Secret Deals & Bargained Justice

Lifting the veil of secrecy surrounding plea bargaining in Victoria

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ABSTRACT

This thesis examines Victoria's plea bargaining process and argues that significant benefits would flow from formalisation, in the form of statutory recognition and control. Drawing upon the responses of 42 participants obtained from 57 semi-structured interviews, and the observations of 51 participants, it identifies and analyses the justifications driving the formalisation of Victoria's plea bargaining process, and discusses the practical and policy implications of formalisation for the adversarial legal culture, the actions of counsel and the judiciary, the pre-trial process and the Legal Aid funding structure. The interview data sheds light on judicial, prosecutorial, defence counsel and policy advisor perspectives, while the observations of legal participants in Victoria's criminal justice process, which focus on pre-trial hearings, facilitate a direct and engaged discussion of the policy implications and practicalities of formalisation.

The intention of this thesis is to stimulate debate about the lack of transparency, scrutiny or control in plea bargaining and the Crown's discretionary powers in making prosecutorial concessions. This thesis also aims to highlight the extent of inefficiency confronting the stability and effectiveness of Victoria's criminal justice system, and to demonstrate the importance of accountability and transparency in efficiency-driven processes, such as plea bargaining and pre-trial reform.

This thesis responds to a significant gap in the literature and in legal policy, and offers a vital contribution to criminology scholarship with a detailed analysis of a highly under-examined area in the Victorian context. In particular, the qualitative data and penetration of Victoria's legal culture provides a unique opportunity to examine the contentious and significant issues surrounding plea bargaining, which are often beyond the reach of researchers and the general public. Importantly, while this thesis examines plea bargaining in the Victorian context, increasing movements towards court efficiency and transparency across common law systems means its findings resonate with the wider Australian and international adoption of efficiency-driven processes. Furthermore, this thesis will inform broader discussions about plea bargaining, prosecutorial discretion, conflicts in adversarial traditions and efficiency-driven reform in a global context.

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Asher Flynn
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LIST OF ABBREVIATIONS

ABS	Australian Bureau of Statistics
ACT	Australian Capital Territory
AIC	Australian Institute of Criminology
AJAC	Access to Justice Advisory Committee
ALRC	Australian Law Reform Commission
CASA	Centre against Sexual Assault
CPS	Crown Prosecutorial Service
DPP	Director of Public Prosecutions
ERM	Early Resolution Manager
Human Rights Charter 2006 (Vic)	*Charter of Human Rights and Responsibilities Act 2006* (Vic))
ICO	Intensive Correction Order
NSW	New South Wales
NZ	New Zealand
OPP	Office of Public Prosecutions
SCAG	Standing Committee of Attorneys General
SCRGPS	Victorian Steering Committee for the Review of Government Provision Services
The Guidelines	*Attorney General's guidelines on the acceptance of pleas and the prosecutor's role in the sentencing exercise 2005*
The Rules	Federal Rules of Criminal Procedure (US)
The Unit	Specialist Sexual Offences Unit
UK	United Kingdom
US	United States
VCCAV	Victorian Community Council Against Violence
Victims' Charter 2006 (Vic)	*Victims' Charter Act 2006* (Vic)
VIS	Victim Impact Statement
VPS	Victim Personal Statement
VLRC	Victorian Law Reform Commission
VSAC	Victorian Sentencing Advisory Council
WA	Western Australia
WALRC	Western Australian Law Reform Commission
WAS	Witness Assistance Services

INTRODUCTION
LIFTING THE VEIL OF SECRECY SURROUNDING PLEA BARGAINING IN VICTORIA

Because [plea bargains] are not conducted in court and are not, therefore, open to public scrutiny, it is extremely important that they be conducted in such a way that the community can be satisfied that the public interest is being properly served and that the rights and interests of the accused are not being abused (Victorian Shorter Trials Committee, 1985, p. 143).

In the justice system, you are often dealing with people who have substance abuse problems or psychological or psychiatric problems, or other pressures which they are ill-equipped to deal with anyway…So I have no doubt that defendants would feel, on occasions, a degree of pressure when making a pleading decision...I suppose it is a question of whether plea bargaining affects a genuine and informed decision being made that is the issue (ProsecutorH).

There is a push for accused people to plead guilty, particularly with concerns surrounding last-minute guilty pleas. There are huge delays and there is an objective to get through court productivity and increase our disposal rates in the County Court. We want the guilty plea at the earliest opportunity and that is where plea bargaining can come into play…I can understand that some victims very much resent it and there is a lot of opposition and concern about it, because I don't think the public are very conscious or very aware of what plea bargaining is. They get concerned about sentences and that is tied up with plea bargaining. Because, in the end, if you negotiate the settlement, then it is often a lower sentence. I think the problem is that plea bargaining is not in the public eye at all (JudiciaryF).

Both sides are competent of making the appropriate decision…No-one is sold down the river (Defence CounselC).

What price is a human life? What price is my mother's life? There is not a day that goes by that I do not think of this and shudder, and my nights are often tortured…It is obvious that legislation governing plea bargaining need be brought into line (daughter of a manslaughter victim, Summers, 2002, p. 21).

Introduction

Like many common law systems, Victoria's criminal justice system faces significant problems emanating from a vicious cycle of delay, and reduced public confidence. These long delays, particularly in the intermediate jurisdiction of the County Court have fuelled moves towards the increasing use of efficiency-driven processes; albeit such moves are often promoted as embodying benefits for victims, defendants and the public, rather than

merely increasing court efficiency. The most effective mechanism to increase efficiency in the criminal courts is to eliminate the number of trials which could have resolved by an early guilty plea (Australian Justice Advisory Committee, 1994; Chan & Barnes, 1995; Corns, 1997; Karpin, 1990; SCAG, 1999, 2000; Shorter Trials Committee, 1985; Victorian Attorney General's Department, 2004; Victorian Sentencing Advisory Council, 2007c). To increase the number of early guilty pleas, incentives, usually in the form of sentence discounts or prosecutorial concessions on the format of charges and case facts, are offered to defendants with the public justification that shorter criminal proceedings benefit all parties. However, when such incentives are provided, increased pressure can be placed upon defendants to plead guilty, while in the public eye these incentives can be seen to unjustly reward defendants, particularly when a sentence discount is the result. This can in turn lead to victims feeling unfairly treated, which fuels public dissatisfaction and decreased confidence in the administration of justice (Ashworth, 1994; Tyler, 1984). Reduced public confidence in this aspect of criminal proceedings is often solely attributed to the incentives associated with what are perceived to be lenient sentences, inappropriate sentence discounts and inadequate judicial decisions (Doob & Roberts, 1983; Hough & Park, 2002; Hough & Roberts, 1998, 2004; Indermaur, 1987, 2006; Mirrlees-Black, 2002; Roberts, 2002). However, a key element of this public dissatisfaction that receives less attention, but is potentially more controversial given the lack of control, transparency and accountability surrounding prosecutorial discretion, arises from the concessions offered on the format of charges and case facts. These prosecutorial discretions are more commonly referred to as plea bargains.

Victorian plea bargaining practices involve a Crown prosecutor or solicitor from the Office of Public Prosecutions (OPP) engaging in an informal discussion with defence counsel on the defendant's likely plea, the possibility of negotiating the charge(s) and/or case facts, and the Crown's possible sentencing submission. Plea bargaining can involve face-to-face meetings, phone calls, emails or facsimiles, and can occur at any time prior to the trial's conclusion. The primary aim of plea bargaining is to arrive at a mutually acceptable agreement between the Crown and defence counsel, according to which the defendant pleads guilty. At the very minimum, discussions aim to identify any issues not in dispute, thus reducing the length of subsequent criminal proceedings and limiting the likelihood of later delays—for example, through trial adjournments. Depending on the jurisdiction, this practice is also labelled 'charge bargaining', 'plea negotiations', 'pre-trial discussions' and 'plea agreements' (Freiberg & Seifman, 2001; Mack & Roach Anleu, 1995; Samuels, 2002). In this research, the terms 'plea bargaining', 'discussions' or 'plea bargains' are used interchangeably in reference to this process.

Given the potential outcomes of plea bargaining—that the defendant pleads guilty and the case resolves without need for a contested trial—discussions are often justified because they reduce court delays, thus providing efficiency benefits that reduce financial

and resource expenditure, and spare victims and defendants from drawn-out proceedings. While plea bargaining is justified on this utilitarian basis, the absence of legal acknowledgement, transparency or control of the discussions, their outcomes or the conduct of those involved within them raises doubt over its legitimacy as a justifiable criminal justice process.

In Victoria, there are no official statistics kept detailing when or why plea bargaining occurs, or how often discussions result in guilty pleas. Importantly, plea bargaining is not recognised in or controlled in any Victorian statute. Thus not only is the process itself not monitored in any statistical or formal sense, but there is also no legal acknowledgement of plea bargaining in Victoria. Instead, it falls under the Crown's discretionary powers, which means we solely rely upon trusting those who engage in discussions to ensure the process, and resulting agreements, uphold the same basic principles and rules of procedure that apply to more transparent proceedings, like the trial. This is particularly concerning given that agreements can alter the seriousness of the conviction and sentence imposed on defendants, and can remove the opportunity for the victim to provide testimony or for the Crown to prove its case within the confines of the contested trial.

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 have access to criminal proceedings except in rare cases under exceptional circumstances (Ashworth, 1994).[1] In addition, because of this non-transparent way of providing justice, questions can emerge over the Crown's motivations for plea bargaining, particularly given the potential for efficiency gains to be prioritised over victim, defendant and public interests. What is quite significant about this aberration from the principle of open and public justice is the lack of criminological and legal research examining plea bargaining's non-transparency, its potential impact on the relevant parties to proceedings, and on the administration of justice. In particular, there is a prominent gap in criminology scholarship on the potential justifications for whether plea bargaining should, or how it could, be formalised.

The absence of a Victorian-based analysis of plea bargaining's informality and of the lack of accountability surrounding the process was acutely evident following the Victorian case, *R v GAS; R v SJK* [2002] VSC 94, or more specifically the appeal made to the Australian High Court (*R v GAS; R v SJK* (2004) 206 ALR 116). The Australian High Court's ruling in this appeal was the first to provide any official recognition of plea bargaining. The case itself involved two offenders who sexually and physically assaulted a victim, which ultimately resulted in her death (*R v GAS; R v SJK* [2002] VSC 94). Due to forensic difficulties in identifying who was the primary offender, the Crown entered into discussions with both defendants. An agreement was subsequently made whereby both

[1] For example, the court may be closed to public viewing when a protected witness is testifying (*Evidence Act 1958* (Vic) s.42BQ(6)).

defendants would plead guilty to manslaughter by an unlawful and dangerous act, on the provision that the Crown's sentencing submission would state that they should be sentenced as aiders and abettors, meaning they should receive a lesser sentence than if they were charged as a principal offender.

Originally, the defendants were sentenced to six years imprisonment with a non-parole period of four years (*R v GAS; R v SJK* [2002] VSC 94). The Crown then appealed on the basis that the sentences were manifestly inadequate, and that the judge had failed to consider all relevant issues, including the seriousness of the offence and general and specific deterrence (*R v GAS; R v SJK* [2002] VSCA 131 at 36). In hearing the appeal, the Victorian Court of Criminal Appeal increased both sentences to nine years imprisonment, with a non-parole period of six years. Two years later, the contents of the plea bargain and the Director of Public Prosecutions's (DPP) decision to lodge the initial appeal were the focus of a defence appeal to the Australian High Court (*R v GAS; R v SJK* (2004) 206 ALR 116).

In this case, the lack of control surrounding prosecutorial decision-making in plea bargaining resulted in negative consequences for all parties, particularly the victim's family and the defendants. Initially, both the plea bargain and prosecutorial conduct were criticised because the victim's family were not provided with accurate details of the agreement or told that there was any possibility that plea bargaining might occur, until just before the defendants pled guilty (Hunt & Gardiner, 2002, p. 1). The victim's family also claimed that the Crown informed them that the defendants would plead guilty to manslaughter because it was too difficult to establish the primary offender beyond all reasonable doubt; however, the family claimed they were further informed that, when pleading, the defendants would state that they murdered the victim. This did not occur (Hunt & Gardiner, 2002, p. 1). The negative impacts of this were detailed in an article written by the victim's daughter, who criticised plea bargaining for failing to uphold victim interests, and called for legislation to control plea bargaining and prosecutorial discretion (Summers, 2002, p. 21).

The defendants perceived themselves as victims of the unscrutinised process, because the Crown reneged on the initial agreement to which they entered their guilty pleas. The defendants agreed to plead guilty to manslaughter by an unlawful and dangerous act on the basis that they would be sentenced as aiders and abettors. The defence counsel argued that the DPP's conduct in seeking a higher penalty by appealing the original sentences broke the agreement because the basis upon which the defendants had pled guilty was no longer upheld. Therefore, the increased sentences were perceived to be unjust and non-reflective of the original agreement. The lack of transparency surrounding the agreement and the Crown's discretion in making and changing plea bargain agreements thus became the focus of the defence appeal, which meant for the first time in Victoria's history a court was required to address plea bargaining issues (*R v GAS; R v SJK* (2004) 206 ALR 116).

Upon hearing the appeal, the Australian High Court predominantly focused on the required roles of the parties within proceedings, including that it is the Crown's responsibility to determine which charges to proceed with (*R v GAS; R v SJK* (2004) 206 ALR 116 at 28); it is the defendant's responsibility to decide whether to plead guilty and this decision cannot be made with any foreknowledge of the sentence, other than the advice provided by their representative on what might transpire (at 28) and; it is the judge's role to determine an appropriate sentence, based on the facts presented to the court (at 31). In directly discussing the plea bargain, the court stated that while there may be an understanding between counsel as to what evidence will be provided or what sentencing or legal submissions will be made, this understanding does not bind the judge in determining the sentence, other than in the practical sense that the judge may be limited to the agreed summary of facts presented (at 31). The court then noted that any agreement made between counsel 'which may later be said to be relevant to the defendant's decision to plead guilty' (at 42) should be recorded in writing, and copies maintained by both parties. The court suggested that:

> Recording what is agreed, in an agreed form of words, should reduce the scope for misunderstanding what is to be, or has been, agreed. It should serve to focus the minds of counsel, and the parties…Most importantly, it enables counsel for both sides to be clear about the instructions to be obtained from their respective clients and the matters about which, and basis on which, counsel should tender advice to their respective clients. There should then be far less room for subsequent debate about the basis on which an accused person chose to enter a plea of guilty (at 42–44).

In making this statement, the court provided some recognition of plea bargaining and the potentially negative consequences of its lack of formality. The court also alluded to the need to provide transparency to plea bargaining by suggesting that written records of agreements be maintained. However, the court did not put forward any significant regulation or scrutiny of discussions, despite being given the opportunity to do so.

The fact that the comments of the Australian High Court made in 2004 compromised the first, and to date remain the only, instance of a Victorian authority (case law and legislation) to acknowledge plea bargaining or attempt to provide transparency to the process, demonstrates a significant gap in legal policy which explicitly contradicts the principle of public and open justice. This gap is also concerning given the potential consequences and negative implications that can result from an unscrutinised agreement, as demonstrated by the 2002 case (*R v GAS; R v SJK* [2002] VSC 94).

Purpose & Scope

In responding to this gap in legal policy and scholarship, this research aims to identify and analyse the justifications driving the formalisation of Victoria's plea bargaining process in

statute. Drawing upon the responses of 42 participants obtained from 57 semi-structured interviews, and the observations of 51 participants working within Victoria's criminal justice system, it examines the issues arising from the potential formalisation of plea bargaining. It also discusses the practical and policy implications of formalisation for the actions of counsel and the judiciary, the pre-trial process and Legal Aid funding within an adversarial context. The interview data sheds light on judicial, prosecutorial, defence counsel and policy advisor perspectives, while the observations of legal participants, which focus on pre-trial hearings, facilitate a direct and engaged discussion on the policy implications and practicalities of formalisation. The qualitative approach of this analysis offers a vital contribution to criminology scholarship by examining a highly controversial and informal process, from a perspective within Victoria's legal culture. This analysis also seeks to inform legal policy, given the increasing focus on reforms in Victoria's criminal justice system that consider victim interests (see the *Victims' Charter Act 2006* (Vic)), uphold human rights (see the *Charter of Human Rights and Responsibilities Act 2006* (Vic)) and increase the efficiency and transparency of criminal proceedings (see s.208-s.209 of the *Criminal Procedure Act 2009* (Vic); s.6AAA of the *Sentencing Act 1991* (Vic)). This discussion focuses on indictable offences that impact directly on victims.[2] The majority of these cases are heard in the (intermediate) County Court;—thus this court is the main focus of this analysis. The occurrence of plea bargaining in the (superior) Supreme Court and (lower) Magistrates' Court is explored where relevant.

Given the public and open justice ideals within the criminal justice system, this thesis intends to stimulate debate about the lack of transparency, scrutiny or control in plea bargaining and the Crown's discretionary powers in making prosecutorial concessions. This thesis also aims to highlight the extent of court inefficiency confronting the stability and effectiveness of Victoria's criminal justice system, and to demonstrate the importance of accountability and transparency in efficiency-driven processes, such as plea bargaining and pre-trial reform. Importantly, while this research examines plea bargaining in the Victorian context, increasing movements towards court efficiency and transparency across common law systems means these findings resonate with the wider Australian and international adoption of efficiency-driven processes. This thesis will also inform broader discussions about plea bargaining, prosecutorial discretion, conflicts in adversarial traditions and efficiency-driven reform in a global context.

Plea bargaining plays a significant role in Victoria's criminal justice system, largely due to its potential utilitarian and emotional benefits which can extend to all parties. This research therefore does not suggest the abolition or restriction of plea bargaining; rather, it focuses on the perceived (il)legitimacy of plea bargaining, in particular how its informality can work to reduce its legitimacy and impede the justifications for its use. For this reason,

[2] For example, homicide, manslaughter, sexual offences, kidnapping, theft, assault, fraud and any offences which involve primary victims as outlined in the *Crimes Act 1958* (Vic) Part 1.

plea bargaining's benefits and limitations are not explored in great detail. Instead, the benefits and limitations associated with formalising plea bargaining and the positive outcomes that could flow from increased acknowledgement of its value are examined. In addition, while acknowledging the importance of research that analyses plea bargaining in direct contrast to the rules of evidence and procedure applied to the criminal trial, the scope of this thesis does not extend to a discussion on these issues, other than to highlight the potential limitations resulting from plea bargaining's non-transparency when compared with other scrutinised and more structured processes. In this analysis, plea bargaining is the focus of the discussion, and is considered a process independent of the trial that is worthy of extensive critique.

Significantly, this research does not recognise sentence indications as plea bargaining. Sentence indications involve a judge informing a defendant of the likely sentence order and/or range that could be received if a guilty plea were to be entered. Due to the similarities of this process to plea bargaining, or more precisely, to the US system of range bargaining, whereby the agreement involves both counsel and/or the judge determining a specific sentencing range, sentence indications are at times considered a type of plea bargain. In the context of this thesis however, sentence indications and plea bargaining are considered alternate processes, with sentence indications being a mechanism of the courts, independent of the discussions that occur between counsel.

Thesis Structure: Chapter Overview

This thesis is divided into five analysis chapters and contains a methodology overview, literature review, and introductory and concluding chapters. The introductory chapter explores the motivations for, purpose and scope of this research and provides an outline of the thesis structure. The introduction is immediately followed by the methodological overview, outlining the research design and approach.

Chapter One: Filling a gap examines a range of literature on plea bargaining issues. In particular, two Australian studies from which this research drew its motivation, and upon which it is intended to extend, are detailed. After defining plea bargaining, the review examines four key issues that emerge from the literature: (1) court inefficiency; (2) sentence discounts; (3) the formalisation debate; and (4) formalisation initiatives. The review incorporates literature discussing Australian and international criminal jurisdictions, particularly where plea bargaining or pre-trial reform has occurred. In doing so, it highlights the contribution of this research to criminology scholarship in providing a Victorian-based analysis of plea bargaining's potential formalisation.

Chapter Two: Motivations for formalisation analyses the three main motivations fuelling the formalisation of previously unregulated criminal justice processes. These are: (1) the discretionary powers of criminal justice agencies; (2) the evolving status of victims

and their increased recognition in law reform; and (3) court inefficiency. These motivations are used to create a foundation for discussing the formalisation of plea bargaining in Victoria. This chapter contextualises the research within the broader topic and theoretical areas, and highlights this study's significance in addressing like concerns in the Victorian context.

Chapter Three: Lifting the veil of secrecy details the main justifications driving the formalisation of plea bargaining in Victoria. This chapter explores the existing prosecutorial decision-making process and examines reasons for and against the formalisation of plea bargaining, with a particular focus on the principle of public and open justice.

Chapter Four: A fight to the bitter end? Contradictions between an adversarial culture and early resolution ideals extends upon the discussion of the benefits of and justifications for formalisation identified in Chapter Three, with a specific focus on the implications of adversarial traditions for the informal plea bargaining process. This chapter examines the contradictions that exist in a system that embraces adversarial traditions, while aiming to achieve court efficiency. The impacts of the adversarial culture on consistent prosecutorial and defence approaches to plea bargaining are also explored as one justification for formalisation. Chapter Four also examines Victoria's Legal Aid funding structure and how it can negatively impact on early resolutions and court inefficiency. In particular, it examines the adversarial and combative focus of the structure, which provides financial incentives to counsel to not seek early resolutions.

Chapter Five: Pre-trial proceedings: Another step in the march towards the contest explores Victoria's pre-trial process and its impact on plea bargaining. This chapter provides an overview of how the pre-trial process operates and examines some concerns arising from its application. The impacts of informality and non-transparency identified in Chapters Three and Four are further explored in the context of the pre-trial process, with a focus on the lack of statutory acknowledgement of the pre-trial hearings which facilitate discussions between counsel. The impact of adversarial traditions on the attitudes and conduct of counsel, as identified in Chapter Four, is also explored in the context of how this impacts on counsel preparation and participation in pre-trial hearings and discussions.

Chapter Six: Sentence Indications: Increasing court efficiency at the expense of justice examines the potential consequences of formalising efficiency-driven reform in statute. Chapter Six analyses the legislated sentence indication scheme implemented into Victoria's indictable pre-trial process in July 2008. This chapter critiques the reform and examines the potential for efficiency-driven reforms to neglect victim, defendant and public interests. This analysis demonstrates the importance of ensuring that plea bargaining's formalisation is achieved with increasing transparency as the primary aim, as opposed to seeking increased efficiency alone.

Summaries of the main findings, conclusions and observations of this research are outlined and reviewed in the conclusion, **Chapter Seven: Conclusion – Transparency is the key to lifting the veil of secrecy surrounding plea bargaining in Victoria**. The conclusion explores the possible policy implications of the findings, and emphasises this research's significance and contribution to the legal and criminological fields. In addition, it acknowledges this study's potential limitations and the need for additional research in this area.

Through a grounded and extensive analysis of literature, legislation, case law, interviews and observations, this thesis provides a unique and much needed analysis of the justifications for formalising plea bargaining in Victoria, to lift the veil of secrecy surrounding discussions. The following sections provide an overview of the research design and methodological approach used to compile this analysis.

METHODOLOGY
CONCEPTUAL FRAMEWORK & RESEARCH DESIGN

> *In attempting to understand a social or political process such as…justice, the process itself must be learned in intricate detail. The initial task then, when studying any aspect of court operations, is to penetrate this haze surrounding the bureaucracy and determine the essentials of the process. Two immediate problems arise in this connection. The first relates to the setting of plea bargaining. Unlike appellate court hearings or trials…no formally designated area is set aside for plea bargaining, nor is any formal record kept...Plea bargaining can take place in innumerable locations, at no specified time. Patterns of plea bargaining vary significantly across courts and actors…Compounding this problem is the oft-noted willingness of court actors to discuss these plea bargaining practices with outsiders…[Thus] it is likely that the highways and byways of plea bargaining remain untravelled by the researcher (Heumann, 1978a, p. 12).*

This empirical, qualitative analysis employs semi-structured interviews, participant observation and the examination of primary source documents to scrutinise plea bargaining's potential formalisation in Victoria. It diverges from a scientific, detached evaluation, insofar as it is a multifaceted and engaged qualitative analysis of plea bargaining within Victoria's adversarial justice system. This research employs a legalistic framework; so in addition to qualitative data analysis, it draws upon legislation, case law and informal policies regulating legal conduct in criminal proceedings. This research does not embody a specific ideology or perspective, but recognises the main ideologies that govern diverse perceptions of law reform, with a particular focus on understandings of crime control and due process. It thus provides a contextualised understanding of plea bargaining's potential formalisation through multifaceted perspectives and considerations.

Primary Source Documents

The examination of primary source documents including reports, case law, legislation, court *Practice Notes* and the OPP's *Director's Policies* and *Practice Guides* assisted in evaluating and defining the practice and processes associated with plea bargaining. These documents are drawn from Victorian, interstate and international criminal jurisdictions from the 1950s until April 2009.[3] The qualitative, critical analysis of these documents offered a preliminary understanding of plea bargaining issues, including the extent of secrecy surrounding Victoria's plea bargaining process, the benefits and limitations of discussions and the differing types of agreements. This material also provided an outline of the existing informal regulations on discussions within internal OPP policies. The exploration of these documents provided the foundation from which this analysis could address and understand the gaps in legal policy. It also shaped the theoretical framework and focused the fieldwork, by informing interview questions and providing insight into possible processes relevant for observation.

Interviews

Semi-structured interviews are the main source of data in this research. As interviews provide 'rich insights into people's biographies, experiences, opinions, values, aspirations, attitudes and feelings' (May, 2001, p. 120), they were an important tool in gathering information and opinions from participants directly involved in plea bargaining, and those involved in making or proposing law reform. Semi-structured interviews were selected because they are positioned between the ordered technique of structured interviews and the flexible, free-flowing style of in-depth interviews. The questions thus remain sufficiently structured to allow for comparative analysis of responses, while there remains sufficient flexibility to probe beyond the questions to seek elaboration and clarification (Devine & Heath, 1999; Seidman, 1998). This is achieved with the assistance of an interview schedule which allows participants' full perspectives to be obtained, without significant deviation from the questions or from the research's focus identified prior to the interviews (May 2001, p. 123; Seidman 1998, p. 104).[4] The two schedules used in the fieldwork also provided a mechanism to maintain control over the direction of the interviews, which was important to ensure because the professional roles of the participants commonly involve them controlling their interactions with others.[5]

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[3] The data collection was concluded in April 2009. However, any relevant material that was yet to be finalised by 30 April 2009, but had been discussed within legal circles or proposed as possible reform recommendations before this deadline, are footnoted where appropriate.

[4] The interview schedules are contained in Appendix A and Appendix B.

[5] Not all participants were asked every question in the interview schedules. Thus, in the subsequent chapters that discuss participants' responses, the number of participants who were asked a question is cited in conjunction with the number of participants who supported or opposed the issue. For example, although there

Participants

The fieldwork involved two interview periods. In the initial interview period, 42 interviews were conducted over a period of ten months in 2007. The mean interview duration was 50 minutes. These interviews were conducted at the interviewees' workplaces or at the criminal courts during regular business hours.

Table 1-1: Initial Interview Participants

Group Name	Number of Participants	Where the interviews occurred
Prosecutorial	19	Victoria
Defence Counsel	11	Victoria
Judiciary	7	Victoria
Policy Advisors	5	Victoria; United Kingdom

The follow-up interview period was conducted solely to ascertain opinions on the legislation implemented in July 2008, which introduced sentence indications into Victoria's summary and indictable jurisdictions (*Criminal Procedure Act 2009* (Vic) s.61, s.208-s.209). Due to time constraints, follow-up interviews were conducted with fifteen participants, all from among the participants from the initial interview period. These participants were selected based on their involvement in the pre-trial process, which meant they were most likely to have in-depth knowledge and experience with the legislated scheme. These interviews were conducted between October 2008 and February 2009. Given the specific focus of these interviews, a decision was made to seek written responses to the questions, where possible. As such, two interviews were conducted at the interviewees' workplaces or at the criminal courts during regular business hours (n=one defence counsel; n=one judiciary), three were conducted on the phone (n=three prosecutorial) and ten were conducted via email and written response (n=four prosecutorial; n=two defence counsel; n=four judiciary).

Table 1-2: Follow-Up Interview Participants

Group Name	Number of Participants	Where the interviews occurred
Prosecutorial	7	Victoria
Defence Counsel	3	Victoria
Judiciary	5	Victoria

were nineteen prosecutorial interview participants, when discussing an issue in detail, the analysis may state that ten out of twelve prosecutorial participants supported a particular view, or that one out of three prosecutorial participants opposed a particular view.

All interview participants were initially selected according to their availability and professional roles. However, in order to increase the diversity of responses, judicial, prosecutorial and defence counsel participants were also selected based on their experience and seniority. Prosecutorial participants were all employees of the Victorian State OPP, and included article clerks (n=one), instructing solicitors (n=two), junior solicitors (n=two), Crown prosecutors (n=six), Program Managers (n=two), education and development staff (n=one), Witness Assistance Service counsellors (n=two), policy advisors (n=one) and Director of Public Prosecutions (n=2). The Victorian State OPP's criminal division is divided into twelve sections; prosecutorial participants represented seven of these: (1) Policy Advising and Court of Appeal (n=three); (2) Specialist Sexual Offences Unit (n=four); (3) Committal Advocacy (n=four); (4) General Prosecutions (n=four); (5) Corruption (n=one); (6) Organised Crime (n=one); and (7) Witness Assistance Services (WAS) (n=two).[6] Within these seven divisions, the Specialist Sexual Offences Unit; Committal Advocacy; Policy Advising and Court of Appeals; and General Prosecutions divisions represented the greatest number of prosecutorial participants because plea bargaining and law reform were perceived to most regularly occur in these four divisions. Prosecutorial participants were also representative of the three criminal courts: the County and Supreme Courts (n=fifteen), and the Magistrates' Court (n=four).

Participants from the defence counsel group were also selected to represent a range of experience. This included Legal Aid solicitors (n=two) and counsel (n=one), instructing solicitors (n=two), barristers (n=three) and Queens and Senior Counsel (n=three). These participants were also representative of the three criminal courts (Magistrates' Court n=five; and the County and Supreme Courts n=six). Judicial participants also represented the three criminal courts, with the majority from the County Court (n=four). Participants included Magistrates (n=one), Judges (n=four) and Justices (n=two).

Given the focus on Victoria, the interviews were primarily conducted in Victoria. However, three interviews were conducted in the United Kingdom (UK) with policy advisors who were involved in the research into, implementation and supervision of formal guidelines that regulate the conduct of Crown representatives when plea bargaining. Two of these participants were also involved in conducting a review which recommended introducing a formalised plea bargaining system for fraud-related offences (UK Fraud Review, 2007). Policy advisor participants thus represented subdivisions of the Victorian Government (n=two), the UK Office of the Attorney General (n=two) and the UK Crown Prosecutorial Service (CPS) (n=one).[7]

[6] The five criminal divisions not represented in the research were: (1) County Court Appeals; (2) Commercial Crime; (3) Bail and Breaches; (4) Circuit; and (5) Drugs. These groups were not perceived to engage in plea bargaining or plea bargaining related issues to the same degree as the other divisions, so participants were therefore not sought.

