties involved in the sentencing process is fraught with difficulties. Tata (2000) has detailed the effort in the construction of the Scottish Sentencing Information System and discusses some of the reasons why judicial decision support systems are not well received by the judiciary. One of the primary reasons for judicial ambivalence is the fact that most systems do not accurately reflect either the manner in which judges reach their decision or are so complicated that they are virtually useless. Until now, we have not discussed the link between how a sentencing decision is reached and how the reasons for the sentence are articulated. In Australia written decisions are not always made available for sentencing decisions at first instance. The opaqueness of the process is further exacerbated by the lack of articulation of reasons.

We now describe a decision support system we are developing to assist criminal defence lawyers at Victoria Legal Aid to provide advice about plea bargaining and sentencing. The sentencing decision support system is being extended into a plea bargaining support system, using the three step online dispute resolution environment of Lodder and Zeleznikow (2005).

## 3. The Toulmin Argument Model for Building Negotiation Support Systems

Vincent and Zeleznikow (2005) discusses research pertaining to the construction of a plea bargaining decision support system for Victoria Legal Aid (VLA). VLA finds decision support systems that advise upon appropriate decisions for the sentencing of criminals, as well as systems that will help in the plea negotiation process, very useful for training and providing support for novice lawyers.

VLA is the principal provider of legal aid in Victoria, in fact VLA is the largest criminal law practice in the State and handles upwards of eighty percent of criminal law defence cases in Victoria. It employs solicitors to act on behalf of people and provides a range of specialist legal services. It is funded by a combination of Commonwealth government, Legal Practice Board's Public Purpose Fund and state government monies also legal cost received by VLA. It is in their interests to be able to provide

9 See http://www.sentencingcouncil.vic.gov.au/wps/wcm/connect/Sentencing+Council/resources/file/ebb5cd402c7f553/Sentence_Indication_Final_Report.pdf last accessed 28 October 2008

10 A decision tree is an explicit representation of all scenarios that can result from a given decision. The root of the tree represents the initial situation, whilst each path from the root corresponds to one possible scenario.

11 See section 4.

sound advice regarding possible sentences as the result of guilty pleas. The sentencing decision support prototype and its ability to provide the reasoning behind a sentence as well as a sentence range means that VLA lawyers can better negotiate with Office of Public Prosecution lawyers and police prosecutors. The reasoning behind a particular sentence can act as an argument in favour of a particular charge over another.

The approach to modelling the discretionary and intuitive domain of sentencing is based on the model of argument proposed by Toulmin (1958). The Toulmin model is concerned with showing that logic can be seen as a kind of jurisprudence rather than science. The jurisprudential nature of the Toulmin argument structure means that it is process focused and more useful in structuring an argument after it has been articulated. It is able to capture arguments regardless of content. The procedural nature and simplicity of the Toulmin model means that argument chains can be constructed by linking together single argument units.

The claim of one argument can be used as the data item for the next. According to Toulmin, an argument is made up of a combination of five components: a claim, some data (grounds), a warrant, some backing, and a qualifier. Claims are ideas that the arguer would like the audience to believe. The data lends support to the claim and makes it more likely that the audience will believe it. The warrant, on the other hand, is the logic of the argument: the rules of inference that lead the claimant to conclude the claim, given one ground or a set of grounds[12]. Backings usually give reasons why the audience should believe the warrant. Modal qualifiers modify the claim by indicating a degree of reliance on, or scope of generalisation of, the claim, given the grounds, warrants, and backing available. Rebuttals are the possible exceptions to the conditions under which a claim holds.

The Toulmin argument structure offers those interested in knowledge engineering a method of structuring domain knowledge. It also enables the reasoning behind certain claims to be made explicit. In any system that will be of use to decision makers, reasons for decisions are important, especially for transparency. The Toulmin Model has been used to model other legal domains (Zeleznikow 2003) most notably family law in the Split-Up system which advised disputing partners regarding property distribution at divorce (Stranieri et al 1999), refugee law (Yearwood and Stranieri 1999) and copyright law (Stranieri and Zeleznikow 2001). The use of Toulmin Argumentation in Online Dispute Resolution is discussed in Zeleznikow (2006). The modelling phase was undertaken by knowledge engineers in conjunction with domain experts to establish the practical nature of the sentencing environment in Victoria. After reading the relevant parliamentary acts governing the Victorian sentencing system, both knowledge engineers and domain experts developed the decision and argument trees. The modelling procedures and steps are more fully discussed in Hall et al (2005).

