REVIEW OF THE NEW SOUTH WALES DIRECTOR OF PUBLIC PROSECUTIONS' POLICY AND GUIDELINES FOR CHARGE BARGAINING AND TENDERING OF AGREED FACTS.

REPORT
BY
THE HONOURABLE GORDON SAMUELS AC CVO QC

1. On 18 September 2001 I was appointed to undertake a review of the New South Wales Director of Public Prosecutions' policy and guidelines for charge bargaining and tendering of agreed facts.

2. Terms of Reference

2.1 The terms of reference for the review are:-

"To review and report on the adequacy of the New South Wales Director of Public Prosecutions' policy and guidelines in relation to charge bargaining and the tendering of agreed facts.

The review shall have particular regard to whether the policy and guidelines:-

(i) ensure adequate consultation with victims.

(ii) ensure that the charges and agreed facts reflect the criminality of relevant offences.

(iii) should permit a sentencing judge to be satisfied that the policy and guidelines have been complied with.

The report on the review should also include recommendations for any necessary amendments to the policy and guidelines and any related matter."

3. Methodology

3.1 An advertisement inviting submissions to the inquiry was placed in the following daily newspapers:- **The Sydney Morning Herald**, **The Daily Telegraph** and **The Australian**; and was also placed on the www.lawlink.nsw.gov.au website. The text of the advertisement is set out in Schedule 1.1 to this report. It attracted submissions from those listed in Schedule 1.2, who included five persons who had been the victims of violent crime.

3.2 In addition letters inviting submissions were sent specifically to the individuals and organisations listed in Schedule 1.3, and submissions (or responses) were received from those (or their nominees) listed in Schedule 1.4. Other submissions were received after the closing date in Schedule 1.1.

3.3 A number of those who made submissions, and some who did not, were interviewed, and the interviews were recorded. Those interviewed are identified in Schedule 2.

3.4 In total 27 written submissions were received. Eighteen persons were interviewed.

4. The scope of the Terms of Reference

4.1 The terms of reference do not require me to make any critical appraisal or analysis of the propriety of the process known as "charge bargaining", or to make an assessment of its utility to the administration of criminal justice or of the principles which underlie it. With one possible exception, I am to report on matters of procedure. However, some reference to questions of principle, and pragmatism, will be inescapable. My approach will be to consider, on the basis of the material before me and my own experience, what features a fair and effective charge bargaining process ought to exhibit; and then to examine the Director of Public Prosecutions (DPP) policy and guidelines to ascertain whether or not, and to what extent, they satisfy these desiderata.

4.2 I note that the Report, made in June 2000, of the Deliberative Forum on Criminal Trial Reform, established by the Standing Committee of Attorneys-General, dealt with a recommendation (Recommendation 31) that "consideration should be given to formalising plea discussions between the prosecution and defence". The Forum Comment was:- "The recommendation was raised at the national meeting of the DPPs in April 2000. It was generally agreed that formalisation of plea bargaining was unnecessary and that the informal arrangements currently in existence were seen as advantageous – any formal requirement might jeopardise the success of the current arrangements".

4.3 The reference to "plea bargaining" is to the process called "charge bargaining" in New South Wales and in other States, to distinguish it from the procedure common in the United States of America, in which a judge, on request, will indicate what sentence might be imposed upon a plea of guilty. Such discussions between counsel and the judge are considered improper in Australia, and do not occur. I start then from the premise that the current view of

Australia's senior law officers is that charge bargaining, which I will define, is acceptable in principle and beneficial in practice.

Sentencing

4.4 I am not required to make any examination of the philosophy or current practice of sentencing, or of the levels of penalty which the courts impose. But in the course of the report, I will need to say something about the extent to which the public perception of charge bargaining is often influenced by what are regarded as unduly lenient sentences in cases where a plea of guilty is the result of an agreement between the prosecutor and the defence.

5. The criminal justice system

5.1 I must commence by setting out in summary form the main elements of the procedure by which serious charges laid by the police, known as indictable offences, are brought to trial usually by a jury in the District or Supreme Court. Most of them are listed for trial in the District Court which is now the main criminal trial court in New South Wales. Generally, the Supreme Court tries only cases of homicide.

5.2 In the system which exists in New South Wales (and for that matter in Australia generally) a criminal trial is an adversarial procedure between the Crown (that is the State) and an accused. They are the only parties to the proceeding. The victim of a crime (where there is one, as in the case of violent crime against the person) is not a party to the proceedings, and is not entitled to be represented.

5.3 Charges initially are laid by the police following, or in the course of, their investigation into the allegation that an offence has been committed. There may be more than one charge laid by the police, and there commonly is. If the charges are indictable, the next stage is that the defendant appears before a magistrate in the Local Court whose function it is to decide whether the charge or charges should go on for trial by jury in the Supreme or District Court. This committal, as it is known, may be a formal proceeding in which witnesses are called and cross-examined or, more usually, it is conducted on the written record of the statements obtained by the police from the victim and other witnesses.[1] An officer from the office of the Director of Public Prosecutions (ODPP), generally

[1] *Justices Act*, 1902, Part 4, Sub-division 7, especially ss 48AA and 48E.

a solicitor, conducts committal proceedings on behalf of the prosecution.

5.4 After committal the Trial Preparation Unit of the ODPP is responsible for settling the indictment, the formal statement of the charge or charges upon which the accused will stand trial. The Trial Preparation Unit (TPU) which was formed in November 2001, is made up of four Crown Prosecutors and an arraignment clerk responsible for liaison between the Crown Prosecutors and the solicitors in the ODPP.

The indictment

5.5 The indictment may not contain all the charges upon which the accused has been committed. The police charge a suspect at a stage in the proceedings when their investigation may not be complete, and naturally enough therefore, with as many offences as the facts ascertained thus far appear to support. It is said by the ODPP that the police sometimes tend to "overcharge". Therefore it is not unusual for the indictment to omit – for want of admissible evidence for example - some of the offences originally charged and on which the defendant has been committed. At all events, it

is the duty of the Crown Prosecutor in charge of the matter in the TPU to settle the indictment, alleging such charges as the Crown on the existing state of facts believes can be proved beyond reasonable doubt. Within four weeks after committal, the matter is placed in the arraignment list in the District Court when the indictment is formally presented and the accused required to plead.[2] An indictment may not be amended after it is presented except with the leave of the court or the consent of the accused.[3] One of the duties of the TPU is to "seek out and negotiate pleas"; and it is at or before arraignment that the process of charge bargaining should ordinarily commence.