[7] The CPS is equivalent to the Victorian State OPP.

While this research is not a comparative study of plea bargaining across jurisdictions, insight into the approach of the UK justice system contributed to understanding formalisation issues and provided an example of plea bargaining reform which actively controls prosecutorial discretion. In addition, the strong public interest and transparency roles of the UK prosecutors provided a comparative basis for analysing the lack of transparency and accountability on prosecutorial conduct in Victoria's plea bargaining process. These interviews also provided another mechanism for the findings to resonate with broader, international audiences, which could not have been achieved from conducting interviews with Victorian participants alone.

The decision not to include victim or defendant perspectives in the research was made largely due to the legalistic focus of this analysis, which utilises legal perspectives on plea bargaining and its potential formalisation to inform discussions, as opposed to seeking perspectives from individuals not directly involved in the legal realm. As a result, any discussions of the potential issues and concerns confronting victims and defendants when plea bargaining occurs are informed by the perspectives of the legal participants. Because it is anticipated that defendant and victim perspectives might indeed be different from those of professionals, such discussions are also informed by the literature, which covers both perspectives.

Participant Observation

The two main aims of conducting participant observation were to gain a direct insight into legal culture and plea bargaining, and to develop a deeper understanding of the legal and practical issues surrounding plea bargaining's formalisation. As McConville (2002a) acutely argues, 'what is stated as the law in books has to be matched by an evaluation of the way the process works in practice' (p. 4).

Participant observation is defined as the 'process in which an investigator engages in a social scene, experiences it and seeks to understand and explain it' (May, 2001, p. 174). It thus:

> involves, quite basically, placing oneself in direct personal contact with the group one is intent to study as they go about their affairs. In contrast to interview techniques wherein we ask people to tell us about their experiences and activities, observational fieldwork entails witnessing people's lives and circumstances firsthand (Weinberg, 2000, p. 135).

In the context of this research, participant observation involved observing participants within their working environments to gain a direct understanding of the issues they confront, the processes with which they engage, how they apply themselves to undertaking their required roles and the daily obstacles and interactions they encounter within Victoria's criminal justice process. This approach was particularly significant because it provided a unique insight into how Victoria's legal culture operates from a closer, more direct

viewpoint, rather than informing the analysis solely with participants' opinions. In addition, it provided a mechanism to assess whether participants' interview responses reflected their actual conduct.

The 'participant as observer approach' (Bryman, 1988) adopted required the intentions of the research to be fully revealed to participants; thus all potential participants were provided with an explanatory statement outlining the study's purpose and intentions. This statement was emailed to all employees at the OPP and potential participants from the criminal courts prior to the fieldwork commencing, to ensure that even non-participants working in these environments were aware of the research when the observations took place. This approach meant I did not try to become a member of the research group; rather I observed participants as an individual looking into their environment (Gold, 1969, p. 22). Thus, although I sought to become part of the environment, I kept myself from being 'completely drawn in…[yet] interact[ed] frequently and intensively enough to be recognised by members as an insider and to acquire firsthand information and insight' (Adler & Adler, 1987, p. 24).

Participant observation in combination with semi-structured interviews offered many benefits that could not have been attained by conducting interviews alone. Importantly, this method provided more complete data, because it allowed the research to directly experience the situations, conflicts and pressures that arise every day in the context of plea bargaining, in addition to hearing the participants voice their concerns and views around these issues. Accessing information on the usually hidden processes associated with plea bargaining through observations was particularly beneficial, given the complications that invariably arise for researchers who, as outsiders, attempt to gain access to legal cultures (Heumann, 1978a, p. 12). This was a significant concern in initially determining the methodological approach, particularly in light of plea bargaining's informality and because there are no recorded statistics on plea bargaining in Victoria. While it is possible to access internal OPP and court policies guiding legal conduct, simply analysing these documents and participants' opinions of them would not have provided the necessary insight into how the conduct of counsel and the judiciary transpires in reality, under the intense pressure created by the criminal justice process. It would also not have demonstrated whether the existing internal mechanisms work effectively in practice, as opposed to how they appear on paper. Using participant observation thus allowed me to access this information and uphold the aims of the research, by ensuring this analysis was reflective not only of the views and interests of the legal participants, but also of criminal proceedings more broadly.

Observing multiple participants who represent the prosecutorial, judiciary and defence counsel groups also provided a multifaceted understanding of plea bargaining within the Victorian context. This allowed for patterns of behaviour to be observed, allowing the research to assess whether there was consistency in counsel approaches to and

use of plea bargaining. These observations also highlighted recurrent issues of concern that emerged from all three groups.

The main potential limitation of participant observation is that the intrusiveness of the researcher may impact on participants' behaviour (Davies, 2007; Dean, Eichhorn, & Dean, 1969; Dewalt & Dewalt, 2002). This limitation however, is evident in all types of transparent, qualitative data collection. For example, during interviews, participants may answer questions with the response they perceive to be correct, based on the way a question is framed. In this research, this limitation was minimal when observing participants within courtroom proceedings, as these are generally open to public view. However, in terms of observing the hidden processes surrounding plea bargaining, this limitation was responded to as much as possible, but it is difficult to gauge the impact of my intrusiveness on the conduct and actions of participants, other than to assume that over the extensive observation period it would be difficult for participants to consistently alter or modify their behaviour.

Participants

The observational fieldwork was conducted over four months at the Victorian State OPP and the Melbourne metropolitan Magistrates', County and Supreme Courts. Fifty-one participants were observed. Twenty-one of these were observed during working hours, Mondays through Fridays, over a six-week period, while the remaining 29 participants were observed on between one and six occasions over four months.

Table 1-3: Participant Observation Participants

Group Name	Number of Participants	Where the observation occurred
Prosecution	25	OPP; Magistrates', County and Supreme Courts
Defence Counsel	15	Magistrates', County and Supreme Courts
Judiciary	11	Magistrates', County and Supreme Courts

Throughout the observation period, I was provided with office space within the OPP's Policy Advising and Court of Appeal division. Within the first two days of observations, four of the OPP's twelve criminal divisions were identified as being of most value, as participants from these divisions most regularly engage in plea bargaining and law reform. The four divisions, also the most represented in the interviews, were: (1) Committal Advocacy; (2) General Prosecutions; (3) Specialist Sexual Offence Unit; and (4) Policy Advising and Court of Appeal.

Observations

For the observations within the County and Supreme Courts, participants and the relevant processes were observed from an unobtrusive position within the public seating area of the courtrooms. In the Magistrates' Court, observations were conducted from within the public seating area of the courtrooms and also of participants within the Magistrates' private chambers.

Participants were observed partaking in a number of court proceedings in all three courts, including Committal Mentions, Committal Hearings, Case Conferences, Directions Hearings, trials and plea hearings. These observations were conducted within the courtrooms, and focused on the effectiveness of the processes in upholding their desired aims as dictated by the relevant legislation and/or internal policy. Whether plea bargaining was encouraged or facilitated during the hearing was also recorded. In addition, the conduct of participants was noted, particularly whether they appeared to be prepared for the hearing, whether they initiated or engaged in plea bargaining and whether they adhered to the requirements of the relevant legislation and/or internal policy. A training session for Magistrates on alternative punishment options was also observed at the Magistrates' Court.

Participants were also observed when interacting with other participants from within both their own and other groups. Ethical limitations, however, were placed on the fieldwork that disallowed the recording of any detailed notes of specific discussions around plea bargaining—for example, recording details of the case, witness names or any specific agreements reached. As a consequence, when these discussions occurred, or when interactions between a participant and a defendant, victim, witness or non-participant occurred, specific details of those interactions were not recorded. Instead, the fact that a discussion occurred, where it occurred, which participant(s) was involved, and whether a guilty plea was entered were all noted. In addition, following the occurrence of any such discussions or interactions, details of whether an offer was made, rejected or accepted, of why this decision was made and of the processes used to make this decision were sought from the participant(s) involved and noted.

The specific processes observed at the Victorian State OPP focused on the informal procedures leading up to plea bargaining, specifically the preparation undertaken before a plea bargain occurs and before pre-trial hearings, and the different roles adopted by Crown solicitors and prosecutors in relation to plea bargaining. Once plea bargaining had occurred, the observations focused on the procedures implemented, specifically in terms of victim and informant consultation, what happened if the plea bargain was rejected or accepted, and what, if any, record of discussions was kept, particularly when an agreement was not reached.[8] Whether participants referred to internal policies for guidance on their conduct

[8] An informant is a police officer in charge of the investigation of a case.

was also noted. Two training seminars within the Specialist Sexual Offences Unit were also observed.

Ethical Concerns

Given the type of data sought and the status and positions of participants, confidentiality and consent were important elements of the research. As such, written informed consent was sought from participants prior to the fieldwork commencing. A confidentiality agreement was also signed between the researcher and the Victorian State OPP to protect the privacy and confidentiality of the prosecutorial participants, and to ensure that any specific case details observed or discussed were not recorded in the field-notes or presented in any publications.

Participants were assigned pseudonyms to ensure privacy and confidentiality were maintained and these pseudonyms were then used in the fieldwork notes, interview transcripts and during the analysis. Pseudonyms are also used throughout this thesis. The pseudonyms were assigned randomly to participants based only on which of the four groups they represented. Prosecutorial participants were labelled as 'Prosecutor', followed by a sequential letter, also assigned randomly: for example 'ProsecutorA' and 'ProsecutorB'. The same method was used for the pseudonyms assigned to observation participants: for example, 'Defence CounselB' and 'JudiciaryE'. If an interview participant was also an observation participant, they were assigned one pseudonym. Similarly, the same pseudonym given to a participant in their initial interview was used in analysing and discussing that participant's follow-up interview data.

There was a minimal perceived risk of any stress, inconvenience or discomfort being imposed on participants during or after the fieldwork as a direct result of the interviews or observations. This was because participants were observed and interviewed to ascertain their professional opinions of, experiences and engagement with plea bargaining, as opposed to seeking emotionally sensitive or personal information. In addition, neither the interviews nor the observations included non-professional or vulnerable participants, such as victims or defendants, which reduced the likelihood of emotional distress occurring. The research was also focused on observing and discussing the interactions and conduct of participants specifically in processes involving or affecting plea bargaining, rather than examining details of specific cases. This therefore limited many of the potential ethical concerns, and there were no instances of distress or concern reported as a result of the fieldwork.

Data Analysis

The observation and interview data included descriptions of behaviour, institutions, court processes, appearances, actions, interactions, personal narratives and accounts (Holliday,

2007, p. 62). In the initial interview period, 39 interviews were audiotaped and transcribed verbatim, while handwritten notes were made in three interviews. Handwritten notes were only made when participants requested that the interview not be audiotaped. In the follow-up interview period, five interviews were audiotaped and ten involved the participant providing written responses. The use of audiotapes and written responses facilitated the precise use of quotations.

The analysis of interviews 'entails systemically coding, grouping or summarizing the descriptions, and providing a coherent organising framework that encapsulates and explains aspects of the social worlds that respondents portray' (Holstein & Gubrium, 2002, p. 124). Coding requires the labelling of passages within the transcripts when they appear interesting or relevant to the research questions (Seidman, 2006; Silverman, 2004). This process then continues until a number of themes emerge. To undertake this process, all relevant information in the transcripts was colour-coded according to identified themes to allow for thematic and comparative analysis of the data. These codes were then identified and, following further analysis, key themes emerged to form the basis of the analysis chapters.

There are many reasons why particular patterns and themes emerge in data analysis (Holliday, 2007; Holstein & Gubrium, 2002; May, 2001; Silverman, 2004). One of the key patterns that emerged from the interview data in this research involved responses that connected in some way to the literature or primary material on plea bargaining, particularly when the opinions of participants either challenged or supported the internal policies regulating legal conduct. Themes were thus identified where participant perspectives conflicted, supported or challenged relevant statutes, case law or internal policy. Patterns also emerged when similar issues and concerns in support of, or contrast to, other perspectives were evident. These similarities and differences provided the basis for critical, comparative analysis of participant responses.

The observational fieldwork required, where possible, that discussions, actions, comments, behaviours and interactions be recorded. This was achieved through written notes, which were transferred into manageable tables each day. Each observation was labelled according to the number of days a participant was observed and within these observation records there could be multiple individual observations noted. For example, if JudiciaryB was observed conducting nine pre-trial hearings on one day and two on another day, this would be recorded as nine individual observations on one observation record, and two individual observations on another observation record (see Table 1-4).

Table 1-4: Example of Observation Fieldwork Notes

Name	**Location**	**Record No. (Ob)**	**Individual Ob No.**	**Details**	**Quote**
Prosecutor G	Magistrates' Contest Mention	1	4	Plea bargaining with defence counsel; outcome—guilty plea entered	
Defence CounselL	Magistrates' Contest Mention	1	1	Sought sentence indication (JudiciaryB); outcome—indication awarded, guilty plea entered	Perhaps Your Honour could offer an indication?
JudiciaryB	Magistrates' Contest Mention	2	1	Provided sentence indication (Defence CounselL); outcome—guilty plea entered	Two months with time already served, community-based order and rehabilitation.

Table 1-4 provides an example of the observation notes. It shows that during one observation day (Record No. (Ob) 1), ProsecutorG's fourth individual observation (Ind Ob No. 4) involved engaging in plea bargaining with the defence counsel, and this resulted in a guilty plea. This table also shows that on the second day of observing JudiciaryB (Record No. (Ob) 2), he provided a sentence indication to Defence CounselL (Ind Ob No. 1). This same interaction is recorded on the table for Defence CounselL (Record No. (Ob) 1, Ind Ob No. 1).

Using a similar process to the interview analysis, the observation data was colour-coded according to identified themes for thematic and comparative analysis. The emerging behavioural and interaction patterns were then analysed in their own context, before being contrasted with the literature and interview analysis. This allowed for the critical comparative analysis of participants' direct engagement with, and perspectives of, plea bargaining, which provided a rich framework for determining significant patterns and

themes. This also provided a mechanism to analyse the desired intention and effectiveness of an early resolution procedure as stated in policy, through the observed interactions and conduct of participants when engaging in this procedure. This allowed for any discrepancies or consistencies between participants' perspectives and actions on the one hand, and the official aims and requirements of internal policy, case law or statute on the other, to be acknowledged. In addition, the differences and similarities between participants' responses and their conduct were identified and analysed. These findings provided another dimension to the research, allowing for participants' responses and the observations of their actions to be explored both individually and comparatively.

Conclusion

The qualitative methodological approach was instrumental in identifying the key justifications for plea bargaining's formalisation, and allowed this research to uphold its aim to produce an original insight into the informality of Victoria's plea bargaining process within the adversarial legal culture. This approach allowed for an in-depth, grounded analysis of the main issues that emerged both from the observations of legal professionals involved in Victoria's criminal process, and from the directly expressed perspectives of representatives from the Victorian State OPP, Melbourne metropolitan criminal courts, Victorian Attorney General's Department, the UK Office of the Attorney General, the CPS and Victorian statutory bodies, which allowed this research to fill the potential gap between what participants say about their actions, and what occurs in practice (Mack & Roach Anleu, 2007).

The next chapter provides a review of the literature examining plea bargaining issues, drawing from state, federal and international criminal jurisdictions. In examining this scholarship, the review identifies the gap in the legal policy and in the literature, thus demonstrating the valuable addition of my research in exploring this largely under-examined area.

CHAPTER ONE
FILLING A GAP

While contested cases, particularly jury trials in the higher courts, are often the focus of a good deal of popular attention, the fact of the matter is that the vast majority of people prosecuted for criminal offences plead guilty. Many of them do so after discussions have taken place between the defence and the prosecution about what is the appropriate course to follow. This practice is widespread and regarded as a normal and appropriate aspect of the criminal justice process. Despite its acceptance within the system, the topic has not…been [a] subject of detailed empirical research and analysis in Australia (The Honourable Justice LT Olsson, as cited in Mack & Roach Anleu, 1995).

Plea bargaining has been a focus of research since the 1960s. However, a large portion of this literature examines plea bargaining within the United States (US), United Kingdom (UK) or Canada (Acker & Brody, 2004; Alschuler, 1995; Baldwin & McConville, 1977; Buckle & Buckle, 1977; Dumont, 1987; JUSTICE, 1993). In Australia, and within Victoria specifically, plea bargaining is a largely under-examined topic. Most existing Australian commentary examines plea bargaining in comparison to the trial, and often in New South Wales (NSW) or with a broader, national focus (Bishop, 1989; Mack & Roach Anleu, 1995; Payne, 2007; Samuels, 2002; SCAG, 2000). In Victoria, there have been only a small number of studies which have focused on plea bargaining and sentencing, including the impact of plea bargains on sentence discounts and their role in sentence indications (P. Clark, 1986; Freiberg & Seifman, 2001; VSAC, 2007c). This has left a significant gap in our understanding of plea bargaining in Victoria, particularly of the impacts of its non-transparency.

Common concepts examined within state, federal and global literature include plea bargaining's procedural elements, such as its regularity and content, who is involved, when it occurs and what agreements entail (Acker & Brody, 2004; Andrew, 1994; P. Clark, 1986; Cowdrey, 1996, 2003; Fitzgerald, 1990; Heumann, 1978a; Johns, 2002; Mack & Roach Anleu, 1995; Pizzi, 1999). The purposes of discussions is also a prominent topic (Alschuler, 1995; Bishop, 1989; Goldstein, 1981; Heumann & Loftin, 1995; Mack & Roach Anleu, 1995; Moxon, 1988; Pizzi, 1999; S. Walker, 1993), as are the increasing prosecutorial obligations to victims when plea bargaining occurs (Cook, David, & Grant, 1999; Dixon, 1996, 1997a; Johns, 2002). This literature is also linked to examinations of criminal justice agencies' wide discretionary powers (Atkins & Pogrebin, 1982; Breitel, 1960; Boyd, 1979; Douglass, 1988; Fionda, 1995; Freidman, 1982; Gabbay, 1973; Louthan, 1985; Pizzi, 1999; Temby, 2000). While judicial involvement in plea bargaining is not a major theme of Australian research, because case law restricts judicial involvement in discussions (*R v Bruce* (Unreported, High Court, 21 May 1976)), where it does feature, a broader definition of plea bargaining is generally used to incorporate judicial sentence

indications (Freiberg & Seifman, 2001; Freiberg & Willis, 2003; Mack & Roach Anleu, 1995; Seifman, 1982; VSAC, 2007a, 2007b, 2007c).

Awarding sentence discounts in exchange for guilty pleas is also a feature of plea bargaining which is heavily criticised in the literature for its potential to undermine victim interests (Gerber, 2003; Johns, 2002; Mack & Roach Anleu, 1998; Sebba, 1996; VSAC, 2007b, 2007c), and induce defendants into pleading guilty (Bishop, 1989; McConville, 1998; McConville & Mirsky, 1995; Payne, 2007; VSAC, 2007b, 2007c). The inability of sentence discounts to uphold retributive ideals and the consequent impact on public confidence, particularly when given in combination with a plea bargain is also a principal theme (Ashworth, 1994; Cohen & Doob, 1989; Doob & Roberts, 1983; Freiberg & Willis, 2003; Payne, 2007; Spears, Poletti, & MacKinnell, 1994; Victorian Community Council Against Violence [VCCAV], 1997; VSAC, 2006, 2008a; Weatherburn & Baker, 2000; Weatherburn & Lind, 1995; Western Australia Law Reform Commission [WALRC], 1999).

The extent of delays and the resultant emergence of reform are also well documented in the literature. Often commentary on these issues proposes pre-trial reform on the basis that it encourages early guilty pleas and can increase court efficiency. In Australian literature, these issues are explored with both a national focus (Access to Justice Advisory Committee [AJAC], 1994; Brereton & Willis, 1990; Chan & Barnes, 1995; Corns, 1997; Hidden, 1990; Payne, 2007; Sulan, 2000; SCAG, 1999, 2000) and within individual states (Aronson, 1992; Coopers & Lybrand, 1989, as cited in Bragg, 1990; Coghlan, 2000; Hill, 1999; Pegasus Taskforce, 1992; Shorter Trials Committee, 1985; Weatherburn & Baker, 2000; VSAC, 2007c; Victorian Law Reform Commission [VLRC], 2007; WALRC, 1999). Similar reforms have been addressed internationally, particularly in the UK and Canada (Chalmers, Duff, Leverick, & Melvin, 2007; Fitzgerald, 1990; Freely, 1978; Mainstreet Committee, 2005; Samuel & Clark, 2003).

Of most relevance to this research, plea bargaining's potential formalisation receives attention in some US, Canadian and UK research (Blumberg, 1967; Heumann, 1978b; Heumann & Loftin, 1995; Kerstetter & Heinz, 1979; UK Office of the Attorney General, 2007). These commentaries propose alternatives to plea bargaining or suggestions for improving the existing process, such as abolishing or limiting practices, or introducing judge-supervised pre-trial discussions (Canadian Law Reform Commission, 1989; Daudistel, 1980; JUSTICE, 1993, 2006; McDonald, 1985; Rubenstein & White, 1980; Verdun-Jones & Hatch, 1987). In Australia, however, this area is manifestly under-examined, except for a handful of nationally based studies (Mack & Roach Anleu, 1995; SCAG, 2000).

This review provides an insight into the existing research and policy analysis on plea bargaining and formalisation issues within a state, federal and global context. Drawing from national and international research, it examines four key themes to highlight the

context of this research in addressing similar concerns in a Victorian-based study: (1) court inefficiency and delays; (2) sentence discounts; (3) the formalisation debate; and (4) formalised initiatives. Given the recent increase in attributing importance to efficiency-driven reform within Victoria's criminal justice system (Rapke, 2008), this review further demonstrates the useful addition of a policy-based analysis.

1.1 Motivations for the Research

Despite the apparent prevalence of plea bargaining in Victoria (Freiberg & Seifman, 2001), there is limited research specifically addressing plea bargaining issues in a Victorian context. Significantly, no research has been conducted on plea bargaining's potential formalisation using the perspectives and observations of key stakeholders from Victoria's criminal justice system. There are, however, two Australian research projects which informed and motivated this analysis. The first, conducted by Mack and Roach Anleu (1995), examined Australian guilty plea processes and offered a detailed analysis of plea bargaining in a national context. The second, conducted in Victoria by the Victorian Sentencing Advisory Council (VSAC) (2007c), reported on specified sentence discounts and sentence indications and provided an extensive examination of sentencing reform and guilty plea issues in Victoria. These two studies presented a foundation for discussion in my research.

1.1.1 Pleading Guilty: Issues and Practices

Mack and Roach Anleu (1995) undertook an empirical evaluation of Australian guilty plea processes. Their research explored plea bargaining's invisibility, the possibility that plea bargaining produces inappropriate outcomes and the potential for improper inducements to be used to encourage defendants to plead guilty. They also explored the possible reformation of guilty plea processes across Australia by introducing internal policies into state OPP, or into statute—for example, a legislated sentence indication scheme. Their analysis defined the prosecutor's role in the guilty plea and sentencing processes and examined what scrutiny, if any, existed of their conduct in this regard. In addition, Mack and Roach Anleu (1995) examined the importance of the defence counsel's role in advising defendants on pleading and the resulting ethical considerations confronting counsel, as well as potential reasons why defendants might plead guilty. They also explored the role of the judiciary in the guilty plea process, specifically in relation to whether they should be involved in plea bargaining at all, and whether sentence discounts and sentence indications are likely to encourage early guilty pleas.

Based on their analysis, Mack and Roach Anleu (1995) proposed a number of reforms, including implementing guidelines for both counsel, which officially acknowledge

plea bargaining and place controls on their conduct in discussions. They also proposed that all provisions surrounding plea bargaining be incorporated into internal guidelines within state OPP, which they argue would provide encouragement for prosecutors to engage in discussions. They suggested that victims' rights and needs, including that victims be kept informed of any agreements, be stated within these guidelines and that a record of any agreements be maintained by the prosecution (Mack & Roach Anleu, 1995, p. 13). They further proposed the implementation of additional legal training to encourage plea bargaining and considered providing the judiciary with a more active function in facilitating and encouraging discussions between counsel, without the judiciary themselves having any role in the discussions (Mack & Roach Anleu, 1995, p. 15).

Mack and Roach Anleu's (1995) analysis was the first major Australian study of plea bargaining and the potential reform of guilty plea processes. Some recommendations within their research have since been implemented: for example, s.9 of the *Victims' Charter Act 2006* (Vic) ('*Victims' Charter 2006* (Vic)') in Victoria and s.20 of the *Prosecutorial Guidelines 2007* (NSW) in NSW, both of which require that information be provided to victims on any charge amendments. The national focus of Mack and Roach Anleu's (1995) research, however, together with the evolving efficiency problems confronting the criminal courts fifteen years after their groundbreaking work was published, to some extent limits the direct applicability of their findings to Victoria today. This thesis thus intends to extend upon their evaluation by specifically focusing on similar issues of prosecutorial discretion and the informal nature of plea bargaining in Victoria, within the current legal climate, and in the context of the contemporary challenges facing the criminal courts.

1.1.2 VSAC Final Report

Another significant study influencing this research was the VSAC final report (2007c) on specified sentence discounts and sentence indications. The VSAC was established in July 2004 under Part 9A of the *Sentencing Act 1991* (Vic). According to Freiberg and Moore (2009), the VSAC was established by a 'reformist government that was keen to project itself as responsive to community concerns…[by] bridging the gap between the community, the courts and government by informing, educating and advising on sentencing issues' (p. 102). Since its creation, the VSAC has advised the Victorian Government on a number of policy changes including suspended sentences, provocation and post-sentence supervision, some of which have been implemented in statute (VSAC 2005a, 2005b, 2007g, 2008b, 2008c).[9]

On 22 August 2005, the Victorian Attorney General commissioned the VSAC to determine the desirability and practicality of introducing specified sentence discounts and/or sentence indications. In commissioning the VSAC, the Attorney General (2005)

[9] See, for example, *Road Legislation (Projects and Road Safety) Act 2006* (Vic).

emphasised the importance of openness within sentencing and the possibility for these reforms to achieve this by 'increasing the transparency of judicial decision-making' (p. 1). The VSAC released a discussion paper (2007b) outlining its initial proposal and considerations in January 2007, and its final report (2007c) was released in September the same year.

The extensive consultation and interview process employed by the VSAC in investigating sentencing reform demonstrated the importance of adopting a multifaceted approach in examining criminal proceedings. The VSAC report (2007c) also filled a significant gap in the literature on sentencing and efficiency-driven law reform, and thus provided a foundation for my analysis of court delays, efficiency-driven reform, guilty plea incentives, sentence discounts and plea bargaining. The significance of the VSAC final report (2007c) is also evidenced by its recommendations leading to statutory reform (*Criminal Procedure Act 2009* (Vic) s.61, s.208-s.209; *Sentencing Act 1991* (Vic) s.6AAA).

The appropriateness of some of the recommendations made in the VSAC report (2007c), particularly in terms of the ability of some recommendations to uphold judicial principles and ensure that public, victim and defendant interests are maintained, is a prominent topic examined in my research. My analysis thus intends to contribute to the VSAC final report (2007c), by critically analysing the potential implications of efficiency-driven reform within an adversarial context.

1.2 Victorian Plea Bargaining Practices

There are many forms of plea bargaining explored in the literature, including the Crown reducing the seriousness of charges (Fox, 2002), or withdrawing one or more charges in exchange for a guilty plea (Department of Public Prosecutions, 1996, p. 23). Plea bargaining commonly extends beyond these outcomes to include negotiating the agreed summary of facts on the basis of which the defendant is sentenced by the court, and negotiating the jurisdiction of the offence—for example, having the case heard summarily rather than in an indictable jurisdiction (Andrew, 1994, p. 236). Plea bargaining can also involve informal agreements not to proceed with charges against another person, or require the defendant to become a prosecutorial witness (Byrne, 1988, p. 801). On occasion, plea bargaining is used simply to reveal the strengths and weaknesses of each side's case, rather than as a mechanism to resolve matters (Heumann, 1978a, p. 127). Regardless of the reason for engaging in such discussions, however, Bishop (1989) maintains that both counsel believe 'plea discussions work fairly [for] both sides…and are very important to the workings of the justice system' (p. 210).

In Victoria, and Australia generally, very little case law regulates or defines plea bargaining. Furthermore, many of the cases which have addressed plea bargaining in the

Australian High Court or Victorian Supreme Court have focused on judicial involvement in plea bargaining, as opposed to the discussions that occur between counsel (*R v Bruce* (Unreported, High Court, 21 May 1976); *R v Marshall* [1981] VR 725; *R v Tait* [1979] 24 ALR (at 473)). The first formal reference to plea bargaining in case law, albeit one that focused on judicial involvement in sentence indications, came from the English Court of Appeal in *R v Turner* [1970] 2 QB 321, which was adopted in Australia via UK law. This case established four guidelines which outlined: (1) how defence counsel should advise defendants on pleading; (2) that defendants should maintain freewill in making pleading decisions; (3) that all discussions with the judiciary should involve both counsel; and (4) the judiciary should not provide sentence indications beyond a possible sentence order, such as a community-based order or custodial term.

In addition to focusing on judicial involvement in discussions, much Australian case law merely alludes to plea bargaining, rather than attempting to control or define it (*R v GAS; R v SJK* (2004) 206 ALR 116; *R* v *Maxwell* (1995) 184 CLR 501). As Seifman (1982) argues, Australian courts 'have been reluctant to [discuss] plea discussions, preferring to rectify any misunderstandings on an ad hoc basis' (p. 80). An example of this was presented in the introductory chapter, in the Australian High Court case, *R v GAS; R v SJK* (2004) 206 ALR 116. Another example of this is *R v Maxwell* (1995) 184 CLR 501, where the Australian High Court established authority for judges to reject guilty pleas, if the factual basis surrounding the charge(s) to which the defendant is pleading guilty does not reflect the available evidence. Without specifically acknowledging plea bargaining, this authority provides some scrutiny of the agreements made between counsel, insofar as the court can reject a plea to amended or negotiated charges if they do not sufficiently cover the offending behaviour, or the evidence does not substantiate them. Thus, in effect the judge can reject the agreement.

This limited reference to plea bargaining in case law is mirrored by an absence of legislation that acknowledges plea bargaining. To date, there is no legislation that acknowledges, sanctions or controls plea bargaining in Victoria. While some legislation alludes to plea bargaining by implementing controls on prosecutorial conduct when charges or facts are amended, no legislation directs the conduct of those involved in discussions or pertains to the plea bargaining process itself (*Public Prosecutions Act 1994* (Vic) s.24(c); *Victims' Charter 2006* (Vic) s.9).[10] The only direct reference to plea bargaining or the conduct of the Crown when engaging in these discussions is located within three internal OPP policies, which are non–legally binding (*Dealing with a Plea Offer 2006* (Vic);

[10] See, for example, s.24(c) of the *Public Prosecutions Act 1994* (Vic), which describes the importance of conducting 'prosecutions in an effective, economic and efficient manner', and s.9 of the *Victims' Charter Act 2006* (Vic), which requires the Crown to keep victims informed of any amendments to the charges laid against the defendant. This research does not support the view that sentence indications are plea bargaining. Thus, while recognising the introduction of a legislated sentence indication scheme for summary and indictable offences, this research does not consider s.61 or s.208-s.209 of the *Criminal Procedure Act 2009* (Vic) to constitute statutory acknowledgement of plea bargaining.

