BARGAINING WITH JUSTICE: VICTIMS, PLEA BARGAINING AND THE *VICTIMS' CHARTER ACT 2006* (VIC)

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Over the past several decades, the role and status of victims of crime has continued to shift. Due largely to the rise of the victims' rights movements, the victim now, at least to some extent, plays a more prominent role in criminal justice proceedings from the initial investigation of the crime, through to the trial, sentencing and even the parole hearing; albeit this position continues to operate within an adversarial framework, which restricts the victim from having a determinative say in the prosecution of their case. Despite many changes to their role and level of recognition, in Victoria, victims continue to be largely alienated from the commonly used, but non-transparent process of plea bargaining — to the extent that when cases are finalised in this manner, victims' needs and interests appear to be, for the most part, overlooked; thus fuelling a perception that plea bargaining and injustice are intrinsically linked. Using a triangulation of qualitative methods, this article offers a unique insight into the actions and perspectives of Victoria's legal community in relation to plea bargaining, and the contemporary limitations of this process for victims. In particular, it examines the impact of s 9 of the Victims' Charter Act 2006 *(Vic), which attempts to combat some of the negative aspects of plea bargaining for victims, by requiring that the prosecution keep them informed of any progress in their case, including explaining any amendments to charges. In analysing these issues, this article intends to draw attention to the implications that are inherent within a non-transparent plea bargaining process, and encourage dialogue pertaining to the use of the* Victims' Charter Act 2006 *(Vic) in Victoria.*

I INTRODUCTION

Over the past several decades, the role and status of crime victims has continued to shift towards the provision of greater recognition and consideration of the victimisation experience.[1] A primary reason for changes to government, academic and social perceptions of victims, and to the scope of a victim's role

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1 Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10/02, Parliamentary Library — Parliament of New South Wales, 2002); Joanna Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985).

within criminal justice proceedings, links back to the feminist and victims' rights movements of the 1970s and 1980s, which condemned the historic treatment of victims in academic research, and within the criminal justice system.[2] In particular, these movements criticised research, which in examining possible causes of crime, explored the idea of victim blaming, whereby certain individuals and groups were labelled as being 'victim prone',[3] and creating ' "temptation-opportunity" situations' for crime to occur,[4] due to characteristics such as the victim's age, attitude, appearance, gender and race.[5] For example, in examining victim culpability, Amir claimed that the crime of rape could occur because 'the victim actually, or so it was deemed, agreed to sexual relations but retracted … or did not react strongly enough when the suggestion was made'.[6] This belief was also (and arguably remains) prevalent within the operation of the legal system, where the victim's appearance, their relationship to the offender and their response to the crime, can be used as a basis for arguing that the victim was in some way responsible for the offence, or that these characteristics demonstrate that a 'real crime' did not occur.[7]

As a result, activism against victim blaming research and policies, and a push towards increased punitivism within the criminal justice system more generally,[8] provided a framework for a critical victims' rights movement.[9] This movement subsequently led to a greater focus on assisting and acknowledging crime victims, which in turn motivated positive social responses and legal reforms, such as rape crisis centres and the recognition of previously unacknowledged offences as 'real' crimes, for example, domestic and family violence, and rape in marriage.[10]

The shift towards greater victim recognition and inclusion was particularly evident in the 1980s, when critiques of a 'soft' and 'offender-focused' justice system, especially in relation to victim consideration in sentencing, became an impetus for law reform. In this context, governments were 'forc[ed] … to

2 Bree Cook, Fiona David and Anna Grant, 'Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia' (Research and Public Policy Series No 19, Australian Institute of Criminology, 1999); Susan S M Edwards, *Female Sexuality and the Law: A Study of Constructs of Female Sexuality as They Inform Statute and Legal Procedure* (Martin Robertson, 1981); Susan Griffin, 'Rape: The All-American Crime' in Dawn Keetley and John Pettegrew (eds), *Public Women, Public Words: A Documentary History of American Feminism* (Rowman and Littlefield, 2005) 142; Leslie Sebba, *Third Parties: Victims and the Criminal Justice System* (Ohio State University Press, 1996); Rosemarie Tong, *Feminist Thought: A Comprehensive Introduction* (Unwin Hyman, 1989).

3 Hans von Hentig, *The Criminal and His Victim: Studies in the Sociobiology of Crime* (Yale University Press, 1948).

4 Andre Normandeau, 'Patterns in Robbery' (1968) 6(3) *Criminology* 2, 11.

5 Ibid; Benjamin Mendelsohn, 'Victimology and Contemporary Society's Trends' (1976) 1 *Victimology — An International Journal* 8; von Hentig, above n 3; Martin E Wolfgang, 'Victim Precipitated Criminal Homicide' (1957) 48(1) *Journal of Criminal Law, Criminology and Police Science* 1.

6 Menachem Amir, *Patterns in Forcible Rape* (University of Chicago Press, 1971) 262.

7 See, eg, Susan Ehrlich, *Representing Rape: Language and Sexual Consent* (Routledge, 2001); Susan Estrich, *Real Rape: How the Legal System Victimises Women Who Say No* (Harvard University Press, 1987).

8 David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press, 1990).

9 Cook, David and Grant, above n 2; Jo Goodey, *Victims and Victimology: Research, Policy and Practice* (Pearson Longman, 2005); Sebba, above n 2.

10 Cook, David and Grant, above n 2; Edwards, above n 2; Sebba, above n 2; Tong, above n 2.

revise sentencing practices … [in order to pay heed to] the relative position of the victim'.[11] As a consequence, the acceptance of a crime as an offence only against the state was challenged and governments began introducing policies in which victims were seen to be a central focus;[12] albeit, such reforms were somewhat constructed on the 'ideal victim', whereby the victim's personal characteristics (for example, age, what activity they were engaged in at the time of the offence, their response to the offence/offender both at the time and in contacting the police) and the crime (for example the location and the offender), were required to at least partially fit within a range of socially constructed and accepted stereotypes.[13] See, for example, Christie's discussion of the young virgin being physically and sexually assaulted by a stranger, in a public place, on her way home from looking after a sick relative.[14] But regardless of the 'motivation of those who clamoured for victims' rights',[15] it is widely accepted that 'the "victims' rights" movement soon became an integral part of the criminal justice system'.[16] Thus the victim now, at least to some extent, plays a more prominent role in the progression of a case from the police investigation, through to the trial, the sentencing hearing and even in determining the parole eligibility of a prisoner.

One of the main 'victim-focused' reforms emerging over the last decade has involved increased attention being given to victims' needs and wants in regards to the prosecution of cases. This includes increasing the provision of information to victims about the progress of their case; albeit such changes continue to operate within an adversarial framework which restricts the victim from having a determinative say.[17] Despite such changes, in Victoria, victims continue to be largely alienated from the commonly used criminal justice process of plea bargaining, predominantly because this practice is shrouded by a veil of secrecy, neither acknowledged nor regulated by legislation. Instead, plea bargaining is guided by three non-legally binding internal policies within the Office of Public Prosecutions ('OPP'),[18] and some case law that directs the guilty plea process, to

11 Cook, David and Grant, above n 2, 84.

12 Sebba, above n 2, 4. See, eg, in Victoria, statutory obligations imposed on some professionals, including doctors and teachers, to report suspected cases of child abuse; the restriction on the cross-examination of victims during Committal Hearings; and the restriction on introducing a victim's sexual history into rape cases: *Children and Young Persons Act 1989* (Vic) s 64(1A); *Evidence (Miscellaneous Provisions) Act 1958* (Vic) ss 37A, 37C; *Magistrates' Court Act 1989* (Vic) s 5 cl 13(4). Limits on who can be cross-examined and the types of questions that are permitted are now governed by ss 119, 123–4 of the *Criminal Procedure Act 2009* (Vic).