6. The nature of charge bargaining

6.1 Charge bargaining, as it is usually called in New South Wales, is a process by which the prosecutor agrees to withdraw a charge or charges upon the promise of an accused to plead guilty to others.[4] The public and the media often seem to perceive this as a kind of Dutch auction or horse-trading session in which bids and counterbids are exchanged until a deal is done, and a charge is found to which the defendant is prepared to plead guilty. In

[2] *Criminal Procedure Act*, 1986, section 54.
[3] Ibid, section 63A.

practice, the process is not at all like this. "Plea discussions and agreements in Australia do not really involve a bargaining, bidding, haggling, horse-trading process, though participants and observers alike sometimes use such language. Australian plea discussions do not appear to rely on unjustified relinquishment of some certain claim or advantage, nor a promise to give some undeserved advantage."[5] It is not a process in which the prosecutor merely reduces the gravity of the charges in return for a plea of guilty.

6.2 The process is designed to establish the appropriate charge, that is to say, the charge which the prosecutor believes can be proved beyond reasonable doubt, which adequately reflects the criminality which those facts reveal, and which provides for the sentencer an adequate range of penalty. It has been well described as "informal, semi-adversarial/semi-cooperative", and as a process which "attempts, in a situation of uncertainty, to identify the facts which can be proved beyond a reasonable doubt and the charge which most appropriately reflects those facts, to the satisfaction of both prosecution and defence … this informal process is actually a

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[4] David Andrew, *Plea Bargaining*, Law Institute Journal (Victoria) April 1994, p 236.

method of attempting to identify the proper outcome, in law and fact …”.[6] The charge bargain is therefore the product of informed and professional discussion between advocates for the prosecution and the defence intended to reach an outcome satisfactory to both, (I interpolate that it is rare for an accused to be unrepresented in criminal proceedings in the District or Supreme Courts) by obtaining a plea of guilty to the charge (or charges) ultimately identified.

6.3 Accordingly, as Professors Mack and Roach Anleu point out,[7] the terms “charge bargain” or “charge bargaining” are misleading and convey a pejorative view of the process. It would be far better to abandon the title of “bargain” and to replace it with “negotiation” or “discussion”. I will return to this point later in this report; for the time being I will continue to use the terminology adopted in my terms of reference.

7. Charge bargaining – why?

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5 *Pleading Guilty : Issues and Practice*, Cathy Mack and Sharyn Roach Anleu, The Australian Institute of Judicial Administration (1995) (hereafter Mack & Anleu) p 6.

6 Ibid.

7 Ibid.

7.1 What is the purpose of charge bargaining and why is it done? Why, for example, does the DPP Policy 6 (Charge Bargaining) direct prosecutors "actively to encourage the entering of pleas of guilty to appropriate charges"? Why not let a prosecution take its course to trial, subject only to an accused's own independent decision to plead guilty – without any encouragement from the prosecution?

The public benefit from pleas of guilty.

7.2 The short answer to these questions is that guilty pleas provide very substantial benefits to the community by the saving in time and cost which would otherwise be consumed by contested trials. It was agreed by all with responsibility for the operation of the criminal justice system that charge bargaining, as the primary means of facilitating the disposal of indictable offences by a plea of guilty rather than by trial, was essential to the administration of justice. Without it, the system could not cope.

7.3 For example, in the District Court for the period January 1998 to 30 September 2001, of the 1,890 cases committed for trial, 591 were negotiated as pleas of guilty through charge bargaining at the

arraignment stage. This represents 32% of matters committed for trial, with an estimated saving of 2,509 trial days or approximately 500 sitting weeks.[8] It has been calculated (with some figures estimated) that the cost of a day in the District Court in a criminal trial, excluding the cost of Legal Aid, Public Defenders, Corrective Services, Crown Prosecutors, Legal Counsel, Police Service, depreciation and courtroom/chambers, is $4526. The figure for the Supreme Court, on the same basis, is $6011.[9] So, rounding off the figures, the cost of 2500 trial days in the District Court would be $11,250,000; and in the Supreme Court, $15,000,000. With the current limitation of available resources (a stringency likely to remain) the necessity to find trial time of this magnitude would result in delays of quite unacceptable degree, apart from the need to absorb the consequential additional cost.

7.4 The great majority of criminal proceedings is concluded by pleas of guilty whether or not the result of agreement. In 1993, 66.5% of persons charged in the Local Court, and 62.4% of those charged in higher courts, were sentenced after pleading guilty.[10] In 2000, the

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8 *Submission* by Peter Dare, Crown Prosecutor, and John Favretto, Acting Crown Prosecutor.

9 New South Wales Law Reform Commission, Discussion Paper 43, *Contempt by Publication*, Appendix B, pp 502-5.

10 NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 1993 (1994) at 1165.*

figures were 55.3% in the Local Court, 66.2% in the District Court, and 36.3% in the Supreme Court.[11]

7.5 Apart from enabling substantial savings of resources, a plea of guilty, once the conviction is recorded, is a conclusive determination of guilt, save in exceptional circumstances. It satisfies the victims (provided that the sentence is seen to be appropriate), and saves them and other witnesses from the necessity to give evidence in court.

7.6 All pleas of guilty are not entered as a result of charge bargaining. Many such pleas are generated by a Crown case of obviously overwhelming strength, or by remorse, or by a desire to take advantage of the discount in sentence available to an accused who pleads guilty at the earliest opportunity; or by a combination of these factors. The discount, at the sentencer's discretion, is from 10 to 25 per cent of a sentence which would otherwise be imposed.[12] Any procedure which can increase the incidence of

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11 NSW Bureau of Crime Statistics & Research, *NSW Criminal Courts Statistics 2000, Local Courts and Higher Courts.*

12 Section 22 *Crimes (Sentencing Procedure)* Act 1999; *R v Thomson & Houlton* (2000) 49 NSWLR 383 at 418, 419.

pleas of guilty without compromising principle is obviously of benefit to the community, and is thus in the public interest.

8. Charge bargaining – principle

8.1 The optimum outcome of a criminal prosecution is resolution by a plea of guilty to a charge which adequately represents the criminality revealed by facts which the prosecution can prove beyond reasonable doubt, and which give the sentencer an adequate range of penalty. A charge bargain must not compromise the principle – which I will call "the criminality principle" – made up of these three ingredients.

9. Charge bargaining - how?

The process of charge bargaining.