Director's Policy 3.1 2007 (Vic); *Resolution of Matters & Early Issue Identification 2007* (Vic); see Chapter Three for further discussion).

1.2.1 The (perceived) Frequency of Discussions

Due to the absence of official recognition or scrutiny of plea bargaining in legislation or case law, Victorian plea bargaining practices remain informal, and their occurrence officially unrecorded. It is therefore difficult to determine accurately when discussions occur or how often they contribute to case resolution. While there are no official records, much research considers plea bargaining to be a frequently used process: as McConville (2007) argues, 'plea bargaining [is] a widespread institutional practice and not isolated aberrational behaviour on the part of some maverick lawyers' (p. 211; see also Freiberg & Seifman, 2001; Johns, 2002; Mack & Roach Anleu, 1995; Seifman, 1982). This is supported by the earlier work of Baldwin and McConville (1979b, p. 224) in the UK, which found that of 122 defendants who pled guilty, almost three-quarters said they did so as a result of plea bargaining.

Often the estimates of plea bargaining's frequency are based on the fact that on average over two-thirds of defendants plead guilty, so it is argued that plea bargains must provide some incentive to encourage these pleas (Roach Anleu & Mack, 2009, p. 1).[11] For example, looking at the stage at which a not guilty plea is changed to a guilty plea as a basis for determination, Johns (2002, p. 8) estimates that approximately 50-60% of all pre-trial guilty pleas result from plea bargaining. Based on their Victorian qualitative study, Freiberg and Seifman (2001, p. 66) maintain that plea bargaining proceeds most regularly in Victoria's Magistrates' Court, occurring in almost 60% of cases. They attribute this regularity to the police prosecutor's discretionary powers in making charging decisions and because Magistrates more actively encourage plea bargaining in summary matters (Freiberg & Seifman, 2001, p. 66).

Mack and Roach Anleu (2007) also estimate that a large portion of plea bargaining discussions that result in guilty pleas, occur in Magistrates' Courts. In an examination of 1,287 matters heard in Australian Magistrates' Courts, they estimated that of the one-third (n=416) with adjournment requests, one-fifth (n=91) of these occurred in order for parties to engage in some form of communication, with 8.7% of the requests (n=36) specifically citing plea bargaining as the rationale (Mack & Roach Anleu, 2007, p. 351). In discussing their results, Roach Anleu and Mack (2009) highlighted the importance of adjournments as a tool for encouraging guilty pleas, because they provide an opportunity to 'speed up negotiations or endorse a particular course that will assist in the production of a guilty plea' (p. 4). Thus, based on their findings, it is reasonable to assume that at least some of the

[11] In Australian superior courts (including intermediate and Supreme) between 2007 and 2008, 81% (11,652) or over two-thirds of defendants pled guilty (Australian Bureau of Statistics [ABS], 2009, p. 2).

adjournments which result in a guilty plea in the Victorian Magistrates' Court pre-trial stream are due to plea bargaining (Roach Anleu & Mack, 2009, p. 7).

While there are no records kept of plea bargaining in Victoria, there are detailed records maintained of the number of guilty pleas entered in Australian criminal courts. Between 2005 and 2006, the Australian Bureau of Statistics (ABS) (2007, p. 4) determined that 88% of the 12, 914 cases that resulted in a guilty finding in Australian superior courts (intermediate and Supreme) involved the defendants pleading guilty. Over the same period, they estimated that 73% of defendants in Australian Magistrates' Courts pled guilty (ABS, 2007, p. 5). In Victoria, the Supreme Court Annual Report (2006, p. 14) shows that between 2005 and 2006, 41% of cases were resolved by a guilty plea. A similar finding was evident for the period between June 2006 and June 2007 in Victoria's County and Supreme Courts, where there was a 9% increase in guilty pleas (Victorian OPP Annual Report, 2007, p. 22). This equated to 46% of defendants pleading guilty in the Supreme Court, and 80.3% in the County Court (County Court of Victoria, 2007, p. 1; Supreme Court of Victoria Annual Report, 2007, p. 19). In the same period (2005-2006), there was an increase of almost 10% in the number of guilty pleas entered prior to trial (Victorian OPP Annual Report, 2007, p. 23). Importantly, this was attributed to the Crown's focus on early resolution, particularly in the County Court, which resulted in a perceived increase in communications between counsel on the possible resolution of matters (Victorian OPP Annual Report, 2007, p. 23).

In their analysis of plea bargaining in the UK, Baldwin and McConville (1977, p. 20) considered whether plea bargaining is less likely to occur in jurisdictions like Australia and the UK than in the US. They found three potential reasons for this: (1) differences in the sentencing systems; (2) differences in the Crown's role in sentencing; and (3) non-judicial involvement in discussions in Australia and the UK. Baldwin and McConville's (1977, p. 21) study also examined whether plea bargaining may occur more regularly in the US because the minimum sentences imposed for many crimes creates additional pressures on defendants to engage in plea bargaining, in an attempt to have their charges altered. Despite these considerations, Mack and Roach Anleu (1995) claim that discussions occur very regularly in Australian jurisdictions, taking place 'nearly every day…even right up to the court and sometimes during the court proceedings' (p. 20). Similarly, Andrew (1994) and Seifman (1982) claim that plea bargaining is indisputably a regular element of Victorian criminal proceedings.

The regularity with which plea bargaining occurs is often associated with the potential benefits it can offer. The following section briefly examines some of the most commonly identified benefits and limitations of plea bargaining, and whether plea bargaining is thus a reasonable option for all crimes.

1.2.2 Appropriate for All Crimes, All the Time?

One of the key justifications for plea bargaining is its potential to increase court efficiency by reducing the duration of criminal proceedings, which can provide resource, financial and emotional benefits (Klein, 1976, p. 59). As McConville (2007) claims, plea bargaining is 'defended as an essential weapon in…the quest for cost-effective criminal justice systems' (p. 213; see also Bishop, 1989, p. 199; Byrne, 1988, p. 66; Freiberg & Seifman, 2001, p. 66; Gerstein, 1981; Maynard, 1984). For defendants, the main benefits of plea bargaining are linked with the charge and sentence concessions offered in exchange for their guilty plea, as well as reduced legal costs (Douglass, 1988; Gerstein, 1981; Mack & Roach Anleu, 1995; Maynard, 1984; *Sentencing Act 1991* (Vic) s.5(e)). Dubber (1997) also argues that 'plea bargaining strengthens the defendant's position by permitting her [sic] to shape the proceedings that will settle her [sic] fate' (p. 604). In terms of public advantages, plea bargaining removes the costly process of a trial, which, as demonstrated by the findings of Samuels's review (2002, p. 2) of the NSW plea bargaining system, can offer annual savings of up to $15 million. Plea bargaining can also benefit the public by reducing delays and allowing contested cases to be tried earlier (Gerstein, 1981, p. 276). These perceived advantages are also commonly seen as beneficial to the courts, the Crown and defence counsel, due to the resultant resource and monetary savings that result (Buckle & Buckle, 1977; Mack & Roach Anleu, 1995; Seifman, 1980).

The potential benefits of removing the need for a contested trial through plea bargaining have also been identified as a positive outcome for victims. Douglass (1988) claims that victims can benefit from having the matter determined without having to experience the traumatic process of giving evidence or attending court. In addition, as Booth and Carrington (2007) assert, the implementation of victims' charters, such as the *Victims' Charter 2006* (Vic) introduced in Victoria in November 2006, can provide a mechanism to rectify victim concerns, because they require that increased consideration be given to victims as part of the prosecutor's official duties. Mack and Roach Anleu (1995, p. 9) also maintain that plea bargaining can benefit victims by offering earlier case resolution, while Mather (1979) holds that having the defendant acknowledge their guilt advances victims' emotional restoration.

In contrast, many researchers argue that plea bargaining disadvantages defendants, victims and the public by trading the contested trial, which retains strict rules of procedure, for an informal method of case disposition (Buckle & Buckle, 1977, p. 22; JUSTICE, 1993, p. 12; Westling, 1976, p. 425). UK law reform group JUSTICE (1993) argues that plea bargaining can impact negatively on defendants, pressuring them to plead guilty and thus revoking their right to trial. Similarly, Utz (1978, p. 29) and Morris (1977, p. 524) contend that plea bargaining creates power imbalances between the Crown and the defendant, because the possible benefits of the agreement will generally far outweigh the potential

positive outcome of continuing to contest the case. These concerns are linked to criticisms of the Crown's unscrutinised discretionary powers (Beale, 1981, p. 286; Byrne, 1988, p. 67; Morris, 1977, p. 526). For example, Douglass (1988, p. 277) and Beale (1981, p. 286) argue that overcharging defendants with duplicate and/or alternative offences is a tool used to pressure defendants into accepting plea bargains, while Bishop (1989, p. 200) claims that plea bargaining allows prosecutors to exercise excessive control over defendants. These claims are contested within some studies that support internal mechanisms as working effectively to monitor prosecutorial discretion in the charge decision-making process (Byrne, 1988, p. 800; P. Clark, 1986, p. 210; Freiberg & Seifman, 2001, p. 68).

Plea bargaining has also been denounced for its potential to undermine judicial principles, including the presumption of innocence and the public's access to transparent justice (Johns, 2002; McConville & Mirsky, 2005). It is also criticised on the basis that victims' rights are not considered, because the process is focused on the prosecution and the defendant (Johns, 2002, p. 2). Consequently, plea bargaining is viewed as offering limited justice to victims and inturn, the public (Barrowclough, 2004, p. 50). As Dixon (1996) argues, 'the rights of victims are often a forgotten factor in plea bargaining' (p. 7).

In light of these potential limitations and the seriousness of some cases, much literature argues that plea bargaining is not a reasonable option for all crimes (Barrowclough, 2004, p. 47; P. Clark, 1986, p. 212; Cole, 1978; Douglass, 1988, p. 269; Seifman, 1980). As Barrowclough (2004) claims, 'there are many cases where the evidence simply doesn't allow negotiations of any kind' (p. 47). Similarly, Douglass (1988) argues that 'undoubtedly there are cases in which the public interest is not well served by…permitting the defendant to plead to a lesser offence' (p. 269). This can include cases in which a defendant maintains his/her innocence, or when the seriousness of the offending behaviour would not be represented by charge amendments. Both counsel, therefore, must consider a number of factors when deciding on a case's suitability for plea bargaining, including the strength of the Crown's case and the seriousness of the offending behaviour (Mather, 1979, p. 140). Mather (1979, p. 140) further claims that the defendant's criminal record, his/her relationship with the victim, and the type of offence (summary or indictable) are considered by counsel when determining whether to plea bargain. Whether discussions occur can also depend upon the 'nature of the charge, the court in which the charge is laid…and the relationship between the prosecuting and defence counsel' (Bishop, 1989, p. 204). Thus, as P. Clark (1986) maintains, 'it would be undesirable for plea bargaining to become the practice in all matters; [instead it should] be considered on a case-by-case basis' (p. 212).

One of the four main themes that emerges in the literature involves the extent and cause of court inefficiency, and whether plea bargaining is an effective mechanism to alleviate court delays. One of the central issues explored in this context is the late guilty

plea, and how plea bargaining can encourage late pleading defendants to plead earlier. The next section examines these issues.

1.3. Court Inefficiency & Delays: Late Guilty Pleas

Late guilty pleas constitute one of the main contributors to court delays (Payne, 2007; Pedley, 1998; VSAC, 2007c). Late guilty pleas generally refer to pleas that are entered on the day of, or up to two days before the commencement of a trial (Ashworth, 1994). These pleas cause immense delays by extending and thus wasting counsel preparation time and resources, and disrupting court schedules, resulting in 'the court remaining empty while cases pile up outside the door' (Osborne, 1980, p. 70; see also Pedley, 1998, p. 15). Late guilty pleas in Australia have been a source of investigation since the 1980s. In 1982, the Flanagan Committee (1982, as cited in Victorian Shorter Trial Committee, 1985) reported on the ineffectiveness of the courts in encouraging early guilty pleas, determining that between 1970 and 1982, between 43 and 45% of defendants who pled not guilty at the Committal Hearing entered late guilty pleas (as cited in Victorian Shorter Trial Committee, 1985, p. 142). In Weatherburn and Baker's (2000, p. vi) evaluation of NSW District Courts, late guilty pleas (35%) were identified as a major contributing factor to the 23% increase in trial delays between 1996 and 1999. Specifically, they estimated that between 1996 and 1999, only 6% of guilty pleas were entered between the time the trial date was set and the start of the trial, while approximately 60% were entered on the first day of the trial (Weatherburn & Baker, 2000, p. vi). Similarly, in the most recent national report to examine court delays conducted by the Australian Institute of Criminology (AIC) (Payne, 2007, p. iii), it was determined that approximately two-thirds of trials fail to proceed on their scheduled day, 50% of which are delayed as a result of late guilty pleas.

Late guilty pleas occur for many reasons. In the VSAC final report (2007c) on specified sentence discounts and sentence indications, most late guilty pleas were attributed to the defendant not having early access to legal counsel. Weatherburn and Baker (2000, p. vi) cited the four most common reasons for late guilty pleas as: (1) delayed decisions by the Crown to accept plea bargains; (2) defence counsel not receiving early instructions to plea bargain; (3) lack of early communication or disclosure between counsel; and (4) ineffective incentives offered in exchange for early pleas. The three main reasons for late pleas identified in the AIC report (Payne, 2007) also relate to these plea bargaining and transparency issues: (1) delayed plea bargaining; (2) defendants being unaware of or uninterested in the effects of a late plea; and (3) defendants not being advised by counsel to plead guilty.

The impacts of late guilty pleas and the resulting efficiency concerns have been the focus of numerous commissions, reports and reviews across Australia (Chan & Barnes, 1995; Corns, 1997; Payne, 2007; SCAG, 1999, 2000; Sulan, 2000). In October 1993, the Australian Commonwealth Attorney General commissioned the Access to Justice Advisory

Committee (AJAC) to make recommendations for reform across Australian criminal jurisdictions, 'in order to enhance access to justice and to render the [justice] system fairer, more efficient and more effective' (1994, p. 3). Chan and Barnes (1995, p. 3) also examined the causes and impact of lengthy criminal trials and delays in Australia in the mid 1990s. In the late 1990s, the Standing Committee of Attorneys General (SCAG) reported on the consequences of delays, and identified a clear need for reforms aimed at encouraging early guilty pleas (SCAG, 1999, p. 19). The SCAG then released a second report in June 2000 outlining possible reforms focused primarily on issues that prevent trials from commencing on schedule.

One of the key themes to emerge from the nationally based research on court delays is that greater support should be given to mechanisms that reduce inefficiency and encourage early pleas (AJAC, 1994; Chan & Barnes, 1995; SCAG, 1999, 2000). A consistent recommendation has been made to promote plea bargaining and encourage greater pre-trial preparation and disclosure (AJAC, 1994; Chan & Barnes, 1995; Karpin, 1990; SCAG, 1999, 2000). As both Karpin (1990, p. 58) and Sulan (2000, p. 10) claim, in order to reduce delays there must be a shift towards early case management and communication between counsel. Chan and Barnes (1995, p. 54) also identified plea bargaining as a mechanism to reduce the delays resulting from late guilty pleas. Similarly, Corns's (1997) analysis of trial delays in Australia in the mid 1990s identified plea bargaining as a positive mechanism for reducing delay. He claimed that 'considerable amounts of trial time can be saved by effective pre-trial communications and negotiations between counsel' (Corns, 1997, p. 111). Ten years later, the AIC report (Payne, 2007) also cited plea bargaining as a positive mechanism for delay reduction.

At a state level, particularly in NSW and Victoria, court inefficiency has been a prominent topic in research and a basis for law reform. In 1988, Coopers and Lybrand (1989, as cited in Bragg, 1990) were commissioned by the NSW Attorney General to investigate trial delays. The Coopers-Lybrand report (1989, as cited in Bragg, 1990, p. 32) found that the mean delay in Sydney's District Court between a Committal Hearing and trial, during the period October 1988 to May 1989, was approximately fourteen months for defendants in custody, and at least 26 months for those on bail. A number of reforms were recommended to minimise these delays, a significant number of which were implemented, including the appointment of additional judges and longer sitting blocks (Coopers-Lybrand, 1989, as cited in Bragg, 1990; Dowd, 1990, p. 27). Other efficiency-driven reforms implemented in NSW between 1992 and 1996 included the implementation of a Criminal Listing Director, responsible for determining the readiness of cases to proceed to trial; an indictable sentence indication scheme (see Chapter Six for further discussion); strict adjournment policies; set time restrictions on cases proceeding to trial within 112 days; and increases in the number of indictable offences that could be tried summarily (Dowd, 1990, p. 28; Weatherburn & Baker, 2000, p. 1; Weatherburn & Lind, 1995).

In Victoria, court inefficiency has been a focus of government and non-government reports since the 1980s, with the establishment of the Flanagan Committee and the Victorian Shorter Trials Committee. The Victorian Shorter Trials Committee was established in 1982 to 'consider and make recommendations concerning methods of shortening criminal committals and trials and of rendering such proceedings less expensive' (p. 1). It released a report recommending 105 reforms to reduce delays (Shorter Trials Committee, 1985, pp. 207-217). Court inefficiency was also a dominant topic in the *Justice Statement* (2004) initiative released in May 2004 by the Victorian Attorney General's Department. The *Justice Statement* (2004) outlined a ten-year plan aimed at increasing the efficiency of Victoria's criminal justice system and identified the encouragement of early guilty pleas as a primary means of reducing delay (Victorian Attorney General's Department, 2004, p. 8). It proposed multiple projects for the 2004 to 2014 period, including: evaluations of possible efficiency-driven law reform (VSAC, 2007c); focusing the attention of the judiciary and both counsel on more active case management and preparation; creating a more efficient and transparent justice system; and improving public access to courts (Victorian Attorney General's Department, 2004, p. 24). One of the key recommendations for increasing court inefficiency identified in the *Justice Statement* (2004) was to expand the criminal jurisdiction of the Magistrates' Court to remove some of the County Court's workload, a move that was implemented in 2006 (Victorian Attorney General's Department, 2004, p. 28).[12]

Court inefficiency is also a major problem confronting common law systems internationally. Concerns relating to a lack of pre-trial disclosure, preparation and communication between counsel have been identified as primary contributing factors to delay, resulting in law reforms which have themselves been the subject of reviews (Mainstreet Committee, 2005; Samuel & Clark, 2003). Two such reviews were undertaken in the early to mid 2000s in the UK and Canada. In 2002, the Scottish Executive undertook an extensive review of the practices and procedures of the Scottish High Court of Justiciary.[13] The review proposed extensive recommendations aimed at addressing the perceived inadequacies of the Court in achieving efficient justice, which were then implemented as pilot trials. The effectiveness of these reforms was evaluated in 2003 by Samuel and Clark (2003), who found that the implementation of efficiency-driven reforms resulted in reductions in the number of trials proceeding and the number of case adjournments, while also increasing the incidence of early guilty pleas. They also found that these reforms significantly limited late guilty pleas, with less than 7% of guilty pleas being entered at trial, in contrast to the situation prior to the enactment of the reforms,

[12] The changes to the *Magistrates' Court Act 1989* (Vic) to enlarge its criminal jurisdiction were enacted by s.22 of the *Courts Legislation (Jurisdiction) Act 2006* (Vic). The changes to the types of indictable offences that can be heard summarily are now governed by s.28-s.29 of the *Criminal Procedure Act 2009* (Vic).

[13] This court has the jurisdictional scope to hear cases that are equivalent to indictable offences tried in Victoria's County and Supreme Courts (Scottish Courts, 2005).

where almost 90% were late guilty pleas (Samuel & Clark, 2003, p. 91). A second evaluation conducted by Chalmers et al. in 2007 supported Samuel and Clark's (2003) earlier findings, with estimates that over 93% of guilty pleas were entered before trial, 48% of which were finalised early in the pre-trial process (Chalmers et al., 2007, p. 3).

In 2005, the Mainstreet Criminal Procedure Committee (2005) produced a report evaluating reforms that had been implemented in the Vancouver Adult Criminal Court (Canada) in response to problems caused by the significant backlog of cases (Mainstreet Committee, 2005). The reforms attempted to refocus criminal proceedings through the establishment of a front-end system that shifted the focus of the system and its agencies from the trial to the pre-trial process and early communication between counsel (Mainstreet Committee, 2005). The reforms included a 'front-end team' (Mainstreet Committee, 2005, p. 9) of four prosecutors, who managed all arraignment procedures to enable consistency in the handling of cases and to encourage plea bargaining. A mandatory pre-trial conference, held outside regular court hours in the judge's chambers, was also introduced for cases where the estimated trial length exceeded eight days. These conferences allowed the parties to identify any matters not in dispute, thereby potentially reducing trial lengths (Mainstreet Committee, 2005, p. 7). Overall, the evaluation found that the front-end approach, particularly the pre-trial conference, saved approximately 246 trial days (Mainstreet Committee, 2005, p. 8). Thus it was deemed a positive mechanism for addressing inefficiency by reducing the number of late guilty pleas and encouraging early communication between counsel (Mainstreet Committee, 2005, p. 9).

Another focus of the literature is on sentence discounts, whereby a discount is given in exchange for a defendant's guilty plea. The following section examines the main concepts emerging from this literature in relation to sentence discounts and plea bargaining.

1.4 Sentencing Discounts

1.4.1 Lack of Transparency

Plea bargaining and sentencing are inextricably intertwined. This is because, among other prosecutorial concessions given in a plea bargain, defendants receive a sentence discount in exchange for their guilty plea (*Sentencing Act 1991* (Vic) s.5(e)). Although the discount itself is not part of the plea bargain, it is often used as a tool to substantiate the benefit of discussions (Bishop, 1989, p. 186). This is one of the most contentious aspects of plea bargaining because of concerns over due process and its potential impact on victim and public interests, and has thus attracted significant attention in the literature (Coghlan, 2000; Payne, 2007; Sulan, 2000; VSAC, 2007c; Warren, 2008).

The practice of awarding sentence discounts was established in Victoria by the Supreme Court in *R v Gray* [1977] VR 147, wherein the court determined that guilty pleas

should attract leniency when the plea furthers the public interest. In this instance, public interest was said to include sparing vulnerable witnesses from testifying and saving costs. This authority was revised in *R v Morton* [1986] VR 863, in the Victorian Court of Criminal Appeal, where it was determined that 'a plea of guilty may be taken into account regardless of whether or not it is also indicative of some other quality or attribute such as remorse…even [if the plea] is solely motivated by self interest' (at 4). The sentence discount is also subject to legislative authority in the *Sentencing Act 1991* (Vic) s.5(e), which states that 'in sentencing an offender, a court must have regard to whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so'.

Although the sentence discount is an established practice in Victoria, prior to 1 July 2008 the 'doctrine of intuitive and instinctive synthesis' prevented judges from quantifying the specific discount amount applied in exchange for the pragmatic benefits of the plea (*R v Mohyuddin* (1997) VSCA, at 7; *R v Storey* [1998] 1 VR 359, at 336; *R v Wong* (2001) 207 CLR 584, at 75).[14] The doctrine of intuitive and instinctive synthesis requires a judge to consider all relevant factors and sentencing principles in making a sentencing decision, without attributing mathematical or numerical values. Instead, they use their innate knowledge and experience to determine the sentence. The value of the doctrine has been identified in a number of Victorian Court of Criminal Appeal and Australian High Court cases (*R v Mohyuddin* (1997) VSCA; *R v Storey* (1998) 1 VR 359; *R v Wong* (2001) 207 CLR 584). In *R v Storey* (1998) 1 VR 359, for instance, the Victorian Court of Criminal Appeal stated that:

> Sentencing is not a mechanical process. It requires the exercise of a discretion. There is no single right answer which can be determined by the application of principle. Different minds will attribute different weight to various facts in arriving at the instinctive synthesis which takes account of the various purposes for which sentences are imposed (at 336).

In addition to supporting the doctrine, Victorian courts have also warned against the adoption of mathematical and/or automated approaches to sentencing. In *R v Mohyuddin* (1997) VSCA, the Victorian Court of Criminal Appeal stated that 'a mathematical dissection of any sentence is not a particularly helpful exercise. Different factors are weighted differently depending upon the facts of the particular case' (at 7). Similarly, in *R v Wong* (2001) 207 CLR 584, the Australian High Court condemned mechanical approaches to sentencing, stating that intuitive synthesis 'is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which…balances many different and conflicting features' (at 75). Despite its perceived value, a consequence of the doctrine is that the sentence discount

[14] On 1 July 2008, s.6AAA was implemented into the *Sentencing Act 1991* (Vic). This section now requires the court to state 'the sentence and the non-parole period, if any, that it would have imposed but for the plea of guilty'.

offered to defendants is non-transparent, and lacks a degree of certainty (Coghlan, 2000; VSAC, 2007b, 2007c; Warren, 2008). This inturn impacts on plea bargaining by removing a clear sentencing incentive for defendants to engage in discussions (VSAC, 2007c). Consequently, increasing clarity around the sentence discount amount has been the basis of a number of recommendations across Australian jurisdictions, with the most recent being the VSAC final report (2007c) on specified sentence discounts and sentence indications.

The key concern to emerge from the VSAC final report (2007c) involving the then sentence discount process was the lack of transparency surrounding the amount awarded or how that amount was determined. As Payne (2007) holds, the lack of clarity over the sentence discount contributes to a defendant's reluctance to plead guilty because a 'lack of appropriate information, clarity and consistency in the sentencing regimes of judicial officers…[results in] the defendant never being able to accurately assess the likely outcome of their case' (p. 52). This absence of clarity is recognised as a primary limitation of the sentence discount, because it is impossible to determine the likely discount with any accuracy, or whether it is significantly higher than the amount that would be given for a late plea (Weatherburn & Baker, 2000). This issue was noted by the Australian High Court in *R v Cameron* (2002) 187 ALR 65, where the court stated that:

> There [is] a danger that the lack of transparency, effectively concealed by judicial instinct, will render it impossible to know whether proper sentencing principles have been applied… If the prisoner and the prisoner's legal advisers do not know the measure of the discount, it cannot be expected that pleas of guilty will be encouraged in proper cases (at 362).

Weatherburn and Baker's (2000) evaluation of NSW District Courts demonstrates the danger of having limited transparency in the sentence discounting process. They found that the median prison sentence when a guilty plea was entered for assault offences at the pre-trial Committal Hearing was 24 months, as opposed to fourteen months for a plea entered after the hearing. Similarly, the median sentence for fraud-related offences was 24 months when a guilty plea was entered at the Committal, as opposed to eighteen months when entered after the hearing; and the median sentence for a guilty plea entered for drug-related offences at the Committal was 30 months, as opposed to 25 months for a plea entered after the hearing (Weatherburn & Baker, 2000, p. 37). These findings reveal that some offences received a significantly lower average sentence when the defendant pled guilty after the Committal Hearing, compared to the sentences given to those defendants who pled at or before the hearing. Thus, not only is the sentence discount amount not transparent, but its very existence appears to be questionable (Weatherburn & Baker, 2000, p. 37).

In response to these types of concerns, some research promotes the use of specified sentence discounts to ensure the defendant can be guaranteed of the benefits of an early plea (Andrew, 1994; Clear, Hewitt, & Regoli, 1982; JUSTICE, 1993). The Pegasus Taskforce (1992) explored this concept in Victoria, and recommended that discounts be

specified. The Taskforce proposed that a guilty plea entered before or during the Committal Hearing receive a 30% reduction, a plea entered before the trial receive a 20% reduction, and a plea entered at the trial receive a 10% reduction (Pegasus Taskforce, 1992, p. 25). These recommendations were not implemented in Victoria. However, in 2007, to address the lack of transparency in sentence discounts, and in an attempt to combat increasing numbers of late guilty pleas, the VSAC final report (2007c) determined that 'it is in the best interests of the participants in criminal proceedings, the efficient administration of justice and the wider community…in making this aspect of the court process transparent and reviewable' (p. 2). The VSAC (2007c) recommended that in order to provide transparency, consistency and certainty to the sentence discount process:

> The *Sentencing Act 1991* (Vic)…be amended to require the court, in passing sentence on an offender who has pleaded guilty, to state whether the sentence has been reduced for that reason, and if so, the sentence that would have been imposed but for the guilty plea (p. 55).

This proposed reform was officially implemented in s.6AAA of the *Sentencing Act 1991* (Vic) on 1 July 2008. Since its implementation, however, it has been criticised by both the media and judiciary for its limited impact in attracting early guilty pleas and for encroaching upon the doctrine of intuitive and instinctive synthesis, by requiring that a somewhat mathematical calculation be undertaken in this one aspect of the complex sentencing process (Freiberg, 2008; Wilkinson & Hunt, 2008, p. 3).

Although sentence discounts occur in most common law jurisdictions, debate exists over the justification for awarding them merely in exchange for a guilty plea (VSAC, 2007c). These debates are particularly relevant in the context of Victoria, because despite the legislative changes to s.6AAA of the *Sentencing Act 1991* (Vic), no specified discount amounts are applied. Thus, the doctrine of intuitive and instinctive synthesis remains the only sentencing practice applied in the sentence discounting decision, in contrast to jurisdictions like NSW where specified discount amounts exist (*R v Thomas and Houlton* [2000] NSWCCA 309, at 72). Using arguments drawn from the existing research, the following section examines the justifications for awarding sentence discounts and discusses the perceived benefits and limitations of this practice, particularly when combined with plea bargaining concessions.

1.4.2 Sentence Discounts: Justified?

The justification for awarding sentence discounts, regardless of the motivations behind a defendant's decision to plead guilty, is because the plea, at the very minimum, offers a utilitarian benefit by saving on the resources and costs involved in running a trial (Clear et al., 1999; Frankel, 1982; Henham, 1999, 2001; Lovegrove, 1997; Payne, 2007, p. 8). Thus, the 'sentence discount has, however undesirably, become an integral mechanism in the

criminal justice process' (Henham, 2001, p. 110). Much of the literature demonstrates that sentence discounts are widely supported within the legal community, particularly in combination with plea bargaining (Coghlan, 2000; Sulan, 2000; VSAC, 2007b, 2007c; Warner, 2005). Indeed, the sentence discount is sometimes referred to as a vital element of plea bargaining because it provides additional encouragement for defendants to plead guilty (Bishop, 1989; Coghlan, 2000; Henham, 1999).

