# Negotiating with the New South Wales DPP

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## Introduction

1. The subject of this presentation primarily relates to the process of charge negotiation between defence counsel and the DPP which can take place at any time up until a court makes a final determination. There are however other areas where such negotiation can occur and they also will be addressed. These include : agreement on facts to be tendered before a sentencing judge, the inclusion of counts on a Form 1, whether a DPP lawyer should be asked to concede a non custodial disposal of the matter, whether a prosecutor should call particular witnesses, and the process of requesting an immunity from prosecution for an accomplice.

2. For the DPP lawyer the most important guidance on these areas of negotiation are the DPP Prosecution Guidelines and it follows that any Defence lawyer should look closely at the relevant guideline before commencing any negotiations. If, in the unlikely event, the DPP lawyer departs from either the letter or the spirit of the applicable guideline then he/she should be referred to it.

3. This paper will deal with certain principles which are central to such negotiations.

## Charge negotiation

4. Charge negotiation is where a prosecutor may agree to discontinue a charge or charges upon the promise of an accused person to plead guilty to another or others. The process is about both parties having a good understanding of what is necessary to prove the existing charges and also what are the rules governing the prosecutor as to what should appropriately be agreed upon.

5. For a number of very sound reasons the priority should be that it take place as early as possible after the accused is charged. Realistically this can only start after the brief has been delivered to a DPP lawyer.

6. One reason is that the DPP will be interested in exploring this avenue as early as possible as can be seen in the following extract from the NSW DPP Guidelines:

"*Negotiations between the parties are to be encouraged and may occur at any stage of the progress of a matter through the courts. Charge negotiations must be based on principle and reason, not on expedience alone. Written records of the charge negotiations must be kept in the interests of transparency and probity. Prosecutors are actively to encourage the entering of pleas of guilty to appropriate charges* [1]

7. The other reason is that if the prosecution case is strong then sometimes many months or even years of a potential sentence can be saved if the client pleads at the earliest available opportunity. These principles are clearly and powerfully stated by the NSW Court of Criminal Appeal as follows. [2]

*(i) A sentencing judge should explicitly state that a plea of guilty has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight.*

*(ii) Sentencing judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. This effect can encompass any or all of the matters to which the plea may be relevant — contrition, witness vulnerability and utilitarian value but particular encouragement is given to the quantification of the last mentioned matter. Where other matters are regarded as appropriate to be quantified in a particular case, eg assistance to authorities, a single combined quantification will often be appropriate.*

*(iii) The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10–25% discount on sentence. The primary consideration determining where in the*

[1] NSW DPP Prosecution Guideline 20

[2] *R v Thomson and Houlton* (2000) 49 NSWLR 383

*range a particular case should fall, is the timing of the plea. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing judge.*

*(iv) In some cases the plea, in combination with other relevant factors, will change the nature of the sentence imposed. In some cases a plea will not lead to any discount.*

*(v) The utilitarian value of the plea does not depend upon the strength of the Crown case.*

**Utilitarian component**

8. This principle has been summarized in a subsequent NSW appeal case[3] :

    i. *The discount for the utilitarian value of the pleas will be determined largely by the timing of the plea so that the earlier the plea the greater discount. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy.*
    ii. *The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse.*
    iii. *The utilitarian discount does not take into account the strength of the prosecution case:* Sutton *[2004] NSWCCA 225.*
    iv. *There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse.*
    v. *There may be offences that are so serious that no discount should be given, where the protection of the public requires a longer sentence.*

[3] *R v Borkowski* [2009] NSWCCA 102

vi. *An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value.*

9. These are really the areas to be focused on during submissions on the level of discount applicable, but they reinforce the need for both counsel for the DPP and for the defence to look at this as early as possible.

10. Sometimes defence will say that it is not possible to have the relevant decision maker from the DPP look at plea negotiation at an early stage. If that is the response given to an approach made by the defence then a letter should be sent immediately to the DPP requesting the appropriate officer within the DPP give urgent consideration to the request so that Guideline which instructs the DPP can be adhered to.

