DIRECTOR of PUBLIC PROSECUTIONS VICTORIA

•PLEA OFFERS AND DISCONTINUANCES DPP SPEECH•

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Introduction

This paper sets out to discuss how to conduct successful negotiations with the Office of Public Prosecutions (OPP), by particularly looking at plea offers, and discontinuance applications. It must initially be acknowledged that every attempt at negotiating a plea offer or making an application for discontinuance of a trial is not likely to be successful. Nevertheless, in this paper I intend to set out what I think are some of the major issues that you should address in approaching negotiations with the OPP, and making your applications for discontinuances.

The starting point – the exercise of the general prosecutorial discretion

Any discussion about settlement negotiations, and discontinuance applications, needs to begin with a basic understanding of the Director's Policy about the exercise of the general prosecutorial discretion. It is only when you understand the process that underpins the decision to prosecute or not, can you best address the issues with which we are presently concerned.

The criteria governing the decision to prosecute are set out in *Policy 2, Director's Policy – The Prosecutorial Discretion.* This policy is available on the OPP website. Fundamentally, the policy recognises that the decision to prosecute, or not, is the most important step in the prosecutorial process. The decision is a careful one and takes into account impacts on any victim, the suspect, and the community at large. It observes that the wrong decision to prosecute, or

alternatively the wrong decision not to prosecute, has a tendency to undermine confidence in the criminal justice system.

For present purposes it is convenient to begin the discussion by reflecting on the 'two-step' test, which encompasses the reasonable prospect of conviction, and considerations of the public interest.

1. The reasonable prospect of conviction

The policy provides that a prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to law has been committed by the alleged offender. The existence of a bare prima facie case is not enough. In circumstances where the prima facie case is found to exist, consideration must be given to the prospects of conviction. The prosecution should not proceed if there is no reasonable prospect of a conviction being secured.

Whether or not there is a reasonable prospect of conviction is thus the first step in a two-step test, in deciding whether or not to prosecute. The decision involves an evaluation of the strength of the case when it is to be presented in Court. It takes into account matters such as the availability, competence and credibility of witnesses, their likely impression on the fact decider, and the admissibility of any alleged confession or other evidence. A prosecutor making an assessment of the decision whether or not to prosecute should also have regard to any lines of defence which are plainly open, or may have been indicated, by the alleged offender. The assessment of these matters may be a difficult one as there can never be an assurance that a prosecution will succeed in the end. Indeed, the policy recognises an inevitability that some prosecutions will fail, despite there being a decision made that there is a reasonable prospect of conviction.

Paragraph 2.1.5 sets out a list of factors in the Director's Policy that should be taken into account when evaluating the sufficiency of the evidence, on a decision whether or not to prosecute. It is not necessary for present purposes to list the matters that must be considered, other than to say that many are obvious, as well as many being of a subjective nature. An experienced prosecutor is expected to be

able to weigh these factors, and pieces of evidence, in making the decision whether or not to prosecute. In this regard the value of using experienced trial and appellate prosecutors for this task cannot be overstated.

2. The public interest test

Assuming that a prosecutor decides that in all the prevailing circumstances there is a reasonable prospect of conviction, and the evidence is sufficient to justify the continuation of a prosecution, the prosecutor is obliged to then consider in light of the provable facts, in the whole of the surrounding circumstances, whether the public interest requires a prosecution to be pursued. This branch of the test accepts that not all offences brought to the attention of the authorities, that may be found to possess a reasonable prospect of conviction, must then be prosecuted.

The factors that can be properly taken into account in deciding whether the public interest requires a prosecution vary from case to case. On the one hand, many public interest factors operate in favour of proceeding with a prosecution, for example, the seriousness of offending, and the need for general deterrence. The more serious the offence, the more likely it will be that the public interest will be served by the continuation of the proposed prosecution. Paragraph 2.1.10 of the Director's Policy lists those matters which may arise for consideration, either alone or in combination, in determining whether the public interest requires a prosecution to continue.

Frequently, these factors involve considerations of the seriousness or possible triviality of the alleged offending, whether it may be of a technical nature, whether there are any significant mitigating or aggravating circumstances, any issues as to the youth, old-age, intelligence, physical health, mental health or other particular infirmity of the alleged offender, victim or witness. In all, the policy lists about 20 factors that can be taken into account. I do not need to list them here, but I suggest that when it comes time to consider offers of settlement, or applications for discontinuance, you should be aware of what these factors are, and be prepared to address them. For instance you will want to consider, whether a sentence may have already been imposed on the offender, and possibly served, prior to a successful appeal being conducted. A further matter might be what the

attitude of the victim is to the alleged offence. The victim might now be reluctant to give evidence or return to give evidence, following a successful appeal being argued. It is sufficient to say that there are many factors which either singly, or in combination, might be put forward as arguable factors supporting the possibility of a plea negotiation, or discontinuance. You should be ready to engage with all these factors, and address each of them, as relevant.