13 For further discussions on the ideal victim, see Nils Christie, 'The Ideal Victim' in Ezzat A Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (St Martin's Press, 1986) 17; Goodey, above n 9.

14 Christie, above n 13, 19.

15 Judith M Sgarzi and Jack McDevitt (eds), *Victimology: A Study of Crime Victims and Their Roles* (Prentice Hall, 2003) 335.

16 Ibid.

17 *Public Prosecutions Act 1994* (Vic); *Sentencing Act 1991* (Vic); *Victims' Charter Act 2006* (Vic).

18 See, eg, OPP, *Policy 9 — Director's Policy as to the Role of the Crown upon Plea and Sentence* (2012); OPP, *Policy 22 — Director's Policy as to the Early Resolution of Cases* (2012); OPP, *Policy 2 — The Prosecutorial Discretion* (2008).

a limited extent, impacts on plea bargaining.[19] As a consequence, and despite the potentially significant impacts which result for victims from a deal that reduces the number and/or severity of the charges, and often minimises the offender's culpability, plea bargaining continues to operate with little transparency and with no legally acknowledged consideration given to the process, or in turn, the victim.

This article examines some of the contemporary limitations of plea bargaining for victims, and explores the impact of the single legislative change implemented in Victoria which offers some redress to these shortcomings. Section 9 of the *Victims' Charter Act 2006* (Vic) ('*Charter*') requires prosecuting agencies to provide victims, as soon as reasonably practical, with the following information:

> (a) The charges filed against the person accused of the criminal offence;
>
> (b) If no charge is filed against any person, the reason why no charge was filed;
>
> (c) If charges are filed, any decision —
>
> (i) To substantially modify the charges; or
>
> (ii) Not to proceed with some or all of the charges; or
>
> (iii) To accept a plea of guilty to a lesser offence.

This section increases the acknowledgement that must be given to victims in prosecutorial charging decisions. Importantly, for the first time in Victoria's history, it places a statutory obligation on prosecutors to keep victims informed of any decisions to modify the charge(s) being proceeded with, and any decision to accept a guilty plea to a lesser charge(s) — thus in effect, to explain why they accepted and engaged in a plea bargain.

This discussion is informed by the findings of a three-year study in which 42 legal participants were interviewed (n=11 defence counsel; n=19 prosecutors; n=7 judiciary; n=5 policy advisors/government representatives) in 2007 and 2008, and 51 legal participants (n=15 defence counsel; n=25 prosecutors; n=11 judiciary) were observed working within Victoria's criminal justice system over a four month period in 2007, shortly following the enactment of the *Charter*.[20] While acknowledging the limitations of the *Charter*, particularly s 22(1)(a) which restricts the victim from having any legal rights to civil action if the requirements defined in the statute are not upheld, this article contends that the legislation has impacted positively on the prosecution's conduct in relation to keeping victims informed about plea bargaining, and the general progress of their case. However, this article ultimately contends that greater external transparency of plea bargaining is required, particularly its statutory acknowledgement as a criminal justice process,

19 See, eg, *Gas v The Queen* (2004) 217 CLR 198, where the High Court recommended both counsel maintain records of any plea agreements; *Maxwell v The Queen* (1995) 184 CLR 501, which gave judges the authority to refuse to accept an accused person's guilty plea to an altered charge(s).

20 Thirty-six of the legal participants that were interviewed were also participants in the observational research. The remaining 15 observation participants were not part of the interview cohort.

if any real consideration is to be given to the rights of victims and the negative consequences that can result when plea bargaining is used to resolve cases.

Further to analysing Victoria's plea bargaining process in the context of the victim, this article also intends to stimulate dialogue pertaining to the use of the *Charter*, as almost five years post implementation, it remains a largely under-researched topic. Using a unique insight into the actions and perspectives of Victoria's legal community, this article also intends to draw attention to the non-transparent nature of plea bargaining. This will be done in order to highlight the inadequacies that can emerge, in this context, for victims, when a seemingly transparent and open legal system continues to readily utilise a process that has limited, if any, external scrutiny, accountability or control applied to the actions of the parties involved within it, or to the decisions and the outcomes reached by those parties.

II METHODOLOGY

This article draws upon the findings of a three-year study which examined the informality of plea bargaining and prosecutorial decision-making in Victoria. For the purpose of this article, the relevant data emanates from the observations of 51 legal participants operating in Victoria's criminal justice system over four months in 2007 (n=15 defence counsel; n=25 prosecutors; n=11 judiciary) and 37 of the semi-structured interviews conducted with legal participants between 2007 and 2008 in Victoria (n=11 defence counsel; n=19 prosecutors; n=7 judiciary). The comments of the policy advisors and government representatives who were interviewed as part of the broader research project have been excluded as they had no direct experience working with the *Charter*. Furthermore, within this article, Witness Assistance Service employees who work within the OPP assisting victims of crime and prosecutorial staff in communicating with victims, while not technically falling under the definition of a 'legal participant', are categorised as representatives from the prosecution group.

The interview data informing this discussion shed light on the perspectives of representatives from the Victorian State Office of Public Prosecutions, Melbourne metropolitan criminal courts, the Criminal Bar Association and Victoria Legal Aid. The participants were representative of a range of experience and seniority, ranging from articled clerks (n=1), instructing or junior solicitors (n=4), Directors of Public Prosecutions (n=2), Crown prosecutors and Program Managers (n=8), to education and development staff (n=2), Witness Assistance Service counsellors (n=2), Legal Aid solicitors (n=3), Queen's and Senior Counsel (defence) (n=3), instructing solicitors (n=2), barristers (n=3), Magistrates (n=1), Judges (n=4) and Justices (n=2). Within the Victorian OPP, seven of the 12 prosecutorial divisions were represented.[21] Overall, the observation and interview participants

21 Policy Advising and Court of Appeal n=3; Specialist Sexual Offences Unit n=4; Committal Advocacy n=4; General Prosecutions n=4; Corruption n=1; Organised Crime n=1; Witness Assistance Services n=2.

were representative of the three criminal courts, with some participants having experience in more than one court (county and supreme courts experience n=50; magistrates' court experience n=25). In order to maintain confidentiality, participants are assigned pseudonyms based on their profession and are referred to as Prosecutor, Judiciary or Defence, followed by a randomly assigned sequential letter: for example, Prosecutor A, Defence C.[22]

The observational fieldwork was conducted over a four-month period at the Victorian State OPP and the Melbourne metropolitan Magistrates', County and Supreme Courts. The observations focused specifically on the informal processes and procedures leading up to a criminal justice hearing, specifically the preparation undertaken before a plea bargain occurs, and the different roles the participants adopt in relation to plea bargaining. The interview and observation data included descriptions of behaviour, institutions, court processes, appearances, actions, interactions, personal narratives and accounts. This triangulation of methods allowed for the critical comparative analysis of participants' conduct when plea bargaining, with their perspectives of plea bargaining. Using this approach to understand plea bargaining thus allows this discussion to move from opinions and statements of law and policy, to determinations of what happens in practice.[23]

III VICTIMS AND PLEA BARGAINING

The complex needs of victims vary significantly depending upon a range of factors relating to the individual victim, the offence, and the victim's relationship with the accused.[24] As Zehr maintains:

> Victims have many needs. They need chances to speak their feelings. They need to receive restitution. They need to experience justice: victims need some kind of moral statement of their blamelessness, of who is at fault, that this thing should not have happened to them. They need answers to the questions that plague them. They need a restoration of power because the offender has taken power away from them.[25]

22 The decision not to include victim participants was made on the basis of ethical, time and cost constraints, as well as the three-year project being carefully placed within a legal and policy context for those directly involved in the operation of plea bargaining. While future research is required in which victim voices are represented, this article focuses on the observations and voices of legal participants who have had direct involvement working with the *Charter*.

23 Asher Flynn, 'Breaking into the Legal Culture of the Victorian Office of Public Prosecutions' in Lorana Bartels and Kelly Richards (eds), *Qualitative Criminology: Stories from the Field* (Hawkins Press, 2011) 47.