**Approach of the prosecutor to plea negotiation**

11. A system of delegations has been in place in the DPP in recent years to facilitate the principles referred to in the decisions cited above. More senior officers are empowered to make binding decisions in relation to proceedings at a very early stage. Every day considerations and directions are given by such delegated officers within the DPP relating to charge negotiations that have been initially entered into by the solicitor handling the committal proceedings and the defence solicitor/counsel appearing for the accused.

12. Specifically, Deputy Senior Crown Prosecutors have been delegated the power to terminate proceedings in the Local Court which do not relate to death or an offence which carries 25 years or more. This

power encompasses the power to direct that a plea offer can be accepted by the DPP or that an alternative counter offer should be put.

**Criteria to be applied by the prosecutor to the process of charge negotiation.**

13. The prosecutor may agree to discontinue a charge or charges upon the promise of an accused person to plead guilty to another or others. A plea of guilty in those circumstances may be accepted if the public interest is satisfied after consideration of some or all of the following matters:

- the alternative charge adequately reflects the essential criminality of the conduct and the plea provides adequate scope for sentencing; and/or
- the evidence available to support the primary charge is weak in any material respect; and/or
- the saving of cost and time weighed against the likely outcome of the matter if it proceeded to trial is substantial; and/or
- it will save a witness, particularly a victim or other vulnerable witness, from the stress of testifying in a trial and/or a victim has expressed a wish not to proceed with the original charge or charges.

*14.* Another feature to look at very carefully is whether there has been overcharging and whether charges are duplicitous. Often this is the case and the DPP lawyer in the first instance will realise this. Often also it will be the case that some charges are brought as alternative or 'back up' offences which will be reflected by placing them on a certificate which will be dealt with by the higher court following a plea of

guilty or at the conclusion of a trial.[4] At times it can be a worthwhile suggestion in negotiating that some of the charges be dealt with under *Section 166 Criminal Procedure Act 1986 NSW*

15. Legislation requires the prosecutor to file in the court a certificate setting out that the requisite consultation with the victim has taken place and any statement of agreed facts arising from the negotiations tendered to the court constitutes a fair and accurate account of the objective criminality of the offender having regard to the relevant and provable facts or has otherwise been settled in accordance with the applicable prosecution guidelines.[5]

**Offences that may be dealt with on Form 1**

16. Some charges may be suitable for inclusion on a Form 1 under section 32 of the *Crimes (Sentencing Procedure) Act* 1999. The decision to place offences on a Form 1 should be based on principle and reason, not administrative convenience or expedience alone. The general principle applicable is that offences on a Form 1 are all taken into account when sentencing for the principal offence and the maximum penalty available is the maximum of the particular principal offence.

*17.* The criteria that apply to the DPP's decision in this aspect is guided by the remarks of Spigelman CJ in *Attorney General's Application under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002 (2002) NSWCCA 518 at [68]*

*"Striking the appropriate balance between overloading an indictment and ensuring that the indictment - leading to conviction and to sentence for, and only for, matters on the indictment - adequately reflects the totality of the admitted criminality, is primarily a matter for the Crown. The decision of the Crown in this regard will, no doubt, be guided by*

[4] *Section 166,167 Criminal Procedure Act 1986 NSW*
[5] Section 35A Crimes ( Sentencing Procedure) Act (NSW)

*the determination in this case that, when matters are 'taken into account' on a Form 1, the sentencing judge does not, in any sense, impose sentences for those offences."*:

18. The counts on indictment should reflect such matters as the individual victims, range of dates, value of property and aggravating factors. Where there are multiple offences relating to the one episode it will be appropriate to place preparatory or lesser offences on the Form 1: eg. indecent assault leading to sexual intercourse without consent; robbery of customers within a bank during a bank robbery (unless there are aggravating factors such as actual bodily harm caused to the customer).

19. Generally speaking, the maximum penalty of offences placed on a Form 1 should be less than the maximum penalty available for the principal offence. An obvious exception to this is the situation where multiple counts for the same or similar offences (such as a series of counts for break, enter and steal or robbery) have been laid against an accused person. However, even in these situations aggravated forms of such offences should not be included on a Form 1 if the principal offence is a non-aggravated count of the same general type.