9.1 The prosecutor looks for the charge which most appropriately satisfies the criminality principle. Only those charges which are supported by admissible evidence should go into an indictment. But if, after arraignment, it should clearly appear that a charge in fact lacks the necessary proof, it should be withdrawn (and not used as a bargaining chip), and the prosecutor will endeavour to obtain a plea to an alternative charge which can be supported. Or

the defence may raise with the prosecutor what appears to be the absence of evidence to support a charge; and might then offer a plea to an alternative and less serious charge. If that charge satisfies the criminality principle, it is the prosecutor's duty to accept the plea. Hence a charge bargain may be initiated by either the prosecution or the defence and at any time. This is accepted practice in the other jurisdictions of Australia, save in Queensland and under the prosecution policy of the Commonwealth; each of these guidelines provides that a charge bargaining proposal should not be initiated by the prosecution.[13]

9.2 The test for the prosecutor is adequacy; adequate reflection of the criminality involved and adequate scope for sentencing. It follows from this that a prosecutor may in certain circumstances properly withdraw a charge which the available evidence supports, and which therefore the prosecution can prove, in return for a plea to a less serious charge. A negotiation for this purpose between prosecution and defence is justified by the high public benefit of a plea, and such a resolution, which might be called a "principled

[13] DPP Queensland – *Statement of Prosecution Policy & Guidelines,* May 1995, p 16; *Prosecution Policy of the Commonwealth*, 1996, para 5.14(a).

compromise" is acceptable provided always that it does not infringe the criminality principle.

9.3 The withdrawal of a charge which the prosecutor believes can be proved, and the acceptance of a plea to a lesser charge, other than for want of proof, may occur in many different circumstances, of which the following three examples are probably the most common.

The timorous witness

9.4 In cases of sexual assaults a young female victim, who is the principal witness for the prosecution, may well feel, and exhibit, the greatest apprehension about giving evidence or having to face the accused (although such an encounter may often be avoided by various means and should be so far as possible).[14] The emotional stress which a witness may experience in such circumstances was described by one of the respondents to this inquiry in these words:- "At the time I was just thinking I couldn't handle going to court. That's all I kept thinking, what I wanted was to just get out of it – I didn't want to go to court, that's all I just kept thinking, that whole time. The whole time I just thought I don't want to go to court. That's all I had in my mind".[15] I have exemplified a young female victim of a sexual assault because this is the most common case in which anxieties of this sort are exhibited; but the victim could be a male, although this extreme emotional response is unlikely save as a consequence of sexual assault. A witness may have such a fear of giving evidence that he or she initially simply refuses to do so.

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14 *Charter of Victims Rights, para 7.*

15 Interview with JH.

Of course, the prosecution may compel a witness at least to enter the witness box; but such a witness is unlikely to present well to a jury.

9.5 Crown Prosecutors seem to me to be generally understanding of and sympathetic to a witness who responds in this way to the predicament in which he or she is placed. They appreciate that a witness already severely shocked by an assault, and stressed and agitated by the unfamiliar surroundings of a court and the mysteries of the legal process, may very well suffer further serious emotional trauma from the ordeal of giving evidence. A witness who does not refuse to give evidence, but is in the state of emotional turmoil described may well be neither coherent nor convincing. In such circumstances a prosecutor, to save the witness testifying, is justified in accepting a plea to a less serious charge of assault, or one taken on the basis of a statement of agreed facts which omits or reduces certain matters of aggravation initially alleged, provided that the criminality principle is observed. Spigelman CJ has said, in discussing the reasons advanced to justify discounting a sentence for a plea of guilty:- "Thirdly, in particular cases – especially sexual assault cases,

crimes involving children and, often, elderly victims – there is a particular value in avoiding the need to call witnesses, especially victims, to give evidence.[16]

The unpersuasive witness

9.6 There is also the case of the victim, and principal witness, whose evidence appears in conference to be significantly short of persuasive. There are many reasons for this, and they do not have to include any element of deliberate untruth. Police officers vary in their quality as interrogators and, understandably, in the course of an interview are not concerned about making judgments regarding subsequent admissibility. Hence, statements, both written and recorded, may include matter which is hearsay, or for other reasons inadmissible at a trial. Further, if the occurrence in question happened quickly, in the dark or in circumstances in which the victim had only a limited opportunity of making observations, the account may be shown to be dubious when compared to other evidence which has come to hand. In these cases the Crown Prosecutor with carriage of the matter must explain to the victim, that although the victim's account is not being rejected as untrue, it may well fail to convince a jury beyond

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[16] *R v Thomson & Houlton* (supra) at 386.

reasonable doubt. It is always a delicate matter to explain to a witness that his or her account of the offence is unlikely to convince a jury. But in such cases it is again the Crown Prosecutor's duty to seek a plea to a lesser charge provided always that the principle of criminality is satisfied. Here, of course, the Crown Prosecutor may very well have to make a judgment as to which of the facts may be accepted in order to establish the relevant degree of criminality. It must be emphasised that references to adequate criminality mean the degree of criminality demonstrated by the accused's admissible evidence.

The overlapping of adequate penalties

9.7 In some circumstances a prosecutor may be of the view that a lesser charge meets the criminality demonstrated by the accused, and that the interests of the community are adequately met by the sentencing options available to the judge in a plea to a lesser charge; and accepts that plea. For example, the indictment may contain a charge under section 33 of the ***Crimes Act***, 1900 of maliciously inflicting grievous bodily harm with intent, and the defence may offer a plea to section 35 which is malicious wounding without the intent. The first carries a penalty of 25

years; the second 7 years. In some circumstances, 7 years might be a completely adequate span for a sentencing judge. The prosecutor's reasoning might therefore be that the Crown can prove the offence under section 33, but at the cost of a lengthy trial which will consume resources of time and money; and that at the end the sentence likely to be imposed on the less serious charge will be one of considerably less than the maximum of seven years.

Multiple offences

9.8 A common example is that of multiple sexual assault charges against a child, who is a stressed and reluctant witness, but still available and willing if necessary to give evidence. The prosecutor might feel that a plea to some only of these charges would give the judge ample scope in sentencing. The prosecution might be able to prove every one of the charges. But to run them all would place a great emotional burden on the child and the child's parents, and would take a great deal of time; and probably convictions on all would not materially increase the degree of criminality which the judge would address in imposing sentence. There are also cases in which the alleged offences took place long before trial, and the victim's recollection or recovered memory

may not be cogent enough to satisfy a jury beyond reasonable doubt. In such circumstances a plea to some only of the charges might be preferable to proceeding on all with the prospect of an entire acquittal. There is, however, in this case one problem to which, I believe, little attention has so far been paid. Ms Gillian Calvert, the Commissioner for Children and Young People, pointed out that the number of convictions for a serious sex offence may be relevant in determining whether a convicted person is exempted from the prohibition against undertaking child-related employment which a conviction would otherwise entail.[17]

9.9 Similarly, in a case of multiple corporate offences in which proof of the offences will be complex and a trial very lengthy, a prosecutor might well be justified in negotiating a plea to some only of the offences charged; if such convictions will offer the judge sufficient scope for sentencing, and will carry with them the same technical disqualifications as would follow conviction upon a larger number of charges.