24 Ann Skelton and Cheryl Frank, 'How Does Restorative Justice Address Human Rights and Due Process Issues?' in Howard Zehr and Barb Toews (eds), *Critical Issues in Restorative Justice* (Willan, 2004) 203; Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002); Martin Wright, 'The Rights and Needs of Victims in the Criminal Justice Process' in Hendrik Kaptein and Marijke Malsch (eds), *Crime, Victims and Justice: Essays on Principles and Practice* (Ashgate, 2004) 141; Howard Zehr, 'Retributive Justice, Restorative Justice' in Gerry Johnstone (ed), *A Restorative Justice Reader: Text, Sources, Context* (Willan, 2003) 69.

25 Zehr, above n 24, 69.

Notwithstanding the often immense differences between individual victims and their victimisation experiences, a common need consistently identified by victims of crime is the desire to be kept informed at all stages of the case's progression through the criminal justice process, particularly *before* prosecutorial decisions are made.[26] When such information is provided, it has been recognised that victims feel an increased level of satisfaction.[27]

Despite the consistent identification of increased information and detailed explanations as being primary needs of victims, the plea bargaining process in Victoria has conventionally failed in addressing victims' needs in this way. Plea bargaining involves a police prosecutor, or a Crown prosecutor or solicitor from the OPP engaging in an informal discussion with a defence counsel on an accused person's likely plea, and the possibility of negotiating the charge(s), case facts and/or the prosecution's likely sentencing submission. There are multiple forms of plea bargaining, which also commonly fall under the term 'charge bargaining'; for example, the prosecution reducing the seriousness of charges, or withdrawing one or more charges in exchange for a guilty plea. Plea bargaining can involve negotiating the agreed summary of facts from which the accused will be sentenced by the court, and/or negotiating the jurisdiction of the offence — for example, having the case heard summarily rather than in an indictable jurisdiction. It can also entail informal agreements not to proceed with charges against another person, or a requirement that the accused become a prosecutorial witness.

Plea bargaining may involve face-to-face meetings, phone calls, emails or facsimiles, and can occur at any time prior to a trial's conclusion. The primary aim of the process is to arrive at an agreement between the prosecution and the defence, according to which the accused pleads guilty. At the very minimum, discussions aim to identify any issues not in dispute, thus reducing the length of subsequent hearings and limiting the likelihood of later delays — for example, through trial adjournments. Given the potential outcomes of plea bargaining — that an accused person pleads guilty and the case resolves without need for a contested trial — the process is often justified on a utilitarian basis, as it can reduce court backlogs and increase clearance rates; the benefits of which extend to reducing financial and resource expenditure, and sparing victims and accused persons from drawn-out proceedings. While potentially offering these benefits, the absence of any legal acknowledgement, external transparency or control of the plea bargaining process, its outcomes or the conduct of those involved within it, can raise doubt over the legitimacy of using plea bargaining as a method of case finalisation, particularly for victims.

In Victoria, like in most common law systems, no official data is kept outlining when or why plea bargaining occurs, or how often discussions result in guilty pleas. However, research indicates that plea bargaining is a frequently used

26 Mike Maguire and Trevor Bennett, *Burglary in a Dwelling: The Offence, the Offender, and the Victim* (Heinemann, 1982); Johns, above n 1; Sebba, above n 2; Shapland, Willmore and Duff, above n 1; Strang, above n 24; Wright, above n 24.

27 Shapland, Willmore and Duff, above n 1; Heather Strang and Lawrence Sherman, 'Repairing the Harm: Victims and Restorative Justice' (2003) 1 *Utah Law Review* 15, 20.

process: as McConville argues, 'plea bargaining [is] a widespread institutional practice and not isolated aberrational behaviour on the part of some maverick lawyers'.[28] Often the estimates of plea bargaining's frequency are based on the fact that on average, over two-thirds of accused persons plead guilty, so it is argued that plea bargains must provide some incentive to encourage these pleas. For example, looking at the stage at which a not guilty plea was changed to a guilty plea as a basis for determination, Johns estimates that almost 32 per cent of cases in NSW between 30 January 1998 and June 2001 were resolved by pre-trial plea bargains.[29] While limited evidence examining the frequency of plea bargaining in Victorian courts exists, research from the 1980s, 1990s and 2000s support the conclusion that plea bargaining occurs very regularly in Victoria's superior and lower courts.[30]

Further to not being monitored in any statistical or formal sense, plea bargaining is not recognised in, or controlled by, any Victorian statute. Instead, it falls under the discretionary powers of the prosecution, which means the public rely solely upon trusting those who engage in discussions to ensure the process, and resulting agreements, uphold the same judicial principles, such as consistency, accessibility, equality and fairness, which apply to more transparent proceedings like the trial. This is particularly concerning given that plea agreements can alter the seriousness of the conviction and sentence imposed on an accused, and can remove the opportunity for the victim to provide testimony or for the prosecution to prove its case within the confines of the contested trial and the rules of procedure applied within this process.

Within the OPP, three internal policies provide some guidance to prosecutors when plea bargaining, for instance, encouraging them to initiate discussions with the defence counsel, regardless of whether the defence approaches them, and to refrain from offering deals to accused persons if they are unrepresented.[31] Significantly, however, these policies are non-legally binding and there are no mechanisms in place to monitor whether prosecutors adhere to them. As such, they ultimately provide limited accountability or control to the plea bargaining process, or the conduct of those involved, and they do little to provide the process or its outcomes with any level of public transparency or legitimacy.

In addition to potentially impinging on just outcomes, as it currently operates, plea bargaining undermines the established principle of public and open justice, whereby justice is seen to be done, and the public, including victims, have access to

28 Mike McConville, 'Development of Empirical Techniques and Theory' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 207, 211 (emphasis altered). See also Arie Freiberg and Robert D Seifman, 'Plea Bargaining in Victoria: The Role of Counsel' (2001) 25 *Criminal Law Journal* 64; Johns, above n 1.

29 Johns, above n 1, 2.

30 Freiberg and Seifman, above n 28; Kathy Mack and Sharyn Roach Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995); Robert D Seifman, 'Plea Bargaining in Victoria — Getting the Judges' Views' (1982) 6 *Criminal Law Journal* 69.

31 See, eg, OPP, *Policy 9 — Director's Policy as to the Role of the Crown upon Plea and Sentence* (2012); OPP, *Policy 22 — Director's Policy as to the Early Resolution of Cases* (2012); OPP, *Policy 2 — The Prosecutorial Discretion* (2008).

proceedings except in rare cases under exceptional circumstances.[32] The principle of public and open justice serves three main purposes: (1) to safeguard the conduct of criminal justice agencies; (2) to increase understanding of how the legal system operates; and (3) to ensure confidence in the legitimacy of proceedings.[33] It is for these reasons that the importance of upholding the principle has been recognised in case law, statute and international covenants since the early 20th century, as 'a sound and very sacred part of the constitution of the country and the administration of justice'.[34] In particular, as Lord Hewart noted in *R v Sussex Justices; Ex parte McCarthy*, 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[35] The underlying reason for which, as Justice Kirby claimed, is 'constantly to submit [legal conduct] to public scrutiny';[36] in other words, justice is seen, scrutinised, and the relevant parties held accountable for their conduct. Due to the non-transparent nature of plea bargaining however, when used to resolve cases, the principle of public and open justice, and hence the safeguard on the conduct of criminal justice agencies, the ability to increase understanding of how the legal system operates, and the capacity to ensure confidence in the legitimacy of proceedings, are all disregarded, and many of the primary needs of victims, particularly those relating to recognition, consideration and the provision of information, are also ignored.

