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# • THE IMPORTANCE OF PLEA AGREEMENTS: OUR APPROACH AND ACCOUNTABILITY •

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October 2014

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## 14<sup>th</sup> International Criminal Law Congress Speech by Victorian Director of Public Prosecutions: John Champion S.C.

### **Introduction**

It gives me great pleasure to be speaking to you all, on the final day, and as the final act, of the 14th International Criminal Law Congress.

I am pleased to have the opportunity to provide an insight into how we, in Victoria, approach plea agreements and how we are accountable in this respect.

Plea negotiations are a daily occurrence in the work we do, and the process of resolving cases crosses every kind of offending. It goes without saying that the resolution of cases by negotiated settlement is an extremely important area of the work we do. Settlement of criminal cases can have deep ramifications for victims and their relatives, for accused people, and for the community's continued level of confidence in the operation of the criminal justice system.

Some basic propositions to start with. In Victoria, we are seeing a steady trend towards more of our matters being resolved as pleas, and we view this as a positive outcome for the Victorian criminal justice system. This is not a recent trend but has developed over some years.

However, to bring you right up to date, in 2013/14, guilty pleas were achieved in 76.6 per cent of our matters – reflecting a steady trend up from an average of 72.9 per cent over the past five years. Significantly, 83.1 per cent of these guilty pleas were achieved at or prior to committal, saving time and effort on the preparation and conducting of jury trials that didn't eventuate. This is an important factor in tackling the problem of endemic delay we experience in resolving cases in Victoria.

There are a number of accepted advantages in negotiating an appropriate settlement in criminal cases. These are some of the main factors, and they are not put forward in order of importance, as the factors relevant to the ultimate decision making are different, and may be differently weighted, in every case under consideration:



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- Giving certainty of the outcome for the prosecution and the community. As we know a jury is able to convict an accused person of any available alternative; but more importantly, acquit altogether.
- Saving victims and witnesses, often young children or elderly people, from the trauma of being exposed to the curial process; and,
- Ensuring that valuable community resources are used efficiently.

I will speak more about these issues later.

### **Criticism**

Decisions to settle cases sometimes attract controversy, among the people involved in the cases, and also in the community. Understandably, many cases that result in settlements are highly emotionally charged. Participants are often damaged, and extremely traumatised by the circumstances that cause them to have to be associated with the criminal justice system. I am particularly conscious of this factor.

Since I was appointed Director of Public Prosecutions (DPP) in 2011 there have been some criticisms in the media, as well as academia, of suggested “secret deals” that occur as a developed practice between the prosecution and defence.

In respect of defensive homicide cases in particular, it has been argued that a so-called practice of “secret deals” has led to cases being settled with a lack of transparency and accountability.

In my opinion such criticisms are misconceived, and the terminology used suggests that something underhand might be going on, that is sought to be covered up. Nothing could be further from the truth. We do not settle cases on whims, or capriciously, but we do so for appropriate and defensible reasons, following published Director’s Policies and Guidelines.

### **Why are cases settled?**

There are many factors and variations 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 and appropriate charges.

Undoubtedly, the most frequent reason is that problems arise with the admissibility of evidence; the credibility or availability of witnesses; or, the reluctance of crucial witnesses - frequently victims - to give evidence. These factors often give rise to real concerns about whether a case can be proven beyond reasonable doubt. As I said, this issue of whether guilt on the major charge before the court can be established would most regularly confront my prosecutors, and myself, as the main and most frequent reason why we move to either proactively suggest, or accept, a negotiated settlement.

It must be remembered that we are working within an adversarial system and these issues that work against the likelihood of a successful outcome on major charges often fall outside of the control of the prosecution. A prosecution is generally only as good as the evidence presented to us by the investigating agency.



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An important related issue can be that there is a prospect of a long and expensive trial for what might be regarded as relatively minor matters, with either minimal or no penalty a likely result, or where the accused is already serving a substantial term of imprisonment. Being able to shorten the case by a negotiated plea to appropriate charges can amount to a desirable outcome that is in the public interest.

As an aside, in relation to the monetary savings achieved by pleas, consider the following:

- Each plea saves the justice system (and victims and witnesses) a trial which on average consumes seven days of court time, compared to approximately one day for a plea. That is a figure provided by the OPP, and takes into account a number of different factors. By comparison, recent statements made on behalf of the County Court suggest that his figure may be as high as 10 days.
- Pleas as a proportion of matters completed by the OPP are up to 76.6 per cent from 69 per cent five years ago, with a corresponding fall in the proportion of matters going to trial. On the other hand, we do know that the length of trials is increasing.
- A 5 per cent shift in completions from trials to pleas can reduce the numbers of trials by around 25 per year, saving around 175 trial court days. That last figure represents a considerable saving in court time, which again, addressed the issue of delay in the resolution of other matters which do genuinely need to go to trial.
- It is estimated that a day in court costs approximately \$20,000, so if my maths is correct, that is a saving of roughly \$3.5 million.

It is clear then that early plea resolutions have a role to play in achieving an efficient and economic handling of cases; however, as I have said, this is only one piece of the picture when considering appropriate settlement. It is worth mentioning that as DPP I am obliged pursuant to the Public Prosecutions Act to conduct the work of the Victorian public prosecutions service in an economic, efficient and effective manner.