The prosecutor's discretion

[17] *Child Protection (Prohibited Employment) Act* 1998, Parts 2 & 3: *Commission for Children & Young People Act*, 1998, Part 7 : *Child Protection Registration of Offenders Act*, 2000.

9.10 From all of this it will be evident that the decision whether to accept a plea of guilty to a lesser charge or to fewer charges involves an independent discretion whose exercise will depend upon the precise factors to be satisfied in each case.

The public interest

9.11 In essence a charge bargain depends upon the balanced satisfaction of two public interests. One is the interest of the community in ensuring that criminal conduct is punished according to its deserts. The other is the interest of the community in reducing, so far as possible, the expenditure of resources in the criminal justice system, and the delay between charge and arraignment and arraignment and trial.

10. Charge bargaining – when?

10.1 In a perfect world of ample resources and comfortable workloads, it would be desirable that pleas of guilty be discussed between the prosecutor and the defence, and taken, before arraignment. But the administration of criminal justice does not always proceed at a stately pace. Its practitioners are often denied the luxury of extensive consideration, and things must be done in a hurry. The

timing of a plea of guilty is of importance to both prosecution and defence. The acceptance of a late plea, that is a plea at or shortly before trial, and therefore after arraignment, to an alternative charge may require amendment of the indictment with the accused's consent. A late plea may deprive the accused of some, or all, of the discount provided for the utilitarian value of a plea offered at the earliest reasonable opportunity. And a late plea will have a serious adverse effect upon the performance of the prosecutor's duty to keep the victim informed about the progress of the prosecution.

The prosecutor's duty to inform and consult

10.2 Paragraph 1 of the New South Wales Charter of Victims' Rights provides that a victim should be treated with courtesy, compassion, and respect for the victim's rights and dignity.

Paragraph 5 is in the following terms:-

"A victim should, on request, be informed of the following:

(a) the charges laid against the accused or the reasons for not laying charges,

(b) any decision of the prosecution to modify or not to proceed with charges laid against the accused, including any decision for the accused to accept a plea of guilty to a less serious charge in return for a full discharge with respect to the other charges,

(c) *the date and place of hearing of any charge laid against the accused,*

(d) *the outcome of the criminal proceedings against the accused (including proceedings on appeal) and the sentence (if any) imposed."*

10.3 Paragraph 5(b), which covers the process of charge bargaining, does not in terms require the prosecution to consult the victim before deciding to conclude a charge bargain. I do not consider that paragraph 5 is an altogether adequate prescription. I can appreciate the view that routine information about the progress of the proceedings need be provided only to a victim who requests it. But I do not agree that any decision of the prosecution to take a plea of guilty "to a less serious charge" should be given to the victim only on request, and after the event.

10.4 In my opinion, victims should be kept informed of the progress of their case to arraignment and trial. Some victims seek a far greater degree of information than others. It is beyond question that a victim should be informed when any charge bargain is initiated, and the views of the victim must be obtained before any formal decision about guilty pleas, for example, is made by the prosecution. The victim must not only be informed that any negotiation of this sort is contemplated. The victim's views as to

the acceptance of a contemplated plea to a particular charge must also be ascertained.

10.5 Informing, and consulting with, victims is not always an easy business. In the first place, the victim may have no knowledge whatever of criminal procedure; hence some indication of the process and the victim's role, or lack of a role, in it should be given at an early stage of the prosecution. Further, the victim's expectations of the outcome of the prosecution may not be objectively realistic. Although a victim's views should be sought about an offer by the defence to plead guilty, or the prosecution's inclination to seek a plea of guilty to a reduced charge, the victim's opinion is not of itself determinative. In the discussions I have had during the inquiry, those who direct agencies which support and counsel victims of crime clearly acknowledge and recognise that the victim's view cannot not prevail over a prosecutor's assessment of what the public interest requires. But victims themselves do not all understand this by any means. This is an additional reason why the consideration due to a victim entails discussion of a proposed plea of guilty with the fullest explanation of the prosecution's responsibility, and why the prosecution proposes to offer or accept it.

10.6 One difficulty is that a lack of resources often prevents these conversations with victims being conducted by the same Crown Prosecutor, with carriage of the prosecution from beginning to end. Desirably, a charge negotiation should be commenced at or before arraignment; and it is at this stage that the views of the prosecution concerning possible pleas should be discussed with the victim. At that stage, however, the Crown Prosecutor with carriage of a particular matter may also be involved in twenty or more other matters; with obvious difficulty in consequence in finding the time to talk to every one of the victims involved. Accordingly, these discussions are commonly undertaken by lawyers in the ODPP other than Crown Prosecutors. These are entirely competent people. But the fact that they are not Crown Prosecutors sometimes suggests to victims that they are not being given the consideration which they deserve. If, as I said earlier, the administration of justice proceeded at a calm and stately pace, it would be possible for a Crown Prosecutor to be briefed in a matter in ample time, to retain that matter until its conclusion, and in the course of it to be able to discuss fully with a victim the details of the case and the possibility of resolving it by a plea of guilty. In such a lotus land a Crown Prosecutor would be able to have a

conference with the victim (and other witnesses, of course) well before arraignment and well before trial, so as to be able to assess in good time the actual evidentiary strength of the prosecution's case. But in practice the limitation of resources and heavy lists demand time constraints. A Crown Prosecutor may be briefed, and able to confer with victim and witnesses, only shortly before trial. The result is that victims may feel that their concerns and anxieties are not understood and properly valued.

11. DPP Policy and Guidelines Examined

11.1 I have expressed various views about the aspects of charge bargaining which seem to me to be of importance. I will now examine these desiderata in the light of the terms of reference and of the DPP policy and guidelines for charge bargaining and tendering of agreed facts.

11.2 No direction can of itself ensure compliance, because it may be forgotten or ignored or rejected for a variety of reasons. I take the first two terms of reference to inquire respectively whether the policy and guidelines are sufficiently clear and comprehensive, and adequately convey what is necessary to ensure adequate consultation with victims, and that charges to which pleas are

taken by agreement appropriately reflect the criminality which the facts establish. The third term of reference is somewhat differently framed, and requires me to consider whether a sentencing judge ought to be required to be satisfied (or, presumably, enabled to be dissatisfied) that the policy and guidelines have been complied with.

Do the policy and guidelines ensure adequate consultation with victims?