There is, however, significant criticism arising from perspectives outside the legal environment of sentence discounts. These criticisms are particularly aimed at jurisdictions like Victoria, where the main factor taken into account in applying the discount is the timing of the plea, as opposed to whether it is indicative of remorse (P. Clark, 1986; VSAC, 2007b, 2007c). Sentence discounts are therefore labelled as unjustly rewarding defendants at the expense of victims, because the discount undermines the punitive ideals of the justice system, particularly the sentencing principles of retribution, deterrence and punishment (Palmer, 2001; Pelly, 2005; VSAC, 2007b). Similar perspectives are reflected in the literature that explores public perceptions of sentence discounts (Ashworth, 1994; Beale, 1981; Buckle & Buckle, 1977; WALRC, 1999), which reveals that the public perceives these discounts as 'letting the defendant off without punishment' (Buckle & Buckle, 1977, p. 1; see also Ashworth, 1994, p. 281). This view was also reflected in a Western Australian Law Reform Commission (WALRC) report (1999), which found the public perception of sentence discounts, particularly when in combination with plea bargaining, was that 'justice is for sale and offenders get off too lightly' (p. 56).[15]

Sentence discounts are also criticised for their potential to place pressures upon defendants to revoke their entitlement to a contested trial (Frankel, 1982; Henry, 1992; Huff, Rattner, & Saragin, 1996; McConville, 1998; Newman, 1966; Pincus, 1987). As Pincus (1987) states, 'people are being punished for insisting on a trial, at least in the sense that they may receive a longer sentence if they plead not guilty than they would if they pled guilty' (p. 477). Henry (1992) supports this contention, claiming that 'given the presumption of innocence, the trial should not be part of the punishment' (p. 77). These concerns were also explored within the VSAC final report (2007c), in which the VSAC stated that any discount awarded in exchange for a guilty plea should 'operate by way of encouragement and not by way of prescription' (p. 38).

The contradiction between rewarding a defendant for saving court resources and punishing a defendant for exercising his/her right to trial is highlighted within case law itself. In *R v Cameron* (2002) 187 ALR 65, the Australian High Court stated that:

> Although a plea of guilty may be taken into account in mitigation, a convicted person may not be penalised for having insisted on his or her right to trial. The distinction between

[15] See also Pelly, M. (2005, April 6). Jail terms slashed to clear clogged courts. *Sydney Morning Herald*. Retrieved from http://www.smh.com.au/news/national/jail-terms-to-be-slashed-to-clear-clogged-courts/2005/04/05/1112489491935.html.

> allowing a reduction for a plea of guilty and not penalising a convicted person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction (at 12).

The court went on to note that:

> A person who pleads guilty at the earliest possible time almost always obtains a shorter sentence than a person who pleads not guilty and is convicted… The courts maintain that the accused who pleads not guilty is not being punished and given an increased sentence for pleading not guilty. Rather, the accused who pleads guilty merely gets a lighter sentence than he or she otherwise deserves. The subtlety of this scholastic argument has not escaped criticism (at 41).

In addition to these comments, there is a breadth of case law outlining the seemingly conflicting elements judges must consider when applying sentence discounts in Victoria, which creates confusion, particularly for the public, in understanding the sentence discounting process (Pelly, 2005). In *R v Hall* (1994) 76 A Crim R 454, for example, the Victorian Court of Criminal Appeal determined that a defendant's entitlement to a sentence discount should not be negated by the aggravating factors of the offence; rather, the judge should focus only on the timing of the plea and its utilitarian worth. However, in *R v Ferman & Stoforo* (1999) VSCA 76, the Victorian Court of Criminal Appeal determined that a guilty plea should justify only a small discount where the Crown's case is strong, thereby bringing the worth of the plea into account. This issue was also considered in *R v Donnelly* (1998) 1 VR 645, where the Victorian Court of Criminal Appeal stated that a discount for pleading guilty should be higher for more serious offences.

The underlying premise of the sentence discount, as established by case law and statute, remains that the discount be applied based on the time at which the plea is entered (*R v Cameron* (2002) 187 ALR 65; *Sentencing Act 1991* (Vic) s.5(e)). Therefore, in Victoria the utilitarian benefits of a guilty plea have a stronger impact on a sentence discount than a plea entered to demonstrate remorse. As discussed by Baldwin and McConville (1977), this type of situation means 'the operation of the discount system has…little to do with justice, [rather] it exists primarily because of administrative expediency' (p. 109). This has been an object of significant criticism in research examining sentence discounts, particularly in cases where a guilty plea is entered after plea bargaining (Baldwin & McConville, 1977; Bishop, 1989; McConville & Mirsky, 2005). This is because if a defendant pleads guilty as part of a plea bargain and in addition they receive a sentence discount, they are effectively rewarded twice with both sentencing and prosecutorial concessions (Baldwin & McConville, 1977; Coghlan, 2000; Remington, 1993). This is quite significant given that in most plea bargains there will be an agreement reached that involves concessions on the charges being entered, on the agreed summary of facts and, often, on the Crown's sentencing submission. The utilitarian benefits of the guilty plea may still be present, but the defendant has received additional concessions, which casts doubt on the legitimacy of their receipt of an additional benefit in their

sentence and can raise questions over the legitimacy of plea bargaining in general (Ashworth, 1994; US Taskforce Report, 1967, as cited in Baldwin & McConville, 1977; Mack & Roach Anleu, 1995).

The potentially negative repercussions of plea bargaining concessions being combined with sentence discounts are exacerbated by the absence of formality surrounding plea bargaining, and by the Crown's discretion in making these agreements. The next section examines the debate located in the literature surrounding plea bargaining's formalisation.

1.5 The Formalisation Debate

Plea bargaining's informality is consistently recognised as one of its major weaknesses, because discussions are conducted behind closed doors and away from public or judicial scrutiny (Barrowclough, 2004; Dixon, 1996; Fitzgerald, 1990; Johns, 2002; Mack & Roach Anleu, 1995; Pizzi, 1999). As the US President's Commission on Law Enforcement and Administration of Justice (1968) claimed, 'few practices in the system of criminal justice create a greater sense of unease and suspicion than the negotiated plea of guilty' (p. 9). As a consequence of its informality, plea bargaining has developed a negative reputation, which is fuelled by a limited public understanding of discussions beyond the representations of dramatised US television shows such as *Law and Order* (Van Leeuwen, 1995). As Douglass (1988) maintains, 'plea negotiations have too long been regarded as shady, backroom processes…These misconceptions stem from a lack of knowledge and poor representation of the facts to the public' (p. 267). Plea bargaining has also been criticised because it 'smacks of wheeling and dealing' (Solomon, 1983, p. 43), and because the lack of transparency surrounding discussions can weaken public confidence in the justice system, as public expectations require that 'justice [be] conducted in public wherever possible' (Johns, 2002, p. 1). Thus, plea bargaining's secret nature has the potential to 'pervert the criminal justice process…and to diminish its stature in the eyes of the public' (Canadian Law Reform Commission, 1989, p. 4).

Plea bargaining's non-transparency was a primary concern identified in Mack and Roach Anleu's (1995) analysis, because it was perceived to impact on public perceptions of whether the principles of justice are upheld. They found that 'there is a lack of public accountability. Moreover, any alteration of the original charges laid…will be seen by the public in general—or at least some segments of the mass media—and the victim(s) in particular, to result from secret deals and improper bargains' (Mack & Roach Anleu, 1995, p. 49). Concerns thus arise because the public are not privy to the details of plea bargains, and this 'inability to know what actually happens, whether the outcomes are accurate and appropriate and whether the decision to plead guilty is based on any sort of inducement or coercion that you would regard as improper or unfair' (Barrowclough, 2004, p. 47), only works to highlight the potentially negative repercussions of plea bargaining. As Baldwin

and McConville (1977) claim, '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' (p. 103).

Like the sentence discount debate, plea bargaining's informality is identified as a concern in relation to the imperatives of crime control and due process. Thus it is criticised because defendants are perceived to get away with their crime and receive inappropriate charge and sentencing concessions, while at the same time, the absence of controls or scrutiny of discussions or the conduct of those involved within them fails to uphold the public interest (Carrington & Hogg, 2002; McConville, Sanders, & Leng, 1991). This informality also raises questions over whether due process ideals can be upheld in plea bargaining, because the process erodes the presumption of innocence and the burden of proof on the prosecution (McConville et al., 1991, p. 171). Research conducted by McConville et al. (1991) determined that plea bargaining is 'contrary to the rhetoric of our adversarial due process system, where openness and judicial decision-making are proclaimed as hallmarks of the rule of law' (p. 171). Similarly, Blumberg (1967) argues that because plea bargaining decisions are not subject to review, they do not adhere to legal principles and 'except for isolated cases, the bargaining procedures on which our entire system of criminal law administration would appear to depend have never been subjected to extensive judicial scrutiny to determine their constitutionality, or propriety in terms of due process' (p. 21). These claims are supported by Buckle and Buckle (1977), who maintain that plea bargaining 'has become the indicator of the demise of the adversarial court' (p. 8)—a notion that is also expressed by McConville (2002b) in his claim that plea bargaining 'has left no part of the process untouched. It has altered the language of the law. It has altered its capacity to treat like cases alike' (p. 376).

With the intention of ensuring plea bargaining adheres to public interests and upholds judicial principles, its formalisation has been promoted (Fitzgerald, 1990; Manak, 1973). As Buckle and Buckle (1977) assert, 'plea bargaining should at least be regularised to mitigate some of its problems' (p. 46). P. Clark's (1986) commentary on plea bargaining also states that plea bargaining:

> is a legitimate part of the prosecution process and should not be prohibited… [However], the circumstances in which it occurs should be the subject of guidelines…that are publicly available, to eliminate what some see as the unsavoury and covert nature of plea bargaining (p. 212).

Much of the literature supporting plea bargaining's formalisation maintains that it is essential if plea bargaining is to continue to be used. As Boyd (1979) argues, 'what is required is that plea bargaining be reformed by raising the visibility of the process, introducing proper supervision and structuring the making of administrative decisions in it' (p. 190). This argument is based on the assumption that plea bargaining's formalisation would increase its accountability to the public and also impact positively on court

efficiency (Boyd, 1979; Byrne, 1988; Chan & Barnes, 1995; P. Clark, 1986; Payne, 2007; Rozenes, 2000; Sulan, 2000; Weatherburn & Baker, 2000). As Rozenes (2000) claims:

> There seems to be every reason why formal discussions between prosecutor and defence counsel as to the perceived strength of the prosecution case should be encouraged. To the extent that [this] leads to matters being disposed of following a guilty plea, without derogating from the need to see appropriate convictions obtained and sentences imposed, that is surely a good thing (p. 6).

In contrast to the above arguments, however, some research argues that plea bargaining's effectiveness would be jeopardised if it were formalised, as one of the main benefits of plea bargaining is that the defence counsel can hypothetically discuss their client's guilt before an admission of guilt has been made (Freiberg & Seifman, 2001). If all elements of the plea bargain were to be publicly revealed, defendants could be disadvantaged and their right to a fair and unbiased hearing jeopardised, should they choose to proceed to trial (Bishop, 1989). Furthermore, Bishop (1989) holds that secrecy is a legitimate aspect of plea bargaining and that 'the success of discussions is due to their informality and unobtrusiveness' (p. 214). Thus as some commentaries maintain, the absence of formality within plea bargaining is acceptable and even necessary (Bishop, 1989; Freiberg & Seifman, 2001), and while 'formalisation sounds impressive, in practical terms it could be near worthless…[and] may well be counterproductive' (Bishop, 1989, p. 214).

The main reasons identified for not formalising plea bargaining include its impact on the flexibility of discussions, the practicalities of formalisation, how regulation would be enforced (Freiberg & Seifman, 2001, p. 72) and importantly, how formalisation might obstruct the very aims of plea bargaining because 'as soon as you try to regiment it all, or formalise it all, or control it in any way, then there'll be less of it' (Mack & Roach Anleu, 1995, p. 63). Further, given there are usually internal safeguards within prosecutorial departments aimed at controlling prosecutorial discretion, some research views this informal control as sufficient (Freiberg & Seifman, 2001; Mack & Roach Anleu, 1995). As Mack and Roach Anleu (1995) state, 'the importance of trust and experience on the part of the legal practitioners are sufficient controls on plea bargaining…Formalisation and additional guidelines are seen as counterproductive, resulting in less frankness and openness' (p. 74). In addition, Mack and Roach Anleu (1995) maintain that although the informal practice of plea bargaining 'is not perfect…it benefits both accused persons and the justice system' (p. 74).

In response to the debates surrounding plea bargaining's formalisation, reforms have been implemented, predominately in the US and more recently in the UK, to sanction and control plea bargaining and reduce its perceived limitations (Bond, 1975; Friedman, 1979; Kaplan & Skolnick, 1982; McCoy, 1993). The following section identifies some examples of these developments.

1.6 Formalisation Initiatives

A common response to the concerns over plea bargaining raised in the 1970s in the US was to abolish or limit the use of such discussions (Bond, 1975; Friedman, 1979; Heumann & Loftin, 1995, p. 185). In 1973 in New York (US), for example, a no plea bargaining policy for drug-related crimes was introduced (Verdun-Jones & Hatch, 1987, p. 100; S. Walker, 1993, p. 102). Similarly, in 1975 plea bargaining restrictions were implemented in El Paso, Texas (US) and in 1977 in Detroit, Michigan (US) (McDonald, 1985). The effectiveness of such reforms in preventing or restricting plea bargaining's use, however, was limited, and they were instead perceived to increase the occurrence of trials and increase judicial involvement in indicating likely sentences (Human & Loftin, 1995; McDonald, 1985; Rubenstein & White, 1980; Verdun-Jones & Hatch, 1987; S. Walker, 1993). Such policies have also been criticised for disregarding the benefits that can be offered by plea bargaining and forcing the discussions even further behind closed doors (Heumann & Loftin, 1995; McDonald, 1985; Verdun-Jones & Hatch, 1987; S. Walker, 1993). As a result, the US abolitionist policies have been abandoned, and abolition has not been a common or supported reform since the 1970s.

Another formalisation initiative implemented in the US in Dade County Florida in the 1970s was the pre-trial conference, which sought to enhance the roles of victims and defendants by giving them a function in the discussion process (Kerstetter & Heinz, 1979). The pre-trial conference also aimed to increase awareness and understanding of discussions and ensure they upheld the interests of all affected parties (Kerstetter, 1994). The aim of introducing the conference was thus 'not [to] envision a de-professionalising of the negotiation process. Rather, it [was] aimed at providing to interested parties a view of the process which previously had not been available and a limited opportunity [for defendants and victims] to add relevant information' (Kerstetter & Heinz, 1979, p. 129). This reform offered some benefits by increasing the information available to defendants and victims, and enhancing their role in the process. However, two evaluations of the conference found that victim and defendant involvement was markedly limited, and there was a noted absence of victim attendance (Kerstetter, 1994; Kerstetter & Heinz, 1979). In addition, although this reform may have worked somewhat positively to consider victim and defendant needs by offering them additional information and lending greater visibility and scrutiny to plea bargaining (Kelly, 1984; Maguire & Bennett, 1982; Johns, 2002; Sebba, 1996; Shapland, Wilmore, & Duff, 1985; Skelton & Frank, 2004; Strang, 2002; Wright, 2004), the two evaluations questioned the ability of the conference to work effectively in high-volume courts (Kerstetter, 1994; Kerstetter & Heinz, 1979).

In addition to offering increased visibility and access to information, a key focus of US plea bargaining reform has been to safeguard the defendant's involvement in discussions. The *Federal Rules of Criminal Procedure 1966* (US) (the 'Rules') provides an

example of this, specifically *Rule 11*, which requires judges to ask defendants a series of questions regarding the voluntariness, willingness and wisdom of their guilty plea (Schulhofer, 1979). The Rules also require the disclosure of the agreement in open court, where the judge must then accept or reject it (Fitzgerald, 1990, p. 158).

The effectiveness of the Rules as a formalised plea bargaining initiative has been extensively analysed in the literature (Buckle & Buckle, 1977; Heumann, 1978b; Miller, McDonald, & Cramer, 1978; Fitzgerald, 1990). Some of the major benefits of this reform identified are associated with allowing discussions to continue unrestrained, while ensuring the outcomes are more visible and subject to judicial scrutiny (Heumann, 1978b). Fitzgerald (1990) and Pizzi (1999) hold that revealing the plea bargain in open court increases the legitimacy of the agreement and better informs the defendant of the true consequences of his/her plea. Conversely however, this reform has been criticised for focusing on the voluntariness of the plea, rather than its basis in factual accuracy, with the result that the prosecution can still make inappropriate or unjust charge reductions without sufficient judicial oversight (Pizzi, 1999). In addition, concerns have emerged that defendants can easily be coached by counsel to ensure they answer questions in a way that demonstrates an understanding of the consequences of their plea and guilt, whether or not an understanding genuinely exists (Heumann, 1978b; McConville & Mirsky, 2003; Pizzi, 1999).[16] As Pizzi (1999) claims, 'judges don't want to ask too many question about the substance of the offence and prosecutors and defence lawyers don't want them to either, because this might raise questions about the wisdom of the plea bargain in the minds of those involved' (p. 187). The Rules have therefore been labelled as merely providing a 'stamp of legality and finality' (Blumberg, 1967, p. 136) as opposed to a genuine process that effectively addresses the needs of those involved in plea bargaining, or that controls the conduct of those involved in the discussions.

More recently in the UK, recommendations were made in the Fraud Review for a formalised plea bargaining system (UK Office of the Attorney General, 2007). The review was commissioned by the UK Attorney General in October 2005 in response to a number of fraud-related cases perceived to have been mismanaged, which fuelled court delays and wasted prosecutorial and court resources. The review thus had the specific aim of determining more efficient processes that could be implemented in the Crown Courts (UK Office of the Attorney General, 2007, p. 17). Significantly, the review recommended that the most effective efficiency-driven mechanism would be a formalised plea bargaining system. This recommendation has since been the focus of another government review, which is examining the best way to implement this recommendation within the Crown Courts (Ruckin, 2008). Suggestions have also been made in the UK media that following

[16] See, for example, McConville and Mirsky's (2003, p. 238) transcript of a judge enquiring into a defendant's guilty plea. The judge's closed questions are followed by an immediate 'yes' response from the defendant, with no further judicial inquiry.

the implementation of this formalised system, a similar process will follow for all criminal offences (Gibb, 2008, p. 35).

The Fraud Review (2007) argued that formalising plea bargaining in statute was a natural progression from the already sanctioned sentence indication scheme (*R v Goodyear* [2005] EWCA Crim 888, at 54) and would preserve the justice system's focus on upholding the ideals of accountability and transparency. The potential resource savings from encouraging early resolutions was also highlighted as a primary justification for the formalised process (UK Office of the Attorney General, 2007, p. 251). In addition to officially formalising discussions, the review proposed that prosecutors and defence counsel be permitted to engage in discussions before the conclusion of the police investigations, even prior to the defendant being charged (UK Office of the Attorney General, 2007, p. 270).[17] The review determined that encouraging early discussions in situations where the Crown believes there is sufficient evidence to support a conviction would result in 'better charging decisions and speedier and more efficient outcomes, which would benefit all parties' (UK Office of the Attorney General, 2007, p. 270). With a similar justification, the review recommended that sentence indications be offered by specialised fraud judges prior to the conclusion of the full police investigation or charge, but only when the accused indicates a willingness to plead guilty (UK Office of the Attorney General, 2007, p. 268). The review estimated that, when introduced, early sentence indications would offer benefits by freeing police and prosecutorial resources for contested matters and reducing costs and delays. The review also proposed that early plea bargaining and sentence indications would benefit defendants by removing the stress and costs associated with a trial (UK Office of the Attorney General, 2007, p. 269).

In addition to revolutionising the timing at which plea bargaining and sentence indications occur, the review recommended that 'plea bargain packages' be determined. This would entail both counsel not only agreeing on the facts and charges with which to proceed, but also determining an appropriate sentencing range—for example, between two and four years imprisonment (UK Office of the Attorney General, 2007, p. 271). As with all plea bargains in the UK, the guilty plea would still be subject to judicial approval, insofar as the judge could reject the plea if the charge(s) did not reflect the available evidence, and any sentence imposed would be based upon judicial discretion and not limited to the range recommended by counsel (UK Office of the Attorney General, 2007, p. 270). Although labelled by the UK Office of the Attorney General as 'more an evolutionary change than a revolutionary one' (p. 250), if implemented, this formalisation would provide the prosecution with much greater involvement in the sentencing process, and would significantly alter the UK's plea bargaining process.

[17] In the UK, prosecutors representing the Crown Prosecutorial Service (CPS) consult with the police to determine the defendant's charges; thus, being involved in the case at the pre-charge stage of criminal proceedings is a regular part of the prosecutor's role.

In contrast to the situation in the US and the UK, few recommendations to formalise plea bargaining have been made or implemented in Australia, despite research condemning its informality (P. Clark, 1986; Victorian Shorter Trials Committee, 1985). More often than not, the possibility of formalising plea bargaining is discussed, but ultimately informal mechanisms such as internal OPP guidelines are promoted as sufficient controls (Mack & Roach Anleu, 1995; SCAG, 2000). When plea bargaining reforms have been implemented, they generally emerge in response to specific cases where there is some evidence or perception of misconduct. For example, in NSW the perceived mistreatment of victims by the OPP in two cases involving plea bargaining resulted in public condemnation of such discussions, and the NSW Attorney General commissioning a review into the adequacy of the existing *Prosecutorial Guidelines* for monitoring prosecutorial discretion (*R v AEM (Snr)*; *R v KEM*; *R v MM* [2002] NSWCCA 58 (13th March 2002); *R v Laupama* [2001] NSWCCA 1082 (7 December 2001)). The review's recommendations (Samuels, 2002) were used as a foundation to amend the *Prosecutorial Guidelines* (NSW) in 2003, which significantly increased the importance attributed to the victim and his/her opinions in the plea bargaining process (see Chapter Three for further discussion).

In Victoria however, there have been no recent reviews commissioned to consider plea bargaining's formalisation, despite a recent high-profile case which created debate over the legitimacy of discussions. This case involved an infamous figure in Victoria's gangland war, Carl Williams (*R v Carl Anthony Williams* [2007] VSC 131). Following several months of discussions, Williams pled guilty to three counts of murder and one count of conspiracy to commit murder (*R v Carl Anthony Williams* [2007] VSC 131 at 1). As part of the agreement, drug trafficking and murder charges were withdrawn and investigations into his involvement with another five murders were concluded (Flynn, 2007). In addition to these concessions, an agreement was made that as part of its sentencing recommendation in the drug trafficking case against his father, George Williams, the Crown would recommend a non-custodial sanction (*R v George Leslie Williams* [2007] VSCA 490).

As a result of media speculation on 'Williams' deal' (*Sunday Age*, 2007, p. 62), public scepticism over plea bargaining's legitimacy arose, alongside concerns raised in the media that 'justice has been traded away' (*Sunday Age*, 2007, p. 62). The lack of information and the hidden nature of the agreement, including the months of secret negotiations and suppression orders prohibiting the media from reporting on Williams's guilty finding from a 2006 murder trial (*R v Williams* [2006] VSC 367), also generated strong concerns within the media regarding the lack of scrutiny surrounding prosecutorial discretion in making charge concessions. Across Australia, media reports questioned '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, p. 62) In Victoria, claims 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, p. 4) and headlines maintaining that 'deal denies Moran [one of the victim's] family justice' (Nguyen & Petrie, 2007, p. 2) further fuelled scepticism over plea bargaining's legitimacy.

Significantly, this case raised a number of concerns involving transparency, victim and defendant rights, and public interest ideals; however, unlike the response in NSW, these were not addressed by the Victorian Government through reform or review. Whether Williams's plea bargain was a fair and just outcome or an example of efficiency benefits being prioritised over public interests remains unclear. Importantly, however, this case highlighted a central problem surrounding Victoria's informal plea bargaining process, and offered another basis for my analysis: that the lack of scrutiny and transparency of discussions and agreements means that one can never properly assess whether justice occurs.

1.7 Conclusion

Drawing from national and international research, this review has provided an overview of plea bargaining and has discussed the four key themes that emerge from the literature involving: (1) court inefficiency and delays; (2) sentence discounts; (3) the formalisation debate; and (4) formalisation initiatives. This review has identified a gap in the literature and in legal policy which limits our understanding of plea bargaining and of formalisation issues within a Victorian context. My research thus attempts to bridge this gap by contributing to, and extending upon, the existing literature with an original, multifaceted and grounded analysis of plea bargaining's potential formalisation in Victoria. The significance of my research within the legal policy context is also demonstrated by the increased consideration currently being given to victims and to upholding human rights within Victorian criminal proceedings and law reform, and the increased importance and attention being placed upon transparent and efficiency-driven reforms (Rapke, 2008; Victorian Attorney General's Department, 2004). To place this research in context, the next chapter draws from both the existing literature and my research data to identify the three main motivations fuelling the formalisation of unregulated criminal justice processes, and how these inform this research's justifications for formalising plea bargaining in Victoria.

CHAPTER TWO
MOTIVATIONS FOR FORMALISATION

The tendency nowadays is to introduce more control rather than less, more control in every area. Like with victims, everything is automated by the Victims' Charter now…There are issues with discretion being exercised now. A discretionary decision is made and someone says why? So there is a focus on reducing discretion. There is scope there [to reduce discretion] but you need to have some [discretion], it just requires a bit of finesse that hasn't been worked out yet…[Then] you have the issue of delay. A lot of the delays in the court system arise from stuff sitting around waiting for something to happen and nothing happens. There are so many delays in the courts and there is pressure to alleviate them. Delay is seldom to the benefit of the prosecution. Victims are badly affected by having to wait, defendants are stressed, everyone is affected…So there is a tendency to implement controls to control these problems, whether that is good or bad, I don't know. But like any system, these faults need to be attended to (ProsecutorJ).

This research examines Victoria's informal plea bargaining process and the justifications driving its formalisation within the context of non-transparent justice, adversarial traditions, the structure of pre-trial proceedings and court (in)efficiency. This chapter identifies three common motivations for formalising previously unregulated and non-transparent criminal justice processes: (1) the wide discretionary powers of criminal justice agencies; (2) the evolving status of victims and their increased recognition in law reform; and (3) court inefficiency (Davis, 1969, 1982; Louthan, 1985; Payne, 2007; Rapke, 2008). This chapter is divided into three parts and provides a theoretical foundation from which the subsequent chapters will expand their focus and discussion on Victoria's informal plea bargaining process.

Many of the issues which challenge the competent operation of Victoria's criminal justice system, particularly those involving efficiency, discretion and transparency, are characteristic of the pressures confronting most common law systems (Baldwin, 1997; Hunter, 2005; Mack & Roach Anleu, 2007; Roberts, 2002). In response to these challenges, there have been moves in Australia over the last 30 years and since the late 1960s in the United States (US), United Kingdom (UK) and Canada, towards controlling criminal justice agencies' discretionary powers (Blumberg, 1967; Dixon, 1997b; Fitzgerald, 1990; Mainstreet Committee, 2005; Pizzi, 1999). This movement is especially noticeable in the UK's approach to justice, where legislation and mandatory guidelines control the actions of criminal justice agencies in almost all aspects of criminal proceedings. The *Attorney General's guidelines on the acceptance of pleas and the prosecutor's role in the sentencing exercise 2005* (UK), which regulate prosecutorial conduct in plea bargaining and sentencing, provides an example of such developments. Using these guidelines as a basis for discussion, Part I of this chapter examines the first common motivation underlying a push towards formalisation, involving the control of discretionary powers. In doing so, it

highlights the context of this research as it relates to issues surrounding prosecutorial discretion and plea bargaining in Victoria.

Part II of this chapter explores the concept of victimology and theoretical understandings of victimisation to examine the second common motivation driving formalisation in common law systems; the rise of the victim's status and the influence of this on law reform. It examines two recent examples of victim-motivated law reform in Victoria—the *Victims' Charter Act 2006* (Vic) ('*Victims' Charter 2006* (Vic)') and the establishment of the Office of Public Prosecutions's (OPP) Specialist Sexual Offences Unit—to demonstrate the benefits of formalising non-transparent processes, and to highlight the significance of this research in examining plea bargaining's informality. Using the *Victims' Charter 2006* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Human Rights Charter 2006* (Vic)'), this analysis extends to a discussion on how the contrasting ideals of the due process and crime control perspectives have contributed to the difficulties inherent to seeking to address both victim and defendant interests, simultaneously, in law reform. While recognising this as a difficulty, Part II suggests that in a similar vein to restorative justice processes, formalising plea bargaining could challenge this polarisation by seeking to uphold the interests of both groups.

Part III examines court efficiency and delays as driving the third common motivation for formalisation. Delays contribute significantly to the failure of criminal proceedings to achieve efficiency aims, particularly during the pre-trial stage. A common method used to minimise the extent and impact of delay is the formalisation of incentives that encourage early guilty pleas and the resolution of any issues and/or cases not in dispute. As a result, there have been moves in some common law systems towards implementing processes which provide transparent incentives to defendants in exchange for their early guilty pleas, such as sentence discounts and indications (see, for example, *Criminal Justice and Public Order Act 1994* (UK) s.48; *Criminal Procedure Act 2009* (Vic) s.61, s.208-s.209; *R v Goodyear* [2005] EWCA Crim 888; *R v Thomas and Houlton* [2000] NSWCCA 309, at 72; *Sentencing Act 1991* (Vic) s.6AAA). Part III explores the concept of court inefficiency as a justification for formalisation, by examining the extent and impact of delays in Australian criminal justice systems, and possible reasons for such delay. This discussion provides a further foundation for this research's analysis of the contradictions inherent to maintaining an informal plea bargaining system, within a court system struggling with inefficiency.

In examining these three justifications, this chapter contextualises this research within the broader topic area. Furthermore, the analysis locates this research within a theoretical framework and within existing considerations and ideological perspectives on law reform.

PART I:
THE CROWN'S DISCRETIONARY POWERS

Discretion can be defined as the 'situation in which an official has latitude to make authoritative choices not necessarily specified within the source of authority which governs his [sic] decision making' (Atkins & Pogrebin, 1982, p. 3). Discretion is also defined as 'the freedom to break rules' (Wilcox, 1972, p. 112). As Aas (2005) observes, 'discretion is usually regarded as the opposite of rules and law…where, instead of deciding a question by recourse or fixed rule…there is no prescribed…course of action' (p. 15). In effect then, discretion directly contrasts with the criminal justice system's aims of consistency, certainty and equality, insofar as it allows for individual idiosyncrasies to control aspects of criminal proceedings. Discretion is therefore 'the antithesis of a decision taken in accordance with the rule of law' (Davis, 1969, p. 25). As a result of this conflict, moves towards the stringent control of criminal justice agencies' discretionary powers, particularly those of the judiciary and prosecutor, have emerged (Aas, 2005).

Moves towards the formalisation of discretionary processes have arisen partially in response to a bureaucratic desire to improve accountability in criminal proceedings and partially as a result of public perceptions that regulatory controls minimise abuses of power (Breitel, 1960; Cotterrell, 2004, p. 21; Kagan, 2004, p. 212; Louthan, 1985; S. Walker, 1993). Consequently, there has been an expansion of controls and regulations so that 'written rules replace custom…and specialists administer the justice bureaucracy in accordance with written procedures and regulations' (Louthan, 1985, p. 15). This shift in the control of discretion has been documented in the literature since the 1960s: in this regard, Davis (1969) accurately predicted that 'much discretionary justice not now governed by or guided by rules should be…and will be' (p. 15). Sixteen years later, Pinkele (1985) claimed that 'the desirability of administrative rules extends as far as discretionary power extends. Whenever any agency or officer has discretionary power, rule-making is appropriate…Just behaviour can occur only through the establishment of just laws' (p. 12). Further, in 2004, Kagan similarly claimed that 'ever proliferating rules…have become very important components of contemporary legal systems' (p. 212).

