NEGOTIATION WITHIN CRIMINAL PROSECUTIONS

- time to consider a holistic approach

By Paul Shaw [1]

Productive charge negotiation within the context of a criminal prosecution can be a somewhat haphazard affair – to a large extent dependent on the personal approaches of the prosecution and defence lawyers involved. Despite its significance from the perspective of both the individual defendant and the public, in NSW (as in other Australian jurisdictions) there is no protocol or articulated set of principles adopted by the whole profession to assist practitioners in dealing with the practical, and often challenging, issues that arise in charge negotiation.

A further impediment to negotiation within a criminal prosecution is that, generally, both prosecution and the defence lawyers have a tendency to adopt an adversarial position where key issues are ventilated before the courts. This approach is not surprising given the significance of the potential outcomes to a prosecution and the historic approach to practising criminal law. However, such an approach does not necessarily equate to the effective disposition of cases nor, once the broader implications are considered, to achieving the best outcome for the parties represented.

The benefits of successful charge negotiation are significant and have been identified in numerous forums [2]. They include, for both the defence and the prosecution, reduced cost and a certainty of outcome and, for the defence, the prospect of a reduced sentence [3]. Additionally, in the majority of cases, there is also the benefit of avoiding the need for witnesses and victims to give evidence and, of course, the potential reduction of the significant public cost associated with running defended trials or hearings.

In the past some steps have been taken to formally include negotiation as a part of the prosecution process. The criminal case conferencing regime that commenced in 2006 as an administrative pilot, and then a legislative pilot[4] from 2008, was introduced with the goal of encouraging early plea negotiations in the course of a criminal prosecution so as to reduce the number of late guilty pleas in indictable matters.

The NSW Bureau of Crime Statistics and Research completed an evaluation of the legislative trial of criminal case conferencing in 2010.[5] That evaluation found little evidence to indicate that the scheme itself had achieved an increase in the number of matters being resolved within the criminal case conferences. This finding was reflected in the second

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[2] See, for example, Review of the NSW Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts. Report by The Hon. Gordon Samuels AC CVO QC dated 29 May 2002.

[3] See *Regina v Thomson & Houlton* (2000) 49 NSWLR 383.

[4] Criminal Case Conferencing Trial Act 2008.

[5] NSW Bureau of Crime Statistics & Research, The Impact of Criminal Case conferencing on early guilty pleas in the NSW District Court. Issue paper no. 44, June 2010.

reading by the Parliamentary Secretary for the repeal of the criminal case conferencing regime. That reading included the following statement:

" Further, one of the aims of the trial was to achieve cultural change, encouraging criminal practitioners to actively discuss matters prior to committal with a view to narrowing the charges and issues that need to be contested at trial. It is envisaged that such discussions will continue in most matters, even without the legislative requirement that they take place in all matters." [6]

Within that reading the prospect of other subsequent policy initiatives being available to reduce late guilty pleas was identified and left open.

With the exception of the rarely used pre-trial conference process available under s.140 of the Criminal Procedure Act 1986 ('CPA'), the only documented procedure relevant to negotiation within criminal practice is that relating to charge negotiation contained within the relevant guidelines and policy of the NSW and Commonwealth Directors of Public Prosecution[7]. However, such guidelines have obviously been prepared by only one party to the prospective negotiation when the negotiation, by its nature, involves two parties.

Essentially, apart from the Local Court Practice Note Comm 1[8] providing for a potential adjournment at the second mention to allow for any negotiations in indictable matters, the relevant Practice Notes of the Local, District and Supreme Courts[9] do not contain any specific reference to negotiation. Therefore, there is little correlation between (any) negotiation and the court process. This is despite its potential significance to all courts through the benefits that flow to them through timely and productive charge negotiation. Indeed, if a plea cannot be agreed upon, benefits would also flow to the courts through effective negotiation between the parties on issues such agreed facts and, potentially, evidence to be called at trial.

The NSW Solicitors' Rules [10] (and the NSW Barrister's Rules) do not provide any practical assistance on charge negotiation or negotiation generally in a criminal matter. The most relevant Rules are those included in the Advocacy Rules (A.17 to A 17B, reflected in the NSW Barristers' Rules) requiring solicitors to, in summary, inform and advise a client who is charged with a criminal offence of alternatives to a fully contested hearing or other advantages to a client. As with the other procedures noted above, the Rules provide a basis for negotiation to occur, but do not provide any guidance or framework for practitioners undertaking negotiation within a prosecution.