11.3 Policy 6 is headed ***Charge Bargaining*** and forms the primary point of reference for this process. It refers to Guidelines 3, 4 and 6. None of these provides for consultation with the victims. However, Policy 11 is headed ***Victims of Crime***, and, having defined a ***victim of crime,*** goes on to provide:-

> *"Prosecutors must, to the extent that it is relevant and practicable to do so, have regard to the Charter of Victims' Rights ... in addition to any other relevant matter.*
>
> *The views of victims will be sought, considered and taken into account when decisions are made about prosecutions; but those views will not alone be determinative. It is the public, not any private individual or sectional, interest that must be served."*

11.4 Guideline 24 is also headed ***Victims of Crime***, and also directs prosecutors "to the extent that it is relevant and practicable to do so" to have regard to the Charter of Victims Rights. It continues:-

> *"Interested victims and relatives of victims, whether witnesses or not, should appropriately and at an early stage of proceedings have explained to them the prosecution process and their role in it. Prosecutors generally should initiate the giving of such information and should do so directly rather than through intermediaries.*
>
> *In the case of a child witness the prosecutor is to ensure that the child is appropriately prepared for and supported in his or her appearance in court."*

Further, it directs that child victims of sexual assault should be referred to the Witness Assistance Service, and that *"special needs or conditions of all witnesses, victims and relatives of victims should be given careful consideration."*

This paragraph follows:-

> *"Careful consideration should be given to any request by a victim that proceedings be discontinued. In sexual offences, particularly, such requests, properly considered and freely made, should be accorded significant weight. It must be borne in mind, however, that the expressed wishes of victims may not coincide with the public interest and in such cases, particularly where there is other evidence implicating the accused or where the gravity of the alleged offence requires it, the public interest must prevail."*

11.5 Guideline 5 is headed ***Conferences with Witnesses*** and provides:-

> *"Recent changes to the form of committal proceedings have removed an opportunity for witnesses to be assessed before trial. There is consequently a greater obligation upon prosecutors to confer with witnesses at the earliest available opportunity before all court hearings.*
>
> *Conferences serve the dual purposes of obtaining information from and about witnesses and providing relevant information about the proceedings to witnesses."*

11.6 Finally, Guideline 28 is headed ***Communications*** and, so far as relevant, is in these terms:-

> *"If they so request, witnesses, victims of crime and concerned relatives of deceased victims must be kept informed of the progress of proceedings in which they are interested and of important decisions made in relation to them. This must be done in a timely fashion and by Office lawyers and Crown Prosecutors directly (and not through intermediaries). The Witness Assistance Service may assist in appropriate cases."*

11.7 Finally, I must refer to a memorandum issued by the Director of Public Prosecutions to all lawyers and Crown Prosecutors in his office dated 17 April, 2001 which may be regarded as an addition to the policy and the guidelines. It deals with "plea negotiations" and "outcomes"; and paragraph 4 provides:-

> *"The views of the police OIC and victim must be sought at the outset of discussions and recorded on the file – and in any event before any formal position is communicated to the defence."*

11.8 Policy 11 and Guideline 24 explicitly direct that appropriate consultation shall be had with, and appropriate information given to, victims; and, so far as information is concerned, to the relatives of victims too. Further, Guideline 28 requires that victims and concerned relatives of deceased victims "must be kept informed" of the progress of proceedings, "if they so request". This qualification would seem to adopt that contained in paragraph 5 of the Charter of Victims Rights.

11.9 In my opinion, (with one reservation to which I will come) the policy and guidelines do ensure (that is, do direct) adequate consultation with victims. It is true that they direct "progress information", as opposed to consultation about specific matters such as contemplated decisions by the prosecutor, to be provided only if victims request it. I will consider this matter further when I come to my recommendations.

11.10 The reservation to which I referred above is that the policy and guidelines do not in terms refer to the use of a statement of agreed facts as an ingredient in a charge bargain. Hence, they do not require that such a document should be shown in draft to a victim,

and the victim's views ascertained, before the statement is agreed and adopted by both sides. Certainly, I think that the final paragraph of Policy 11, which I have set out above, requiring the views of victims to be considered "when decisions are made about prosecutions" would fairly cover statements of facts which the prosecution and the defence propose to adopt. The memorandum of 17 April, 2001 provides in paragraph 5:- "If a version of the facts is negotiated and agreed, the ODPP officer involved must prepare a statement of agreed facts. A copy must be kept on file with an explanation of how and when it came into being". But there is no requirement here either that such a document should be shown to a victim before it is agreed. I will deal with this matter also in my recommendations.

Do the policy and guidelines ensure that the charges and agreed facts reflect the criminality of relevant offences?

11.11 Policy 6 is headed ***Charge Bargaining*** and I have already described it as the primary point of reference for this process. It sets out the various consents which must be obtained where a plea of guilty is proposed to a charge other than that contained in the indictment. It provides that necessary consent or approval *"will*

usually be forthcoming if the public interest is satisfied after consideration of the following matters:

(i) the alternative charge adequately reflects the essential criminality of the conduct and the plea provides adequate scope for sentencing;

(ii) the evidence available to support the Crown case is weak in any material respect;

(iii) the saving of cost and time is great when weighed against the likely outcome of the matter if it proceeded to trial; and/or

(iv) it will save a witness, particularly a victim or other vulnerable witness, from the stress of testifying in a trial".

It goes on to provide that:-

> "*An alternative plea will not be considered where its acceptance would produce a distortion of the facts and create an artificial basis for the sentencing, or where facts essential to establishing the criminality of the conduct would not be able to be relied upon, or where the accused intimates that he or she is not guilty of any offence".*

Finally, Policy 6 directs that the consent of a Crown Prosecutor or the Director's approval to an alternative plea *"must be based upon principle and reason. Unprincipled 'deals' will not be made".* I refer also to Policy 7 which deals with the circumstances in which an indictable offence may be disposed of summarily. It provides, inter alia:-

"Summary disposal should not occur where the offender's criminality cannot be adequately reflected in the available sentencing options".

11.12 It seems to me, therefore, that the policy and guidelines do ensure (that is, do direct) that charges to which a plea of guilty is accepted reflect the criminality of the offences which they allege. I add that it is clear to me from my interviews with the Director and with senior Crown Prosecutors that the criminality principle, as I have called it, is well understood and regarded as an essential factor to be satisfied in the charge bargaining process.

