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

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

Plea negotiations: An empirical analysis

Asher Flynn and Arie Freiberg

Across Australian criminal jurisdictions, the most frequent method of case finalisation is not a contested trial, but rather by an accused entering a plea of guilty. In this context, negotiated guilty pleas, commonly referred to as 'plea bargaining', 'plea negotiations', 'settlements' and 'early resolutions', have taken on a more prominent and significant role in the delivery of modern day justice.

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

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

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

Aims and method

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

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

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

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

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

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

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

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

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

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

Phase 3 involved a two-hour consultation workshop with key legal and policy stakeholders (n=15, eight of whom had been interview participants) in a roundtable focus group setting. Participants were asked to respond to specific questions pertaining to 15 key themes identified in the interview and de-identified case file analyses, and to identify any considered flaws or issues of importance that did not appear in the findings—for example, whether the offences present in the case files were representative of the types of offences most commonly negotiated. This allowed the accuracy of the findings to be tested with those directly involved in the negotiation process.

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

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

Results

Frequency

The study found that between 87 and 100 percent of guilty pleas entered at all levels of Victorian courts were the result of a negotiated agreement between the prosecutor and the defence. As reflected in the following comments, the interview data produced higher estimates of the rate of plea negotiations, sitting at between 90 and 100 percent of guilty pleas entered by an accused:

'Every case is negotiated.' (Judge02MR)

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

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

'Every case.' (Defence18M)

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

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

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

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

The process

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

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

Timing

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

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

Summary and indictable courts

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

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

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

'It depends upon the magistrate who you've got and how open they are to resolution.'
(Defence13FR)

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

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

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

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

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

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

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

Offences

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

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

The study found that sex offences were considered the most difficult to resolve, with 66 percent of participants identifying these as the most challenging offences to negotiate. This is supported by data obtained from the County Court which show that between 2008 and 2015 there was a noticeable difference between the guilty plea rate in general offences, which averaged to 72 percent over seven years, and the guilty plea rate in sex offences, which averaged to 45 percent. It is perhaps unsurprising that sex offences do not commonly feature in plea negotiations, given the number of sex offence matters that proceed to trial in the County Court and the high acquittal rate, which participants said provided an incentive to ‘risk’ a trial. The study also found that the sex offender registration scheme is a key limitation in encouraging guilty pleas and negotiations in sex offence cases, with participants describing it as ‘one of the biggest hurdles to successful negotiations’ (Defence21M) and ‘a significant impediment to any kind of resolution’ (Defence20M). For more information on the effect of the sex offender registry on guilty pleas, please see the project’s [final report](#) (Flynn & Freiberg 2018).

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

Forms of plea negotiations

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

- ‘charge bargaining’ (Manikis 2012: 411)—which incorporates withdrawing charges and substituting charges (Flynn 2016; Fox & Deltondo 2015; Johns 2002; Mackenzie, Vincent & Zeleznikow 2015; Wren & Bartels 2014; Yang 2013);
- ‘fact bargaining’ (Manikis 2012: 411)—which incorporates discussions on which facts will form the basis of the agreed summary presented to the court from which the accused is sentenced (Flynn 2016; Johns 2002; Mackenzie, Vincent & Zeleznikow 2015); and
- ‘sentence bargaining’ (Manikis 2012: 411)—which incorporates discussions on the prosecutor’s sentencing submission, agreements as to what stage in proceedings the accused indicated an intention to plead guilty and which jurisdiction the offence should be heard in (Flynn 2016; Fox & Deltondo 2015; Mackenzie, Vincent & Zeleznikow 2015).