With the support of a grant from the Victorian Partnership for Advanced Computing, TAMS software is being used to convert free-text sentencing decisions into a fixed format. Following from the successful use of neural networks in the family law domain (Stranieri et al 1999) we are using neural networks and association rules to glean how sentencing decisions are made[13].

## 4. An Online Plea Negotiation Environment for the Victorian Contest Mention System

Criticisms of plea negotiation have centred around several keys issues, namely: transparency, inducements and coercion, and incorrect outcomes (Bibas 2004). Mack and Anleu (1996) have identified faults in the process. The significant points include:

1. The transparency of the process: in general, plea bargaining occurs outside the court system.
2. Guilty pleas may be induced by the unwarranted benefits of those burdens caused by the decision to go to trial. The quantum of sentence discount that is associated with the plea of guilty is an added pressure to engage in plea bargaining.
3. Incorrect outcomes in terms of both the determination of guilt and the subsequent sentence imposed.

These three main areas of concern are all present in the Victorian Contest Mention system. If the accused decides to plead guilty to the charges filed, the charges are dealt with at the time of the Contest Mention hearing. The facts of the case are presented orally to the magistrate by the prosecutor by way of a written summary of the offence, which has been agreed to by the defence lawyer. There is no transparency in this process, as the magistrates are presented with only an altered copy of the summary and it is this summary alone that is preserved on the record

The Victorian Magistrates' Court deals with over 95% of all criminal offences that are resolved in Victorian courts.[14] Of the 130,890 matters finalised in 2003-04, 9082 were finalised via the Contest Mention.[15]

In 1993, as a result of the severe impact of late guilty pleas,[16] the Contest Mention system was introduced in the Broadmeadows Magistrates' Court. It was initially a pilot program with the specific aims:[17]

1. To reduce the number of cases originally listed as pleas of not guilty that turned into guilty pleas at the court door.
2. To identify the plea (guilty or not guilty) at an early stage.
3. To reduce the number of adjournments.
4. To narrow the issues between the parties to areas of genuine dispute thereby reducing wasted preparation time by both the prosecution and the defence.
5. To reduce the instances of witnesses' time being unnecessarily wasted.
6. To generally assist in 'case flow management' techniques.

The Contest Mention system is a set of procedural guidelines for assisting the prosecution and defence lawyers in identifying guilty pleas. Attempting to

12 It should be noted that inferences can be provided by humans rather than machines. This occurred in the Embrace System (Yearwood and Straniery 1999) which dealt with the discretionary issue of appeals to the Australian Refugee Review Tribunal.

13 See Zeleznikow and Hunter (1994) and Stranieri and Zeleznikow (2005) for an excellent discussion of the use of artificial intelligence in law

14 The figure of 95% is derived from the Victorian Magistrates' Courts Sentencing Statistics: 1996/1997-2001/2002, p. 1. A brief examination of both the Victorian Magistrates' Courts Sentencing Statistics: 1996/1997-2001/2002 and the Victorian Higher Courts Sentencing Statistics: 1997/1998-2001/2002 leads to a figure of around 97% of all defendants who had charges decided without resort to either bench or jury trial.

15 Magistrates' Court of Victoria 2003-04 Annual Report, 15.

identify guilty pleas involves negotiation and, as indicated by Cowdery (2005),[18] "principled negotiation" [19]. This involves the separation of the people from the problem this will be discussed a little later. One of the main features of the Contest Mention system is the process of sentence indication.[20] The magistrate can give an indication as to a possible sentence if the accused continued with a plea of guilty at the Contest Mention. It is only conducted in appropriate circumstances. The Contest Mention guidelines state that the procedure should only be undertaken when the magistrate is aware of all the relevant factors.