Statements of Agreed Facts

11.13 The passage I have quoted from Policy 6 concerning the creation of an artificial basis for sentencing implicitly refers to statements of agreed facts but does not do so in terms. The Director's memorandum of 17 April 2001, to which I have already referred, refers to statements of agreed facts and requires in paragraph 5 that:- "*If a version of the fact is negotiated and agreed, the ODPP officer involved must prepare a statement of agreed facts. A copy must be kept on file with an explanation of how and when it came into being".*

However, it says nothing as to the contents of the statement or the extent to which it must reflect the criminality which may be derived from statements to the police for example. The Director issued an earlier memorandum dated 22 August, 1996 about statements of agreed facts. So far as relevant, this provides:-

> *"Pleas of guilty are often accepted on the basis that facts in an agreed form will be presented for the sentencing court. It is a useful practice, provided proper regard is had to, inter alia, prosecution Policy 6 (charge bargaining)".*

11.14 There is no specific provision in the policy and guidelines directing that "agreed facts" should comply with the criminality principle. However, here the facts are more important than the charge. The statement of agreed facts, whether drafted by the prosecution or defence, must satisfy the prosecution's assessment of what the criminality principle entails; and the charge will be that which is appropriately supported by the facts. It is improbable that a prosecutor would agree to a statement of facts which fell short of supporting the ingredients of the charge to which the plea was to be taken. In such a case the judge may advise, but cannot compel, the accused to withdraw the plea, unless it appears to the judge that

the plea is not unequivocal or genuine, when it must be rejected.[18] I am satisfied from the material before me that prosecutors are well aware that a statement of agreed facts in support of a charge, as well as the charge itself, must satisfy the criminality principle. Indeed, it could hardly be otherwise. However, the policy and guidelines do not expressly say so, and I will return to this point in my recommendations.

12. Should the Policy and Guidelines permit a sentencing judge to be satisfied that they have been complied with?

12.1 The policy and guidelines, as one would expect, are silent about the involvement of the sentencing judge. It would be quite inappropriate that a statement of policy designed to guide prosecutors and to regulate their conduct should also enable or restrict the powers, responsibilities and discretions of the judges. However, this does not answer the larger question, which is whether there is a role for the sentencing judge, however and wherever it is to be defined.

Is there a role for the sentencing judge?

[18] *Maxwell v The Queen* (1995) 184 CLR 501 at 510-11 per Dawson and McHugh JJ. Distinguish the case where an accused pleads guilty to a charge which is less serious than the facts support; here the judge has no power to reject the plea : *Maxwell* at 513 per Dawson and McHugh JJ, and at 533 and 535 per Gaudron and Gummow JJ.

12.2 All but one of those whose submissions I read, or whom I interviewed, who were involved as judges or lawyers in the criminal justice system, were unanimous in rejecting any role for the judge. Their reasons were those expressed by the High Court in ***Maxwell***[19], that to involve the judge in the selection or rejection of charges, or in the vetting of statements of agreed facts, would tend to compromise judicial independence and integrity.

Division of functions between prosecutor and judge.

12.3 In ***Maxwell*** the decision of the High Court is summarised in the headnote as follows:-

> "Save to prevent an abuse of process, the trial judge has no power to review the making of an election by a prosecutor to accept a plea of guilty to a lesser offence, nor to intervene and reject the plea. Where a plea of guilty is accepted by the prosecution, subject to the judge's duty to ensure an unequivocal plea the judge must proceed to sentence the accused on the basis of that plea, notwithstanding any reservation he might entertain".

As to what might constitute an abuse of process, Dawson and McHugh JJ in ***Maxwell*** at 514 approved an earlier decision of the Court of Criminal Appeal of New South Wales,[20] concluding "that in an appropriate case a court may need to give effect to its own right to prevent an abuse of its process". The learned Justices

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19 Supra, footnote 18.

20 *R v Brown* (1989) 17 NSWLR 472 at 479.

continued:- "That conclusion is undoubtedly correct, but the need for a court to exercise its inherent power to protect its own process should in this context rarely, if ever, arise. A mere difference of opinion between the court and the prosecuting authority could never give rise to an abuse of process."

12.4 The principle for which ***Maxwell*** stands and which the headnote summarises may be expanded by further reference to the judgments. At 513 Dawson and McHugh JJ said:- "The decision whether to charge a lesser offence, or to accept a plea of guilty to a lesser offence than that charged, is for the prosecution and does not require the approval of the court. Indeed, the court would seldom have the knowledge of the strength and weaknesses of the case on either side which is necessary for the proper exercise of such a function. The role of the prosecution in this respect as in many others, 'is such that it cannot be shared with the trial judge without placing in jeopardy the essential independence of that office in the adversary system'".[21] At 534 Gaudron and Gummow JJ (the other members of the majority - Toohey J dissented) made the following statement:- "It ought now to be

[21] *R v Apostilides* (1984) 154 CLR 563 at 575.

accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process – particularly, its independence and impartiality and the public perception thereof – would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what".

12.5 There is, accordingly, high authority in Australia for the proposition that a judge has no role to play in any case where the prosecutor accepts a plea of guilty, either in consequence of a charge bargain or on any other footing, provided that the plea is genuine.[22] Gaudron and Gummow JJ went on to point out:- "It follows from the nature of a criminal trial, in which the prosecution bears the onus of proving guilt beyond reasonable doubt, that it cannot be an abuse of process to proceed on a lesser

[22] *Maxwell* at 511 per Dawson & McHugh JJ.

charge, whether by acceptance of a plea under section 394A of the Act [now section 87 of the ***Criminal Procedure Act*** 1986] or otherwise, merely because there is evidence which, if accepted, would sustain a conviction for a more serious offence."[23]

Arguments in favour of a judicial role – ensuring consultation with victim

12.6 Those who favoured judicial participation in the process were principally those involved in victim support agencies of various kinds, who saw it as a means of ensuring consultation with the victim. It was suggested, for example, that written confirmation, presumably signed by the victim, that a prosecutor had consulted the victim before formalising the plea and the statement of agreed facts, should be tendered to the trial judge. Another suggestion was that notwithstanding a plea of guilty and a statement of agreed facts, the judge should be asked to look at the victim's original statement to the police and compare it with the statement of agreed facts.

12.7 As to the first of these, a victim who vehemently disagreed with the course proposed by the prosecutor, the plea of guilty and the

[23] Ibid at 535.

contents of the statement of facts, might well refuse to certify that consultation had taken place. Or the victim might complain that a discussion was had with the prosecutor, but did not amount, in the victim's view, to a consultation. What is the judge to do? The victim is not a party to the proceedings, and his or her consent is not required to enable a charge bargain to proceed, and a victim's dissent is not fatal to it. That being so, there is no purpose in requiring the judge, before proceeding to conviction and sentence, to be satisfied that a consultation had taken place in which the victim's views were entirely non-determinative. Certainly, the victim ought to be consulted, but this step must be left to the prosecutor alone to take in accordance with the policy and guidelines. I add that I do not consider that failure to consult the victim can amount to an abuse of process.