The 14 forms of negotiations identified in this study include:

1. withdrawing charges* (removing a charge(s) from the indictment)—evident in 44 files and identified by 95 percent of participants;
2. substituting charges* (accepting a guilty plea to a less serious charge)—evident in 20 files and identified by 95 percent of participants;
3. rolled up counts* (combining like offences into one charge or fewer charges)—evident in 14 files and identified by 100 percent of participants;
4. representative counts* (having one offence represent a course of conduct)—evident in 10 files and identified by 95 percent of participants;
5. fact bargaining* (agreement on the summary of facts)—evident in 24 files and identified by 100 percent of participants;

6. agreement as to what the prosecutor will submit as part of their sentencing submission* (eg a non-custodial sentence is within range)—evident in five files and identified by 97 percent of participants;
7. diversionary programs* (eg agreement to plead guilty if the matter is accepted on a diversion program)—evident in six files and identified by 76 percent of participants;
8. agreement on costs* (eg an outcome that includes an agreement not to apply for costs against the opposing party)—identified by 67 percent of participants;
9. agreement to change jurisdiction (eg allow the indictable offence to be sentenced in the Magistrates' Court)—evident in nine files and identified by 92 percent of participants;
10. accused to provide information on another matter (this may also involve the accused acting as a prosecution witness and/or confidential police informant)—evident in four files and identified by 89 percent of participants;
11. agreement for the police/prosecution not to pursue charges/investigation into other offences involving another person known to the accused—identified by 44 percent of participants;
12. agreement not to pursue charges/investigation into other offences involving the accused—identified by 47 percent of participants;
13. agreement to provide protection or financial support in some form to the accused and/or their family (eg pay school fees or relocation fees)—identified by 29 percent of participants; and
14. bail as a point of negotiation (eg agreement to plead guilty if bail is granted before the plea hearing)—identified by 49 percent of participants.

Most common forms

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

1. *Withdrawing and substituting charges*

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

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

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

Case study 1

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

2. *Rolled up and representative counts*

A rolled up charge can comprise:

...a number of separate offences against the same statutory provision, even where they do not amount to a ‘single transaction’ (eg where the acts occurred on different occasions).

(Victorian Government Solicitor’s Office 2014)

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

As Judge01M maintained, ‘Rolling up charges is a perfectly sensible way of resolving a number of matters.’ Judge13F identified the rationale for this form of negotiation as being ‘to avoid having what is often described as an overloaded presentment or an overloaded indictment’. In this regard, the rolling up of charges was commonly identified as a way to ‘simplify everything’ (Defence07M).

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

Case study 2

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

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

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

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

Similar to rolled up counts, the fact the offence is representative should be specified in the summary of facts presented to the court to inform the sentence, to ensure that the penalty acknowledges the offence is representative of a course of conduct, not simply one offence. However, unlike rolled up counts where participants suggested it 'doesn't make a lot of difference' to the sentence (Judge05M), representative counts were identified as both a 'tool to minimise the number of charges on the indictment' (Judge08M) and a way to generate a 'lesser sentencing outcome than if you have specified charges for each of the alleged forms of behaviour' (Judge08M). While Defence02F stated that 'The sentence itself does not actually change; the client is still being sentenced on, for example, a 10 year period of offending,' most judicial participants said the sentence would be lower, because 'There's a particular way the court looks at representative counts and it generally would result in a lesser sentencing outcome' (Judge08M). For these reasons, Defence05M identified representative counts as being 'more advantageous to an accused than a rolled up count, because it will get rid of a number of different offences that would be used for accumulation'.

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

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

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

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

Case study 3

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

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

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

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

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

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

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

Contrary to the view of the majority in *MacNeil-Brown*, the prosecution's conclusion about the bounds of the available range of sentences is a statement of opinion, not a submission of law. ... [at 42]

To the extent to which *MacNeil-Brown* stands as authority supporting the practice of counsel for the prosecution providing a submission about the bounds of the available range of sentences, the decision should be overruled. The practice to which *MacNeil-Brown* has given rise should cease. The practice is wrong in principle. [at 23]

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

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

Case study 4

The defence offered to plead guilty to one aggravated burglary charge and one assault in exchange for the withdrawal of two aggravated burglary charges and an agreement that the Crown's position on sentence would be for a partially suspended sentence (case O25-NS).

Conclusion

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

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

This paper has provided an overview of some of the findings from the Negotiating Guilty Pleas Project highlighting the frequency of plea negotiations, identifying the most and least common offences featured in negotiations and discussing some of the different forms and outcomes of negotiations. It is hoped that the findings presented in this paper will improve understanding of plea negotiations in Victoria. For more information on the project, please see the [final report](#) (Flynn & Freiberg 2018).

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