IV POTENTIAL IMPLICATIONS OF PLEA BARGAINING

The legal participants involved in this study identified a range of justifications for engaging in plea bargaining, including recognising its possible benefits for victims. Prosecutor H maintained that 'saving resources is the main purpose, but there is obviously sparing any victims the ordeal or experience of having to come to court and give evidence'. Prosecutor M similarly observed that:

> We are trying to achieve a satisfactory outcome for the community, for victims and for the perpetrator. So there are the practical benefits of not only costs saved in terms of [the] emotional and psychological, but also the costs in terms of financial costs, which can be extreme and after it all

32 For example, the court may be closed to public viewing when a protected witness is testifying or in the Children's Court.

33 Rob Allen and Mike Hough, 'Does It Matter? Reflections on the Effectiveness of Institutionalised Public Participation in the Development of Sentencing Policy' in Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Courts* (Hawkins Press, 2008) 224.

34 *Scott v Scott* [1913] AC 417, 473. See also, *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 24(1), (3); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14; *Webb v The Queen* (1994) 181 CLR 41, 47.

35 [1924] 1 KB 256, 259.

36 Michael Kirby, 'Attacks on Judges: A Universal Phenomenon' (Speech delivered at the American Bar Association: Section of Litigation Winter Leadership Meeting, Maui, Hawaii, United States, 5 January 1998) <http://www.michaelkirby.com.au/images/stories/speeches/1990s/vol41/1998/1475-Attacks_on_Judges_-_A_Universal_Phenomenon_(American_Bar_Association).doc> 7.

> you might end up with the same sentence after the trial as you will through plea bargaining.

Prosecutor O also identified that the early guilty pleas resulting from plea bargaining can offer significant benefits for all parties, hence providing a strong reason for engaging in the process:

> Well if you look at the benefits, obviously the defence gets a benefit, the community benefits, because you have a conviction for something that you might not otherwise get. Victims have a lot to gain if it is a plea offer that adequately reflects the criminality. There is certainly a benefit, a demonstrable benefit to the accused pleading guilty as opposed to being found guilty, because they get some sort of [sentence] discount for pleading.

Reducing court backlogs by increasing clearance rates, and saving victims and accused persons from drawn-out proceedings were consistently offered as legitimate justifications for plea bargaining by those involved in the process. As Defence C explained, 'from a defence point of view, it saves money and anxiety on the part of the defendant. From the victim's point of view, it saves anxiety from them having to give evidence'. Importantly, one of the main potential benefits for victims that was identified by the participants, particularly those representative of the prosecution group, was that plea bargaining offers a guaranteed conviction. Importantly, the outcome of a guaranteed conviction was perceived by the participants as equating to public and victim interests being upheld, because the accused was held accountable for his/her criminal actions.[37] This view supports McConville and Baldwin's early analysis of plea bargaining in the UK, which found that 'it is in the public interest that those who are indeed guilty should admit their guilt'.[38]

The benefit for both the public and the victim from obtaining convictions through plea bargaining is, however, somewhat questionable, and depends entirely upon how the notion of 'upholding interests' is defined; particularly because the conviction recorded as part of a plea bargain will not necessarily reflect the full extent of an accused person's culpability, or the full extent of the crimes committed. This 'benefit' is also questionable due to the absence of external transparency or legal framework governing plea bargaining, as opposed to if a conviction is obtained from the more transparent trial. In discussing this issue, Prosecutor N asked:

> Is it ever appropriate to abandon or not pursue charges that if they were looked at in their own right, in isolation, you would say they meet all the criteria for proceeding with them, just because agreeing to drop them will induce a plea of guilty to a whole lot of other matters? It is common knowledge that in some cases we do just that in order to get the plea … It [plea bargaining] is a guessing game, a relative value to what you are being offered.

37 Prosecutor M.

38 Michael McConville and John Baldwin, *Courts, Prosecution, and Conviction* (Oxford University Press, 1981) 66.

Prosecutor L similarly maintained that plea bargaining is a compromise and 'like any settlement, both sides are winners and losers'. He explained:

> It will depend on the case and who is a better bargainer who gets the best of the deal. There is obviously compromise on both sides, but sometimes a bird in the hand is worth two in the bush. So both sides win and lose depending on how you feel about it on the day. Nobody is really 100 per cent satisfied with a compromise, and a plea bargain has to be a compromise. It is a deal, so everyone walks away a little bit of a winner and a little bit of a loser.

While there is a recognised element of uncertainty in seeking to obtain a conviction from trial, the language used by these two participants, particularly the terms 'winner', 'loser', 'guessing game' and 'compromise', brings into question the extent to which obtaining a compromised conviction through an unscrutinised process can uphold victim or public interests, particularly when contrasted with the possible acquirement of a conviction (potentially on the full charges) obtained in a transparent and regulated trial.

Although identifying a number of justifications for using plea bargaining, the participants were not ignorant of the number of ways it can negatively impact on victims. As Prosecutor A claimed, 'if a plea bargain is not done well and if it is done not for the right reasons, then you will get disgruntled police, victims and members of the public'. Further to simply amending the charges laid against an accused, a plea bargain will almost always involve a negotiation on the facts of the case. This is because when charges are altered, the facts presented to the court as the basis for sentencing the accused must reflect these offence changes. As a result, factual elements of the crime may be removed from the statement presented to the judge, or the severity of aspects of the crime may be understated. For example, murder becomes manslaughter, or intentionally causing serious injury becomes a reckless accident. As a consequence, a reduced level of culpability is assigned to the accused person's conduct. The implications that arise for victims from a reduction in the number or seriousness of charges laid against an accused, and a reduction in the offender's culpability as outlined in the agreed summary of facts, are further exacerbated by the lack of external transparency and scrutiny of the prosecution's decision in making such changes, particularly the absence of transparent details as to why this decision was made. As Prosecutor B described:

> It isn't just, would you accept a plea of guilty to this many counts of robbery instead of this many counts of armed robbery? It is, will you accept a plea to x on the factual basis of a, b, c, d? … It may involve the circumstance where the factual basis is put deliberately not mentioning certain aspects of the offence, which might otherwise be thought to be aggravating … We are not misleading the court, we are just not telling them x, y, z because the defence have said that is the basis for the plea bargain.

Aside from the issues relating to perceptions of justice and just outcomes which are raised by an unscrutinised process that does not 'mislead the court', rather it just avoids telling it the entire story, this aspect of plea bargaining affects victims

by limiting how much of their victim impact statement can legally be considered by the court before a sentence is imposed. Under ss 5(2daa), (2da) and (2db) of the *Sentencing Act 1991* (Vic), when sentencing an offender, 'a court must have regard to … the impact of the offence on any victim of the offence; the personal circumstances of any victim of the offence and; any injury, loss or damage resulting directly from the offence'. In order to assist the judge in gaining this information, prior to imposing a sentence, a victim impact statement is read to or by the judge which details the effects the victim has experienced both physically and mentally as a result of the crime, including any physical and emotional harm, property loss or damage, and other effects, such as ongoing suffering.[39]

The victim impact statement is a significant, yet highly contentious, victim-focused reform, and its (in)effectiveness in addressing victims' needs has been a significant focus of much research and debate.[40] While not immune to criticism, victim impact statements provide an avenue for victims' voices and needs to be addressed and considered in sentencing, and they offer an opportunity for victims to play a greater role than simply that of a prosecution witness. Accordingly, these statements have become an important part of the sentencing process, both in terms of ensuring proportionality in sentencing, and in providing some consideration to victims. However, when a case is resolved by a plea bargain, and the facts of the case are subsequently altered, the court is limited in the extent to which it can take into account the impact statement. This is because when determining a sentence, judges can only consider the impact of the crime on the victim for those matters with which the accused is convicted.[41] If the facts surrounding certain elements of the crime are altered or minimised to allow a lesser charge, the full victim impact statement is then not disclosed to the judge. The disregard for a victim impact statement is of itself a strong limitation of plea bargaining, but when this is combined with the non-transparency of plea bargaining, in that these decisions are made without any scrutiny applied or a legislative framework regulating prosecutorial discretion, it highlights a further significant limitation of a non-transparent plea bargaining process for victims.