Plea negotiations

In formulating your approach, you should be aware of the Director's Policy as to the early resolution of cases. This is *Policy 22, Director's Policy as to the Early Resolution of Cases* and should be read in conjunction with the general policy as to the prosecutorial discretion, in particular paragraph 2.6 which relates to plea negotiation. Essentially, paragraph 22.2 recognises the public interest in identifying pleas of guilty at the earliest possible stage in the criminal justice process. This consideration is capable of giving certainty of outcome, the saving of valuable community resources, reducing the burden on witnesses, and assisting victims of crime. Paragraph 22.3 of this policy provides that staff members of the OPP must at every stage of the prosecution process proactively consider and assess whether the matter can be resolved as early as possible to a plea of guilty, to appropriate charges, regardless of whether the possibility of resolution is raised by the accused's legal representatives.

To my mind, and given my experience travelling through the criminal justice system, paragraph 22.3 represents a considerable shift in attitude by the OPP. Experience tells me that not so many years ago prosecuting authorities seldom, if ever, stepped forward with the suggestion that a case might be negotiated to a settled position to that less than the charge originally brought by that agency. In past times, to be seen to approach the defence in this way would have been regarded as a sign of weakness, and was officially at least, almost never done.

The policy to proactively consider and assess resolution prospects throughout the criminal proceedings is seen to be an essential tool to ensure the efficient and economic use of OPP resources, to assist in the interest of victims and witnesses, and to ensure the proper and effective conduct of prosecutions. Pausing at that

point, it is particularly relevant to note that recent amendments to the *Public Prosecutions Act* which came into force earlier this year, making it clear that an essential part of my role as the Director of Public Prosecutions is to lead the Victorian Public Prosecutions Service, now comprising the Office of the Director, Chief Crown Prosecutor, Crown Prosecutors and Associate Crown Prosecutors, Solicitor for Public Prosecutions and Office of Public Prosecutions, and to ensure that the operations of all of these parts of the Victorian Public Prosecutions Service are carried out in an efficient, economic and effective manner. Early plea resolutions in cases, have a clear role to play in achieving this.

Plea negotiations in our State are to be distinguished from the American practice of 'plea bargaining' whereby the prosecutor, defence counsel and the judge in the case confer, usually in the judge's chambers, for the purpose of obtaining a judicial indication of the likely sentence that could be imposed in certain circumstances. That is not what we have in Victoria.

Recently there has been some criticism in the media of suggested 'secret deals' that occur as a developed practice, between the prosecution and the defence. It was argued that this so called practice has led to cases being settled with a lack of transparency and accountability. In my view, such criticisms are misconceived. When this criticism was mounted in the media the Chief Crown Prosecutor Gavin Silbert S.C., and I jointly issued a press release confirming that plea negotiations and the settlement of cases occur in structured and accountable circumstances, and follow the Director's Policies to which I have referred above.

Director's Policy 2.6.6 sets out the major factors which may cause the Crown to accept an accused's offer of a plea of guilty to lesser charges. The policy sets out 10 major factors, which are not exclusive, and are commonly taken into account in the resolution of criminal cases. It is of significant importance to note that cases are frequently settled on the basis that on a proper assessment of the evidence, by expert prosecutors, the Crown case is determined to be fraught with forensic difficulty. In other words, in the well educated and experienced eyes of Crown Prosecutors and solicitors, the case on the major charge or charges will be

difficult to prove and that on balance, the risk of a complete acquittal in the face of a settled plea, is regarded as an unjustifiable one to take.

Thus on careful analysis, frequently problems arise in the admissibility of evidence, to the credibility or availability of witnesses; or, with the reluctance of important witnesses, frequently victims, to give evidence. There are many other factors, and variations of the factors listed, that might lead to careful scrutiny being given to whether or not a case should be subject to a settled plea of guilty to lesser charges. An important related issue can be that there is a prospect of a long and expensive trial on what might be regarded ultimately as relatively minor matters, with either minimal or no penalty as a likely result of that lengthy proceeding. In such circumstances, the shortening of the case by a negotiated plea of guilty to a satisfactory set of charges can amount to a desirable outcome in the public interest. In this regard many factors of various kinds can combine to contribute to such a decision.