Formalising discretionary powers has also been recognised and supported within liberal and radical perspectives on criminal justice reform. For the most part, liberal theory argues that laws and formal restrictions are the framework of a democratic system because they offer consistency and uniformity (Aas, 2005; Pinkele, 1985; S. Walker, 1993). Stringent controls on discretion mean all individuals are, at least in theory, treated under the same set of rules and receive like treatment (Aas, 2005). Liberal perspectives thus acknowledge the necessity of formalisation in any area where there is the potential for individual or institutional abuse, claiming:

> The behaviour of no-one in a position of authority can be excluded from another's scrutiny…Decision makers should be allowed little other than the most minimal form of weak discretion…The more constraints in place to restrict discretionary administrative interpretation and implementation, the better off we are as democratic people (Pinkele, 1985, p. 560).

Radical perspectives also, for the most part, support the control of discretionary powers. Radical thought questions the legitimacy of those who hold discretionary powers, claiming it is usually the powerful and dominant classes who attain and gain from discretion, while the less powerful classes suffer (Giddens, 1990). From these two perspectives, it can then be argued that controlling discretion is attractive, because it offers a mechanism to control the powers of criminal justice agencies ensuring these are clearly defined and transparent (Aas, 2005; Dixon, 1997b).

In criminal proceedings, formalised discretion has largely impacted on prosecutors and the judiciary, generally with the justification that their public interest roles require formalisation to imbue transparency and consistency to their decisions (Cotterrell, 2004, p. 21; Kagan, 2004, p. 212; Mainstreet Committee, 2005; Samuel & Clark, 2003). This has been achieved through statutory and formal controls, such as the many binding and stringent sentencing guidelines implemented in the UK by the Sentencing Guidelines Council.[18] The Council was formed in 2004, with their primary aim being 'to develop comprehensive sentencing and allocation guidelines…to assist all courts in England and Wales to help encourage consistent sentencing' (UK Sentencing Guidelines Council, 2008). Aas (2005) extends this purpose to include reducing judicial discretion and making judicial 'decision-making more transparent and predictable…[because] sentencing decisions lacked a coherent structure, they were a law without order' (p. 15).

My data indicates that controlling discretion through formalisation is not limited to the UK. Participants from both the defence counsel and prosecutorial groups have observed that criminal proceedings in Victoria are also becoming increasingly bureaucratised with greater controls placed on discretion. As Defence CounselA claimed, 'it is the spirit of the times, the flavour of the month to formalise everything and control everything. Nothing is left to discretion, it is all regulation and structure'. ProsecutorE also maintained that 'in all areas, prosecutors, defence and the courts are trusted less and less, and monitored and checked more and more'. The formalisation of the previously informal summary sentence indication process operating in Victoria's Magistrates' Court provides an example of this. The informal process previously involved the Magistrate, at the defendant's request, providing an indication of the likely sentence, if the defendant were to plead guilty. Despite 30 out of 37 participants claiming this informal process operated effectively, statutory guidance was enacted in July 2008, which now formally dictates the required roles of

[18] See, for example, *Guideline on Breach of Anti-Social Behaviour Order 2008* (UK); *Guideline on Causing Death by Driving 2008* (UK); *Guideline on Theft and Burglary in a Building other than a Dwelling 2008* (UK).

Magistrates, defence counsel and police prosecutors in this process (*Criminal Procedure Act 2009* (Vic) s.61; *Magistrates' Court Act 1989* (Vic) s.50A; VSAC, 2007c).

Victoria's plea bargaining system, however, directly contrasts with these moves towards controlling discretion, as cases are resolved by unscrutinised prosecutorial decisions in an entirely unregulated, non-transparent process. This lack of control or transparency of prosecutorial discretion is particularly unusual given the increasing moves in Victoria towards controlling discretion and transparency in criminal proceedings that impact on sentencing (see *Criminal Procedure Act 2009* (Vic) s.61, s.208-s.209; *Sentencing Act 1991* (Vic) s.6AAA).[19] The importance of formalising prosecutorial discretion in charging decisions is also heightened by the increased control over judicial sentencing powers, which Aas (2005) claims 'makes the pre-trial decisions, where the charges are negotiated, more significant' (p. 19). This is because the inflexibility of set sentencing penalties and minimum sentences means the charging decision has a greater impact on the defendant's likely sentence, which in itself increases the justification for providing some degree of control over prosecutorial discretion in making such decisions initially (Galligan, 1986; Lezak & Leonard, 1985). As Davis (1969) pertinently questioned, 'why should the prosecutor's charging decision be immune to review by other officials and immune to review by the courts, even though our legal and governmental system elsewhere generally assumes the need for checking human frailty?' (p. 81)

An emerging theme among participants' responses to this question was that retaining an absence of control on prosecutorial discretionary powers in plea bargaining is necessary due to the inherent tension that exists between flexibility and uniformity. Participants claimed that a level of prosecutorial discretion is required when plea bargaining, in order to facilitate reasonable outcomes and to be able to consider the individual circumstances of cases. This need to balance flexibility with uniformity has been referred to within the legal community as 'to turn on the facts' (ProsecutorH) or the 'factual matrix' (Defence CounselC). However, without some uniformity, the flexible, unscrutinised powers held by prosecutors when plea bargaining have the potential to be abused, or at the very least to create a perception of unfairness or abuse. Thus, any formalisation of plea bargaining must strike a balance between uniformity and flexibility, whereby it should seek to control discretion within the parameters of legal principles and due process, allowing a compromise to be made in which some public scrutiny is provided to prosecutorial decisions, while prosecutors still maintain some flexibility and control in making decisions.

A key component of this type of formalisation is to control discretion by 'confining, structuring and checking' (Dixon, 1997b, p. 300). This may be achieved by specifying the

[19] The *Criminal Procedure Act 2009* (Vic) s.61 and s.208-s.209 governs the summary and indictable sentence indications schemes operating in Victoria (see Chapter Six for further discussion). The *Sentencing Act 1991* (Vic) s.6AAA provides greater transparency to the process whereby a sentence discount is applied in exchange for a defendant's guilty plea.

discretionary powers and what limits exist on these in statute. In Victoria, this would entail providing statutory acknowledgement of plea bargaining and authorising its use by both Crown representatives and defence counsel. The benefits of this type of formalisation are presented in the subsequent chapters, but for now, it is important to note that this type of formalisation can minimise the gap between what is accepted and known within the legal community, and what information is available to the public, which could reduce some of the scepticism surrounding plea bargaining, in particular, surrounding prosecutorial discretion in making plea bargaining decisions (Davis 1969, 1982; Jones, Weatherburn & MacFarlane, 2008).

The UK's approach to justice is a prominent example of a common law system in which extensive controls (legislative, case law and formal guidelines) are placed on criminal proceedings and those involved within them.[20] In the context of plea bargaining, controls restricting and removing prosecutorial discretion have been implemented on charging decisions, while the prosecutor's role in the sentencing hearing has also been clearly defined, predominantly by the *Attorney General's guidelines on the acceptance of pleas and the prosecutor's role in the sentencing exercise 2005* (UK) ('the Guidelines'). The following sections provide a snapshot of the UK's approach to justice, with a specific focus on the Guidelines.

2.1 A Snapshot of the UK's Approach to Justice

The power held by the Attorney General to issue the Guidelines was based on his role in supervising the Crown Prosecutorial Service (CPS), and all other prosecutorial services, including the Serious Fraud Office and the Revenues and Customs Prosecution Office (Policy AdvisorA).[21] Although not incorporated in statute, the Guidelines are mandatory requirements for prosecutors and are endorsed by the courts as 'best practice' (Policy AdvisorC). This means that while breaching the Guidelines would not in itself result in a case being dismissed due to prosecutorial misconduct, deviation from them could be a factor influencing an Appeal Court in ruling against the Crown (Policy AdvisorA). As observed by Policy AdvisorA, 'they are Guidelines, but they must be followed'.

The Guidelines were initially introduced in December 2000 in accordance with s.7 of the *Human Rights Act 1998* (UK), and the *European Convention on Human Rights 1950* (EU), both of which outlined the importance of transparency in the administration of justice. The Guidelines were also introduced in response to a publicised case of prosecutorial misconduct. As Policy AdvisorA described:

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[20] See, for example, *Code for Crown Prosecutors 2004* (UK); *Domestic Violence, Crime and Victims Act 2004* (UK) s.32; *Farquharson Guidelines on the role and responsibility of the prosecution advocate 2001* (UK); *Prosecutor's Pledge 2004* (UK); *R v Goodyear* [2005] EWCA Crim 888 (at 54).

[21] Lord Peter Goldsmith was the UK Attorney General when the Guidelines were introduced in 2005.

> The first Guidelines were introduced following a case where the prosecutor had become totally bound up in the sentencing proceedings, so much so that the Attorney General found that his hands were fettered when he wanted to refer the case for an unduly lenient sentence to the Court of Appeal.[22] That was the reason for the original Guidelines that we produced and that was very much a stripped down version saying this is the role of the prosecutor, you don't get involved in the sentencing arena and this is how you engage in relation to the acceptance of pleas. It wasn't anywhere near as comprehensive as the document you see here. But the role of the prosecutor has and is developing quite significantly….So in 2003, we decided to work on a more comprehensive update to the Guidelines. The document you see now took eighteen months to put together and negotiate. We were on about version fourteen by the time we got to the stage that you see now.

In addition to updating the prosecutor's role, Policy AdvisorC claimed the Guideline's restructure in 2005 was to provide additional control of prosecutorial discretion in plea bargaining and sentencing 'beyond the limited scope of the original Guidelines'.

The Guidelines operate in conjunction with a number of other legislative and formal controls, which regulate prosecutorial conduct and discretion. These include, the *Farquharson guidelines on the role and responsibility of the prosecution advocate 2001* (UK), which control prosecutorial conduct in the prosecution process, and the *Code for Crown Prosecutors 2004* (UK), which controls prosecutorial conduct in relating to the laying of charges through to the Plea and Sentencing Hearing. The *Code of Practice for Victims of Crime 2004* (UK) is another control that works in conjunction with the Guidelines. This policy outlines prosecutorial obligations to victims and is recognised in s.32 of the *Domestic Violence, Crime and Victims Act 2004* (UK). The extent of these controls placed on prosecutorial conduct reveals the movement towards incorporating consistent and transparent prosecutorial approaches in proceedings within the UK's criminal justice process. The formal acknowledgement and guidance provided to both counsel on these generally quite informal processes, as dictated in the Guidelines, also reveals the extent of controls placed on discretionary powers and legal conduct within the UK's criminal justice process, which as Policy AdvisorC claimed, also 'ensures greater transparency in plea bargaining decisions'. These controls further demonstrate the potential for formalisation to work as a mechanism to achieve transparency and consistency in prosecutorial conduct and in the plea bargaining process itself.

2.1.1 The 2005 Guidelines

The Guidelines are divided into five areas that outline the required prosecutorial conduct and responsibilities in pre-trial, trial and sentencing proceedings. The key aims of the Guidelines are to provide transparency of prosecutorial decisions when plea bargaining, and to uphold public interests. As Policy AdvisorA explained:

[22] In the UK the Attorney General can decide whether to appeal against a court's sentencing decision.

> Very much the driver of the Guidelines is you get the charge right, you get the acceptance of plea right and you play a part in the sentencing. Then you are as a prosecutor, a more rounded individual. You're influencing in terms of public interest and in the public good.

Policy AdvisorA also maintained that a central aim of the Guidelines is to ensure that victims' rights are seen to be considered within plea bargaining and sentencing. This aim aligns strongly with the victim-focused approach of the UK justice system, whereby in addition to being a leading reformer of prosecutorial discretion, the UK Government and Office of the Attorney General have been prominent advocates for legislating victims' rights (*Code of Practice for Victims of Crime 2004* (UK); *Code for Crown Prosecutors 2004* (UK); *Domestic Violence, Crime and Victims Act 2004* (UK) s.32; *Prosecutor's Pledge 2004* (UK) s.2-s.3; Shapland, Wilmore, & Duff, 1985; Strang, 2002).

In accordance with this victim-focused approach, and the legal obligations dictated in formal guidelines and legislation, s.B3 of the Guidelines states that victim interests must be considered at every stage of the plea bargaining process (*Code for Crown Prosecutors 2004* (UK); *Domestic Violence, Crime and Victims Act 2004* (UK) s.32; *Prosecutor's Pledge 2004* (UK)). To achieve this, the Guidelines require prosecutors, wherever practical, to speak with the victim or their family to explain any plea bargain offers (s.B3). In addition to advising victims, prosecutors must also ascertain their opinions on the plea bargain before accepting it, and they must record this opinion in writing, which then forms part of the court records and may impact on the judge's decision whether or not to accept the defendant's guilty plea (Policy AdvisorC).

Further to providing recognition to victims in the plea bargaining process, the Guidelines also outline the main factors that should be considered by prosecutors before deciding whether to plea bargain (s.B4). These focus on whether the plea bargain adheres to public interests; demonstrates the severity of the offending behaviour; reflects the physical and/or emotional injuries to the victim; demonstrates the impact of the crime on the community; and what the likely sentence might be. The Guidelines also provide instructions for both counsel in determining the 'basis of the plea bargain' (s.C). This is essentially the agreed summary of facts upon which the agreement is based, and the court will sentence the defendant. S.C2–s.C3 requires the defence counsel to record the basis of the plea bargain in writing, and directs the prosecution to 'consider [this] with great care' (s.C3) to ensure it reflects the prosecution's version of events and the impact of the offence on the victim. The Guidelines then require the prosecutor to seek approval for the written basis of the plea bargain from the prosecuting authority (Policy AdvisorC).[23] If the prosecuting authority endorses the written basis of the plea bargain, the Guidelines require that the document be signed by all parties and lodged as part of the court records.

[23] The prosecuting authority is the equivalent of a Crown prosecutor in Victoria.

2.1.2 Section C6: The Big Change

The most contentious element of the Guidelines, due to its potential to encroach upon judicial independence in sentencing and to significantly control prosecutorial pre-trial preparation, is s.C6. S.C6 was implemented in the Guidelines in June 2007, in response to the Lord Chief Justice's comments in *R v Cain and Others* [2006] EWCA Crim 3233, where he criticised the lack of guidance presented to sentencing judges by prosecutors. S.C6 thus obliges prosecutors to prepare a Plea and Sentence Document, seven days prior to the Plea and Case Management Hearing in the Crown Court, regardless of whether there is a perceived likelihood of the defendant pleading guilty.[24] The Plea and Sentence Document requires prosecutors to commit to writing: (1) the aggravating and mitigating factors of the offence(s); (2) any statutory provisions relevant to the offender or the offence(s), including relevant sentencing guidelines and guideline cases; (3) the Victim Personal Statement(s) (VPS); (4) evidence of the impact of the offence on the community; and (5) any intentions of the Crown to apply for ancillary orders, such as a confiscation order.[25] S.C6 requires prosecutors to then use this material to determine a qualitative and quantitative sentencing range (for example, a custodial sentence of between three and five years) that would be acceptable from the Crown's perspective if the defendant were to plead guilty at the Plea and Case Management Hearing (Policy AdvisorC). The justification for requiring that this document be completed at such an early stage of proceedings is that if the defendant pleads guilty at the hearing, the prosecutor has sufficient information to address the court immediately on sentencing, and thereby the sentence can be determined without the need to adjourn the hearing and risk delaying finalisation of the case (Policy AdvisorC).

S.C6's official purpose is cited as being to 'further enhance the role of the prosecutor in the sentencing process by ensuring there is an accurate record of the basis on which a case is brought and that the court has the necessary assistance in sentencing' (UK Office of the Attorney General, 2007, p. 1). Policy AdvisorA also claimed that it offers 'greater consistency and accuracy in the judge's sentencing decision'. In line with the Guidelines' overall aims, Policy AdvisorC further maintained that s.C6 reiterates the importance the UK Government and criminal justice system places upon 'upholding [public] confidence with restrictions on discretion…and greater guidance is provided to plea [bargaining] and sentencing processes'.

While some Victorian participants responded positively to the Guidelines, generally on the basis that 'it is just formalising an informal process really' (Defence CounselE), s.C6 was not supported by any Victorian participant, largely due to the potential for it to encroach upon judicial independence in sentencing (37 out of 37 participants). As

[24] This is the equivalent of the Committal Hearing in Victoria.
[25] The VPS is equivalent to the Victim Impact Statement (VIS).

JudiciaryE claimed, 'it is important that prosecutors understand that the court is independent of them, just as we must understand that their prosecuting decisions are independent of us'. ProsecutorD similarly maintained that:

> It is not our role to provide that information. We can point out the authorities and the precedents and even suggest perhaps a rough custodial or non-custodial, but that should be it. Otherwise, you run the risk of hindering them from making a decision, because they know there will be a basis for a Crown appeal if it doesn't fit.

The majority of prosecutorial (fifteen out of nineteen participants) and defence counsel (eight out of eleven participants) participants also criticised s.C6 for its potential to hinder the process of plea bargaining before the Plea and Sentence Document had been prepared. ProsecutorJ argued that 'once you start to formalise such processes, it will have a hampering impact on the whole notion of plea bargaining'. Similarly, ProsecutorN claimed that requiring this type of prosecutorial preparation 'extends beyond the prosecutor's historical duty to the public and [the] court, and would in all likelihood hinder them from thinking about early resolutions'. These arguments were based largely on prosecutors having to shift their focus towards written advocacy and sentencing issues, and away from the possibility of case resolution. As ProsecutorD stated, 'the more we seem to generate paperwork, the more we seem to spend on the paperwork rather than actually spending time analysing the case and trying to assess it'. ProsecutorC similarly maintained that 'there has been a preoccupation with people having to file forms on time, and that's become the primary focus of everyone, and people don't talk anymore and you can't resolve things if you don't talk'.

In contrast to these views, however, two of the UK policy advisor participants were generally supportive of s.C6's ideals. As Policy AdvisorA explained:

> Sentencing is complex and a lot of erroneous sentences tend to be made which get to the Court of Appeal. To make sure the appropriate sentence is then passed, it is right that the prosecutors with their public interest role, play a role in assisting the court to make sure the sentence is right…In effect, what we are saying is that prosecutors always need to stand up to the mark in sentencing, which means they have to play a part in the sentencing process.

Policy AdvisorC also claimed that judicial independence is not hindered by a prosecutorial sentencing range because 'it is not determinative. The judge can still make a decision independent of their [the prosecutor's] statement'. In addition, in line with s.C6's main aims, Policy AdvisorC argued that the prosecutor's involvement in sentencing would reduce the likelihood of an appeal against the manifest inadequacy of the sentence and would provide the judge with a framework upon which to base his/her sentence, so it would accurately correspond with all mandatory sentencing regulations. He maintained that:

> Prosecutors are not advocating and will never advocate what the sentence should be. But what the Guidelines are saying is on the basis of the defendant's offending, on the basis of

> x, y and z, the CPS are saying the appropriate sentencing range for this is between two and four years…The prosecutors say what the range should be to assist the court. The court can say I thank you Mr [sic] prosecutor but I think you are talking a bit of rubbish and I am going to sentence him [sic] to x. But at least you have tried to assist the court in where the range should be…We are also saying that you have a responsibility when you stand up as a member of the CPS to make sure the court enters a sentence that is good in law…Time moves on, and the role of the prosecutor has developed quite significantly. Really at all stages they are more engaged in the charge stage and very much involved in the other end of the process, which is the acceptance of pleas and sentencing…So the role they play should be to assist with the sentencing stage, as part of that public duty, to make sure the sentence reflects what the public expects.

In a similar vein, Policy AdvisorA maintained that completing the document was 'an important task for prosecutors to undertake, and it must and should happen in every case as part of the Crown's responsibilities to the public'.

The main justification offered by the UK participants in support of s.C6 was the potential efficiency benefits that could result from early prosecutorial preparation. As Policy AdvisorC argued:

> If the defendant doesn't plead guilty, they go to trial and if they get convicted, then you will still need it [the document]. And if they do plead guilty you need it and you need it fairly urgently and you will have it. So it is not a case of the prosecution going to court and not being able to give the required information to the court because they didn't have time to complete it before the hearing. Because of this change, this information will be available straight away.

However, even as a supporter of s.C6's ideals, Policy AdvisorA acknowledged the potential limitations of preparing a sentence-focused document at such an early stage of proceedings. He claimed:

> This is where the world changes at s.C6. It is going to increase workloads dramatically. I have had so much stick from prosecutors over this because it is going to create a lot of additional work and there is a lot of angst about it. Because it requires prosecutors to prepare a fairly substantial document that is only useful for the sentencing process and it will often be prepared before any plea discussions take place, [or] the defendant makes a decision to plead.

As implicitly revealed in these comments, there are potential resource consequences of requiring that a sentence-focused document be compiled at the pre-trial stage. Initially, it will increase prosecutorial workload pressures by requiring the completion of a substantial level of work be completed in the pre-trial process, which is generally not completed until after a guilty plea is entered or returned from trial. As ProsecutorL maintained, 'there is already excessive workload pressures on prosecutors in the UK where plea bargaining is very common, because the volume of work is so great and they couldn't get through it unless they resolved cases and I imagine this pressure will only get worse with this [s.C6]'. ProsecutorG similarly argued that:

> Prosecutors don't really have time to be completing sentencing information before a guilty plea [is entered] so you may find people turn up at the pre-trial process and not have done all the correct forms and procedures. But you can't really blame them, because they are under other work pressures already.

Victorian participants also claimed that the time and resources used to complete the document could be wasted, because the case is not guaranteed to resolve by a guilty plea or finding; thus the document may never be used. This concern is particularly significant given that between 2006 and 2007 in two sample UK Crown Courts, over 50% of cases resulted in a dismissal or a not guilty verdict in London's Crown Court (juvenile offenders), and over 30% of cases resulted in a dismissal or not guilty finding in Birmingham's Crown Court (adult offenders) (Birmingham Crown Court Annual Report, 2007, p. 9; London Crown Court Annual Report, 2007, p. 7).

A major benefit of s.C6, as identified by Policy AdvisorC, is the potential to reduce court delays because defendants can be sentenced immediately following their guilty plea, as opposed to the matter being adjourned for a later hearing. This benefit however, is only obtained if the defendant pleads guilty at the pre-trial stage. Given that late guilty pleas were entered in almost 30% of juvenile cases and 40% of adult indictable cases in London and Birmingham's Crown Courts respectively between 2006 and 2007, the impact of this benefit is questionable (Birmingham Crown Court Annual Report, 2007, p. 8; London Crown Court Annual Report, 2007, p. 9). In addition, as two Victorian participants identified, even if a guilty plea is entered at the pre-trial stage, the benefit of the prosecution preparing all relevant sentencing material will only arise if the defence counsel also has all plea material prepared (Defence CounselF; ProsecutorJ). If the defence is not prepared, the hearing has to be adjourned regardless of any prosecutorial preparation.

In response to such criticisms, Policy AdvisorC drew comparisons to a similar initiative employed in New Zealand (NZ), involving a *Sentencing Memorandum* document (*Sentencing Practice Note 3 2003* (NZ) s.2). He argued that in comparison to the requirements of the NZ document, s.C6 was a 'brief and easily prepared piece of work'. He claimed:

> Within s.C6 there is a plea and sentence template, which is a one-page document. A *Sentencing Memorandum* is like a book that prosecutors have to complete. We think the Plea and Sentence Document will provide sufficient assistance to the court, without going down the path of the *Sentencing Memorandum*, which is an excellent document and would be great, but we don't have the capabilities to do it because we are dealing with a large volume of crime and it wouldn't be practical.

While there are similarities between the required content of these two documents—for example, both require prosecutors to identify any aggravating factors and if applicable, any sentences imposed on co-offenders—there is a significant difference between them. The *Sentencing Memorandum* is completed only after a guilty plea or finding has been attained,

and must be filed with the court two days prior to the sentencing hearing, not during the pre-trial process. Thus comparisons between the documents can be made only based on the content of the documents, not the timing or resource implications as suggested by Policy AdvisorC.

In addition to s.C6's potential resource implications, Victorian participants raised substantial doubts over the accuracy of a sentence-focused document prepared at the pre-trial stage. This was of particular concern to defendants because much of their personal mitigation may be unknown to the Crown. Personal mitigation specifically relates to factors impacting on the offender, as opposed to the offence itself (Jacobson & Hough, 2008, p. 10). It can include information on a defendant's past, employment history, his/her circumstances at the time of offending, financial pressures, psychiatric or intellectual problems, drug addictions and future prospects (Jacobson & Hough, 2007, p. viii; Shapland, 1981). Personal mitigation can also include the defendant's 'response to the offence and prosecution (e.g. remorse, acts of reparation)' (Jacobson & Hough, 2008, p. 10). Importantly, a recent study in the UK found that personal mitigation can not only impact on the length of a sentence, but is also a key factor considered by judges in determining a custodial or non-custodial sanction (Jacobson & Hough, 2007). Therefore, in the absence of this information, any sentence recommendation made to the court by the Crown is likely to be inaccurate.

In addition to the document's accuracy being questionable, ProsecutorM challenged the relevance of any material compiled at such an early stage of proceedings, claiming that any information obtained could change significantly between the time of the document being compiled, and the time of the defendant being sentenced. He maintained that:

> When the document is first written, a matter in mitigation might be that the offender was receiving counselling, was living at home with his [sic] family, was meaningfully employed and in a stable relationship. But by the time the sentencing comes along, the offender is no longer living at home, no longer in the relationship, no longer working, not receiving counselling, using alcohol and drugs and committing further offences. Those matters are extremely significant and can make a massive difference to the sentence, so its accuracy is then in doubt.

As ProsecutorM's comments demonstrate, any information on a defendant's personal circumstances which could impact on his/her sentence is likely to require amendment at a later date from when the document was originally compiled. In light of this, it is likely that prosecutors would need additional time to review the document prior to using it as a basis for their sentencing recommendations, and thus many of the resource benefits acquired by completing it at an early stage will be lost, in most cases.

2.2 Similar Guidelines in Victoria?

As a whole, the Guidelines place rather strict requirements on prosecutorial conduct and discretion. However, s.C6 appears to move even further than this, to significantly control and alter prosecutorial pre-trial preparation, while also to some degree, restricting judicial independence in sentencing. While the Guidelines may provide a clear example of the movement towards the restriction of discretionary powers, it is questionable whether the benefits of restricting discretion in this manner exceed its potentially negative consequences. As ProsecutorL maintained, 'fortunately we in Victoria are not in that [UK] situation. We don't have the same imperatives or formalised restrictions on us to try and absorb delay to that extent'.

The need to introduce similar guidelines to control prosecutorial discretion in plea bargaining in Victoria is limited, if this is in any way likely to restrict discussions by shifting the pre-trial focus of prosecutors away from early resolution and towards sentencing; as the Victorian participants anticipated would occur if like guidelines were implemented. However, in terms of providing transparency to plea bargaining, the Guidelines could provide a basic framework for reform. The structured approach to plea bargaining imposed upon prosecutors in the UK, although potentially limiting the scope for flexibility, does have the benefit of providing transparency and consistency to the process, and to prosecutorial charging decisions. As transparent justice is seemingly absent when plea bargaining occurs in Victoria, there is a degree of attractiveness in providing transparency in this manner, in order to impose a level of public scrutiny upon discussions and prosecutorial charging decisions. Providing formal authorisation for counsel to engage in discussions would also work to improve consistency in counsel approaches to and use of plea bargaining in Victoria overall. Therefore, by adhering to the basic framework of the Guidelines, similar mechanisms could have the potential for offering some transparency to plea bargaining in Victoria, and could assist in minimising the negative public perceptions that can arise due to its non-transparency.

In addition to controlling discretion being a motivating factor for formalisation, victims, in particular, the rise of the victim's status in criminal proceedings has been a prominent factor driving statutory reform. The following sections examine this concept, commencing with a discussion of victimology.

PART II:
THE RISE OF THE VICTIM'S STATUS IN VICTORIA

Since initial explorations of victimology in the 1940s, changes in public, academic and government perspectives on victims have emerged, resulting in some substantial, if at times merely symbolic, efforts to recognise victimisation (Johns, 2002; Shapland et al., 1985).

Victimology refers to the study of victims and their experiences of crime and the criminal justice process. The term is credited to Von Hetnig (1948) and Mendelsohn (1956, as cited in Mendelsohn, 1976) for their initial explorations of victims as direct precipitators in the commission of the offence(s) committed against them (Goodey, 2005; Nagel, 1963; Sebba, 1996; Sgarzi & McDevitt, 2003; Walklate, 1989; Wolfgang, 1957). Von Hetnig (1948) identified certain individuals as being 'victim prone', due to socioeconomic characteristics such as age, gender, race and mental state. In a similar vein, Mendelsohn (1956, as cited in Mendelsohn, 1976) introduced a scale of 'victim culpability' ranging from innocent to guilty victims, depending on how much a victim is perceived to have contributed to the commission of the offence against him/her. For example, a sexual assault victim would be labelled as 'guilty' if they 'knowingly [took] a range of psychoactive [or] party drugs and were less able to resist the attack' (Porter, 2006, p. 1). Similar theories emerged during the 1960s and early 1970s which stipulated that certain victims were in some way to blame for creating 'temptation-opportunity situations' (Normandeau, 1968, p. 110). Most controversially, Amir (1971) examined the possibility of victim-perpetrated rape, whereby 'the victim actually, or so it was interpreted by the offender, agreed to sexual relations but retracted...or did not resist strongly enough when the suggestion was made' (p. 262).

In the early 1970s and continuing into the 1980s, victim-precipitation was increasingly criticised, and a focus on assisting and acknowledging crime victims emerged as part of the victims' and feminist movements (Edwards, 1981; Griffin, 1971, as cited in Griffin, 2005; Tong, 1989). This emerging focus on victims' civil rights motivated positive social responses and victim-focused reform, such as rape crisis centres (Sebba, 1996). Furthermore, the recognition of new types of victims and offences, for example, domestic violence victims and the state as offender, developed in response to these movements (Cook, David, & Grant, 1999; Fattah, 1998; Sebba, 1996).