The potentially negative consequences of this element of plea bargaining were demonstrated in two cases in New South Wales in the early 2000s. In *R v Laupama*,[42] a plea bargain was agreed to in which charges of murder, kidnapping and assault were withdrawn, in exchange for a guilty plea being entered to manslaughter. The plea was accepted on the basis that the accused was suffering from a major depressive illness and a serious psychiatric disability at the time of committing the offences. In this case, the accused murdered his ex-partner's five year old daughter, and then forced his ex-partner and her two children at knifepoint into a car with the body of the deceased, ordering her to drive for a

39 Ybo Buruma, 'Doubts on the Upsurge of the Victim's Role in Criminal Law' in Hendrik Kaptein and Marijke Malsch (eds), *Crime, Victims and Justice: Essays on Principles and Practice* (Ashgate, 2004) 1; Sebba, above n 2.

40 See, eg, Cook, David and Grant, above n 2; Goodey, above n 9; Sebba, above n 2; Strang, above n 24.

41 Johns, above n 1.

42 [2001] NSWSC 1082 (7 December 2001).

period of almost eight hours. As part of the plea bargain, all references to the crimes of murder, kidnapping and assault were removed from the summary of facts, which meant that when sentencing the accused, the judge could not take into account any references to how these crimes affected the victims, despite the extensive impact these crimes had on their emotional and physical wellbeing. Furthermore, the plea bargain altered the status of the victims from primary victims, to related victims,[43] because the crimes committed directly against them were no longer presented, thereby reducing the extent and status of their victimisation experience.

The second case, *R v AEM (Snr)*,[44] involved serious sexual and physical assault, theft and kidnapping. In this case, two 16 year old females were at a railway station in the early morning when they were picked up by five males and driven unwillingly to a house. Once at the house, the two victims were subjected to aggravated sexual and physical assaults, as well as having money stolen. The victims alleged that the males used force to get them into the car, and once inside the car, a knife was produced and they were driven to a house and kept there for over five hours. However, in order to permit guilty pleas to be entered to sexual assault charges only, the agreed summary of facts presented to the Court differed significantly; instead stating that the victims voluntarily returned to the house, that no knife was produced, and no references were made to the theft or physical assaults. An examination of this case found that both victims felt 'cheated by the justice system',[45] with one victim claiming:

> I did expect [proceedings] to give me some sort of closure … But it's been the exact opposite. It's just made things worse, because … now my story has been changed by the legal system … The facts were changed and I want to stop that. My story should be told the way it happened. … Personally, I would rather go through the process of court because at least my story is getting told and they are actually sentenced on what they did and not what they didn't do.[46]

The public and media outcries following these two cases encouraged then Attorney-General (NSW) Bob Debus, to commission a review of the Director of Public Prosecution's (DPP) *Prosecutorial Guidelines*.[47] The review found that the guidelines were lacking in a number of areas involving plea bargaining and victims, and recommended that any changes to the summary of facts as part of

43 Under ss 7 and 11 of the *Victims of Crime Assistance Act 1996* (Vic), a primary victim refers to 'a person who is injured or dies as a direct result of an act of violence committed against him or her'; while a related victim is defined as a 'person who, at the time of the occurrence of the act of violence — a) was a close family member of; or b) was a dependant of; or c) had an intimate personal relationship with — a primary victim of that act who died as a direct result of that act'.

44 [2002] NSWCCA 58 (13 March 2002).

45 Johns, above n 1, 8.

46 Ibid 8.

47 Nicholas Cowdery, 'Negotiating with the Director of Public Prosecutions, Especially under the Samuel's Report' (Speech delivered at the Young Lawyers One-Day Criminal Law Seminar, Sydney, Australia, 15 March 2003) <http://www.odpp.nsw.gov.au/speeches/Young%20Lawyers%20CLE%20-%2015.3.03.htm>; Johns, above n 1.

a plea bargain, and the reasons for the changes, should form part of the court records.[48] This recommendation was later implemented in s 6 of the *Prosecutorial Guidelines 2003* (NSW). Section 6 of the *Victims' Rights Act 1996* (NSW), which contains the *Charter of Victims' Rights 2003* (NSW), was similarly altered to include this requirement. In Victoria, however, despite the potential consequences of inappropriate or unjust alterations to case facts, no external transparency applies to the prosecution's discretion in making a decision on which facts to include in the agreed summary. Instead, plea bargaining continues to operate in a shroud of secrecy, with no legal requirements surrounding prosecutorial discretion or the plea bargaining process itself.

The lack of scrutiny surrounding prosecutorial discretion in plea bargaining can also create doubts for victims over the appropriateness of any negotiations and the motivations underpinning the prosecution's decision to plea bargain, particularly when there may have been sufficient evidence to warrant proceeding with all charges. As Prosecutor N claimed:

> The victim might prefer it were recorded that they were a victim of a rape rather than an indecent assault, or if they are a secondary victim, that their family member was the victim of a murder, not a manslaughter. That is more a matter of kudos or recognition of what occurred. That is what happens when you downgrade offences.

As Prosecutor N's comments indicate, the use of plea bargaining can result not only in the 'downgrading' of the offences, but also the downgrading of the victim's status. Accordingly, this can impact on a victim's right to be recognised as a legitimate victim of the full extent and number of crimes that were committed against them.

In a similar way, the victim status of multiple victims can be affected by plea bargaining because if not all charges proceed there may never be a finding of guilt or conviction recorded for the offence(s) committed against some of the victims involved. There are many issues victims face when this occurs, as Prosecutor N explained:

> We might get a defendant turn around and say look, maybe I did rob 30 stores, but just between you and me, if we go to trial for the 30 we will be here for months. Can I plead to ten? So you would have 20 citizens walking down the street who are not happy … The only real downside is that over half the victims will not get a result, but the outcome is overall, still positive.

As implicit in Prosecutor N's comments, plea bargaining will often require a negotiation between the interests of the victims involved and a satisfactory outcome in terms of the broader public's interests. However, while Prosecutor N might accept that two-thirds of the victims not having a finding of guilt in relation

48 Gordon Samuels, *Samuels' Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts* (29 May 2002) Lawlink NSW <http://www.lawlink.nsw.gov.au/report/lpd_reports.nsf/pages/report_gsamuels>.

to their crime is still a 'positive' outcome, the absence of external transparency in the prosecution's decision to alter charges in this way, significantly impacts on perceptions of whether plea bargaining can offer a just outcome in cases involving multiple victims. Consequently, the labelling of this deal as a 'still positive' outcome, feeds into a perception of injustice; as Prosecutor U observed, 'there is a perception out there that plea bargaining means that it is all the defence's way … The perception is the big problem. The victim perceives that if we plea bargain, then they have been sold out to some degree'.

This perception of failed justice and being 'sold out' reflects some of the existing concerns surrounding the private nature of plea bargaining more generally. Plea bargaining's informality has consistently been recognised as one of its major weaknesses because discussions are conducted behind closed doors and away from public or judicial scrutiny.[49] As the *United States' Commission on Law Enforcement and Administration of Justice* noted, '[f]ew practices in the system of criminal justice create a greater sense of unease and suspicion than the negotiated plea of guilty'.[50] In a similar vein, Cole observed that:

> Compared to the openness of plea negotiations in the United States, one gets the impression that Australian lawyers … prefer to frame the practice in neutral, technical legalisms, thus shielding the dynamics of bargaining from public view. They seem to validate these discussions in terms of "getting the charges and facts right." Although the practice maintains [the] boundaries of the legal community, questions must be asked …[51]

Largely as a consequence of its informality, plea bargaining has developed a negative reputation that 'smacks of wheeling and dealing'.[52] This reputation is further fuelled by a limited public understanding of discussions beyond the representations of dramatised television shows; as Douglass maintains, '[p]lea negotiations have too long been regarded as a shady, backroom process … these misconceptions stem from lack of knowledge and poor representation of facts to the public'.[53]

One of the many resulting impacts of this perception, as identified in this study by Prosecutor D, is that plea bargaining's non-transparency makes it difficult to communicate the potential benefits of a plea bargain to the public and to victims:

49 Judith Dixon, 'Rights of Victims' (Speech delivered at the Prosecuting Justice Conference, Melbourne, Australia, 18–19 April 1996) <http://www.aic.gov.au/events/aic%20upcoming%20events/1996/~/media/conferences/prosecuting/dixon.ashx>; Oonagh E Fitzgerald, *The Guilty Plea and Summary Justice: A Guide for Practitioners* (Carswell, 1990); Johns, above n 1; William T Pizzi, *Trials without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It* (New York University Press, 1999).