For the accused, the burdens of going to trial are caused by the probability of conviction by a jury and the consequent threat of a usually higher sentence based on the higher number and severity of the charges filed by the prosecution and the lack of a sentence discount for an early tem. We are constructing the system using the Lodder-Zeleznikow framework. The key points of this framework are:

1. Accurate provision of advice about a BATNA.
2. Developing a process that enables direct communication and negotiation between the parties which supports interest based communication.
3. Developing a process that provides negotiation support through the use of compensation and trade-off strategies.

**The BATNA:** The sentencing decision support system described above, provides a BATNA. The sentencing decision support system provides advice concerning possible sentences, as well as giving information about how these sentences might be combined, either cumulatively or consecutively in the case of multiple charges. It must be remembered though, that the sentence is not being negotiated; it is a plea of guilty to a particular charge or set of charges that needs to be decided.

BATNA advice in plea negotiation, at present, is not provided by specific electronic tools. Zeleznikow and Stranieri have developed a system to provide BATNA advice in the Family Law domain (Bellucci and Zeleznikow 2006). Once an offer is made it must be measured against the BATNA. The step of reality testing is very important in the process of alternative dispute resolution (ADR).

De Vries et al (2005) indicates that in the final stage of the negotiation process, reality testing provides an excellent method of ensuring that parties are fully aware of the agreement they are about to reach. The plea negotiation process is a form of shuttle bargaining, an offer followed by a counter offer. The defence lawyer evaluates the quality/benefit of the offer and either accepts of rejects the offer and makes a new offer. This is the case in the Contest Mention system as it operates in Victorian Magistrates' Courts. Unless the defence lawyer is experienced, the types of negotiations that occur before the beginning of the Contest Mention can be very problematic and difficult. A less experienced lawyer

16 Identified in part in the Pegasus Task Force Report, Reducing Delays in Criminal Cases (1992).

17 A more detailed discussion of the implementation of the Contest Mention system is available in Serge Straijt, The 'Contest Mention System' in the Magistrates' Court. Some of its effect and impact on the administration of criminal justice (Unpublished Report, 1995).

18 At 2, 2.

19 See especially Fisher and Ury (1981) at 17-39.

20 Magistrates' Court – Guidelines for Contest Mention, 3.

might accept a plea that might not be the best achievable outcome in the situation even though it may have been perfectly adequate for another defendant in a different case.

**Communication:** There are various methods of electronic communication available for parties to conduct negotiations. E-mails, SMS messaging, telephone, "snail" mail can all be used for effective communication. For example, Square Trade[21] is one of the largest suppliers of online dispute resolution and utilises e-mail exchange via a mediator to resolve issues.

The method of negotiation discussed in the Lodder-Zeleznikow model needs to be adjusted to reflect the differences in the process of resolving plea negotiations. The fact that the defence need not make any disclosures but the prosecution must divulge all the facts, as they are relevant to the charges, must be taken into account in our revised model. The argument tool used in the Lodder-Zeleznikow model is utilised to make explicit how the statements of the parties support their arguments. The tool makes the parties enter statements in a sequence that reflects the evidence cited for supporting each party's goals.

**Negotiation:** The method that is utilized in the Lodder-Zeleznikow model to support compromises and trade-offs revolves around the creation of lists of issues. In the case of the Contest Mention, the concerns of the prosecutor and the defence may well be overlapping in some respects, but can also be quite different in others. There are two matters that might be of little concern to the defendant but of a much greater concern to the prosecutor; the impact on the victim and restitution.

Most of the other issues in dispute will revolve around the facts of the crime. These will usually be aggravating factors that make the sentence more severe. The accused may well plead guilty to a crime but not admit to certain facts. The perceived strength of the prosecutor's evidence will be the major inhibitor to a plea bargain being struck. The Lodder-Zeleznikow framework includes a phase where compromise and trade-offs are utilized to assist in the resolution of disputes. The trade off part of the Lodder-Zeleznikow model is based on the Family_Winner system (Bellucci and Zeleznikow 2006). The system asks individuals for their positions and importantly their reasons for taking their positions. The system uses a point allocation procedure to distribute items or issues to the participant who values the item or issue more. The system provides possible suitable allocation of items or issues but is dependant on human interlocutors to accept and finalize an agreement.

