Contemporary Comment

Carl Williams: Secret Deals and Bargained Justice – The Underworld of Victoria's Plea Bargaining System[*]

On 28 February 2007 following seven months of plea bargaining negotiations, infamous Victorian underworld figure Carl Williams shocked the public by pleading guilty to one count of conspiracy to commit murder and three counts of murder. Discussions between Williams' defence counsel and the Office of Public Prosecutions (OPP) commenced after Victoria Police Purana Task Force investigators secured five of Williams' associates to provide evidence of his involvement in four murders. As part of Williams' plea bargain, drug trafficking and murder charges were withdrawn and investigations into his involvement with another five murders were concluded. No 'deal' was made on sentence, although based on Victorian law, a guilty plea constitutes mitigation and will usually result in some reduction of sentence. The Victorian Director of Public Prosecutions (DPP) also highlighted the potential sentencing reductions Williams may receive if he cooperates with police in other investigations (Wilkinson 2007:17). The DPP pointed to examples involving other underworld cases, such as the defendant referred to only as 'the driver', whose guilty plea and cooperation with the police resulted in a sentence of imprisonment that included a non-parole period of 10 years, despite his implication in four murders (Wilkinson 2007:17). As a result of Williams' plea bargain and speculation in the media regarding the secrecy of the process, sentencing deals and the withdrawal of charges, public scepticism regarding plea bargaining's legitimacy have arisen with concerns that 'justice has been traded away' (*Sunday Age* 2007). The following contemporary comment examines the re-emergence of such concerns in the wake of Williams' plea bargain.

Plea bargaining involves informal discussions between prosecutors and defence counsel regarding case facts, the defendant's likely plea and the possibility of negotiating charge(s). In most instances, plea bargaining requires defendants to plead guilty in exchange for selected leniencies from prosecutors and the court (Blumberg 1967; Department of Public Prosecutions 1996; Ashworth 1994). Plea bargaining has become a common method of case disposition internationally due to the benefits it offers the justice system, including reducing court costs and delays and sparing victims and witnesses from the trauma of testifying (Seifman 1980; Mack & Anleu 1995; Freiberg & Seifman 2001; Johns 2002). In Victoria there are no official statistics on its occurrence, however it is estimated that at least 50-60 per cent of guilty pleas result from plea bargains (Beale 1981; Solomon 1983; Johns 2002; Victorian Sentencing Advisory Council 2007a:5).

Despite its regular employment, in Victoria plea bargaining remains a hidden process arguably removed from public or judicial scrutiny (Clark 1986; Andrew 1994). This lack of transparency jeopardises the principles of public, accountable justice and inadvertently decreases plea bargaining's legitimacy. The absence of information on plea bargaining in

* The author acknowledges Associate Professor Jude McCulloch and Dr Dean Wilson for their comments on this paper.

Victoria and the resulting limited public understanding also jeopardises the significance of plea bargaining's advantages. It may therefore be seen as a means of reducing costs and delays at the expense of community, defendant and victims' rights. The limited case law and absence of formal guidelines surrounding plea bargaining in Victoria also strengthens its negative public image. This is particularly significant because it contrasts with trends towards the formalisation of plea bargaining in other Australian States, the United Kingdom and the United States (Kerstetter & Heinz 1979; Rubenstein & White 1980; Davis 1982:83; Pattenden 1982:11; Dixon 1997:302).[1] Subsequently, although Williams' plea bargain may have been the most effective, fair and practical method of dealing with his offences, due to the hidden nature of plea bargaining in Victoria the public will never know whether justice was adequately served.

One of the main principles ingrained in Victoria's justice system is public justice, whereby unless there are exceptional circumstances the public have access to the criminal trial (Ashworth 1994). This principle encompasses radical, liberal and conservative ideals by ensuring victim and defendant rights are publicly seen to be upheld during proceedings, that the conduct and decisions made by criminal justice personnel are subject to judicial, public and media scrutiny and that due process occurs (King 1981; Mawby & Walklate 1994; Carrington & Hogg 2002). Public confidence in the open criminal process is therefore theoretically maintained. Due to its invisibility however, plea bargaining contradicts this notion. This is particularly evident in Victoria as opposed to other Australian States, because of the absence of guidelines and/or legislation regulating plea bargaining. In addition, any Victorian case law which has explored plea bargaining such as *R v Marshall* has focused on judicial involvement within discussions, including inappropriate sentence indications, as opposed to determining and/or acknowledging plea bargaining's legitimacy.