50 United States President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* (US Government Printing Office, 1967) 9.

51 George F Cole, 'Pleading Guilty and Professional Relations in Australia: Comment' (2001) 22 *Justice System Journal* 185, 186.

52 Peter H Solomon, *Criminal Justice Policy, from Research to Reform* (Butterworths, 1983) 44.

53 John Jay Douglass, *Ethical Issues in Prosecution* (Houston University Law Centre, 1988) 267.

> Victims will say, well why should that person get a plea bargain? Why shouldn't all the charges go ahead? … And I will say, so that you do not have to come to court and give evidence, and so that we get a plea at the earliest possible time … whereas if we string everything out, you are not going to get justice for eighteen months and then you are going to have to come along to court and give evidence, which could be quite stressful. But if we accept the plea bargain now they will be out of your life … This is very difficult to explain and very difficult for them to comprehend.

This view is also reflected in Baldwin and McConville's analysis of plea bargaining in the UK, in which they found that 'citizens feel even if an offender is punished, the result of plea bargaining is that it is impossible to tell … if the punishment really fits the crime'.[54]

In light of such criticisms, and the absence of transparency surrounding plea bargaining more generally, prosecuting agencies have been criticised for the lack of information they provide to victims when an agreement is reached, and for the perceived limited consideration given to victims in the decision to bargain. This failure to recognise victims has been consistently identified as a major limitation because it means victims are 'not paid the fundamental courtesy by police and prosecutors of being informed of significant events and occurrences in the prosecution of … cases'.[55] Plea bargaining has also been identified as giving victims 'no opportunity for input … [which] is a source of frustration and anger for many victims'.[56] It has thus been recognised that 'victims not only felt frustrated and alienated from the justice system but, importantly, that this dissatisfaction focused on the process rather than the outcome of their cases'.[57] In response to such concerns, and in accordance with existing interstate and national policies which sought to incorporate the recognition of victims' rights into legislation or formal guidelines,[58] the *Charter* was enacted in Victoria in November 2006, with a primary aim being to increase victim satisfaction and understanding of the criminal justice system and its proceedings, including, albeit to a very limited extent, plea bargaining.

54 John Baldwin and Michael McConville, *Negotiated Justice: Pressures to Plead Guilty* (Martin Robertson, 1977) 105.

55 Dixon, above n 49, 7.

56 Strang, above n 24, 10.

57 Ibid 12.

58 All seven states and territories have established some type of recognition of victims' rights in legislation or formal guidelines. See, eg, *Charter of Victims' Rights 2003* (NSW); *Criminal Offence Victims Act 1995* (Qld); *Declaration of Victims' Rights 2001* (SA); *Northern Territory Charter for Victims of Crime 2005* (NT); *Victims' Charter Act 2006* (Vic); *Victims of Crime Act 1994* (WA); *Victims of Crime Act 1994* (ACT).

V THE *VICTIMS' CHARTER ACT 2006* (VIC)

The *Charter* outlines twelve principles that govern the actions of Victoria Police, the OPP and victim support agencies when responding to victims of crime.[59] A key aim of the *Charter* is to provide victims with legal recognition of the impact of crime upon them, and to ensure they are treated with courtesy, dignity and respect. The *Charter* also requires that victims be offered information, support and assistance throughout the prosecution process, in order to improve their overall experiences of the criminal justice process. The most significant aspect of the *Charter* in the context of this discussion, is the increased acknowledgement that must be given to victims in prosecutorial charging decisions under s 9, which for the first time in Victoria's history, places a statutory obligation on prosecutors to inform victims of any decisions to modify the charge(s) being proceeded with, and any decision to accept a guilty plea to a lesser charge(s).

Although the *Charter* constitutes significant progress for victims in providing them with some form of legal consideration when plea bargaining occurs, the plea bargaining process itself is not defined within the statute, nor is any acknowledgement given to 'plea bargaining' or to this process by any other name. In addition, while the author acknowledges the significance of the *Charter* in providing greater recognition to victims in the prosecution process, s 22(1)(a) creates a possible limitation for victims. This section states that the victim has no legal rights to pursue civil action following the perceived failure of the prosecution to adhere to his or her rights as dictated in the *Charter*. Consequently, an argument could be made that the legislation is not infallible in terms of being able to protect victims' interests or ensure they are upheld, as s 22(1)(a) effectively removes any liability from the prosecution in adhering to their statutory requirements. It should be noted however, that even without the capacity to pursue civil action, it is still possible for a victim to complain to the OPP if they believe the requirements of the *Charter* were not upheld in their case, following which, an internal review would be conducted. If the complaint was found to be justified, this would likely result in some form of disciplinary action being taken against the prosecutor by the OPP.

A *Victims, Plea Bargaining and the* Charter

Despite the potentially fallible nature of the *Charter*, the findings of this study suggest that the statutory recognition of victims' rights in the *Charter* has made a significant difference in prosecutorial approaches to plea bargaining, in terms of keeping victims informed, and generally seeking their opinions prior to making decisions. This was demonstrated during the observational fieldwork component of this research, where prosecutorial participants were consistently observed to be upholding the principles of the *Charter* in relation to keeping victims informed of any changes or proposed changes in the progression of their cases. In addition to the

59 *Victims' Charter Act 2006* (Vic) ss 6–17.

specified requirements, prosecutorial participants were further observed seeking victims' opinions, as well as those of the police informant and an authoritative prosecutor, before making a decision to plea bargain. For example, during one observation, after examining the brief of evidence, Prosecutor G rang Defence B, 'just to have a bit of a chat about whether their client has indicated which way they want to go, you know, if they [the accused] might plead guilty'. Defence B indicated that a guilty plea might be possible if an appropriate arrangement could be agreed upon. Following this conversation, Prosecutor G contacted the informant to discuss the case and ascertain his opinion, and then contacted the victim to obtain her perspective of the case progressing through plea bargaining, as opposed to a trial. Prosecutor G then spoke with the Crown prosecutor,[60] about making a possible plea bargain offer, outlining her recommendations and the opinions she had obtained. Prosecutor G and the Crown prosecutor then proposed an offer to Defence B, which involved withdrawing some of the charges. When asked about this process, Prosecutor G explained that:

> At all stages before we decide whether we would go with a resolution we speak with a Crown prosecutor and then there is a bit of bargaining down there of what they want and what we want, and what we think is appropriate and what the informant thinks is appropriate, and what the victim thinks … The Crown prosecutor has to look more to what is in the interests of justice in terms of what the victim wants and what's going to be appropriate in terms of the law. There can be lots of parties involved and putting their two bits in, but we always try to consider all of their views.

The internal policies implemented and/or updated to reflect the Crown's obligations to victims as dictated in the *Charter*, provides further evidence of its impact within the internal environment of the OPP — albeit such policies are informal, in that they are non-legally binding and unscrutinised.[61] Thus, while there are elements of the *Charter* that are problematic (for example s 22(1)(a)), it has appeared to have had some impact on general prosecutorial conduct in the plea bargaining process.