The Contest Mention system does not at first glance lend itself to the process of creating lists of issues. One of the greatest problems to overcome in this process is the case of multiple charges. Combining charges is one of the methods that the prosecutor may use to ensure that a plea of guilty is obtained for a particular desired charge. The various charges that might be levelled for a particular set of facts will vary if the defendant does not admit to the veracity of some of the facts.

One of the key elements in the authors' on going research is to establish what is negotiable in the plea negotiation and how the information can be represented and negotiated using the Lodder-Zeleznikow model.

## 5. Future Research

One of the most difficult tasks still remaining is the validating the system. The usual method of validating expert systems requires experts trialling the system with a real case or cases and then measuring the accuracy of the advice provide by the system. Our Negotiation Support System will require two levels of validation, the first relating to the sentencing indication and the second to the accuracy of the replication of the process of the negotiation.

As noted in section one, plea-bargaining can be seen as a form of negotiation that has benefits of administrative efficiency for the prosecution and provides certainty for the defence. Generally, the interests of the parties focus upon reduced sentences and reducing costs. In other negotiation domains, in particular housing disputes and family relationships, more complex trade-offs can be employed to meet the parties' interests.

In conjunction with industry partners Relationships Australia and Victoria Body Corporate we have received substantial funding from the Australian Research Council to develop negotiation support systems to enable the continuation of constructive relationships following disputes.

In this project we wish to combine integrative bargaining, bargaining in the shadow of the law and formulation to develop decision support systems that support mediation and negotiation, specifically in body corporate and family disputes. We will:

(a) develop negotiation support systems that support formulation: both in Family Law and Body Corporate disputes. The systems will respect ethical and legal principles and rely upon processes that are not only fair but are perceived by the parties to be fair.
(b) construct negotiation support systems that provide planning advice to help avoid disputes rather than resolve conflicts.
(c) develop an integrated Online Dispute Resolution environment that provides relevant legal knowledge, allows for communication and provides decision support tools.
(d) use knowledge discovery from databases techniques to try and learn how mediators provide advice.
(e) thoroughly evaluate and re-engineer our negotiation support systems.

In a project with title 'Developing negotiation support systems in law which encourage more consistent and principled outcomes' we argue that unless negotiation support systems are seen to advocate outcomes which arise from consistent and principled advice, disputants will be reluctant to use them. We are conducting research that will develop measures for assessing the outcomes of online negotiation in the legal domains of sentencing, plea bargaining and family mediation. Such measures will form the basis of a new model for evaluating justice and consistency within online dispute resolution systems.

The model will inform the construction of fairer and more consistent systems of IT-based negotiation support in the future. To meet this goal we will:

1. Develop models of consistency and justice based on two very distinct legal domains: sentencing and family law. Further, the knowledge about these domains

21 More information about the range of services offered by Square Trade can be found at http://www.squaretrade.com/cnt/jsp/index.jsp (at 20 November 2006).

will be shared from three distinct Common Law jurisdictions: Australia, Israel and USA.

2. Develop information retrieval techniques to extract knowledge from textual legal and negotiation data.
3. Use KDD techniques (such as association rules, Bayesian belief networks and neural networks) to compare litigated and negotiated family law cases.
4. Develop models of disputation and negotiation in both family law and sentencing. These models will then be tested to examine how closely they align with the notion of Bargaining in the Shadow of the Law (as compared to 'pure' interest-based negotiation).
5. Use Lodder and Zeleznikow's three step model for an Online Dispute Resolution Environment and Toulmin's theory of argumentation to construct a generic online dispute resolution environment. The development of such an environment on which to place various negotiation support systems will increase users' access to justice.
6. Develop and evaluate specific sentencing and negotiation support systems using our newly developed Online Dispute Resolution Environment.