In the mid 1980s, observations of the social construction of victims and their subsequent treatment by the public and criminal justice agencies were identified by Christie (1986) in his examination of the 'ideal victim'. Christie (1986) identified stereotypical characteristics relating to the personal attributes of a victim into which one must fit in order to be classified 'ideal' and receive empathy—for example, being weak, old or very young and undertaking a respectable activity at the time the offence was committed. Social constructions of victims have also been attributed to media depictions of victims, which are informed by Christie's (1986) ideal victim stereotype. Media portrayals of the personal characteristics of victims can either fit them within socially accepted constructs of an ideal victim who is then labelled as seemingly blameless for the crime committed against them, or, if the victim fails to adhere to an idealistic social image, he/she will endure less positive depictions and treatment in the media, and therefore be more likely to receive a negative

public response (Davies, Francis, & Greer, 2007).[26] This social construction of ideal and non-ideal victims is linked to a 'hierarchy of victimisation' (Carrabine, Iganski, Lee, Plumber, & South, 2004, p. 117), which is visible not only in media depictions of victimisation, but also in the amount of media coverage given. This social construction has also been linked to the criminal justice system's response to victims (H. Clark, 2007). For example, s.25.6.2.12 of the current *Victorian Sentencing Manual 2005* (Vic) provides guidance to judges that, when sentencing a victim of rape who is also a prostitute, this fact should be considered relevant to the sentence because 'the elements of shame and defilement may be missing or diminished, and the offence will thus lack a circumstance of aggravation'.[27] This oppressive and discriminatory treatment and depiction of some victims by the media, the criminal justice system and the community has consequently been linked to the under-reporting of sexual assaults and domestic violence (H. Clark, 2007; Davies et al., 2007, p. 150; Tong, 1989).

In the late 1980s, victim-centred and feminist critiques became an impetus for law reform, by 'not only forcing governments to revise sentencing practices, but also…highlighting the relative position of the victim' (Cook et al., 1999, p. 84; see also H. Clark, 2007). As a consequence, the government's approach to crime as an offence only against the state was challenged, and the government began introducing victim-focused policies, albeit somewhat constructed on the ideal victim mould (Fattah, 1998; Goodey, 2005, p. 131). Such developments included: statutory obligations being imposed on some professionals, including doctors and teachers, to report suspected cases of child abuse; restrictions on cross-examination of victims during Committal Hearings; and restrictions on introducing a victim's sexual history into sexual assault cases (*Children & Young Persons Act 1989* (Vic) s.64(1A); *Evidence Act 1958* (Vic) s.37A, 37C; *Magistrates' Court Act 1989* (Vic) s.5, cls.13(4)).[28] These types of policy responses were labelled as victim-focused because victims were seen to be 'at the heart of…[the] policy reform' (Sebba, 1996, p. 4). It has been recognised (Fattah, 1998; Johns, 2002), however, that at times this 'victim-focused' policy is the result of 'victim interests [being] hi-jacked in the interests of severity, by being invoked to justify punitive policies' (Davies et al., 2007, p. 56). Yet,

[26] See, for example, the media depictions of the seemingly innocent 'student' and 'grandmother' victims in Dowsey, A. (2008, July 26). Bash student put in coma. *Herald Sun* (p. 17) and Anderson, P., & Roberts, B. (2008, June 9). Brutal thugs belt woman. *Herald Sun* (p. 11) in contrast to the discussion on 'drink-spike victims [having] one too many' in Porter, L. (2006, June 4). Drink-spike victims had one too many. *The Age*. Retrieved from http://www.news.com.au/heraldsun/story/0.21985,23832332-661,00.html or 'rape compensation cut for drunk victims' in Bogustawksi, L. (2008, August 12). Rape compensation cut for drunk victims'. *The Independent*. Retrieved from http://www.independent.co.uk/news/uk/crime/rape-compensation-cut-for-drunk-victims-891816.html.

[27] It is important to note that the *Sentencing Manual* dates from 2005 and given the many legislative and formal changes being implemented as a result of the Victorian Government's *Sexual Assault Reform Package*, it is anticipated that this section of the manual will be altered (see also *R v Hakopian* (1992) 16 Crim LJ 200).

[28] Limits on who can be cross-examined and the types of questions that are permitted are now governed by s.119 and s.123-s.124 of the *Criminal Procedure Act 2009* (Vic). For a discussion on victim-focused legislative changes in Victoria prior to the introduction of the *Victims' Charter Act 2006*, (Vic), see Lauristen (1997).

regardless of the 'motivation of those who clamour for victims' rights' (Sgarzi & McDevitt, 2003, p. 335), it is widely accepted that 'the victims' rights movement is an integral part of the criminal justice system from all critical perspectives' (Sgarzi & McDevitt, 2003, p. 335). To further inform the analysis of victim-focused law reform, the next section briefly examines the critical perspectives that seek to explain victimisation, before discussing two examples of victim-focused developments in Victoria.

2.3 Approaches to Understanding Victimisation

Early approaches to understanding victimisation were linked with conservative and liberal ideologies. Liberal understandings of victimisation perceive crime (with a particular focus on white-collar and corporate offences) as the result of individual responses to social inequalities (Mawby & Walklate, 1994). Liberal perspectives thus argue that changing existing social inequalities will ease victimisation. This view is often linked with due process perspectives, insofar as it encourages restitution and the rehabilitative treatment of defendants (Palmer, 2001, p. 5). On occasion, liberal approaches have been linked with crime control perspectives, due to the perceived failure of due process ideals to effectively rehabilitate defendants (Martinson, 1974; Palmer, 2001; Sebba, 1996). However, for the most part, liberal perspectives argue that achieving equality within the law and within society is the key method to reduce victimisation (King, 1981; Palmer, 2001).

Conservative understandings of victimisation perceive crime as the defendant's personal failing, and their lack of discipline and respect for community values (Palmer, 2001, p. 5). This approach focuses on street crime and retributive justice, and perceives detecting and punishing defendants as the most effective response to victimisation (King, 1981; Palmer, 2001). Conservative approaches portray the polarisation of victims and defendants as a key factor in addressing victimisation. Thus, tough, punitive responses to crime are supported and these approaches are closely linked with crime control perspectives.

These early perspectives of victimisation focused predominantly on individuals as victims, as opposed to considering the structural or socioeconomic factors contributing to victimisation. Positivist victimology, for example, examined individual risk factors to explain victimisation, promoting crime reduction strategies as a method of reducing victimisation on the premise that changing one's environment reduces crime (Davies et al., 2007, p. 72; Mawby & Walklate, 1994). The subsequent emergence of critical and radical perspectives, however, sought to understand victimisation through social, economic and cultural influences, exploring the differences in victim experiences between countries, social groups and classes. Radical thought, for example, perceives victimisation as the result of inequalities in social, economic and political conditions, and argues that there will be no reduction in victimisation until there are significant changes to the social system

(Palmer, 2001, p. 5). The radical approach explores victimisation beyond domestic criminal law, including human rights abuses by the state and the secondary victimisation experienced as a result of criminal proceedings (Mawby & Walklate, 1994). In line with left realist criminology, radical understandings prioritise victims of street crimes and the role of class and social inequality in understanding victimisation (Dodd, Nicholas, Povey & Walker, 2004; Palmer, 2001).

Critical victimology also seeks to understand victimisation through analysis of social, cultural and economic structures. This approach perceives victims as consumers of criminal justice systems, but unlike previous conservative and somewhat punitive understandings, critical victimology attempts to 'transgress the dualism between victims and offenders by recognising that they are more often drawn from the same social groups' (Davies et al., 2007, p. 54; see also Mawby & Walklate, 1994).

Whichever perspective is applied to understanding victimisation, it is indisputable that recognition of the victim has provided significant motivation for law reform. A recent example of victim-focused formalisation in Victoria is the *Victims' Charter 2006* (Vic). In the context of this research, s.9 of the *Victims' Charter 2006* (Vic) is particularly significant, given the requirements on prosecuting agencies to keep victims informed of any modifications to the format of charges. Indeed prior to the enactment of the *Victims' Charter 2006* (Vic), prosecuting agencies were traditionally criticised for the lack of information they offered to victims and the perceived limited consideration given to them in the prosecutor's charging decision. This failure to recognise victims was identified as a major limitation of plea bargaining because victims were 'not paid the fundamental courtesy by police and prosecutors of being informed of significant events and occurrences in the prosecution of cases' (Dixon, 1996, p. 7). The lack of control of prosecutorial discretion when plea bargaining was also criticised because victims had 'no opportunity for input…in those cases where the defendant pleads guilty…[which was] a source of frustration and anger for victims' (Strang, 2002, p. 10). It was thus 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' (Strang, 2002, p. 12). In response to these types of concerns, and in accordance with existing interstate and national policies that incorporated the recognition of victims' rights into legislation or formal guidelines in all Australian states and territories, the *Victims' Charter 2006* (Vic) was introduced in Victoria in November 2006.[29]

Although the *Victims' Charter 2006* (Vic) constitutes significant progress for victims in providing them with some form of consideration when plea bargaining occurs,

[29] All seven states and territories have established some type of recognition of victims' rights in legislation or formal guidelines. See, for example, *Criminal Offence Victims Act 1995* (QLD); *Declaration of Victims' Rights 2001* (SA); *Northern Territory Charter for Victims of Crime 2005* (NT); *Victims' Charter 1996* (Cth); *Victims' Charter 2003* (NSW); *Victims' Charter 2006* (Vic); *Victims of Crime Act 1994* (WA); *Victims of Crime Act 1994* (ACT).

'plea bargaining' is not acknowledged within the document. In addition, while this research acknowledges the significance of the *Victims' Charter 2006* (Vic) in providing greater recognition to victims in the prosecution process, s.22 1(a) of the *Victims' Charter 2006* (Vic) creates a possible limitation for victims. S.22 1(a) states that the victim has no legal right following the perceived failure of the Crown to adhere to his or her rights as dictated in the *Victims' Charter 2006* (Vic). This means that the *Victims' Charter 2006* (Vic) is somewhat more symbolic than real, in being able to protect victims' interests or ensure they are upheld. Despite this potential limitation, my findings suggest that the statutory recognition of victims' rights in the *Victims' Charter 2006* (Vic) has made a significant difference in prosecutorial approaches to plea bargaining, in terms of keeping victims informed and seeking their opinions prior to making decisions. These findings were demonstrated during the fieldwork, where prosecutorial participants were consistently observed to be upholding the principles of the *Victims' Charter 2006* (Vic). The opinions of prosecutorial participants also demonstrated the significance of the *Victims' Charter 2006* (Vic) in including the victim as a consideration in prosecutorial charging decisions. Furthermore, the numerous internal policies implemented and/or updated to reflect prosecutorial obligations as dictated in the *Victims' Charter 2006* (Vic) also demonstrates the importance placed upon this statute by the OPP. Thus, while it may be symbolic in some respects, as the following section demonstrates, the *Victims' Charter 2006* (Vic) appears to have positively altered prosecutorial conduct in regards to victims, in the plea bargaining process.

2.4 *Victims' Charter 2006* (Vic)

The *Victims' Charter 2006* (Vic) outlines twelve principles that govern the actions of Victoria Police, the OPP and victim support agencies when responding to victims of crime. It aims to provide victims with legal recognition of the impact of crime upon them and to ensure they are treated with courtesy, dignity and respect (Victorian OPP Annual Report, 2007, p. 41). It also requires that victims be offered information, support and assistance throughout the prosecution process, in order to improve their overall experiences of criminal proceedings (Victorian OPP Annual Report, 2007, p. 41).

The most significant aspect of the *Victims' Charter 2006* (Vic) in the context of this research is the increased acknowledgement of victims in prosecutorial charging decisions. Specifically, s.9 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.

Thus, for the first time in Victoria's history, prosecutors are obliged by statute to keep victims informed about prosecutions (*Victims' Charter 2006* (Vic) s.9A-s.9E).

Fourteen of the nineteen prosecutorial participants identified the significance of this section in recognising victims; however, five prosecutorial participants maintained that despite no formal requirements having been previously imposed, this type of consultation did already regularly occur. As ProsecutorA claimed, 'the Director [of Public Prosecutions] has always been very big on victim consultation. Even before the [*Victims'*] *Charter* [*2006* (Vic)] you could have a perfect settlement, but you had to discuss it with the victim'. These five participants however, did recognise the significance of implementing these requirements in statute and acknowledged that this move had appeared to have a positive impact in increasing the consistency and number of victim consultations that occurred. As ProsecutorD claimed, 'when I started, 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, ProsecutorJ 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 *Victims' Charter* and we are conscious to put them to the forefront of our considerations and we won't resolve matters without having given consideration to the victims.

Although all nineteen prosecutorial participants supported the principles behind the provision of additional recognition to victims in the *Victims' Charter 2006* (Vic), some limitations of this additional acknowledgement were identified, involving workload pressures and victim misperceptions. 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 ProsecutorN 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'. These increased workload pressures are particularly problematic given that victims have no legal avenues with which to pursue a complaint if these or any other pressures on prosecutors prohibit them from carrying out their statutory obligations (*Victims' Charter 2006* (Vic) s.22 1(a)).

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

> The way that the [*Victims'*] *Charter* [*2006* (Vic)] 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 [sic] 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 Director [of Public Prosecutions] have with victims.

This limitation was identified by ten of the nineteen prosecutorial participants, including ProsecutorL, who claimed that while victim consideration is an important element of their role it is not a 'primary goal'. He claimed that:

> 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, to what we think and to what the police who brought the charge in the first place think. So we have our own opinion, we listen to what the others think, the police and the victims, 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 prosecutorial decisions, there was little prosecutorial resistance to the statutory requirements, or evidence of non-compliance observed during the fieldwork. On the contrary, the observations of prosecutorial participants when considering a plea bargain offer demonstrated the OPP's strong commitment to upholding its statutory obligations. For example, in one observation, ProsecutorF contacted the victim within minutes of receiving an offer from Defence CounselD. 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, ProsecutorF contacted the Crown prosecutor (ProsecutorN) involved in the case. ProsecutorN was also dissatisfied with the offer, but suggested an appropriate way to respond that would encourage further discussions. ProsecutorN suggested that ProsecutorF 'say no, but say that is not a definite "no" to all potential offers'. ProsecutorF and ProsecutorN then determined an offer that they considered adequately reflected the culpability of the offending behaviour and that they perceived took into account the victim's opinion. ProsecutorF then rang the victim to seek her opinion. This discussion was not observed; however, following the conservation ProsecutorF stated that the victim told her she 'was happy with whatever they decided appropriate'. ProsecutorF then rang Defence CounselD and said 'we reject your offer, but we would be willing to accept a plea of guilty to…[details of the Crown's proposed plea bargain offer]'. Defence CounselD 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, ProsecutorF 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 [ProsecutorN] 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 [behaviour] and we are so close so why give up now? In one matter I received an offer so I rang up the victim and they said honestly, I don't care. The offender is guilty of it all but I just want it over. But then I went to see [the Crown prosecutor] who said no, he [the defendant] has done the wrong thing and the victim thinks he is guilty. For us to proceed with that just because the victim can't be bothered isn't good enough. We really should proceed. 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.

In line with ProsecutorF's comments, throughout the observations, victims' opinions consistently informed prosecutorial decisions in determining whether to accept plea bargain offers. 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. During one observation day, the WAS division scheduled two conferences with victims, a counsellor and the relevant Crown solicitor and prosecutor aimed at providing an explanation, in one conference, of why a plea bargain had been accepted, and in the second conference, of why plea bargaining was being considered. These meetings were not observed; however, following one of the conferences ProsecutorV 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'.

The only stage of criminal proceedings at which is was evident that victims were not always informed of plea bargains prior to their acceptance was during the pre-trial Committal Mentions in the Magistrates' Court, which this appeared to be largely due to the fast pace and high volume of matters dealt with in this court (see Chapter Five for further discussion). As ProsecutorG claimed, '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 and it has attempted to create safeguards that allow victims' views to be considered before a plea bargain is discussed with the defence, by arranging consultations with victims prior to any offers being made. ProsecutorO maintained that this type of consultation occurs 'quite often', claiming that the Crown:

> 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? As we say to all victims or their families, we can't guarantee that we are going to get a conviction in this, we never can. We say you're a very important witness and we take very seriously what you say and we take it into account…So we get them in early to discuss things when we think a plea bargain is the way things are going to pan out.

ProsecutorO's comments were supported during the fieldwork, where it was observed that if a victim could not be contacted prior to a guilty plea being entered as a result of a plea bargain, he/she was consulted by the relevant Crown solicitor and sometimes a WAS counsellor as soon as possible following the plea. This occurred twice over a six-week period and in both observations, 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' (ProsecutorS). As ProsecutorS 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 or very shortly after [the plea is entered]…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.

As these findings indicate, not only is there a movement towards victim-focused reform within the Victorian OPP's culture, but s.9 of the *Victims' Charter 2006* (Vic) has had a significant impact on prosecutorial conduct in responding to victims' needs in the plea bargaining process, thus demonstrating the impact formalisation can have in informing positive prosecutorial conduct.

In addition to the Victorian Government's enactment of victim-focused reform, the OPP created the Specialist Sexual Offences Unit in April 2007, with the aim of increasing victim satisfaction and understanding of the criminal justice process in sexual offence cases. The next sections examine this unit and its unique, early-resolution and victim-focused approach to prosecutions.

2.5 Specialist Sexual Offences Unit

The Specialist Sexual Offences Unit (the 'Unit') was the first division established in the Victorian OPP's history to have a specific focus on early resolution ideals and victim interests.[30] One of the main motivations for the Unit's creation was to improve public confidence in the prosecution of sexual offences, which was further perceived to be an effective mechanism to enhance understanding of sexual offence issues, and increase public reporting of sexual offences (SSOU, 2007a). The Unit comprises Crown solicitors and prosecutors who have recognised expertise in handling sexual offence matters, who work closely with Victoria Police and the WAS division to improve victim experiences of the

[30] Since the conclusion of the observation fieldwork, an Early Resolution Unit was implemented into the Victorian State OPP. In a similar vein to the Unit, the Early Resolution Unit attempts to proactively identify and finalise matters that can resolve prior to trial. The Early Resolution Unit has a particular focus on offences involving theft, armed robbery, aggravated burglary, assault and attempted murder (Victorian OPP Annual Report, 2007, p. 38).

prosecution process (ProsecutorT). In addition, unlike other OPP divisions in which Crown prosecutors and solicitors are located in different parts of the building, including different floors, the workspaces of the Unit's Crown prosecutors and solicitors are shared. According to ProsecutorT, this enables the Unit to uphold one of its primary aims, of 'creating a consistent, team approach to crimes involving sexual offences'. Significantly in the context of this research, another of the Unit's primary aims is to minimise the trauma experienced by victims, by having a primary focus on early resolution (Victorian OPP Annual Report, 2007, p. 34). ProsecutorT claimed that this early resolution focus emerged because:

> There are a significant number of pleas in sex cases; however, a lot of these don't eventuate until the trial day or close to it. These create a huge ordeal, trauma and stress upon the victim, preparing them for a trial and then getting a last-minute offer [to plead]. The Unit will therefore hopefully eliminate this drawn-out procedure, with its early resolution approach.

To assist in achieving the early resolution ideals of the Unit, an Early Resolution Manager (ERM) undertakes a preliminary assessment of all sexual offence cases and identifies any issues that could potentially resolve. As ProsecutorK claimed, 'the ERM is supposed to read files very early, pretty much after the arraignment hearing, contact the defence, contact the informant and find out what everyone's thinking in terms of possible resolutions'. My three-day observations of the ERM (ProsecutorT) provided an insight into how this role is carried out in practice. In one observation, a brief of evidence was received by ProsecutorT. ProsecutorT assessed the Crown's case and contacted the informant to obtain information on the defendant's criminal history and his opinion on whether early resolution was appropriate. After discussing the matter with the informant, ProsecutorT made notes on three issues in dispute that could potentially be resolved through plea bargaining, and provided his opinion on the appropriate charges with which to proceed. When asked how a case ultimately resolves through this process, ProsecutorT explained:

> Once the ERM has detailed what they think is appropriate in terms of how the case proceeds, if the Crown solicitor allocated to the case supports this, then they check with the Crown prosecutor, and then the defence and victims can be contacted to discuss the possibility of a plea bargain and to get their opinions.

ProsecutorD described this unique approach to prosecutions as allowing prosecutors 'to be in a more commanding position in relation to these cases, and to know what can and can't be settled'. He claimed that using the ERM to filter cases 'allows for greater control and familiarisation with the cases at a slightly higher level, because you have it run by a prosecutor straight away, which we have never done before'. With a similarly positive view of the filtering process, ProsecutorL maintained that:

> It adequately prepares our cases for discussions. This process gets the ball moving. We will not and never have sold people short. There is only a settlement when it is appropriate and

> reflects the criminality and takes into account all relevant views and factors relating to the case, particularly the victim's views. But it gets the ball rolling.

The two main benefits of the early resolution approach identified by prosecutorial participants from the Unit were its ability to provide consistency in prosecutorial approaches to sexual offence cases and victims, which allows for 'fewer points of contact for victims' (ProsecutorK), and its ability to focus the attention of all parties on the possibility of early resolution. As ProsecutorK claimed, this approach 'should increase the early identification of possible issues for resolution in sexual offence cases by the defence as well, because they will know that we have that same focus when it is appropriate'. These potential benefits were also identified by prosecutorial participants working outside the Unit, like ProsecutorQ, who recognised the potential for 'specialised structures and groups to become the norm in all sections of the OPP, especially those divisions that deal with victims and where early resolution is, as a result, so beneficial'.

The Unit commenced operation in the same month I commenced observations, yet already the transparency and formality of its structures were evident, and these appeared to assist the Unit in achieving its primary aims. This was apparent during observations of one of the Unit's training seminars, in which early resolution and increased recognition of victims and their needs were encouraged. The training seminar observed was one of two seminars that took place in April 2007. The aim of which, as identified by ProsecutorT, was:

> To provide the members of the Unit with information, education and an opportunity for dialogue and debate to enhance the practice of prosecuting sex offences in a way that is proactive and sensitive to the needs and concerns of victims and encourages case issues to be identified early so we can be proactive in seeking out early resolution.

One of the training sessions observed was titled 'Proactive prosecution: How to resolve matters early. What does being proactive really mean?' (SSOU, 2007b) This session provided information on the ERM's role and the importance of identifying potential issues for resolution throughout criminal proceedings. The observations of this seminar indicated the clear commitment of the Unit to upholding its primary objectives and to considering victim needs in sexual offence prosecutions.

This unique approach to prosecuting sexual offences, with its focus on early resolution and upholding victims' rights, reveals an attempted shift in the OPP's traditional perceptions of sexual offence victims, and of the role of plea bargaining in these cases. It also highlights the victim's role in motivating law reform aimed at increasing accountability on prosecutorial conduct. Similar victim-inspired formalisation is emerging from within other areas of Victoria's criminal justice system, particularly in sexual offence matters. For example, in January 2008 the Supreme Court announced it would take exclusive control over hearing trials involving serious sexual offences (Warren, 2008). This

change was enacted in s.167 of the *Criminal Procedure Act 2009* (Vic) in March 2009, which provides the Supreme Court with the power to determine whether a defendant in serious sexual assaults will be tried in the Supreme, or County Court. It is also demonstrated by the introduction of stringent time requirements on the courts in processing sexual offence cases (*Criminal Procedure Act 2009* (Vic) s.126 (1)(a); s.212) and is embodied in s.198(1) of the *Criminal Procedure Act 2009* (Vic), which allows vulnerable victims to give evidence outside of the trial setting to restrict the contact between defendants and victims.[31]

The victim has thus played a significant role in motivating law reform in Victoria. A common misperception of such law reform, however, is that it can only uphold either the rights and interests of victims, or those of defendants. The following sections explore this common misperception through an exploration of due process and crime control perspectives.

2.6 Victim- & Defendant-Focused Law Reform?

In the context of law reform, there are two main perspectives:

1) The due process perspective, which upholds offender-focused ideals and is commonly supported by human rights groups. This perspective focuses on providing legal protections to defendants to ensure equality (Packer, 1968); and
2) The crime control perspective, which upholds victim-focused ideals and is generally supported by the media and government. This perspective focuses on controlling and preventing crime and achieving justice through punitive measures (Sebba, 1996).

2.6.1 Due Process

The underlying principle of due process is equality for all who come before the law—that is, impartial treatment which ensures justice is fair and accessible regardless of financial means or factors such as race, religion, gender, age or sexuality (Victorian Attorney General's Department, 2004, p. 9; Mack & Roach Anleu, 1998, p. 113). Due process perspectives uphold the rule of law ideal, which encompasses four aspects: (1) that the law and all surrounding processes are transparent, reliable and consistent; (2) that legal remedies and sanctions are consistently and fairly applied and accessible; (3) that legal institutions remain independent from the government; and (4) that legal institutions are

[31] In accordance with the recommendations of the Victorian Law Reform Commission's (VLRC) final report (2004) and the sexual offences implementation report (VLRC, 2006), Committal Hearings involving sexual offences must be heard within three months of the defendant's arraignment and sexual offence trials must be held within three months of the Committal Hearing or, if no Committal Hearing is held, within three months of the defendant's arraignment.

appropriately scrutinised and publicly supported (Victorian Attorney General's Department, 2004, p. 22). As such, due process perspectives favour traditional adversarial values whereby criminal proceedings are a contest between the state and the defendant, and a number of rules of evidence and procedure exist to protect defendant rights (Sanders, 1997; McConville, Hodgson, Bridges, & Pavlovic, 1994, p. 183). These rights include the presumption of innocence; the right to challenge the prosecution's case; the prosecution holding the burden of proof; proceedings being conducted in open court; the right to remain silent; the right to a jury trial; the right to a speedy resolution; the right to legal representation; and that only legally admissible evidence which complies with complex rules of evidence can be introduced (Corns, 1997; Victorian Attorney General's Department, 2004, p. 25). Many of these rights are enshrined within case law (*R v Cameron* (2002) 209 CLR 339; *R v Dietrich* (1992) 177 CLR 292), while some are recognised globally (*International Covenant on Civil and Political Rights 1966*; *Universal Declaration of Human Rights 1948*).

Due process perspectives have provided motivations for a range of law reform. In particular, due process frameworks underlie the formalisation of previously unregulated processes to ensure equality and consistency, and to safeguard defendants' interests (see, for example, *Criminal Procedure Act 2009* (Vic) s.61, which formalised the once unregulated summary sentence indication process in Victoria's Magistrates' Courts). A recent example of a due process-inspired reform in Victoria is the *Human Rights Charter 2006* (Vic), enacted on 1 January 2007. This somewhat revolutionary statutory recognition of due process rights provides scrutiny on the actions of the government when making law, and enshrines the rights of all Victorian citizens with a particular focus on criminal proceedings. For example, s.25 dictates that:

> Any person charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law…[and] any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law (s.25(1); s.25(4)).

In addition, under s.26 'a person must not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with the law'.

In a similar vein to s.22 1(a) of the *Victims' Charter 2006* (Vic) however, the *Human Rights Charter 2006* (Vic) can be criticised for its potential to be somewhat more symbolic than real. This is because s.36(5)(b) restricts individuals from undertaking legal action if the principles of the *Human Rights Charter 2006* (Vic) are not upheld. Similarly, s.39(3) states that 'a person is not entitled to be awarded any damages because of a breach of this Charter'. As such, although the *Human Rights Charter 2006* (Vic) offers significant recognition of defendant interests, it tends towards being symbolic and thus limited in its ability to protect or ensure that its due process ideals are upheld. Nonetheless, the

significance of the statute in legally acknowledging due process rights, particularly in the context of an increasingly punitive system of justice, must be recognised (Garland, 1990, 2001; Young, 1999).

2.6.2 Crime control

Early scholarly commentary of crime control perspectives criticised due process ideals for failing to effectively punish defendants or deter crime (Martinson, 1974). The key justification for this argument was increasing recidivism rates and the perceived failure of the rehabilitation ideal (Fattah, 1998). As a result, a shift emerged from 'rehabilitation to retribution, from the culpability of society to the culpability of the offender, and from reasoned policy to symbolic gesture' (Fattah, 1998, p. 18). In tandem with this shift, an evolving fear of crime among citizens created a culture that encouraged retributive policies, ostensibly in the interests of victims and the community (Garland, 1990, 2001; Young, 1999). In response, popular punitivism emerged, whereby the publicly supported response to crime is punitive punishments like prison, which in turn creates a polarity between the victim as good and the defendant as evil (Pratt, 2002; Zedner, 2002, p. 598). As Roberts and Hough (2002) assert, 'the public is encouraged to make an association between punishment and prison by the news media, populist politicians and some advocacy groups' (p. 5). Punitive policies have thus become synonymous with upholding victims' rights, and undermining those of defendants, as Ashworth (2000) observes, 'the two movements—towards greater penal severity and towards integrating a victim perspective—seem to go hand-in-hand' (p. 186).

The link between punitive responses to crime and upholding victims' interests has been strengthened by the role of the media and conservative governments in labelling 'just desserts' punishments as victim-focused (Goodey, 2005; Indermaur & Hough, 2002). Similarly, media representations of non-punitive responses to crime as a failure on the part of governments and criminal justice agencies to respond to victims' needs further fuels this polarisation (Indermaur & Hough, 2002, p. 199; Pratt, 2002). This is particularly evident in the media's focus on perceived lenient sentences as direct attacks on victims, which was a prominent media focus in Victoria during 2006, when the *Herald Sun* newspaper ran a series of articles responding to the perceived leniency of sentences imposed on defendants convicted of manslaughter in cases involving child victims.[32] In one article, Mitchell (2006) asked:

[32] See, for example, Lapthorne, L., & Buttler, M. (2006, November 29). Tiny lives betrayed. *Herald Sun*. Retrieved from http://www.news.com.au/heraldsun/story/0,21985,20840736-661,00.html; Mitchell, N. (2006, November 30). Look at these children and ask about justice. *Herald Sun*. Retrieved from http://www.news.com.au/heraldsun/story/0,21985,20843451-5000117,00.html; Warren, M. (2006, November 30). Judging the child killers. *Herald Sun* (p. 24).

> Where's the justice?…Today every decent person in this state should be on their knees begging for forgiveness from a haunting gallery of dead children. The system we own has failed them…We understand sentencing is a heavy burden and enormously important. Yes it's a tough job. But do it or stand down…[In this case] the effective sentence was a paltry five years. The judge could have sentenced [the defendant] to 35 years…But after saying his sentence would be tougher than most, only five years will be served. By his own words the judge is confirming what this community has sensed for years—a child's life is worth less than most (p. 25).

The polarisation between victim- and defendant-focused law reform can also be linked to the origins of the adversarial tradition, which encourages combative behaviour between parties. As Ashworth (2000) observes, the contested trial is 'a classic conflict between two sets of rights, those of the defendant…and those of…the victim' (p. 188). Thus, a perception has emerged that the 'due process rights of the defendant…place a bar on the consideration of the victim' (Kirchengast, 2006, p. 196), which means the polarisation between defendant and victim rights has, however undesirably, become entrenched within both criminal proceedings and law reform (Sebba, 1996).

2.6.3 Due Process, Crime Control & Plea Bargaining

Despite the perceived inability of law reform to uphold both victim and defendant rights, formalising plea bargaining to make the process and the conduct of those involved within it more transparent could offer benefits to both groups. This is because the benefits of plea bargaining's formalisation, particularly those resulting from increased transparency and scrutiny, can provide greater consideration and recognition of victim *and* defendant needs and interests. Like the ideals of restorative justice processes, which are promoted as benefiting both victims and defendants, formalising plea bargaining could combine both due process and crime control perspectives in law reform (Ashworth, 2003; Braithwaite, 2003a, 2003b; Cavadino & Dignan, 1997; Christie, 1977; Fattah, 2004; Herman, 2004; Walgrave, 2000, 2004).