The secret nature of plea bargaining generates public confusion surrounding the differences between plea bargaining and sentencing in the United States and in Victoria. This confusion primarily exists due to the absence of information publicly provided when plea bargaining is employed. This misperception is also strengthened by dramatised television shows from the United States such as *Law and Order*, where as based on the United States system prosecutors commonly exchange sentences for the defendant's guilty plea (Van Leeuwen 1995:31). Plea bargaining is not a standardised practice with identical implications across all criminal justice systems, for example sentencing is not part of Victoria's plea bargaining process (Boyd 1979; Byrne 1988). Unlike in the United States, Victorian prosecutors cannot guarantee sentences in exchange for guilty pleas. They can however suggest to the court that they will not appeal against a certain sentence order, but the decision is ultimately the judiciary's (Mack & Anleu 1995:45). Although plea bargaining in Victoria does not directly involve discussions on agreed sentences, it does rely upon the 'agreement between the accused and the court that a plea of guilty will attract [sentence] leniency' (Bishop 1989:186). In Victoria, guilty pleas are encouraged by sentence reductions because of the perceived utilitarian benefits they offer the justice system. Sentence leniency is therefore a main component and expectant result of plea bargaining, albeit there is no 'deal' made on actual sentences. This practice was initially explored in *R v Gray* (1977) in Victoria's Supreme Court, where it was determined that guilty pleas should attract leniency when the plea furthers public interest. This rule was revised in *The Penalties and Sentences Act* 1985 (Vic) s4 which maintains that the court should consider leniency for a guilty plea 'regardless of whether or not it is also indicative

1 See, e.g., the United Kingdom's *Attorney-General Guidelines on the Acceptance of Pleas and the Prosecutor's Role in Sentencing* (2005), the United States' *Federal Rules of Criminal Procedure* (1966) and the New South Wales *Prosecutorial Guidelines* (2003).

of some other quality or attribute such as remorse ... [and] even though it is solely motivated by self interest'. *The Sentencing Act* 1991 (Vic) s5 also indicates that sentence leniency exists, however there are no guidelines enforcing the specific amounts applicable. This may soon change if the Sentencing Advisory Council's proposal for specified sentence discounts are introduced, in which case reductions may automatically be awarded on a sliding scale based on when the guilty plea is entered (Victorian Sentencing Advisory Council 2007b:40).[2] Currently however, despite the severity of Williams' crimes, his decision to plead guilty particularly if he cooperates with police, may eventually earn him the benefit of parole eligibility.[3]

The veil of secrecy surrounding Williams' plea bargain makes it difficult for the public to understand the difference between him receiving sentence reductions, in the form of parole eligibility, due to Victorian law as opposed to receiving it as part of his negotiations with the OPP. This is particularly evident with media reports claiming his plea bargain results in a 'discounted jail sentence for [a] murderer' (Hunt & Anderson 2007:3). The lack of information and hidden nature of Williams' plea bargain, including the months of secret negotiations and suppression orders prohibiting the media from reporting information about Williams' guilty finding from a 2005 murder trial, created immense public concern regarding the lack of scrutiny surrounding plea bargaining in Victoria. Subsequently, questions emerged asking, 'how is it that a man who was a crime warlord and a confessed murderer can only be convicted through doing deals?' (Gold Coast Bulletin 2007:62). Claims in the media that 'as a result of the deal he will never be charged with another six murders police believe he committed ... Melbourne's worst gangster offered a chance of freedom' (Silvester 2007:4) and headlines maintaining that 'deal denies Moran family [one of the victims of the withdrawn murder charge] justice' (Nguyen & Petrie 2007:2) also generated public scepticism regarding plea bargaining's legitimacy in providing justice.