The generally supportive comments made by prosecutorial participants in relation to the *Charter* and their obligations to include the victim as a consideration in their charging decisions, also demonstrates the impact the *Charter* appears to have had on prosecutorial conduct. In specifically discussing s 9 of the *Charter*, 14 (of 19) prosecutorial participants acknowledged its significance both in terms of providing greater victim recognition and consideration, and in altering prosecutors' approaches to plea bargaining. The remaining five prosecutorial

60 Prosecutor M.

61 See, eg, OPP, *Preparing for a Case Conference in the County Court 2007* (Vic) s 11; *Preparing for a Supreme Court Section 5 Hearing, Case Conference and Directions' Hearing 2007* (Vic) s 3(a). See also the *Memorandum of Understanding 2007* (Vic) between Victoria Police, the OPP and the Witness Assistance Service division (OPP); OPP (Vic), *Pathways to Justice: A Guide to the Victorian Court System for Victims and Witnesses of Serious Crimes* (revised ed, 2011). In 2007, the OPP also established a Victims' Charter Implementation Committee to review the effectiveness of their internal processes and policies in upholding their obligations as dictated by the *Charter*.

participants maintained that despite no formal requirements having previously been imposed, victim consultation, as part of the plea bargaining process, already regularly occurred. Prosecutor A claimed, 'the [then] DPP has always been very big on victim consultation. Even before the *Charter* you could have a perfect settlement, but you had to discuss it with the victim'. While disregarding the significance of the *Charter* in regards to its impact on their personal conduct in plea bargaining, these five participants did note the significance of these requirements being implemented into legislation and acknowledged that this move did appear to have had a positive impact in increasing the consistency and number of victim consultations that occurred across the OPP more generally. Prosecutor D observed that, 'when I started [prosecuting], victim consultation wasn't something that happened. That has been a concept which has been a welcome development more formally than it once was'. In a similar vein, Prosecutor J claimed:

> I can't speak confidently about historically whether they were considered, but they are today. Today we are very conscious of the role and place of the victim in the criminal justice system. We have the *Charter* and we are conscious to put them to the forefront of our consideration and we won't resolve matters without having given consideration to the victims.

Although all 19 prosecutorial participants supported the principles behind the provision of additional recognition of victims' needs in s 9 of the *Charter*, some limitations of this acknowledgement involving workload pressures and victim perceptions were identified. Initially, the increased workload for prosecutors in contacting victims was considered a potential limitation that may emerge from the practical application of the statute. As Prosecutor I maintained, 'it is very labour intensive explaining that kind of thing to victims, because they are upset and don't want to accept what has been done'. Although not directly stating that victim consultation does not occur, the potential negative implications of Prosecutor I's comments are quite high, given that victims have no legal avenues with which to pursue a complaint if workload or any other pressures prohibit prosecutors from carrying out their statutory obligations to keep victims informed of charge amendments.

The second main limitation identified by participants was that the additional focus on the victim may create misperceptions about who the prosecution represents, and it may fuel misunderstandings about the level of influence the victim's opinions can have on charging decisions. As Prosecutor C claimed, 'the victim is not our client. I think that could be a misperception, they may think we are now acting for them'. Prosecutor N also maintained that:

> The way that the *Charter* sets out our obligations in relation to victims can be a little bit difficult for victims to understand. A lot of victims having watched a lot of crime dramas on TV think that we are their solicitors; that we act on their behalf. But there is a clear distinction between the solicitor-client relationship on the one hand, and the relationship that members of our office and indeed the DPP has with victims, even post the enactment of the *Charter*.

This potential limitation was identified by 10 of the 19 prosecutorial participants, including Prosecutor L, who claimed, in a very round-about manner, that while victim consideration is an important element of their role, it is not a 'primary goal':

> This is the Office of Public Prosecutions, not the Office of Private Prosecutions, so we have regard to what victims have to say, but it is not determinative; but we always have regard to what their position is, but that is not our primary goal. We are all very conscious of the need to have regard for what victims think. We would always in resolving a case have regard to what the victims think, as a general rule … but it is ultimately our call.

Although over half the prosecutorial participants were wary of the impact that the additional consideration of the victim may have on victims' perceptions of their role and influence on prosecution decisions, there was little resistance to the statutory requirements or evidence of non-compliance observed during the fieldwork component of this study. On the contrary, the observations of prosecutorial participants when considering a plea bargain offer demonstrated a strong commitment within the internal environment of the OPP to uphold the statutory obligations imposed upon them. For example, in one observation, Prosecutor F contacted the victim within minutes of receiving an offer from the defence. During this conversation she told the victim 'this is what they have offered, I still have to speak to someone about it, but I wanted to get your opinion on it'. The victim said she was not happy with the offer. Following this conversation, Prosecutor F contacted the Crown prosecutor involved in the case.[62] The Crown prosecutor was also dissatisfied with the offer, so in consultation with Prosecutor F, they determined a counter-offer that they considered adequately reflected the culpability of the offending behaviour and that they perceived took into account the victim's opinion. Prosecutor F then rang the victim to seek her opinion. This discussion was not observed; however, following the conservation, Prosecutor F stated that the victim told her she 'was happy with whatever they decided appropriate'. Prosecutor F then rang Defence D and said 'we reject your offer, but we would be willing to accept a plea of guilty to … [details the offer]'. Defence D said he would speak with his client and respond.

When asked how significant the victim's opinion was in making the decision not to accept the original plea bargain, Prosecutor F explained:

> If the victim had said I don't care I just want it to be over, I would discuss that with the Crown prosecutor, but if [Prosecutor N] said no it is too serious, then we won't accept it. We can't just accept it because the victim wants us to. We would explain that it is too serious and that the offer doesn't represent the seriousness of the offending … In one matter I received an offer, so I rang up the victim and they said "honestly, I don't care". But then I went to see [the Crown prosecutor] who said, "no he [the accused] has done the wrong thing, for us to proceed with that offer just because the

62 Prosecutor N.

> victim can't be bothered isn't good enough" … I rang back the victim and explained that, and they understood. Most victims understand that we will only recommend what we think is the best way for the matter to proceed. It just takes a bit of explaining, rather than just telling.

In line with Prosecutor F's comments, throughout the observations, victims' opinions were commonly sought, and explanations provided, prior to a decision being made as to whether to accept and/or offer a plea bargain. Prosecutorial participants were also observed to be upholding their statutory obligations to provide meaningful information to victims on any progress or changes in the case, particularly with the assistance of the Witness Assistance Service ('WAS') division. The WAS division is a significant point of contact for victims within the OPP and they can play an important mediating role between prosecutors and crime victims. For example, during one observation day, the WAS division scheduled two conferences with victims, a WAS counsellor and the relevant Crown solicitor and prosecutor. In one conference, the aim was to provide an explanation of why a plea bargain had been accepted, and in the second, the aim was to explain why plea bargaining was being considered as a method of case finalisation. These meetings were not observed due to ethical restrictions preventing the researcher from observing private discussions between victims and prosecutors; however following one of the conferences, Prosecutor V claimed that the WAS counsellor 'helped me clearly explain, in terms the victim could understand, the reasons behind why the plea offer was accepted and the benefits to them that would come from it. So the victim really got it, and they seemed much happier than if I had tried to tell them just by myself'.

The main stage of criminal justice proceedings at which it was most common for victims not to be informed of plea bargains prior to their acceptance, was during the pre-trial Committal Mentions in the Magistrates' Court. The reason for this appeared to be due to the fast pace and high volume of matters dealt with in this Court.[63] As Prosecutor G observed, 'it may be that sometimes it all happens very quickly in the Magistrates' [Court] and the victim might not be able to be contacted and it needs to be done on that day, so we have to go ahead without speaking to the victim'. This limitation has, however, been identified by the OPP, which has attempted to create safeguards, albeit informal and unscrutinised safeguards, to allow victims' views to be considered *before* a plea bargain is discussed with the defence. This is achieved by arranging consultations with victims prior to any offers being made; a consultation, Prosecutor O maintained, which occurs 'quite often':

> The Crown will often get a victim or victim's family in, if that person is deceased, and say how do you feel about this? We haven't decided anything, but this is what we think might happen. How do you feel about this? … So we get them in early to discuss things when we think a plea bargain is the way things are going to pan out.