Another extremely important issue which is of particular significance in the prosecution agreeing to settle cases for lesser charges, is that an acceptance of a plea of guilty frequently saves witnesses, often young children or elderly people, from the trauma of being exposed to the curial process.

I have not listed all of the issues in detail for present purposes, but I do strongly suggest that in formulating your approach to plea negotiations with the Crown, or approaching the issue of a discontinuance application, that you carefully read Policy 2.1 on the exercise of the general prosecutorial discretion, and Policy 22, on the early resolution of cases. By being familiar with these two policies, you will be significantly assisted in addressing the primary issues that the prosecution is obliged to take into account in dealing with these two types of approaches by the defence.

Making an approach to settle a case or an application for discontinuance

Fundamentally, you will give your client the best opportunity for a successful outcome in either resolving a case or seeking a discontinuance of a case, if your

approach is made in writing. It should either be in the form of an email, or preferably a letter containing an attached submission.

Applications for discontinuances should be made directly to the case officer concerned in your case, and copied to me. On the other hand, offers of settlement should be made directly to the case officer concerned in the matter. In respect of both kinds of approach, the communication should not be directly to a permanent Crown Prosecutor. In the case of externally briefed Counsel, if the matter is at trial, that Counsel should be informed about what is occurring, and copied into communications, but the key written material should be forwarded to the OPP. Policy 22.10 provides that in receipt of these types of approaches the OPP solicitor concerned should provide written or verbal advice to a Crown Prosecutor, whilst expressing their view on the matter. In turn, the case officer is obliged in appropriate cases to seek advice from their immediate superior in the OPP. Once the question is considered by a Crown Prosecutor, that Crown Prosecutor attains ultimate decision making responsibility in relation to the formulation of the Crown's initiated proposals for resolution, and the acceptance or otherwise of defence plea offers, and formulating the reaction to an application for discontinuance.

If the case that you have written about concerns any form of homicide (murder, manslaughter, culpable/dangerous driving causing death, arson causing death, child homicide, infanticide or any Occupational Health and Safety charge arising out of a fatality) plea offers made by the accused or applications for discontinuance will not be accepted other than with the approval of the DPP, or in my absence the Chief Crown Prosecutor. In these cases, within the OPP for all plea offers to be considered by myself, or in my absence the Chief Crown Prosecutor, written advice is first obtained from a Senior Crown Prosecutor.

Therefore, it can be seen that approaches of the kind we are discussing are treated seriously within the OPP but just as importantly, they are treated by an established procedure, at each stage of the process being looked at by different individuals, in many cases leading to my ultimate decision. In this way, there are checks and balances on this process, and as I said before, established ways in

which the process is resolved transparently, but also in an orderly and structured way.

It should also be observed that in many cases, apart from the compilation of written advice from point to point upwards in the decision making process, there are many opportunities for oral discussion, and in most cases, resolutions of plea settlements and discontinuances applications are resolved with the input of all the relevant parties within the OPP and frequently having the informant in attendance at those discussions. It is of particular importance to observe that victims, and relatives, are consulted in any process of settlement and are consulted by the case officer with the assistance of members of the Witness Assistance Service, as a matter of course. The OPP is well set up to carry out discussions with victims and families in a professional manner about the matters of plea negotiations and discontinuances. Therefore, it is quite incorrect to observe, as has been alleged recently, that the acceptance of plea offers in secret circumstances, takes place. Such allegations in my experience are quite misconceived.

I have said that your plea negotiations and discontinuance applications should be in writing. Further to that, I make the strong suggestion that in drafting the documents that are to be sent to the OPP for consideration that you set out your argument as fully as possible. It is of course a tactical matter for you whether you decide to hold back some part of your exposition, on the basis that to fully set out the strengths and weaknesses of the Crown's case might ultimately be to your disadvantage, should the approaches to the OPP fail. You might think that a full argument risks exposing a gap in the Crown case that you think might not have been picked up by those at the OPP. In my view this is false economy. It is already likely that any gaps you have picked up have already been well identified by OPP staff assessing the case in a vigilant manner.

It is of course a matter for you, but for what it is worth, my view is that you are far better off to make the fullest effort at trying to either resolve your case, or persuade the OPP to withdraw, than holding back on some point that you believe might be a killer point in the event that the case should run to trial. The OPP staff will be much more assisted by a fully reasoned and rational argument that sets out

why this case ought to settle, or be discontinued. In my view therefore, the interest of your client is best served by setting out the full reasoning of the document that you will send to the OPP on your client's behalf.

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Victoria