Concerns surrounding the lack of publicly available information were initially explored in an Australian context in Mack and Anleu's evaluation of guilty plea processes in 1995. They found that when plea bargaining is employed 'there is a lack of public accountability' (1995:49). Barrowclough's exposé in 2004 also highlighted such concerns by claiming 'it's the inability to know what actually happens [and] whether the outcomes are accurate and appropriate' (2004:47). These concerns have again become evident in 2007 through Williams' plea bargain, specifically as his involvement with several murders will no longer be investigated and at least one murder charge was withdrawn without any reasons being publicly revealed. Subsequently, the public will never know whether justice was adequately served, particularly with the murder victims' families openly claiming 'it's a denial of justice ... it's a disgrace' (Nguyen & Petrie 2007:2). In addition, media speculation that Williams' plea bargain included that his parents' house would not be confiscated under the proceeds of crime laws and that his father would be offered a deal to plead guilty to a reduced charge and receive a fine for trafficking amphetamines, undermines the open and just principles of Victoria's justice system (Robinson & Hannan 2007:4). Whether

2 The Victorian Sentencing Advisory Council was commissioned to examine the potential introduction of specified sentence discounts in Victoria. They initially proposed three models for consideration ranging from awarding automatic discounts on a sliding scale to basing the decision entirely on judicial discretion. Their final submissions are due late 2007.

3 Victorian law indicates that a guilty plea and the level of cooperation offered to the Crown constitutes mitigation and usually results in sentence reductions. In a case where a life sentence is to be imposed, a minimum term will generally be set to offer the defendant the possibility of parole. At the time of this comment's submission, Williams had not been sentenced. He has since been sentenced to life imprisonment with a minimum term of 35 years, as a result of his guilty plea.

Williams' plea bargain was a fair and effective method of justice or an example of the benefits it offers the justice system being placed ahead of public interests is not clear. One thing that is certain is if plea bargains and reasons behind their acceptance by the OPP are not disclosed through the introduction of transparent formalised initiatives, plea bargaining in Victoria will never be subject to scrutiny. Therefore its appropriateness in terms of victim and defendant rights, sentence leniency and the occurrence of justice will never properly be determined.

Some plea bargaining advocates argue that plea bargaining's informality increases its effectiveness and measures to assess its legitimacy are not required (Buckle & Buckle 1977; Clark 1986; Bishop 1989; Pizzi 1999; Freiberg & Seifman 2001). Arguments can also be made that the introduction of *The Victims Charter Act* 2006 (Vic) s8 reduces some of the aforementioned criticisms by requiring prosecutors to inform victims, when reasonably practical, of any decisions to accept guilty pleas to lesser charges or to modify or not proceed with charges. This process, while a step in the right direction, nevertheless fails to inform the public of plea bargains or confirm their legitimacy. The information provided to victims is also limited by requiring they only be informed of charge modifications or the acceptance of guilty pleas, not the reasons behind these decisions.

To address concerns across other jurisdictions, reform initiatives have been implemented to ensure plea bargaining is subject to scrutiny. For example, in 2005 the United Kingdom introduced *The Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise*, which requires a written record of the plea bargain be kept on court records and extensive information on the plea bargain and surrounding issues be provided to victims. The plea bargain's acceptance is also subject to judicial approval. The United States implemented *The Federal Rules of Criminal Procedure* (1966) which requires the disclosure of plea bargains in open court, where judges must determine their factual basis and accept or reject them. New South Wales also introduced guidelines in 2003 requiring that when plea bargaining occurs the agreed summary of facts is kept on record with an explanation as to how it was produced and/or altered (NSW OPP 2003:2). These reforms allow plea bargaining to continue, while ensuring it is a visible process subject to judicial and public scrutiny. These reforms are examples of how Victorian plea bargaining practices could be formalised and how the introduction of similar initiatives would be a step towards upholding judicial values, providing scrutiny of decisions and increasing the public's understanding of plea bargaining's importance and legitimacy.

Transparent plea bargaining reform should be introduced in Victoria to eliminate the potential abuse of public justice. The disclosure of plea bargains and reasons behind their acceptance by the OPP would provide a level of scrutiny that already exists in the trial system, which is seemingly missing from this popular method of case disposition. It would also increase the public's understanding and awareness of plea bargaining processes. It is unlikely that formalising plea bargaining would reduce its occurrence or effectiveness in disposing of cases. It would however offer transparency and understanding to a process engulfed by scepticism and claims of illegitimacy. The message portrayed from Williams' plea bargain to the Victorian community is that deals will be made, but the public do not need to know how, why or whether justice results. In a democratic society however, as Victorians lay claim to being, public justice is a principle that should be upheld in all possible circumstances. Plea bargaining is an effective and beneficial tool and through the transparent disclosure of plea bargains and reasons behind their acceptance by the OPP, plea bargaining could emerge from its veil of secrecy to become a legitimate and publicly accepted method of case disposition in Victoria.

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