63 Asher Flynn, 'Victoria's Legal Aid Funding Structure: Hindering the Ideals Inherent to the Pre-Trial Process' (2010) 34 *Criminal Law Journal* 48.

Prosecutor O's comments were supported by the observations, whereby on the three occasions (over a six-week period), when a victim could not be contacted prior to a guilty plea being entered as a result of a plea bargain, the relevant Crown solicitor and on one occasion, a WAS counsellor, contacted the victim as soon as possible following the plea. In these three cases, the victims were informed on the same day on which the plea was entered. In the interviews, participants also identified the situation in which a victim is not contacted to discuss a possible plea bargain prior to a guilty plea being entered as 'rare'.[64] As Prosecutor B explained:

> You would very, very rarely do a done deal with the defence without consulting with the victim, or at the very least, discussing it with them as a possibility beforehand … Victims are hurt, but they are not left out of anything. They are considered and their views are taken into account and we do discuss things with them.

B *Is the* Charter *Enough for Victims?*

Although the majority of the observation and interview data secured in this study demonstrated a predominantly positive outcome resulting from the introduction of s 9 of the *Charter*, there were still some comments made by participants which indicated that such positive outcomes were not always reflective of plea bargaining in practice. As Prosecutor N observed, 'while the *Charter* obliges us to try to explain to victims how and why things have happened in their case, and this does happen … there are still matters where plea bargaining happens, but the explanations do not'. Prosecutor J similarly claimed that 'in most cases, not all cases, but most, the victim is consulted and their opinion considered before we accept an offer, but not always'. These comments indicate that when plea bargaining occurs, the provision of transparent information about the progress of a case may still be problematic for some victims, even post the *Charter's* implementation. Similar observations were also evident in the Victoria Police's 2008–09 *Annual Report*,[65] which identified that the police compliance rate for responding to victims in line with their requirements, as dictated in the *Charter*, is at 75 per cent.

While a lack of consideration for victims was not evident in the fieldwork component of this study, these comments, combined with the potential workload pressures, unrealistic victim expectations (identified by the participants), and the inclusion of s 23(1)(a), suggest that having only one statutory requirement that guides prosecutorial conduct in relation to victims and plea bargaining, and only to a limited degree, cannot adequately address the potential consequences that can arise from plea bargaining. In particular, one formalised requirement that fails to define, regulate or acknowledge plea bargaining does not provide a guarantee that prosecutors will uphold their public and victim interest roles in the process. Instead, the one provision highlights a problem surrounding the

64 Prosecutor B.

65 Victoria Police, *Annual Report 2008–2009* (2009) 18.

legitimacy of plea bargaining, because neither the process nor the conduct of those involved within it are sufficiently scrutinised.

Without question, the *Charter* addresses some of the foremost limitations of plea bargaining that affect victims, at least to some degree. For example, by requiring that prosecutors not only inform, but explain to victims why certain decisions were made in their case, the limitations relating to victims feeling alienated and disempowered by the plea bargaining process can be reduced. Importantly, additional explanation of the plea bargain and why the decision was made to resolve the case can address the significant limitation that impacts on victim perceptions of being sold out, or the process failing to offer just outcomes. However, having only one section of legislation directing the discretionary powers and required conduct of prosecutors in plea bargaining, and to a fairly limited extent, given that plea bargaining itself is not specifically mentioned, reduces the ability of the *Charter* to address the needs of victims when plea bargaining occurs, or to combat the significant implications emerging from plea bargaining. This is particularly relevant in relation to reducing the legitimacy of a victim's status as a victim of crime, if the comments made by Prosecutor N and Prosecutor J, in terms of victim consultation not always occurring, are reflective of prosecutorial conduct in practice, even to a minor extent.

The requirements detailed in s 9 of the *Charter* also do not assist in ensuring the victim's full impact statement is available for consideration by the judge prior to the sentencing of the accused; nor does it alter the fact that in some cases, the crime will be recorded as being less severe, or with fewer charges than what actually occurred. Similarly, it does not compensate for the cases involving multiple victims, whereby not all victims will have their crime acknowledged, or a finding of guilt recorded.

When a case resolves through a plea bargain, the outcome is as the name suggests — a bargain, a deal is made to gain a guilty plea. Therefore, the limitations of the *Charter* in addressing issues such as the full victim impact statement being considered by a judge prior to sentencing an accused, or having all relevant charges applicable to the accused person's culpability recorded on the charge sheet and reflected in the agreed summary of facts, will never fully be addressed. But providing greater external transparency and control regarding the conduct of prosecutors in making these decisions, and recognising, in statute, that the practice of plea bargaining actually occurs, can offer some benefits in terms of granting a level of scrutiny to the process and the resulting outcomes. This recognition could also offer some scrutiny in that if an agreement is made that does not reflect the culpability of the accused person's conduct, it can more readily be recognised by the court, who can then use their powers under *Maxwell v The Queen*[66] to reject the accused person's guilty plea to the altered charges, if the plea does not sufficiently cover the offending behaviour, if the evidence does not substantiate the altered charges, or if the agreed summary of facts are inconsistent with the available evidence.

66 (1995) 184 CLR 501.

VI CONCLUSION

There are some potentially significant limitations for victims that arise from plea bargaining. While plea bargaining can also offer a mechanism for a case to be dealt with promptly and without the need for a trial, ultimately the private nature of the process and of prosecutorial discretion in making charging decisions, exacerbates the potential implications of plea bargaining — particularly as the motivations behind the plea deal are often shrouded in secrecy. The fact that this study's observations did not demonstrate any overt prosecutorial misconduct in plea bargaining and that the majority of the legal participants themselves believe prosecutors can be 'trusted' to appropriately engage in discussions (30 of 37 participants), does little to redress the potential consequences that can arise for victims, largely due to the absence of external transparency of plea bargaining. These implications remain because when plea bargaining occurs or a prosecutorial decision is made involving plea bargaining, there is no public transparency or accountability in the process or applied to the prosecution's discretion in making this significant decision. Justice is not seen to be done.

Providing greater statutory acknowledgement and control to plea bargaining to make the process and the conduct of those involved within it more transparent, is likely to provide greater consideration and recognition of victim needs and interests by legally recognising the rights of victims when plea bargaining occurs. In line with the prosecutorial obligations dictated in s 9 of the *Charter*, formalising plea bargaining could provide a mechanism to uphold a victim's need to be kept informed of their case's progression throughout the criminal justice process, with the additional outcome of greater scrutiny and transparency on the conduct of prosecutors in the plea bargaining process, and on the resulting outcomes. The benefits that arise from formally recognising plea bargaining as a criminal justice process could also extend to greater recognition and consideration of victim satisfaction and empowerment within the aims of the prosecution process more generally.

While the process of plea bargaining — in that a deal is made and a transparent trial avoided — creates a situation where all parties are unlikely to be entirely satisfied, at the very least, if this criminal justice process continues to be regularly used, it requires a greater level of external accountability, transparency and legitimacy, than that which it currently holds. A legal system cannot lay claim to being a justice system when charges and case facts are able to be negotiated and altered without external transparency, scrutiny or even recognition being applied. Although recognising plea bargaining in law may not address all possible limitations of the process for victims, this study suggests that it will at least provide victims with the primary need of being kept informed of their case and having some accountability and scrutiny applied to plea bargaining decisions; a benefit that cannot be achieved by relying on the operation of the *Charter* alone.