## 6. Conclusion

The Toulmin model, although probably intended as a method of exploring arguments in a more theoretical setting, is finding itself used more and more in representing knowledge in different types of decision support whether computerized or not. The great benefit of this type of system comes about as it begins to make the intuitive part of sentencing more transparent and open to scrutiny. This system provides a method for lawyers, both experienced and inexperienced, to make better arguments for sentences for client before the bench.

In this paper we have considered how a plea bargaining decision support system can help support the advocacy provided by Victoria Legal Aid. Such systems are particularly useful for training novices. The first step in the plea bargaining process is determining relevant sentences. With this goal in mind, we have developed an appropriate decision support system. We are currently using the sentencing decision support system together with the Lodder-Zeleznikow three step online dispute resolution environment to build our plea bargaining decision support system.

Rhode (2004) suggests that "Court-appointed lawyers' preparation is often minimal; sometimes taking less time than the average American spends showering before work." As part of the overall push to improve access to justice, decision support system can help to achieve that goal. They can provide important advice for the legally disadvantaged. This advice is useful both at trial and in conducting charge and plea negotiations.

The Lodder-Zeleznikow framework is a useful method for the construction of a negotiation support environment for the charge and plea negotiation process. It has great potential for making the plea negotiation process more transparent and efficient, both in Australia and overseas.

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i In this paper we use the term bargaining and negotiation interchangeably, it worth

noting that there is some disquiet in some circles about the use of the term bargaining.

ii Table 5.46.2004. It is most notable that for the more serious crimes the percentage of conviction via guilty plea drops considerably. Of the number of felony convicted of murder 69% were by way of guilty plea.

Bureau of Justice Statistics Source Book of Criminal Justice Statistics (http://www.albany.edu/sourcebook/, at 20 November 2006), especially tables 5.17 and 5.46. Bibas (2004) also indicates that it is impossible to know the percentage of guilty pleas that resulted from plea bargaining.

iii Table 5.24.2007. The percentage of convictions secured by way of guilty pleas for

murder in District courts is 78% (calculated on very low numbers 117 of the 146 total).

# Victims ignored in plea deals

**A LONG-SERVING solicitor from the Office of Public Prosecutions has condemned the widespread abuse of the plea bargaining system, warning that defendants accused of violent crimes are negotiating their way out of more serious charges without appropriate consultation with victims.**

August 8, 2009


## RUTH POLLARD

Investigations Editor www.smh.com.au


**SPECIAL INVESTIGATION**

His claims are backed by the NSW Attorney-General, John Hatzistergos, whose spokesman said: ''Concerns about communication between the Office of the Director of Public Prosecutions and victims is an issue which has been raised with the Attorney-General on a number of occasions.''

A case before the NSW District Court graphically illustrates the weakness in the system. A plea deal meant the full extent of a horrific attack on a Sydney woman, Nanette May, by her former partner, was not revealed to the court.

It was only through Ms May's determined lobbying efforts that the evidence was presented to the judge yesterday to consider in sentencing. Despite that, her attacker might receive as little as seven years in jail.

Mr Hatzistergos recently wrote to the Director of Public Prosecutions, Nicholas Cowdery, QC, to raise concerns about the complaints his department had received. Mr Cowdery dismissed those concerns.

''I reject the assertions that consultation [with victims about charge negotiation decisions] is not genuine,'' Mr Cowdery replied. He declined to answer detailed questions put to him by the Herald.

The pressure on governments to protect the rights of victims of crime prompted a high-level review of plea bargaining in 2002 by the former NSW governor and Supreme Court judge, Gordon Samuels, QC.

He recommended that the DPP's policies and guidelines ensure ''adequate consultation with victims … and that the charges and agreed facts reflect the criminality of relevant offences''.

Yet the solicitor, who has instructed on many criminal trials, said the recommendations were being ignored.

The solicitor, who asked to remain anonymous, said that in seven years since the release of the Samuels review he had participated in only three trials where the guidelines had been followed. ''That would be a conservative estimate,'' he said.