The complex needs of victims vary quite significantly depending upon factors relating to the individual victim, the offence, and the victim's relationship with the defendant (Skelton & Frank, 2004, p. 203; Strang, 2002; I. Walker, 1989; Wright, 2004; Zehr, 2003). As Zehr (2003) maintains:

> Victims have serious important 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 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 (p. 69).

Significantly, there is one common need consistently identified in the literature that examines victimisation experiences; the need to be kept informed at all stages of the case's

progression through the criminal justice process (Kelly, 1984; Maguire & Bennett, 1982; Johns, 2002; Sebba, 1996; Shapland et al., 1985; Strang, 2002; Wright, 2004). Shapland et al.'s (1985) examination of victim experiences in criminal proceedings found that above all else, victims want to be kept informed and consulted at all stages of the prosecution process. In particular, they seek information on 'whether the offender was caught, what the charges were, whether he [sic] was in custody or on bail, when the court appearances would be, whether the victim would have to give evidence, whether the offender was convicted and what the sentence was' (Shapland et al., 1985, p. 213). Importantly, Shapland et al. (1985, p. 216) found that victims desired information and consultation before prosecutorial decisions were made to alter charges. When this information was provided, they found that not only did victims feel an increased level of satisfaction, but that it also aligned with their desire for greater levels of participation within the prosecution process (Shapland et al., 1985, p. 215).

In line with prosecutorial obligations dictated in s.9 of the *Victims' Charter 2006* (Vic), formalising plea bargaining could provide a mechanism for upholding this need. Thus in a similar vein to the ideals of Dignan and Cavadino's (1995; see also Dignan, 2003) integrated restorative justice model, which seeks to integrate victims' needs into criminal proceedings, formalising plea bargaining would assist in integrating victim satisfaction and empowerment into the general aims of the prosecution process. It would achieve this by providing formal recognition to plea bargaining, thus allowing transparency and scrutiny of prosecutorial conduct in discussions, and legally recognising the rights of victims when plea bargaining occurs.

While this research acknowledges the importance of integrating victim needs and interests in plea bargaining and in the prosecution process (Dignan & Cavadino, 1995), in line with Ashworth's (2000) observations, it is vital that 'the growing interest in promoting the victim perspective…not reduce our vigilance about proper standards and safeguards in criminal justice' (p. 186). Significantly, formalising plea bargaining in Victoria could achieve this by transgressing the traditional polarisation between victim- and defendant-focused reforms. This is because the benefits of providing transparency to plea bargaining would apply not only to victims, but also to defendants.

As presented earlier in this section, defendant needs within criminal proceedings mirror the due process ideals outlined in the *Human Rights Charter 2006* (Vic), including the presumption of innocence, the right to legal representation and Legal Aid, and to be tried without undue delay (s.25). In addition to these procedural needs, defendants also have emotional and rehabilitative needs, such as the need to express remorse, to explain their actions, to understand the impact of their offending behaviour, to have any prior victimisation recognised, and to have the opportunity to restore the damage they have caused (Toews & Katounas, 2004, p. 109). When plea bargaining occurs, defendants also require protection from the potential increase in pressure on them to plead guilty

(McConville, Sanders, & Leng, 1991). However, without any scrutiny of discussions, the potential advantages of the plea bargain, combined with a sentence discount, does little to address this need. As Skelton and Frank (2004) recognise, 'plea bargaining, in which the offender gives up rights in order to benefit from reduced sentences, often puts offenders under stress as it makes them choose between a rock and a hard place' (p. 205). Formalising plea bargaining in statute could, however, redress this negative consequence for defendants and address their needs by offering greater transparency and accountability to both the plea bargaining process and the discretionary decisions of the Crown. Formalisation could therefore serve as a mechanism to address defendants' procedural, emotional and protection needs, as well as addressing the complex needs of victims, thus allowing this law reform to transgress the polarisation between defendant- and victim-focused reform.

The third main motivation driving the formalisation of previously unregulated criminal justice processes involves court inefficiency. The next section examines this motivation and highlights the extent of court delays emerging in Australian and Victorian criminal courts since the early 2000s.

PART III: COURT EFFICIENCY

Court inefficiency is possibly the most significant problem confronting Victoria's criminal justice system, as it negatively impacts on every aspect of the prosecution process. The main contributing factor to court inefficiency is delay. There are four main stages at which delay occurs: (1) during investigations of crime; (2) between the laying of charges and commencement of pre-trial proceedings; (3) between pre-trial proceedings and the trial's commencement; and (4) between the trial and commencement of any appeals. In this research, court delay relates to the period from the case's initiation in pre-trial proceedings to the time of the plea hearing, or until a not guilty finding is returned from trial.

2.7 Delays in Australian Criminal Courts

Court delays have been identified as a significant problem confronting Australian criminal jurisdictions since the 1980s (AJAC, 1994; Bishop, 1989; Mack & Roach Anleu, 1995; Payne, 2007; SCAG, 2000; Shorter Trials Committee, 1985), with intermediate courts recognised as suffering the most from the negative impacts of delay (Chan & Barnes, 1995; Coghlan, 2000; Payne, 2007; SCAG, 1999, 2000; VSAC, 2007c; Weatherburn & Baker, 2000; Weinberg, 2000).[33] An evaluation into NSW intermediate District Courts in 2000

[33] Court delays have also been a significant problem confronting civil jurisdictions; however, the scope of this thesis does not extend to civil proceedings. For an extensive discussion on delays within Victoria's civil

found that the average delay between the Committal Hearing and the outcome of a trial was 410 days in 1998 and 480 days in 1999 (Weatherburn & Baker, 2000, p. 2). This was despite findings that the court's capacity to hear trials had increased by 92% and initiation rates had only increased by 20% in a comparable time (Weatherburn & Baker, 2000, p. 8).[34] Similar findings were identified in Western Australia's (WA) District Court between 2005 and 2006, where an average delay of 51 weeks occurred between the Committal Hearing and the commencement of the trial (WA District Court Annual Report, 2006, p. 4).

Across all Australian intermediate jurisdictions between 2004 and 2005, one-fifth of matters remained in the system for twelve months or more, while between 5 and 7% remained for more than two years (Payne, 2007, p. 10). These statistics are mirrored for Australian intermediate and superior courts between 2005 and 2007, where low case finalisation rates and increased pending case lists were identified (ABS, 2007, 2008). Only 3% of cases were determined in these courts in the 2005-2006 and 2006-2007 periods respectively; however, by June 2007 the number of cases finalised had decreased by 5% since June 2005 (ABS, 2007, p. 10, 2008a, p. 3). In cases where defendants proceeded to trial and were found guilty, a significant delay pattern was identified in the intermediate courts between 2005 and 2006, with only 55% of cases being finalised within 52 weeks or less (ABS, 2007, p. 10). This figure increased to 59% between 2006 and 2007; however, for cases where defendants were acquitted, 45% took over one year to finalise (ABS, 2008, p. 3). In cases where the matter was finalised by a guilty plea (between 2005 and 2006), 38% were finalised within less than thirteen weeks (ABS, 2007, p. 10). However, this significantly decreased to only 24% between 2006 and 2007 (ABS, 2008, p. 3). Overall, between 2005 and 2006 only one in four matters in Australian intermediate courts were finalised within thirteen weeks, while two out of three were not finalised within one year (ABS, 2007). Between 2006 and 2007, this decreased to fewer than one in four matters being finalised within thirteen weeks and over two thirds were not finalised within one year (ABS, 2008, p. 1).

In the context of this research, the most significant findings to emerge from the national statistics on court delays included that across all Australian criminal jurisdictions at June 2008, the Victorian County Court maintained the largest pending caseload of any court in Australia (criminal cases pending n=2341; 27.8% waiting twelve months; 5.7% waiting over two years), and the lowest national clearance rate (96.5%), while the Victorian Supreme Court had the highest number of pending cases of any Supreme Court in Australia (n=166) (SCRGPS, 2009). Victoria has experienced a significant and rapid increase in court delays since the early 2000s. Between 2003 and 2004, the County Court experienced an 8% increase in the number of cases (n=1601) that remained pending within the criminal

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jurisdictions, see the VLRC (2007) *Civil Justice Inquiry Draft Recommendations June 2007*. The intermediate court is referred to as the County Court in Victoria and the District Court in other Australian states and territories.

[34] The statistics on court capacity and initiation rates were gathered between 1995 and 1999.

trial section, when compared with the same period in 2002-2003 (County Court of Victoria Annual Report, 2004, p. 4).[35] Between 2004 and 2005, 14% of County Court cases remained in the system for more than twelve months and 3% remained for over two years (Payne, 2007, p. 10). Similar patterns emerged between 2005 and 2007. While there was an increase of 3.4% in the number of criminal cases finalised between 2005 and 2006, there was a 13% increase in the number of cases awaiting trial from 1,802 in 2005 to 2,038 cases in 2006 (County Court of Victoria Annual Report, 2006, p. 17). This figure then increased significantly by 20.7% to 2,460 cases at June 2007 (County Court of Victoria Annual Report, 2006, 2007). These patterns emerged despite a 2% decrease in the number of cases initiated between 2006 and 2007, and evidence that between 1999 and 2006, the sitting days of the County Court increased from 3,723 to 4,929, which should have provided additional opportunities for matters to be heard (County Court of Victoria Annual Report, 2007, p. 8; OPP Annual Report, 2007, p. 92).

A 2008 report (SCRGPS, 2008, p. 26) shows that these County Court delays are continuing to increase. At June 2007, just under 24% of cases (n=538) remained pending in the court for over twelve months—an increase of almost 10% since June 2005—while almost 4.5% remained pending for over two years (SCRPGS, 2008, p. 26). These figures rose again between 2007 and 2008, with 27.4% of cases remaining pending for over twelve months and 5.7% for over two years (SCRGPS, 2009, p. 27).

Victoria's Supreme Court has also experienced increased delays. Historically, the number of cases awaiting trial in this court rarely reached above 50; however, in May 2006 approximately 80 cases were awaiting trial (VSAC, 2007c, p. 18). This figure increased significantly to 171 cases in June 2007 and 166 cases in June 2008 (Supreme Court of Victoria Annual Report, 2007, p. 19; SCRGPS, 2009, p. 27).[36] Also of note is that between 2005 and 2006, almost 14% of matters remained in the system for over twelve months, while over 8% remained pending for over two years (VSAC, 2007c, p. 18). Like the County Court, these delays exist despite an increase in sitting days from 679 in 1999 to 1,123 in 2006 (Victorian OPP Annual Report, 2007, p. 92). Recent statistics on criminal case delays in the Supreme Court show a dramatic increase in the number of pending cases since 2006, whereby at June 2008, almost 34% of cases remained pending for over twelve months, while over 10% remained for over two years (SCRGPS, 2008, p. 26; VSAC, 2007c, p. 18)

The Victorian Magistrates' Court, although statistically a quicker method of case resolution than its superior court, also suffers from increasing delays (Magistrates' Court of

[35] The criminal trials section includes all criminal trials and plea hearings. It does not include any criminal appeals or civil matters.

[36] It should be noted that this increase can partially be attributed to the increase in the types of cases being heard within the Supreme Court jurisdiction, including serious sexual offences (Warren, 2008).

Victoria Annual Report, 2006, p. 13).[37] Between 2005 and 2006, there was a 4% decrease in the number of cases finalised, with 27,259 cases pending at June 2006 (Magistrates' Court of Victoria Annual Report, 2006, p. 13). The number of criminal cases pending for more than twelve months also increased between 2005 and 2006 to a significant 5.4% (Magistrates' Court of Victoria Annual Report, 2006, p. 13). Recent statistics on the Magistrates' Court show similar patterns to those of its superior courts. At June 2007, the number of cases waiting to be heard for longer than six months increased to over 20%, while the number of cases waiting for over twelve months increased to 5.5% (Magistrates' Court of Victoria, 2007; SCRGPS, 2008, p. 26). This figure rose again between 2007 and 2008 to a significant 7.25% of cases pending for more than twelve months, and 24.4% pending for over six months (Magistrates' Court of Victoria Annual Report, 2007, 2008; SCRPGPS, 2009, p. 27). The number of cases finalised at the pre-trial Contest Mention also decreased between 2006 and 2008, reducing from 8,750 in June 2006 to 7,258 in June 2008 (Magistrates' Court of Victoria Annual Report, 2008, p. 22).

The interviews also revealed the extent of delays confronting Victorian courts. As ProsecutorD claimed, 'the delays on trials have blown out, particularly in the County Court from a Case Conference to trial. For a short trial, you are looking at, at least a twelve-month waiting period before it will get up and for a long trial, not until the following year'. JudiciaryB also maintained that:

> Delays are a real problem, particularly in the County Court. There is an average thirteen-month delay from the Committal to trial. Imagine this if the accused is on remand. The Magistrates' Court hears matters relatively quickly, but there are delays in issues involving forensic analysis, which can involve between ten months and one year.

Similar delays were evident in my observations of criminal proceedings where the period between one pre-trial hearing and the next was often immense. In one observation, plea bargaining discussions had resulted in a defendant pleading guilty at the pre-trial Case Conference in the County Court. Following this plea, JudiciaryC asked ProsecutorL and Defence CounselF for possible dates to schedule the plea hearing, at which the defendant's sentence would be determined. The plea hearing was then scheduled for a date eight months following the Case Conference. Therefore, even though plea bargaining led to an early guilty plea being entered, the determination of the defendant's sentence was delayed by a further eight months. When asked whether this extent of delay between the guilty plea and plea hearing was unusual, ProsecutorL claimed 'no, unfortunately not. The current system, as you can see, is not working. There is more delay than ever in every aspect and that is creating more injustice and more problems than ever'.

[37] Between 2005 and 2006, the Magistrates' Court finalised 125,432 criminal cases (93% clearance rate), compared to the County Court, which finalised 4,492 cases (85.2% clearance rate) (County Court of Victoria Annual Report, 2006, p. 15; Magistrates' Court of Victoria Annual Report, 2006, p. 13).

2.8 Explaining Court Delays

Delays occur in criminal proceedings because the system does not have the capacity to continuously process a high volume of cases. An evaluation of criminal delays across Australian courts found that delays are caused by three main factors:

1) Unnecessary delay, where there is a failure by parties to act within appropriate judicial practices;
2) Deliberate delay, where there is a deliberate intention to cause delay; and
3) Unavoidable delay, resulting from uncontrollable causes, such as witnesses being unavailable (Payne, 2007).

Another key factor contributing to delay and late guilty pleas is the lack of pre-trial preparation undertaken by counsel and the judiciary (Osborne, 1980; Rozenes, 2000). Similarly, the absence of continuity of counsel and failure to use senior counsel early in the criminal justice process can fuel delays (Payne, 2007). The absence of senior counsel is particularly problematic because junior counsel may not have the authority to engage in plea bargaining or to accept offers, which makes any negotiations prior to the appointment of the senior counsel more or less futile. ProsecutorB also identified delays resulting from the time needed for counsel to develop an in-depth understanding of the case as it proceeds from one representative to the next as a direct consequence of the absence of continuity of counsel. He claimed that 'because the case moves from one solicitor to the next solicitor and then to a more senior counsel, this can mean you have to start the process all over again…[because] each person has to learn the case in detail and it takes time to do that'.

An increase in the number of criminal matters being initiated is another factor contributing to increasing delays. For example, at June 2007, the number of cases initiated in the County Court had risen by 4.4% since June 2006 (County Court of Victoria, 2008). This type of increase in case initiations has been attributed to numerous factors including increasing crime rates and changes in the definition of what constitutes illegal activity (Osborne, 1980). An increase in trial complexities and thereby length of criminal proceedings has also been identified as creating delay (Payne, 2007; Weinberg, 2008). Weinberg (2008) claims that a 'short trial' has increased from one half day of advocacy to one or two full days of advocacy, while a trial that would previously have taken between three days and one week to hear is now running for two weeks. These claims are supported by statistics indicating that, in Victoria between 1982 and 2001, the average length of criminal trials increased from approximately five days to fourteen days, while the average trial in Victorian superior courts at June 2007 was nine days (PricewaterhouseCoopers, 2008, p. 10; Victorian Attorney General's Department, 2004). Such increases in trial lengths have been linked to evidentiary complexities, including changes and advances in

technology and the subsequent time needed to process and verify forensic evidence (Osborne, 1980; Payne, 2007; Rapke, 2008; Rozenes, 2000). These complexities were identified by the Victorian Director of Public Prosecutions (DPP) in 2008, when he claimed:

> There is no question that the types of offences and the seriousness of offences now being dealt with by law enforcement and prosecution agencies are vastly different. Drugs remain a major scourge in modern society and their corrosive influence on the community is reflected every day in court lists around the country. Organised crime, violent crime, sexual assault, corruption, home invasions, violent street crime (often involving gangs), fraud and transnational crime occupy the bulk of the time of the contemporary prosecutor. The trials that follow police investigation of these offences are invariably longer, more complex and more costly (Rapke, 2008, p. 4).

Over-listing is another factor contributing to delay (Payne, 2007). Over-listing occurs when a court lists a number of trials to commence on the same day, without having the capacity to hear them. For example, the Australian Institute of Criminology (AIC) (Payne, 2007, p. 31) found that between March and May 2006, Queensland's District Court over-listed cases by approximately 2.8 sitting days each week. Courts use over-listing in an attempt to redress any time wasted by late guilty pleas or adjournments. This is because over-listing ensures that there are standby matters that can be interchanged if the original matter does not proceed on its scheduled day (Coghlan, 2000). ProsecutorL identified over-listing as being common in courts that have a high volume of cases, such as the Magistrates' and County Courts in Victoria. Paradoxically however, over-listing can cause delays when multiple hearings are scheduled for the same day and there are no adjournments or late guilty pleas. When this occurs, over-listing creates a cycle of delay, because the standby cases must be adjourned to another date, which in turn impacts on cases listed to commence on those dates (Coghlan, 2000).

The research participants identified a number of reasons for the increase in court delays, including some pragmatic and structural factors, such as 'too many cases' (ProsecutorL) and 'less judges sitting in the crime division at the moment' (ProsecutorD). Participants also identified the ineffective pre-trial process as a factor creating delays. Defence CounselA claimed that 'the pre-trial hearings don't work well, especially the Committal. What they do work well at is creating another cog in the process, another step in the ladder, and they can be adjourned and put off and used to create more and more delay'. The likelihood of delays resulting from ineffective pre-trial hearings is well documented, particularly in relation to Committal Hearings, which are being used less and consequently becoming a less valuable process (AJAC, 1994; Brereton & Willis, 1990; Coghlan, 2000; National Legal Aid Advisory Committee, 1993; Pegasus Taskforce, 1992; Weinberg, 2000). For this reason, a number of proposals have emerged since the 1980s to abolish Committal Hearings in Australia, the UK and Canada (Bishop, 1990, p. 48;

Brereton & Willis, 1990, pp. 14-15), and in 2004, WA adopted this recommendation and abolished the pre-trial Committal Hearing (*Criminal Procedure Act 2004* (WA) s.42-51).

Committal abolition was also proposed as an option in Victoria by the DPP, who claimed 'it's a costly and inefficient and time-wasting process, for what you get out of it…they don't serve the purpose they were originally intended to serve, which is as a proper filtering process' (as cited in Kissane, 2008, p. 10). While there are no official proposals as yet to abolish Committal Hearings in Victoria, changes have been made to the Committal Hearing in an attempt to increase its usefulness.[38] For example, Victorian Magistrates must now determine whether the evidence is sufficient to support a conviction at trial, rather than simply sufficient to warrant sending the defendant to trial. In addition, the defendant's right to enter a reserved plea at the conclusion of the Committal Hearing has been abolished, so they must make a pleading decision at the conclusion of the hearing (*Criminal Procedure Act 2009* (Vic) s.141-s.144).

Two major reasons for the increase in court delays emerged in participants' responses. The first involves a number of compounding factors that impact on the pre-trial preparation of counsel, which can hinder the occurrence of plea bargaining. For example, ProsecutorI identified the limited resources available to counsel and the courts to prepare and run cases, particularly if Legal Aid is involved, as a primary factor creating delay. He claimed that 'delay happens because there are not enough resources and there are budgetary cuts from above, so we can't get through the workloads we already have'. ProsecutorM also identified adversarial traditions as hindering counsel's pre-trial preparation. He argued that these traditions prioritise the contested trial and promote the view that Crown representatives should be discouraged from initiating discussions until a senior prosecutor is assigned to the case. He maintained that, as a consequence, 'there is a limited focus on identifying issues or cases that may resolve at an early stage which creates delays down the track' (ProsecutorM). Defence CounselC also maintained that 'delays are due to human elements, as well as practical reasons. We focus more on combative behaviour than resolution and there is less communication between counsel'. This view was also supported by ProsecutorJ, who claimed that 'there is not enough preparation for pre-trial hearings so communication with the defence sometimes just doesn't happen and time gets wasted'. These perspectives are also supported by Australian High Court Justice Hayne (2008), who criticised counsel pre-trial preparation and attributed the significant increase in trial lengths to the increasing reliance upon written advocacy, and the consequent reduction in counsel filtering out non-relevant issues prior to trial. He claimed that:

> There was a time when the solicitor would choose what he or she thought to be the most relevant documents, have a copy typist copy the text of the documents and then send those documents with some observations to counsel for an opinion…The moment of

[38] The observations and interviews indicated that it is likely that Committal Hearings will feature on future reform agendas. However, at the time of writing there were no proposals advocating this view.

> discriminating between what was important and what was not has moved…More and more often counsel gave the bundles [of documents] to the judge. And the judges did not say, as they should have said when that was done, why? What is this that you are giving me? How is it relevant? How is it admissible?…Now counsel can have everything available on a single disc...And most of what appears on that might have some relevance to the issues between the parties. Some of it might even be important to the proper resolution of those issues. So [counsel think], why choose between the material that can be compressed into this single record? Why not give it all to the judge to see what he or she makes of it? If it is not immediately important, it can be described as useful background material…The focus of the game is [now]…how many issues can I leave alive at trial and how much material can I assemble and leave for the judge to consider (pp. 19-22).

This lack of filtering and the focus on adversarial traditions means additional resources are spent sorting through material by all parties, which reduces early resolution possibilities and fuels delay.

The second reason observed by the research participants for the increase in delays was late guilty pleas. The reasons for the occurrence of late guilty pleas are numerous. As JudiciaryE maintained, 'some defendants will simply wait until the trial to plead guilty'. Similarly, ProsecutorO claimed:

> It is a common experience from a prosecutor's point of view that defendants hang out and hang out and hope that some way it will just get better and that something will give and it will all go away. So nothing will happen until you get to the door of the court and they realise, oh well, I guess I better get it over with then and then they plead guilty.

ProsecutorG also argued that:

> The difficulty is that in practice, a lot of the time late guilty pleas happen not because of something the Crown has done, but because the defence are limited by the instructions of their client and the time they have to spend with their client, and the fact that it is often not until they turn up on the day of the trial and get really nervous about what is going to happen that they plead. So we waste all this time and make all these additional delays.

ProsecutorI identified the defendant being on bail as contributing to late guilty pleas because 'they have an incentive to try and prolong things as long as possible. So instead of a plea at the Committal, they enter a reserved plea or even just a not guilty till I hear something better'.[39] ProsecutorD also claimed that 'if people are in custody there is probably more encouragement to resolve matters quickly rather than [being] on bail. Being on bail seems to be, on the whole, a great encouragement not to have a matter dealt with'. The consequences of which delay a defendant's guilty plea, which in turn wastes court resources and counsel preparation.

In addition to their remand status, Policy AdvisorE maintained that:

[39] This interview was conducted prior to amendments requiring defendants to enter a guilty or not guilty plea at the conclusion of the Committal Hearing (*Criminal Procedure Act 2009* (Vic) s.144).

> Defendants play the system, or they may have limited access to finances to attain legal representation, or their legal representation may encourage them to withhold a plea in the hope of attaining a late offer from the Crown. So they may not plead guilty until the trial becomes a reality.

ProsecutorE also asserted that in serious indictable cases 'there is a reluctance of people to plead guilty because they are going to get a pretty big sentence at the end of it, so they may as well give it a run and wait as long as they can to see if anything gives'.

Another factor suggested by ProsecutorK to impact on the early identification of guilty pleas among sexual offenders is their compulsory registration on the *Sex Offenders' Registry* (*Sex Offenders Registration Act 2004* (Vic)). S.34 of the *Sex Offenders Registration Act 2004* (Vic) requires that all sexual offenders who plead or are found guilty of one or more individual sexual offences involving a child must keep police notified of their location and personal details for between eight years and life, depending on the number and category of offences committed. This is required on the basis that this will reduce the likelihood of reoffending. ProsecutorK claimed, however, that 'because of the *Sex Offender's Registry*…it makes it difficult to get people to plead guilty because that stays with them for life'. Policy AdvisorB also identified post-sentence orders, such as extended supervision orders and confiscation orders, which can be given to defendants after they plead guilty as a factor hindering early pleading decisions (*Sentencing Act 1991* (Vic) Part 4–Part 6). Participants identified the impact of these factors in hindering early guilty pleas as further working to fuel court delays and contribute to court inefficiency levels.

Some participants identified the absence of transparency and certainty around the sentence discount provided to defendants in exchange for their pleas as another contributing factor to late guilty pleas. This was a particular concern raised by defence counsel participants, who argued that the lack of transparency surrounding sentence discounts 'minimises the likelihood of defendants entering early guilty pleas' (Defence CounselC). Defence CounselI also maintained that 'the law specifies that the court can take into account when the person has pleaded guilty, and if so the timing of which they did so, but this is not really much of a code for giving a sentence discount'.[40]

2.9 Impacts of Court Delays

The impacts of court delays extend to all parties involved in criminal proceedings. As a judicial participant in Mack and Roach Anleu's (1998) study claimed:

[40] This concern has to some degree been addressed by s.6AAA of the *Sentencing Act 1991* (Vic) which requires the judge to specify 'the sentence and non-parole period, if any, that would have been imposed but for the plea of guilty'. See the literature review for further discussion on this reform.

> One of the banes of our system is people who change their plea on the morning of the trial. It means that you have a judge sitting around twiddling his [sic] thumbs for the day because there's no other cases to take its place. You've brought in a jury panel which is costing the state goodness knows how much, you've got a prosecutor sitting around who's prepared the case, you've got witnesses who have come in and then they are all told to go home again (p. 265).

Traditionally, the negative impacts of delay were seen to affect defendants, particularly those held in remand, on the basis of the human rights argument that defendants were being additionally punished before being found guilty (Osborne, 1980). As Osborne (1980) argues, there is 'no justice, only unproved accusations hanging over a defendant's head…[which is] punishment before conviction of someone who may never be convicted' (p. 7). Defence CounselA also maintained that such delays can increase the pressure on these defendants to plead guilty. He claimed that:

> There is a pressure created from the situation of delay. It is not individuals placing pressure on defendants to plead guilty, it is the pressure of the system of delay and everyone wanting to get through it that puts pressure on them to plead, especially if they are being held [in remand].

Defence CounselJ also pointed to the exacerbation of financial pressures on defendants resulting from having to acquire continuous legal representation throughout a period of delay, claiming that 'some defendants just can't afford to keep running the case if it spills over to one or two years before it is finalised'.

Delays have also been recognised as impacting on judicial principles, because 'no matter which theory is the cornerstone of punishment, each is at least partly dependent for its success upon getting to the offender without undue delay' (Osborne, 1980, p. 17). Thus, 'whether the emphasis is on protecting society, discouraging the offender or others from committing criminal acts or rehabilitating the offender, delays may reduce any efficacy [the punishments] might have' (Osborne, 1980, p. 17). The impact of delay on the quality of justice was similarly identified by ProsecutorJ, who stated that:

> The courts simply cannot cope with the amount of work that they have and it seems as if the lists just get longer. The victims suffer when trials are delayed, accused people are put under enormous stress from the delay, evidence is lost. So nobody wins through delay. Certainly the prosecution doesn't.

The significant impact on victims and witnesses created by delay was a prominent concern among participants, particularly prosecutorial participants. As ProsecutorJ claimed, 'by prolonging the criminal justice process, the trauma and stress of a trial is often exacerbated'. The extent of the stress caused by delays was also identified by the Victorian DPP (Rapke, 2008) when he asked:

> How often have we stopped to consider what delay in justice really means in human terms? What delay means to victims, to witnesses, to accused persons, to police investigators, to judges, to the community? Can any of us who have not been either a victim of crime or accused of committing a crime conceive the stress associated with waiting for a matter to be concluded? Lives are interrupted and put on hold. Family life is disrupted. Jobs are sacrificed. Freedom is curtailed. And when the matter finally meanders its way into court, the quality of the evidence led is adversely affected. Who benefits from this? No one—and it is certainly not justice (pp. 5–6).

In the same speech, Rapke (2008) detailed the significant emotional impact of delays claiming:

> I cannot begin to tell you of the heartache that my staff and I experience when confronted by a victim of crime who has been worn down by the system. I have heard the cries and pleas of victims and their families to put an end to prosecutions, to allow them to close that chapter in their lives and move on. They plead with me, fully cognisant that if I accede to their request, their tormentors will escape justice (p. 8).

Due to these extensive, negative impacts, combating court delay has been a prominent motivation for formalisation, particularly of pre-trial proceedings. The next section examines some examples of efficiency-driven reform in Victoria.

2.10 Efficiency-Driven Reform

Reducing court delays by encouraging early guilty pleas has been a focus of recent Victorian law reform and proposals for reform (VSAC, 2007c). Within the Victorian OPP, a number of formal changes have been instigated in response to delays, including 'streamlining the management of cases, modernising court-related processes and resolving cases at an early stage' (Victorian OPP Annual Report, 2007, p. 38). In October 2007, an Early Resolution Unit was also established with the aim of proactively identifying and finalising matters that could resolve prior to trial (Victorian OPP Annual Report, 2007, p. 38). To achieve this, the Unit employs an 'internal call over system', which identifies any issues that may lead to late adjournments or delays and where possible, seeks to resolve them (Victorian OPP Annual Report, 2007, p. 38).

Further to these internal changes, in a media release in May 2007, the Victorian Attorney General outlined a $110 million plan to 'deliver justice to all Victorians' (Victorian Department of Treasury & Finance, 2007, p. 1) by reducing court delays with the appointment of four additional judges, two in the Supreme Court and two in the County Court, and the employment of additional support staff and resources for the courts and associated bodies, including the OPP (Victorian Department of Treasury & Finance, 2007).[41] The Attorney General (2007, as cited in Victorian Department of Treasury &

[41] In 2007, the Victorian Government increased the OPP's budget by approximately 20% ($28 million) to assist with its efforts to minimise delay. For a breakdown of the Victorian OPP budget, see its 2007 Annual

Finance, 2007) claimed that these funding initiatives would 'speed up the delivery of justice…giving all Victorians a justice system that is quicker, fairer and more responsive to their needs' (p. 2). In February 2009, the Attorney General announced the appointment of two more County Court judges to 'provide the court with additional resources to deal with its workload' (Victorian Attorney General's Department, 2009, p. 1). In addition, a new Solicitor of Public Prosecutions was appointed to the Victorian OPP to 'continue the existing organisational change program at the OPP which…supports initiatives that reduce delay' (Victorian Attorney General's Department, 2009, p. 1). The Attorney General argued that these efficiency-driven changes would 'enhance the operation of Victoria's prosecution services…[and overall] make a significant contribution to [the efficiency of] Victoria's criminal justice system' (Victorian Attorney General's Department, 2009, p. 1).