20. Offences such as failure to appear, firearms offences (where there are multiple firearms offences some may be placed on a Form 1), serious offences against police officers, breaches of apprehended domestic violence orders, offences committed while on bail or while on probation/parole, offences in relation to the administration of justice, or traffic offences where the offender has a poor traffic record should not generally be placed on a Form 1. Such a matter should usually proceed on indictment or by summary proceedings so that a conviction is entered for the public record.

**Agreed Facts**

21. This has become an extremely important area of negotiation and clearly enough can sometimes be the difference between a successful or unsuccessful plea negotiation outcome. One aspect sometimes overlooked is that a plea of guilty need not depend on facts being agreed. Where it is not possible to agree on everything the preferable course is to tender a document and indicate which parts will be disputed facts and require resolution by the sentencing judge.

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

23. Prosecutors should be familiar with the principles established in *R v De Simoni* (1981) 147 CLR 383. Where the prosecution agrees not to rely on an aggravating factor no inconsistent material should be placed before the sentencing judge.

**Calling witnesses**

24. The prosecution should generally call all apparently credible witnesses whose evidence is admissible and essential to the complete unfolding of the prosecution case or is otherwise material to the proceedings. Unchallenged evidence that is merely repetitious should not be called unless that witness is requested by the accused.

25. If a decision is made not to call evidence from a material witness where there are identifiable circumstances clearly establishing that his or her evidence is unreliable, the prosecution, where the accused requests that the witness be called and where appropriate, should assist the accused to call such a witness by making him or her available or, in

some cases, call the witness for the purpose of making him or her available for cross-examination without adducing relevant evidence in chief.

26. Mere inconsistency of the testimony of a witness with the prosecution case is not, of itself, grounds for refusing to call the witness. A decision not to call a witness otherwise reasonably to be expected to be called should be notified to the accused a reasonable time before the commencement of the trial, together with a general indication of the reason for the decision (eg The witness is not available or not accepted as a witness of truth). In some circumstances, the public interest may require that no reasons be given. Where practicable the prosecution should confer with the witness before making a decision not to call the witness.

**Negotiating for an immunity from prosecution**

27. There are two types of immunities: indemnities under section 32 and undertakings under section 33 of the *Criminal Procedure Act* 1986.

28. Section 19 of the *Director of Public Prosecutions Act* 1986 enables the Director to request the Attorney General to grant indemnity from prosecution or to give an undertaking that an answer, statement or disclosure will not be used in evidence

29. A request for an indemnity or undertaking on behalf of a witness will only be made by the Director to the Attorney General after consideration of a number of factors, the most significant being:
    (i) whether or not the evidence that the witness can give is reasonably necessary to secure the conviction of the accused person;
    (ii) (ii) whether or not that evidence is available from other sources; and

(iii) the relative degrees of culpability of the witness and the accused person.

30. It must be able to be demonstrated in all cases that the interests of justice require that the immunity be given.

**Seeking a concession from the DPP as to a particular sentencing option**

31. The prosecutor has a duty to make submissions if it appears there is a real possibility that the court may make a sentencing order that would be inappropriate and not within a proper exercise of the sentencing discretion, - particularly if, where a custodial sentence is appropriate, the court is contemplating a non-custodial penalty.

32. It is a judicial officer's duty to find and apply the law and that responsibility is not circumscribed by the conduct of legal representatives. Any understanding between the prosecution and defence as to submissions that will be made on sentence does not bind the judge or magistrate.

33. A prosecutor should not in any way fetter the discretion of the Director to appeal against the inadequacy of a sentence (including by informing the court or an opponent whether or not the Director would, or would be likely to, appeal, or whether or not a sentence imposed is regarded as appropriate and adequate). The Director's instructions may be sought in advance in exceptional cases.

34. These matters make it clear that it is only in exceptional cases that a prosecutor should be asked to indicate or concede a particular approach to sentencing.

## Conclusion

35. There are a number of areas in the interaction between defence and the DPP where negotiation is not only possible but at times completely desirable and appropriate.

36. A clear understanding of the principles that apply is important to both sides and should be relied upon proactively at the earliest point possible in criminal proceedings. Negotiation in all of the ways referred to above is very much part of the duty of both prosecuting and defence counsel.