He said there was great pressure on the Crown prosecutor and the judge to ensure cases were resolved quickly yet this expediency was often at the expense of those affected by the crime.

It is a view shared by the NSW Police Association, which has long been horrified by the sentence discounts given to violent offenders.

When those responsible for the death of the police officer Glenn McEnallay and the violent attacks on several others in 2002 were able to accept pleas to significantly lesser offences without proper consultation with the family or the surviving victims, the union went public with its concerns.

''The problem is that the DPP is simply not following its own guidelines. We believe the system is breaking down, and victims and police are not being kept informed of the way decisions are made,'' said the union's director of research, Greg Chilvers.

The number of guilty pleas negotiated has steadily increased in the past decade, occurring in 62 per cent of charges in higher courts, up from 50 per cent in 1998, figures from the NSW Bureau of Crime Statistics and Research show.

Mr Hatzistergos is so concerned about the issue that in January last year he commissioned another review by the Sentencing Council. Its report is due this month.

''For the public and police to have confidence in the justice system it is important to see offenders being held accountable for their crimes and that any discounts have a legitimate public purpose'' he said.

# Australia's justice systems are prioritising cost efficiency and productivity. Some experts have concerns

**In 2020, it was revealed that the NSW Police had been given a quota of more than 240,000 searches, including strip searches, during the 2019 financial year.**

April 4, 2023

## BY SAM NICHOLS FOR FUTURE TENSE

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In 2020, it was revealed that the NSW Police had been given a quota of more than 240,000 searches, including strip searches, during the 2019 financial year.

The following year, they had additional quotas to issue almost 110,000 move-on directions and detect 305,000 crimes, despite a fall in crime rates across most categories between 2019 and 2021.

But by 2022, the police scrapped the controversial target-based strategy after facing heavy criticism from legal groups and civil libertarians.

Former NSW director of public prosecutions Nicholas Cowdery described the strategy as a distortion of law enforcement, telling Nine Media that it had "serious consequences for innocent citizens".

It is just one example of how "managerialism" has crept into the public sector, both in Australia and around the world, since the 1980s.

"[The thinking was] we should treat citizens as customers, and we should put customer service at the centre of what we do in government," Professor Beth Noveck, the director of New York University's Governance Lab, tells ABC RN's Future Tense.

"But I think for a lot of reasons, this really hasn't worked. And in many ways, these theories have done a lot of harm."

A number of public sectors have been affected by the ideological shift, including

the healthcare sector, tertiary education and academia — to their detriment. For example, a 2023 paper reported that studies considered "disruptive" were declining, with "productivity" tipped as a contributing factor.

Another sector that's been impacted is the justice system, with a shift away from going to court to decisions being reached behind closed doors, all in the name of efficiency.

For example, in 2018, a study found that between 87 per cent and 100 per cent of all guilty pleas in Victoria were "the result of a negotiated agreement between the prosecutor and the defence".

Since 2012, those who plead guilty in South Australia within four weeks of appearing in court can receive reduced sentences of up to 40 per cent. And since 2020, serious crimes, including rape and death by dangerous driving, can receive a maximum discount of up to 25 per cent.

"The requirements of devoting time, energy and resources run counter to the requirements to be efficient, because efficient means, 'How can you use your resources in a manner that is most cost-effective'. But effectiveness is a different issue," Professor Arie Freiberg, an emeritus professor at Monash University, says.

"If we measure things by 'effectiveness', then we may find that other means of dealing with people – such as drug courts, family violence courts, Koori courts and the like – are more effective in dealing with the underlying problems."

"But a managerialist approach would consider those to be inefficient."

**Is the push for cost efficiency harming Australia's justice system? (ABC News: Brendan Mounter)**

**Professor Arie Freiberg says a managerialist approach to justice may see effectiveness as inefficient. (Supplied)**

**Professor Brian Opeskin says cost-efficient justice systems are important, but there is a chance they could compromise key values. (Supplied)**

## The efficiency model

In 2005, Professor Freiberg gave a lecture on managerialism's influence on the Victorian criminal justice system.