12.8 As to the second suggestion, it is again not clear what the judge is supposed to do, having compared the original statements with the statement of agreed facts. If they differ, as they almost certainly will, the judge is precluded by the decision in ***Maxwell*** from intervening in any way to query the reason for the difference, or to refuse to accept the plea.

12.9 The suggestions to which I have referred are intended to protect the victim or at least to ensure compliance with the victim's right to be consulted. There is another argument in favour of judicial intervention in a charge bargain which is designed to protect the accused.

Protecting the accused

12.10 The involvement of the sentencing judge has been recommended as an element in a more formal charge bargaining procedure intended to protect accused persons against unfairness, particularly coercion to plead guilty, and to dissipate the suspicion and cynicism with which many regard the process.[24] The proponents of this suggestion tend rather to assume the case of an unrepresented accused, which would be a very rare instance in the disposal of indictable offences in the District and Supreme Courts in New South Wales. Hence, the chance of direct coercion by the prosecutor is unlikely; and the same can be said of the possibility of unscrupulous direct pressure by a defence advocate anxious to pursue a separate agenda. In almost all cases the defence is

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24 Mack & Anleu, op cit, at pp 128-9, and 140-4; these passages were written before the decision of the High Court in *Maxwell* supra.

conducted by the Public Defender. A plea induced by incompetent advice, and any conviction on the plea, may amount to a miscarriage of justice, and is liable to be set aside on that account.[25]

The discount for pleading guilty

12.11 The breadth of my factual investigations has been limited. However, none of the lawyers who made submissions or were interviewed (including judges) could recollect any example of an accused's plea of guilty being forced by coercion or direct pressure. But it is certainly true that there is pressure on an accused to plead guilty, and by that means to obtain the benefit of the discount for a timely plea. The statutory discount available in New South Wales[26] is, of course, intended to induce early pleas. No doubt, it follows that an accused may properly be advised, and prefer, to take the discount rather than persist in a contested trial with dubious, or indeed no better than even, prospects of acquittal. Spigelman CJ has said:- "Section 22 of the New South Wales Act must, of course, be implemented by New South Wales courts. Nevertheless, there are limits to the pursuit of the public interest

25 See *R v Birks* (1990) 19 NSWLR 677.

26 See footnote 11.

sought to be served by this section. Some parts of the community, like Aboriginal accused, may be particularly vulnerable to inappropriate pressures to plead guilty. A sizeable discount for a plea may increase such pressures. None of the parties appearing in these proceedings suggested that this was a matter of substantial concern in the practice or administration of justice in New South Wales. Nevertheless, it is a matter to which a court may need to be sensitive when leave is sought to withdraw a plea or an appeal is brought, notwithstanding a plea".[27]

Formalising the procedure

12.12 It is suggested, for example, that to lend greater transparency and legitimacy to a charge bargain, a detailed written explanation, including an analysis of the evidence and the reasons for the agreement, should be made available to the accused and "presented" in open court; and supplemented by judicial inquiry of the accused if needed. On the material before me such a procedure appears to be neither necessary nor desirable.[28] It must be plain that any direct inquiry by the judge of an accused would run counter to the reasoning in ***Maxwell***; except in the case of an

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27 *R v Thomson & Houlton* (supra) at 388; apart from the respondents, the Attorney General, the Public Defender and, of course, the Crown, were represented before the Court.

unrepresented accused, when it is perfectly proper for the judge at least to make such inquiry as would satisfy the court that the accused understands what he or she is doing and intends to make an unequivocal plea. "If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered."[29] Apart from acting to protect the court's process against abuse (which would be an extremely rare eventuality in this context), the dictum just quoted represents the limits of the judicial power to intervene. In an earlier case, it was said:- "It has been said that a plea of not guilty should have been entered, but it appears to me that where a man who evidently knows what he is about insists upon recording a plea of guilty, the Judge cannot interfere".[30]

12.13 However, even if a direct judicial inquiry is excluded, the detailed statement to which I have referred would be quite useless unless the judge is expected, and expressly or impliedly invited, to express some opinion upon its contents. This would, of course, immediately invite the judge to trespass upon forbidden territory.

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[28] And see para 4.2 (supra).

[29] *Maxwell* (supra) at 511 per Dawson & McHugh JJ.

It is true that as Dawson and McHugh JJ pointed out in ***Maxwell***,[31] a court may express its view upon the appropriateness of a charge or the acceptance of a plea and "no doubt its view will be accorded great weight." They went on:- "But if a court does express such a view, it should recognise that in doing so it is doing no more than attempting to influence the exercise of a discretion which is not any part of its own function and that it may be speaking in ignorance of matters which have properly motivated the decision of the prosecuting authority. The court's power to prevent an abuse of its process is a different matter and the question of its exercise could only arise in this context if the prosecuting authority were seen to be acting in an irresponsible manner. That, as experience happily tells, is seldom, if ever, likely to occur." The detailed statement would provide details of the evidence – or the prosecution's assessment of the evidence – which would dispel part of the ignorance which would otherwise cloud the judge's view. But any view which the judge might be minded to express, after having taken time to examine the detailed statement, would still be no more than advisory. It would probably lack any greater support than that which would be provided by the charge and a

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30 *R v Martin* (1904) 21 WN (NSW) 233 at 235 per Owen J.
31 At 514.

statement of agreed facts. The sentencing judge cannot intervene to impose the court's view upon the process, and a difference of opinion between the prosecutor and the judge as to evidence or any other matter is not an abuse of process.

12.14 The detailed statement which is contemplated would, of course, take considerable time to prepare, since it is suggested that it should discuss the evidence and indicate why the prosecutor has preferred some items of evidence to others. The time involved in preparation would become an acute problem when a charge agreement is reached very shortly before the trial; or, indeed, no more than hours before the trial – or even less. This hurried procedure is not regarded by anyone involved in the administration of justice as desirable, but limited resources and a heavy workload cannot always be denied. Ordinarily, a charge agreement will be supported by a statement of agreed facts, either prepared by the accused, or by the prosecution, and in either case tendered to the court. If it is prepared and tendered by counsel for the accused, there can be no doubt about whether or not the accused is aware of its contents. If it is prepared and tendered by the prosecution, the absence of objection by counsel for the accused will serve the

same purpose. In the case of an unrepresented accused, the statement should be authenticated by the accused. I see no reason to encourage the court to pursue an investigation designed to enable it to exercise its limited powers or to determine whether the charge bargain conceals some threatened abuse of process.