A consequence of this current environment is a lack of consistency in approach between individual cases. In turn this creates a potential detriment that affects all those involved in

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[6] Second Reading, Criminal Case Conferencing Trial Repeal Bill 2011. The Hon. D Clarke, Hansard 22 February 2012, page 50. The criminal case conferencing regime was repealed with the passing of the Criminal Case Conferencing Trial Repeal Act 2012, with effect from 14 March 2012.

[7] Guideline 20, Prosecution Guidelines of the Office of the Director of Public Prosecutions for NSW, and paragraphs 6.14 to 6.21, Prosecution Policy of the Commonwealth, and Commonwealth Director of Public Prosecutions Charge Negotiation chapter, Guidelines and Directions Manual.

[8] Procedures to be adopted for committal hearings in the Local Court, para 6.1

[9] Local Court Practice Note Crim 1 and ibid; District Court Practice Note 9 et al. The Supreme Court Practice Note SC CL 2 includes procedure concerning s.140 CPA case conferences before the trial judge.

[10] Revised Professional Conduct and Practice Rules 1995

the process including the parties, the courts and witnesses/victims. Importantly it also creates a potential loss of fairness for each defendant, who should be able to avail themselves of the same opportunities of a charge negotiation and plea arrangement that is made available to others in a similar position.

It is suggested that two (interrelated) issues need to be addressed to achieve more effective negotiation within the criminal jurisdiction. They are, firstly, an absence of accepted procedures and principles by which such negotiation can take place and, secondly, a lack of a culture of negotiation– perhaps reflecting a lack of requisite skills.

The concept of principled negotiation has been in existence for many years[11] , however it has not been fully considered from the perspective of all interested parties and clearly articulated within the one document relating to the practice of criminal law. While the ambit of such prospective principles and guidance would require broader consultation and development, potentially they could include factors such as:

- Guidance on when, and how, charge negotiation is undertaken, including the principles to be adopted by parties in the course of the negotiation.
- Acceptance of the protections of 'without prejudice' communications in the course of the negotiation, subject to the underlying principles of fairness to the defendant.
- Where relevant and appropriate, informing a sentencing judge of a prior plea offer made in the course of negotiation.
- Principles to be observed for the negotiation of agreed Statement of Facts on sentence.
- Defining a role for the courts in noting the status and/or opportunity of negotiation – which could be reflected in relevant Practice Notes. Potentially this could also include a role for the courts in ensuring through enquiry of the parties that, if the prospect of negotiation is identified, it is being diligently pursued.
- Acknowledging the rights and processes to be followed if victims are involved.

A number of these factors have previously been considered, at least to some degree, separately by the courts or in some aspect of practice. What has not occurred is for these, and other relevant factors, to be considered together and, where possible, for contentious issues to be addressed with relevant principles then set out in the one cohesive and documented framework. This approach would be consistent with what may be found in other areas of the legal profession where negotiation, and Alternative Dispute Resolution ('ADR'), have a significant role to play in practice.

If principles of negotiation are developed and accepted within the criminal jurisdiction, their application and use could potentially be achieved without the defence or prosecution expending additional overall resources, although it is accepted that it may involve an earlier allocation of resources to a matter. Certainly effective and productive charge negotiation would release both defence and prosecution resources in the medium and longer term, and have a positive impact on the resources of the courts.

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[11] See Getting to Yes: Negotiating an agreement without giving in, R Fisher and W Ury, Random House, second edition 1992. See also, The man who lead who led us to Yes, Tony Dempsey, Law Society Journal, November 2012 page 64.

Over the last 20 years the civil jurisdictions have seen the significant rise and influence of ADR, however there has not yet been a similar development within the criminal jurisdiction. It is suggested that the current environment is conducive to considering and developing principles for charge negotiation, and negotiation generally, in criminal practice. Hopefully such principles could be prepared with the input of, and ultimately acceptance by, relevant bodies, courts and professional associations. These principles could establish standards and procedures by which negotiation, and in particular charge negotiation, within a criminal prosecution can effectively and fairly occur, to the benefit of the parties, practitioners and the courts. Development of a change in culture and an improvement of the negotiation skills of those practising in criminal law would, hopefully, be one consequence of such a regime that would also enable negotiation in the criminal jurisdiction to be more confidently and consistently undertaken.