These impacts ranged from how its police force began treating citizens as "customers" to its court system having performance indicators, including appeal rates, cost-per-case and client satisfaction.

He says this was the direct result of managerialism's prioritisation of efficiency.

"The efficiency model looks at the outputs and requires judges and prisons and others to be measured against a series of key performance indicators, which may not reflect the quality of the work that needs to be done, but the quantity," he says.

"And secondly, it does not take account of the need for personal relationships in many of the interactions between the state and individuals."

This model goes beyond Victoria. After speaking with seven federal police leaders, a 2017 study found performance results influenced resource allocation.

"Governments will say, 'we will give you so much money and if you don't make us a profit on that you won't get as much next year.' This is really quite callous," one police leader said.

Professor Freiberg says it's important to remember there were inefficiencies in Victoria's criminal justice system and managerialism did, in some ways, "sharpen the public service".

But he says we should ask ourselves the underlying question, namely: "What do we want from our criminal justice system?"

## Necessity of cost value

Australia's justice system does need to be more efficient.

In the 2022 financial year, more than 83,000 criminal cases in Victoria were waiting to be heard by a magistrate. And in its 2022 budget, the state's government announced it would invest $41 million into the courts to help drive down backlogs.

"I think that underlying concern of managerialism is not an unreasonable

one. How do we get the best value out of the use of public money in discharging all the different functions that government has to discharge?" Brian Opeskin, a law professor at the University of Technology Sydney, says.

In 2022, UNSW published Professor Opeskin's paper that considered whether managerialism and cost-effectiveness were harming key values of Australia's justice systems.

But while there's a need for efficiency in the justice system, there are also tensions, Professor Opeskin says. Examples include the introduction of criminal infringement notices and plea bargaining, which make the system move quicker but removes it from the court's oversight.

"The point is that the state, in terms of the judicial system, has no say over [these]."

Similarly, plea bargaining carries a risk of creating injustice, yet the system would be overwhelmed if every case went to a hearing.

"In a sense, plea bargaining has become a necessity driven by the limitation on resources in the system. But that doesn't mean that the system can't be improved."

"The question is: 'How can you finesse the system to accept the fact that plea bargaining might be a reality and a cost-effective solution, but without overly compromising the values that are important to the system, which include procedural fairness, just outcomes and impartiality?'"

Cost-effectiveness measures can be done intelligently "without really compromising much else," the law professor says.

"But where cost-effectiveness does come at serious cost to other really important systems of the judicial system, then we need to stop and just take account and ask ourselves, 'What is being lost?

"And is there a better way to do it so that we aren't making it just a cheap and dirty system?'"


**Professor Freiberg says we need to question managerialism's influence. (ABC News: Karen Percy)**

**Since the 1980s, managerialism has crept into Australia's public sector, including its justice systems. (ABC News: Che Chorley)**

**One 2017 study reported that Australian police budgets were linked to performance results. (Supplied: NSW Police)**

## The price of efficiency

Others have also suggested the model of efficiency, above all else, can undermine the justice system.

The UK is a good example. Dr Ed Johnston, a senior law lecturer at the University of Northampton, says the justice system has significantly suffered under managerialism.

He says since the early 1990s, the English and Welsh court systems have been seen to have "excesses that need to be cut".

"We had piecemeal changes to try to speed up the system. There were changes to the 'right to silence' provisions. There were changes to disclosure law, in terms of what the defence had to offer the other side."

Since 2001, Dr Johnston says the pursuit of efficiency has been a major driver in courts becoming "conviction minded". He adds defence teams now also face a lack of legal aid funding, and guilty plea incentives.

"It's very hard for defence lawyers to be zealous advocates [for their clients] because the system is no longer designed for them to be zealous advocates.

"They are designed to be a cog in the machine."

Dr Johnston fears the UK's justice system will continue to be impacted by this approach, with the last three decades seeing the "centrepiece of justice" shifting from the court to the police station.

"The majority of cases are designed to finish in the police station by whatever mechanism of disposal," he says.

"I think that's part of that administration of justice – that more managerialist approach. That you're keeping cases out of court."

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