No role for the judge

12.16 Accordingly, it seems to me that the proposed measures – tendering a detailed statement supplemented by direct judicial inquiry - are not necessary to remedy current flaws in the system, and, in any case, their inevitable result – indeed, their purpose - involves the sentencing judge in what is not judicial business. Certainly, I am not bound in this inquiry to offer only those views and recommendations which are consistent with the current state of the law. It is open to me to make recommendations for legislative change. For my own part, however, although I respect the argument to the contrary, I do not consider that additional power should be conferred upon the sentencing judge to enable the court to explore, and to approve or reject, a concluded charge bargain.

13. Conclusions

The Director of Public Prosecutions policy and guidelines

- **do ensure (that is, do require) adequate consultation with victims;**
- **do ensure (that is, do require) that the charges and agreed facts reflect the criminality of relevant offences;**
- **do not and should not allot any role to the sentencing judge in the charge bargaining process.**

14. Recommendations

14.1 *Terminology*

As I have already suggested, the terms "charge bargain" and "charge bargaining" convey, inaccurately, a pejorative or disreputable image of the process. In my view these terms should be abandoned, and replaced by "charge agreement" and "charge negotiation", which provide a more appropriate description of the procedure.

Policy 6, Charge Bargaining

14.2 Policy 6, as I have previously said, is the primary point of reference for the charge bargaining process. It appears to me that it ought to be amended in various ways. I am aware that the Director is considering general amendments to the prosecution policy and guidelines, and I do not propose to embark upon any redrafting myself, but to suggest the kind of amendments which I think should be included.

Suggested amendments to Policy 6

14.3 Policy 6 should be designed to constitute a complete and self-sufficient prescription for the prosecutor's conduct of charge bargaining. The first two paragraphs of Policy 6 should remain, section 439 of the ***Crimes Act***, 1900 being altered to section 22 of the ***Crimes (Sentencing Procedure) Act*****,** 1999. However, I find some difficulty with paragraph 3. I think that this exegesis of authority and delegation might be removed and inserted either at the end of Policy 6 or, preferably elsewhere in the policies and guidelines. It is not clear whether "alternative charge" covers both a charge other than that contained in an indictment, and a charge provided for or contemplated by statute. In any case I feel that the

third paragraph does not directly address the questions which are of primary importance. Hence, I suggest something along the following lines:-

> "A prosecutor may agree to withdraw a charge or charges in the indictment upon the promise of an accused to plead guilty to others. A plea of guilty in these circumstances may be accepted if the public interest is satisfied after consideration of the following matters:-
>
> subparagraphs (i) to (iv) might remain

14.4 The substance of the Director's memorandum of 17 April, 2001 should be inserted in Policy 6; in particular, paragraph 4 of the memorandum which requires the views of the police OIC and victim to be sought at the outset of any charge discussions. It is also important to include paragraph 5, with the addition that it should require that the views of the police OIC and victim must be sought about any statement of agreed facts before it is adopted. I am inclined to think too that the requirements in paragraph 7 of the memorandum should be included either in Policy 6 or in a linked Guideline. Policy 6 should also contain a statement to the following effect:- "The views of the victim about the acceptance

of a plea of guilty and the contents of a statement of agreed facts will be taken into account before final decisions are made; but those views are not determinative. It is the public, not only private individual or sectional, interest that must be served." This contains the substance of what appears in the third paragraph of Policy 11; and since the actual terms of that paragraph are general, and not confined to the acceptance of pleas or the adoption of a statement of agreed facts, that general statement should remain.

Observance of Guideline 24, Victims of Crime

14.5 The second paragraph of Guideline 24 provides that interested victims and relatives of victims should at an early stage of proceedings have explained to them the prosecution process and their role in it. This is a most important requirement. The material before me in the Inquiry indicates quite clearly that it is ignorance about the way in which the system works which predisposes victims to feelings of suspicion and bewilderment : and thus to the conviction that they are regarded as of little account in the prosecution process.

It must be emphasised that victims are often greatly shaken and emotionally disturbed by their experience. It is not to be expected that those in the depths of sorrow at bereavement, or of anger and humiliation, can easily consider their situation with the detachment that the administration of justice demands. They seek revenge, but as the Federal Court has said: "Vengeance is not to be equated with justice".[32] Nor can anguish be measured and compensated by terms of imprisonment. Victims may feel that objectivity denotes indifference or want of compassion. Hence, explanation of how the system works, and discussion of possible outcomes, must be handled with delicacy. The Witness Assistance Service, to which such victims should be referred, can be of considerable assistance in these cases.

I think that the terms of the exhortation in Guideline 24 are adequate; but a means should be found of emphasising to Crown Prosecutors particularly, and to other members of the ODPP, the importance of observing it.

32 *R v P* (1992) 111 ALR 541 at 547.

Suggested amendment to Guideline 28, Communications

14.6 ***Guideline 28*** provides in the second paragraph:- "If they so request, witnesses, victims of crime and concerned relatives of deceased victims must be kept informed of the progress of proceedings in which they are interested and of important decisions made in relation to them." The words "and of important decisions *made* in relation to them" clearly imply that this information may be conveyed after the deed has been done. This, of course, is quite contrary to what should be the appropriate procedure. I have been doubtful whether the words "if they so request" should be omitted. It is quite a demanding operation to require the ODPP to keep all witnesses and victims of crime and concerned relatives of deceased victims informed of the progress of proceedings throughout the course of the prosecution. This would entail informing this cohort of all mentions and arraignment hearings. However, the rule ought to be that the people in question should be kept informed whether they ask or not. "Concerned relatives" may themselves be victims by dint of section 5(3) of the ***Victims Rights* Act,** 1996. Hence "victims of crime as defined by

s 5 of the Victims Rights Act, 1996" would be sufficient identification.

14.7 I consider therefore that the first sentence of the second paragraph of Guideline 28 should be deleted and the following inserted in lieu:- "Witnesses and victims of crime (as defined by section 5 of the Victims Rights Act, 1996) must be kept informed of the progress of proceedings in which they are interested and victims must be consulted about important decisions proposed to be made in relation to them". Guideline 28 mentions:- "The Witness Assistance Service may assist in appropriate cases". The Witness Assistance Service seems to me to perform very competently and helpfully, and its assistance should be sought in every case of any substance; that is to say, certainly in any case in which there is an identifiable victim of serious crime, particularly cases of sexual assault.

Victims' access to court documents

14.8 The regulations governing public access to written evidence and judgments in the Supreme and District Courts and Local Court should be amended to permit victims of crime as defined in the

Victims Rights Act 1996, section 5, to have access to, and to obtain without fee copies of judgments and written evidence in those cases in which they are concerned as victims.

29 May, 2002

I acknowledge the assistance provided to me during the course of the Review by Mr Andrew Osborne, Policy Officer, Legislation and Policy Division, New South Wales Attorney General's Department.