### **Director's Policies**

Let me speak a little more deeply about the considerations that are brought to mind in settling cases. Much of the work we do as prosecutors involves the evaluation of “possibilities” and “probabilities”, and assessing the “prospects of conviction”, and findings “beyond reasonable doubt”.

Each of these involves a wide range of value judgments based on variable factors. One very important tool in achieving a standard approach is through the development and publication of Director's Policies. These policies, published on the OPP website, provide clear guidance for those involved in the prosecution of matters – such as OPP solicitors, Crown Prosecutors and the private bar. They also act to inform the community about our standards and approach, and what they can expect. The Policies about which I speak are thus publicly available.



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Needless to say, they are of course available also to the defence, and accused people.

In relation to plea negotiations, there is a Director's Policy on Resolution, which clearly sets the considerations OPP solicitors must take into account when considering resolution by a plea of guilty. These include the strength of evidence including any admissions; any probable defences; the views of the victims and the informant; the accused's criminal history; and the likely length of a trial.

Within our service there are clearly defined procedures that take place, with a series of different people considering the matter at different stages, from solicitors upwards, with final decisions being made by a Crown Prosecutor, or myself. Those final decisions are thus made by independent statutory officers and if I might say, experts in the field of court craft, advocacy, and the law and procedures relating to the conducting of the state's most serious criminal trials.

I spoke in my Welcome to this Congress about the valuable and unique resource to the Victorian community of our expert body of Crown Prosecutors. The processes involved can mean that it can take some time for an ultimate decision, but the number of checks and balances in place do their best to ensure correct appropriate decisions are made.

### **Making reasons public**

Let me pose this question. In carrying out the process of settlement, or once a plea has been accepted to lesser charges, is it appropriate that there occurs some public ventilation of the reasons for the decisions made to settle a case? To do so would mean that the strengths and weaknesses of a prosecution case; or details of a victim's reluctance to give evidence; or the fact that a complainant or a crucial witness might suffer from an intellectual disability or mental illness that might be assessed as adversely affecting the reliability of the evidence to be given, would be made public.

Acting on a reasonable understanding of social interests and standards, I do not reasonably think that the community would expect, or be tolerant, of the Crown revealing difficult personal circumstances of infinitely various kinds, so that popular media interests could be satisfied. Instead, in my view, to do so would be seen as a significant invasion of a person's privacy. Many people we see are already damaged enough as it is, and are deserving of respect and security.

Further, it surely would not be expected that the Crown should reveal that there is a reasonable belief that a particular line of evidence is thought to be inadmissible, and to prevent the continuation of a case, in circumstances where an organised crime gang, or terrorist organisation might be looking on. These types of issues simply cannot be articulated publicly, yet these very factors frequently invite the need for resolution of cases.

I want to make to clear that whilst there is no public ventilation in court of the reasoning processes I have spoken about that might lead to, or force, a settlement, this does not mean that these issues are kept as closely held secrets within the four walls of the OPP. It is very important for the community to understand that the "interested parties" we deal with, characteristically including victims, relatives



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and police, are consulted throughout the resolution process. It is not, as has just been suggested, a case of victims “eventually becoming privy” to resolutions.

The views of those involved are taken into account, and decisions are explained to them. The OPP is well set up to carry out these discussions, with the assistance of staff from the Witness Assistance Service. I am quite satisfied that the culture at the Victorian public prosecutions service is one of consultation, concern, and diligence with respect to this question.

We have a legislative obligation to do so pursuant to the Victim’s Charter Act, and my expectations about this are further addressed in my policies. Do we get it right all the time? I can’t say that we do. We are dealing in an area of human interaction, with cases of all kinds, involving victims and relatives with many different perceptions, and sometimes widely differing expectations. All I can say is that I am satisfied that I lead a staff that approaches their work with a deep concern for peoples interests and that the approach to my mind, is of one of care, and concern. That is the approach that I am committed to inspire.

In my view the community can be assured that decisions regarding plea negotiations are made according to established guidelines, with rigorous checks and balances in place, and in consultation with those people directly involved in a matter.

In conclusion, I want to emphasise that there are multiple ways myself and the OPP are accountable for decisions made. This accountability can be seen to be to Parliament; by the creation of Director’s Policies; various requirements to consult with interested parties; providing written reasons for discretionary decisions; that our prosecutors work is carried out under public gaze in open courts; the ability of the media to report on proceedings; publicly available court decisions; and the publication of the Annual Report. All of these separate things ensure that accountability and public transparency is achieved.

I hope I have been able to give you some insight into the importance of plea negotiations in Victoria, our approach and accountability.

On a final note, I conclude by quoting a paragraph from a paper written by the Chief Crown Prosecutor, Gavin Silbert QC, which was in response to an academic article published in the Melbourne University Law Review criticising the so-called secret deals taking place in Victoria:

“There are no problems with plea bargaining in Victoria. The community can be assured that the quality and qualifications of those entrusted with the task ensure complete integrity and honesty in the process, free from outside influence and subject to a rigorous process of scrutiny and verification. The call for transparency is ill founded and betrays a total lack of understanding of the criminal justice system”.

It was matter of regret to me that the journal which published the original academic article declined to publish Mr Silbert’s response.