A significant example of efficiency-driven reform introduced in Victoria resulted from the recommendations of the VSAC final report (2007c) on specified sentence discounts and sentence indications, which as discussed in the literature review, was commissioned by the Attorney General in 2005. This report influenced the statutory implementation of sentence indications for summary and indictable offences and greater specification of sentence discounts (*Criminal Procedure Act 2009* (Vic) s.208-s.209; *Sentencing Act 1991* (Vic) s.6AAA; see Chapter Six for further discussion on the indictable sentence indication scheme). Both reforms were identified in the VSAC report (2007c) as providing mechanisms to increase court efficiency by enhancing transparency of the information and incentives that would encourage defendants to enter early guilty pleas; the resource, emotional and financial benefits of which, the report proposed, would extend to all parties, including victims and defendants (VSAC, 2007b, 2007c). Significantly, and as explored in Chapter Six, these reforms, particularly the indictable sentence indication scheme provide an example of the movement within Victoria towards efficiency-driven reform, providing a potential basis for arguing for the formalisation of plea bargaining given its potential efficiency benefits.

2.11 Conclusion

As demonstrated by the discussion in Part I, the importance of this research in addressing key policy concerns relating to plea bargaining's non-transparency is strengthened by its disregard for the potential consequences of unscrutinised prosecutorial charging decisions and its direct contrast with international moves towards the formalisation of prosecutorial discretion. While the analysis of the UK Guidelines revealed that moves towards the strict control of discretion have the potential to hinder plea bargaining's effectiveness, and to encroach on judicial independence, it also provided a strong justification for formalising

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Report. Available from http://www.opp.vic.gov.au/wps/wcm/connect/Office+Of+Public+Prosecutions/resources/file/ebal334afl16cdba/OPP_Annual_Report2006-07-fullreport.pdf.

plea bargaining and thereby imposing transparency and accountability on prosecutorial discretion. Similarly, as discussed in Part II, providing greater transparency, consistency and accountability to plea bargaining and prosecutorial discretionary decisions can also offer benefits that apply to both victims and defendants. As a result, plea bargaining's formalisation could thus transgress the traditional dualism between defendant- and victim-focused reform, while working to recognise the changing role of victims in criminal proceedings from viewing them as simply prosecutorial witnesses, to ensuring that their needs and rights are considered throughout the prosecution process, in tandem with recent victim-focused reform (*Victims' Charter 2006* (Vic)).

The potential benefits of formalising plea bargaining extend beyond transparency and accountability to include efficiency. As demonstrated by the discussion in Part III, in light of the statistical evidence showing increasing delays across all three Victorian criminal courts and the serious consequences of these delays, plea bargaining's formalisation could provide a mechanism to respond to and address court inefficiency. Formalising plea bargaining is likely to encourage early guilty pleas and to increase the number of issues that are resolved prior to trial, thus reducing the duration of criminal proceedings and offering the resource, emotional and financial benefits associated with increased efficiency. Court inefficiency thereby provides another strong reason for plea bargaining's formalisation.

This chapter provided an analysis of the three common motivations for the formalisation of unregulated criminal justice processes in common law systems involving the control of criminal justice agencies' discretion, the increasing recognition of the status of victims, and reducing court inefficiency. The next chapter extends upon these motivations to analyse the justifications that specifically drive the formalisation of plea bargaining in Victoria.

CHAPTER THREE
LIFTING THE VEIL OF SECRECY

There is a real desirability in the public and victims and the accused being properly informed about plea bargaining. But because it is done behind closed doors so to speak, plea bargaining seems to be a cop out. Most of the public think that. I think the OPP [Office of Public Prosecutions] needs to sell what they do a little bit better. People need to understand what goes on behind the scenes. They don't have a clue about what goes on. They get a very distorted view of plea bargaining from the media, both on plea bargaining and sentences handed down by the courts. They perceive plea bargaining however the media tell them to perceive plea bargaining. They think that we sit around and talk directly to the accused and tell him [sic] if he [sic] doesn't plead guilty he [sic] will go to jail for 20 years, but if he [sic] pleads guilty we will say that five years is an appropriate sentence and we will tell the judge that. They think that system applies here, but it doesn't. The media reporting is either distorted, inaccurate or only tells part of the picture, because they like to deal in absolutes, in black and white. So in many ways, the public is only being given an edited version of what happens. So people don't have a realistic view of what the negotiations are about. The only way to address that is to give them more information, to put plea bargaining out in the open, make it more transparent and make us more accountable to the public (ProsecutorS).

The absence of legislation acknowledging plea bargaining in Victoria undermines its legitimacy, because the principles and restrictions inherent to other criminal proceedings are not applied—in particular the public interest principles of accountability and transparency are noticeably missing (Cohen & Doob, 1989; Doob & Roberts, 1983; VCCAV, 1997; VSAC, 2006, 2008a). The absence of legislation can also exacerbate the potentially negative consequences of plea bargaining, particularly the increased pressures on defendants to plead guilty, and a perceived lack of consideration for the victim, which in turn can fuel negative perceptions of the Crown's true motivations for plea bargaining, given the potential resource savings. As a consequence, regardless of whether or not any misconduct or impropriety occurs, the lack of transparency and scrutiny of prosecutorial conduct and of the process itself fuels a negative public perception that plea bargaining is in some way unjust. These impacts of plea bargaining's informality thus provide significant justification for its formalisation.

With a particular focus on public accountability and transparency concerns, this chapter analyses the effectiveness of the existing mechanisms, particularly the internal Office of Public Prosecutions (OPP) policies, in providing transparent guidance to prosecutors in making plea bargaining decisions. It also examines whether formalising plea bargaining would better uphold the principle of public and open justice by allowing the public greater access to discussions, thus increasing their understanding and confidence in the process (Cohen & Doob, 1989). This chapter argues that there are significant benefits

that could flow from plea bargaining's formalisation, and that it is indeed necessary if plea bargaining is to be accepted as a legitimate criminal justice process.

3.1 Why Plea Bargain?

3.1.1 Aims

During the observations, it emerged that the OPP relies strongly upon plea bargaining, particularly in the Committal Mention, which is the first indictable pre-trial hearing after a defendant's arraignment. During one two-hour observation of this hearing, six discussions were observed, three of which resulted in guilty pleas. Among the four OPP divisions focused upon during the fieldwork—Committal Advocacy; General Prosecutions; Policy Advising and Court of Appeal; Specialist Sexual Offence Unit—at least one discussion was observed every day. These did not always result in guilty pleas or amendments to charges, but regardless of the outcome, the observations revealed the extent to which plea bargaining occurs, reflecting the findings of previous research (Freiberg & Seifman, 2001; Mack & Roach Anleu, 1995, p. 20).

Participants identified a range of aims as justification for regularly engaging in discussions. The predominant purpose to emerge from the prosecutorial responses was the need to minimise the occurrence of trials and late guilty pleas, in cases where an early guilty plea can be identified. This finding reflects the early resolution ideals embodied in plea bargaining, which can deliver resource, emotional and financial benefits to all parties by reducing the duration of criminal proceedings. Plea bargaining also embodies some contested trial ideals by encouraging parties to minimise the number of issues in contention prior to trial. This inturn reduces the length of criminal proceedings and reduces the likelihood of trial adjournments and late guilty pleas. Prosecutorial participants identified both the early resolution and contested trial ideals embodied in plea bargaining as benefiting the Crown through the saving of resource expenditure, but also as benefiting victims by minimising the negative impacts of unnecessarily drawn-out proceedings. As ProsecutorH maintained, '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'. ProsecutorM also maintained 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 emotional and psychological, but also the costs in terms of financial costs, which can be extreme and after it all you might end up with the same sentence after the trial as you will through plea bargaining.

ProsecutorO also highlighted plea bargaining's early resolution ideals as the primary reason for engaging in discussions. She maintained:

> 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 discount for pleading. So the purpose is really those benefits.

Defence counsel participants also identified early resolution ideals as a justification for plea bargaining. Defence CounselC claimed that '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'. Defence CounselF also recognised the resource savings plea bargaining can offer, claiming 'it saves a significant backlog of cases in the system and reduces delay in the system'.

Within the prosecutorial group, the main reasons for plea bargaining were identified as saving costs and resources, sparing victims from drawn-out proceedings and obtaining convictions. Significantly, prosecutorial participants pointed to obtaining convictions as the greatest benefit, because they perceived this to also uphold public and victim interests by holding the defendant accountable for his/her criminal actions (ProsecutorM). In other words, it is 'in the public interest that those who are indeed guilty should admit their guilt' (McConville & Baldwin, 1981, p. 66). This method of obtaining a conviction also saves prosecutorial resource expenditure, which ProsecutorN claimed 'passes onto the public, because more resources are available for other matters'.

The benefit for both the public and the victim of obtaining convictions through plea bargaining based on this reasoning however, is questionable, and depends entirely upon how the notion of upholding interests is defined. As plea bargains generally involve some prosecutorial concession on the number or severity of charges, and amendments to the case facts to reflect these changes, often the conviction recorded does not reflect the full extent of the defendant's criminality. In light of this, plea bargaining can also impact on the severity and type of sentence. In this context, obtaining a conviction through plea bargaining may not be seen to uphold public or victim interests to the same extent as might be possible by obtaining a conviction from a trial on all relevant charges. In discussing this issue, ProsecutorN claimed:

> 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 met 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, we say yes there are cases that we might have pursued on a trial and we might have won, but we have knowingly dropped them, not pursued them, in order to get the plea to the other matters in which, if we had gone to trial, we might have got a conviction or we might have got all acquittals. We just don't know. That is why it is a guessing game, a relative value to what you are being offered.

ProsecutorL also maintained that plea bargaining is a compromise and 'like any settlement, both sides are both 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% 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 conviction through the unscrutinised plea bargaining process upholds victim or public interests, particularly when contrasted with a conviction on the full charges obtained in a transparent and regulated trial.

3.1.2 Prosecutorial Considerations when Plea Bargaining

Prosecutorial participants identified a number of often conflicting factors at play when deciding whether to plea bargain: for example, considering victim interests, which may be best reflected by proceeding to trial on all charges, in contrast to the possible resource savings from accepting an early plea, at the 'expense of withdrawing the head count' (ProsecutorN).[42] On this issue, ProsecutorA observed:

> The main factors we consider would be that something is settled on the basis of the facts so that the victim is happy enough with it and legally it is acceptable. You don't bargain down just so you get rid of it, you have to take into account the strength of the evidence, the seriousness of the case, the trauma to the victim, the type of victim—a child or someone mentally impaired, you may settle a bit less than you ordinarily would, just to spare the victim [from the trial], you may, you may not. You have to take all those sorts of factors into account and at the end of the day, consider if it is acceptable to the community.

ProsecutorL similarly asserted that the most important questions Crown representatives ask before plea bargaining are: 'If we accept a plea to this charge, is it enough? Does it fairly represent a just and fair result? Does it sufficiently describe the criminality involved? Is the penalty likely to be imposed an appropriate penalty?' When asked to expand upon the importance of these questions, he claimed:

> The Crown will ask these questions for a variety of reasons. If we have no evidence, because it might be expedient to do so, witnesses might be terminally ill or going out of the jurisdiction. So the decisions made about such things can be essentially pragmatic. We will then ask how will this affect the victim? What do they think? What is in it for them? So

[42] The head count refers to the most serious charge on the presentment.

> there is also an emotive element to the decision, and we always think what's in it for us. There always has to be something in it for us.

ProsecutorE also maintained that considerations vary depending on individual cases:

> There will be some cases that are all about evidence and what you can prove. There will be some cases about what is enough in that particular case, so say you might have 100 counts of theft, well you are never going to run a trial for that. So you have to work out which way you are going to run that and what reflects the criminality. With your sex cases you sometimes have a very large number of counts that you are never going to be able to run as a trial and if you can work out some other way of running it, then we try and do that. It is very hard in fact to write down what the sort of criteria is because they are very broad in range. You can look at any individual case and say these are the things that are in play here, but they will be different issues in another seemingly like case.

Despite the difficulties ProsecutorE identified in labelling the considerations, the primary consideration to emerge from the prosecutorial responses was 'whether or not the offer is realistic' (ProsecutorM)—that is, whether it takes into account the impact of the crime on the victim, what the likely sentence might be after any charge alterations, and whether it upholds public interests, which ProsecutorM defined as 'reflecting the criminality of the defendant's behaviour'. ProsecutorL extended this definition to include when the defendant can provide information on another crime, if it will spare a particularly vulnerable victim from potentially distressing cross-examination, or if it saves prosecutorial resource expenditure for 'more complicated cases'. Interestingly, all seventeen prosecutorial participants who identified considerations pointed to the victim as a primary factor which impacts on their decisions over whether to plea bargain. Two of these participants prioritised the victim as the most significant consideration in deciding whether to plea bargain, while the other fifteen prioritised the likelihood of obtaining a conviction as the main consideration, although they identified this as a mechanism to uphold victim interests. Insofar as this finding reflects the role of prosecutors in representing the state's interests as opposed to those of individual victims, it does reveal a potential lack of understanding of individual victim needs. Fifteen prosecutorial participants believed that victims' needs are upheld in plea bargaining from a guaranteed conviction, and from sparing them from providing testimony. However, by simplifying the varied and often complex needs of individual victims in this manner, there is the potential for a source of tension to be created between prosecutors and victims in the plea bargaining process, particularly given the absence of scrutiny surrounding prosecutorial discretion in making plea bargaining decisions.

3.2 Existing Controls: Legislation & Case Law Authority

As employees of the state, most prosecutors have their conduct regulated through statute and/or case law. Plea bargaining's informality, however, means that no Victorian legislation refers to plea bargaining or regulates prosecutorial conduct in discussions. Some sections of legislation controlling prosecutorial conduct in criminal proceedings can indirectly impact on prosecutors' actions when plea bargaining. For example, s.24(c) of the *Public Prosecutions Act 1994* (Vic), a statute which outlines the main responsibilities of prosecutors, alludes to plea bargaining by describing the importance of conducting 'prosecutions in an effective, economic and efficient manner'. In addition, without specifically referring to plea bargaining, s.9 of the *Victims' Charter Act 2006* (Vic) ('*Victims' Charter 2006* (Vic)') imposes statutory requirements on prosecutorial conduct following discussions, by requiring that prosecutors keep victims informed of any alterations to charges. These two pieces of legislation are the only statutory controls, however limited, of prosecutorial discretion when plea bargaining in Victoria.

The plea bargain itself is to some extent subject to scrutiny in the courts. As part of a plea bargain, counsel determine an agreed summary of facts which may leave out certain factual elements of the crime in order to warrant a guilty plea to the altered charges. This summary forms the basis upon which the defendant is sentenced. To provide some scrutiny of these factual alterations, the Australian High Court established in *R* v *Maxwell* (1995) 184 CLR 501 that a judge:

> cannot be forced to sentence an offender on a factual basis the judge cannot consciously accept. The trial judge has a residual discretion to reject the plea. It is impossible to define the circumstances in which it is appropriate for such discretion to be exercised more closely than by saying it is to be exercised where the interests of justice so require (at 535).

Therefore, in effect the judge can reject a guilty plea resulting from an inappropriate plea bargain, if the plea does not sufficiently cover the offending behaviour or the evidence does not substantiate the altered charges. This decision was upheld in the Victorian Supreme Court of Criminal Appeal in *R v Duong* [1998] 4 VR 68, during which the court stated that a judge is not bound to accept the version of facts agreed by counsel as the sentencing basis if the facts are inconsistent with the evidence. Based on her own experiences, Defence CounselF also pointed to the court's power as a safeguard on plea bargaining, claiming that:

> In this case I did, the judge said he had doubts when the accused entered his plea of guilty as to whether or not the evidence actually could prove beyond reasonable doubt that the offence had occurred. So he expressed his concern and told the accused to go away and rethink his plea.

Defence CounselG also identified the judge's discretion in determining sentences as a safeguard on plea bargaining, claiming:

> Because the judge is not involved in plea bargaining, whatever agreements are made between parties doesn't bind the judge in sentencing…So you can have a prosecutor and defence agree for the defendant to plead guilty and for the prosecutor to stand up and say, a non-custodial sentence is within range, sending a clear message that if the defendant gets a non-jail sentence they would not appeal, but the judge can go ahead and jail the defendant anyway. Judges are not bound by any statement from either one from the bar table. The judge has absolute discretion to sentence.

The Australian High Court case *R v GAS; R v SJK* (2004) 206 ALR 116, also loosely recognised plea bargaining by suggesting that both counsel maintain written copies of any agreement that may have influenced the defendant's pleading decision, particularly if it might impact on the likely sentence (at 42). While the circumstances of the plea bargain in this case demonstrated the potential consequences of unscrutinised agreements, the court did not attempt to define or acknowledge the practice of plea bargaining or provide any significant scrutiny of the process itself (see Introductory Chapter for further discussion).

3.3 Internal OPP Policies

Within the OPP, non–legally binding guidance on plea bargaining is detailed within two *Practice Guides* and one *Director's Policy*. *Director's Policies* are considered official policies insofar as they should be upheld whenever possible; however, there are no penalties applied for deviation, and no mechanisms exist to monitor whether the requirements of the *Director's Policies* are followed. *Practice Guides* form part of an internal database within the OPP, and offer guidance on prosecutorial conduct in criminal proceedings. These guidelines are considered less official than the *Director's Policies*, however, the Director of Public Prosecutions (DPP) recommends that prosecutors avoid deviating from them whenever possible (ProsecutorN). The *Director's Policies* and the *Practice Guides* are used in conjunction with each other.

3.3.1 *Director's Policy 3.1 2007 (Vic)*

The *Director's Policy 3.1 2007* (Vic) provides guidance on prosecutorial discretion when accepting plea bargains. The policy states that the decision to prosecute 'is the most important step in the prosecution process' (s.1.2) and Crown representatives should 'prosecute wherever it appears…in the public interest' (s.1.2). When there is a sufficient evidentiary and public interest basis for prosecuting, the policy requires Crown representatives to assess whether it is in the public interests to resolve, or to try the case

(s.1.6). In making such determinations, the policy details the benefits of obtaining early guilty pleas and provides guidance to Crown representatives in assessing whether plea bargaining is in the public interest, particularly in terms of ensuring whether any charge alterations will maintain public confidence in the OPP's ability to fairly administer justice (s.2.6.6).

3.3.2 *Practice Guides*

The two *Practice Guides*, *Resolution of Matters & Early Issue Identification 2007* (Vic) and *Dealing with a Plea Offer 2006* (Vic), provide more extensive guidance on prosecutorial conduct when plea bargaining, at two different stages of the process. The 2006 *Practice Guide* provides guidance on the Crown's obligations to victims and on potential factors to consider before plea bargaining. In particular, it offers guidance on the type of information that should be provided to enable victims to form proper views of the plea bargain. This may include advising them that there will be no trial or need to testify and, where applicable, that a plea bargain may result in fewer convictions being recorded than what may otherwise have occurred. The 2007 *Practice Guide* outlines the main stages of criminal proceedings during which early resolution should be considered, and how to identify suitable cases for plea bargaining. Predictably, given the early resolution focus of many pre-trial hearings, the pre-trial process is cited as the primary stage at which plea bargains should be sought. However, the policy also suggests that:

> Prior to the formal commencement of any trial, the instructing solicitor should reiterate to the defence representatives any previously discussed basis upon which the matter might resolve, and should ensure that the defence is aware of the basis, if any, upon which the Crown would be prepared to resolve the matter as a plea of guilty (p. 3).

Both *Practice Guides* outline informal safeguards to scrutinise the conduct of Crown representatives when plea bargaining. To uphold their public interest roles, Crown solicitors are discouraged by the 2007 *Practice Guide* from initiating plea bargaining in cases involving a fatality, without obtaining approval from a Crown prosecutor or the DPP. Initiation of discussions is also discouraged in cases involving intentionally causing serious injury. The policy also suggests that approval from the DPP be sought before accepting a plea bargain in these cases. With a similar intention, the 2006 *Practice Guide* suggests that Crown solicitors seek approval from a senior prosecutor before making any changes to the agreed summary of facts, in order to ensure that the defendant's criminality is still reflected. In line with the *Director's Policy 3.1 2007* (Vic) s.2.2.6, the 2007 *Practice Guide* also discourages Crown representatives from approaching unrepresented defendants to engage in discussions. As both policies state, 'whilst plea negotiations are pursued out of court they remain part of an adversarial legal process requiring considerable legal expertise and tactical experience. To seek to conduct them with an unrepresented accused is patently

unfair' (s2.6.6). However, and somewhat in contrast, both policies allow the Crown to accept an offer to plead guilty from an unrepresented defendant in exchange for selected prosecutorial concessions (s.2.6.6).

3.3.3 Existing Controls: Are These Mechanisms Sufficient to Control or Offer Scrutiny of Plea Bargaining?

It is important to state at the beginning of this discussion that the interview and observation data did not provide any evidence of prosecutorial misconduct during plea bargaining. During the observations, plea bargaining was only considered in cases where there was some justification for doing so—for example, due to 'weak evidence'; 'the victim's/informant's opinion'; 'the sentence is likely to be the same regardless'; 'saving resources'; and 'avoiding prolonging proceedings'. In addition, prosecutorial participants were consistently observed to be seeking victim and informant opinions, as well as an authoritative opinion, before making a decision to plea bargain. For example, during one observation of ProsecutorG, after examining the evidence she rang Defence CounselB, '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 defendant] might plead guilty'. Defence CounselB indicated that a guilty plea might be possible if an appropriate arrangement could be agreed upon. Following this conversation, ProsecutorG contacted the informant to discuss the case and ascertain his opinion, and those of the victim. ProsecutorG then spoke with the Crown prosecutor (ProsecutorM) about a possible plea bargain offer, outlining her recommendations and the opinions she had obtained. ProsecutorG and ProsecutorM then determined a possible plea bargain which they proposed to Defence CounselB. When asked about this process, ProsecutorG 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, and often this can be quite different because the informant knows the witnesses and may want to get rid of the brief because it is difficult for them, whereas 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.

Twenty-four participants with prosecutorial experience identified the three internal policies outlined above as providing some guidance and control on prosecutorial conduct in discussions. However, while these policies provide some informal guidance for Crown representatives when plea bargaining, the extent of their influence in controlling prosecutorial conduct or monitoring any deviation from the policies, given that they are non–legally binding, is minimal. Perhaps most importantly in the context of this discussion, these policies do not provide transparency to the public when plea bargaining occurs. As a

result, regardless of whether or not any misconduct or impropriety was evident in the data, merely the absence of transparent justice when plea bargaining transpires can create doubt over the legitimacy of plea bargaining being used as a criminal justice process.

The overwhelming response to these concerns that emerged from the interview data was that ultimately when engaging in discussions, the Crown can be 'trusted' to consider victim, public and defendant interests, and not to make deals purely for efficiency motivations. When questioned as to *how* the Crown could be 'trusted' to perform this role without any formal scrutiny, participants claimed that their public interest roles and status within the criminal justice process provide a sufficient basis for engendering trust. As Defence CounselE claimed, 'we have to put some degree of faith in legal counsel to do their job in that regard'. Similar views were also expressed by legal participants in Mack and Roach Anleu's (2001) research, whereby 'the implicit claim by defence and prosecution lawyers is that such discussions and resulting agreement are not coercive, but proper and ethical' (p. 155).

The fact that the observations did not demonstrate any overt prosecutorial misconduct in plea bargaining and that the legal participants themselves believed the Crown can be 'trusted' to appropriately engage in discussions, however, does little to redress the potential consequences of plea bargaining's non-transparency. These concerns exist because when plea bargaining occurs or a prosecutorial decision is made involving plea bargaining, there is no public transparency or accountability in this process or in prosecutorial discretion in making these significant decisions (Huff, Rattner, & Saragin, 1996; Newman, 1966). Justice is not seen to be done. Plea bargaining's lack of formality beyond the internal policies can thus impact on public perceptions of discussions and their legitimacy, and potentially hinder public confidence in, and understanding of, plea bargaining (Cohen & Doob, 1989; Freiberg, 2003; VCCAV, 1997; VSAC, 2006). Therefore, if plea bargaining is going to continue to be used as a criminal justice process, maintaining only three internal policies that offer informal and non-binding guidance to prosecutors is not adequate, because this does not uphold established judicial and public interest principles, particularly those of public and open justice (Ashworth, 1994; Kirby, 1998; Spigelman, 1999). In its current format, plea bargaining also fails to provide a level of prosecutorial scrutiny similar to that applied to other criminal proceedings, like the trial. As Cole (2001) claims:

> Compared to the openness of plea negotiations in the US, 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 (p. 186).

The mere perception that misconduct or impropriety could occur during the process of plea bargaining in itself constitutes a substantive reason for implementing scrutiny and

authorisation to plea bargaining through statutory formalisation. To support this contention, the following sections examine the concerns that can be exacerbated by plea bargaining's non-transparency, focusing on defendants, victims, the OPP and the public.

3.4 Consequences of Plea Bargaining's Non-Transparency

3.4.1 Pressures on the Defendant

One of the primary weaknesses of plea bargaining's informality that is exacerbated by its non-transparency is the potential enhancement of pressures compelling defendants to plead guilty. As Baldwin and McConville (1979a) argue:

> The guilty plea system transforms criminal justice from one which seeks to determine whether the State has reliably sustained its burden of proof to another which seeks to determine whether the defendant, irrespective of guilt or innocence, is able to resist the pressure to plead (p. vi).

These pressures can include the financial constraints of proceeding to trial, which can appear particularly burdensome when contrasted with plea bargaining's benefits, that may reduce the severity of the conviction recorded, and possibly, the sentence. As Defence CounselC claimed:

> Some defendants just can't face the thought of going to a contested hearing because of the stress and emotional trauma. More significantly though, most can't afford the cost of a contested hearing, so there is a fair bit of pressure on them just to plead guilty, especially when it is sweetened with a [plea] bargain.

As part of the incentive for entering a guilty plea includes a sentence discount, the pressures to plea bargain can also be increased by the possibility that the length and type of sentence may be significantly reduced (Defence CounselA). This concern was identified by a defendant in Baldwin and McConville's (1977) research, who claimed that 'if your barrister comes up to you and tells you you've got a 50-50 chance that if you plead guilty you'll get off with less than if you plead innocent, well what would you do?' (p. 26) Defence CounselA also identified this concern, claiming:

> The defendant obviously has more to lose than the Crown, particularly if it may involve a jail term. There is of course a natural pressure because if you go on with the trial and lose, there are bigger consequences. If you don't settle you may get an acquittal, but it is unknown. It is a gamble either way, and unpredictable. So there is pressure on them to plead.

These pressures are exacerbated by the non-transparency surrounding plea bargaining, particularly given the number of vulnerable defendants who come before the court. As Policy AdvisorB claimed:

> There are such a high proportion of people who will go through the system who weren't functioning very well at the time they committed the crime and are not functioning any better by the time the case gets to court, and for that kind of client, pressure to plead is a real issue. Certainly it is a real issue for the legal profession, particularly those who practise in the Magistrates' Court and community legal centres who see these kinds of vulnerable people all the time. They have been concerned that the fact that people are already in a hurry, that cases don't take very long, that there isn't a lot of paper work involved, that there are people who probably do plead guilty because they are under pressure and they would prefer for proceedings to resolve.

ProsecutorH also identified these vulnerabilities, arguing that 'in the justice system, you are often dealing with people who have substance abuse problems or psychological or psychiatric problems, or other pressures which they are ill-equipped to deal with anyway'. The essence of these concerns is reflected in Mack and Roach Anleu's (2000) findings, which showed that those most likely to plead guilty are indigenous people and defendants who would 'not present well in court' (p. 82).

When discussing the potential for the informal plea bargaining process to exert pressure on defendants into pleading guilty, eight participants, exclusively from the prosecutorial group, argued that this was unlikely. Representing this view, ProsecutorA stated:

> An innocent accused is never going to plead guilty. I think the pressure probably is on them and that is there to get them to plead early, to get the [sentence] discount. The earlier the plea, it is meant to be the greater the discount, but if you are an accused and you are totally innocent you are never going to plead whether you get a discount or not.

Similarly, ProsecutorL maintained:

> We don't get too many cases of innocent people pleading guilty and being sent to jail, we don't. What we see are cases where we are lucky to get a win. The Crown is lucky to get a person convicted and you wouldn't think that person was going to get a conviction, and that usually isn't because that person is innocent, it is because we think the case against them was a sketchy kind of case, and we were surprised by the result. But there aren't too many innocent people pleading. In fact, I can't think of any person who pled guilty that I would say was innocent. I have seen plenty of people convicted who I thought might not have been convicted, but that is a very different story.

While these participants acknowledged that plea bargaining places some pressure on defendants simply due to the possible concessions inherent to such agreements, all eight maintained that this pressure was not 'inappropriate' (ProsecutorC). As ProsecutorC claimed:

> There is an uncertainty in the whole process, both from the Crown and the defence's point of view. At the end of the day, if you have a trial it is up to twelve jurors to decide whether the person is guilty or not. The best Crown case ends up an acquittal and one you think you may lose, you end up with a conviction. So that uncertainty is probably more a factor as to why a defendant might plead, but it is not an unreasonable pressure. A defendant is told by their solicitor that if they plead they are entitled to a discount and the plea might be the difference between a custodial and non-custodial sentence, but it is not unreasonable, it is not going to force an innocent person to plead.

ProsecutorC's reference to 'unreasonable' pressure implies that he recognises that there is some degree of reasonable pressure applied to defendants during plea bargaining. Using a similar term, ProsecutorH stated:

> I have no doubt that defendants would feel, on occasions, a degree of pressure when making a pleading decision. But plea bargaining doesn't create unacceptable pressure. I suppose it is a question of whether plea bargaining affects a genuine and informed decision being made that is the issue.

In this instance, the term 'unacceptable' pressure implies there is some degree of 'acceptable' pressure applied to defendants when plea bargaining. Given some of the vulnerabilities facing defendants as outlined earlier by Policy AdvisorB and ProsecutorH, including drug addictions, financial constraints and mental health issues, it must be questioned how one determines when these 'reasonable' and 'appropriate' pressures become 'unreasonable' or 'inappropriate' pressures, particularly in a non-transparent and unregulated process like Victoria's plea bargaining system.

Six of the eight prosecutorial participants further pointed to legal representation and the judge's power to reject guilty pleas if there is no substantive evidentiary basis to support the altered charges as safeguards on plea bargaining pressures for defendants. ProsecutorO explained:

> I firmly believe, and I think all prosecutors believe, that one day in jail is a long day and too much for an innocent person. So, we take that pretty seriously. I would hope that there is not a pressure where people who are not guilty are pleading guilty and I wouldn't have thought that is the case, because you have safeguards. Our judicial system is pretty good, and judges won't accept pleas if they're not there. They will say you can't make this out. I think there are checks and balances to ensure that [pressuring defendants] doesn't happen.

ProsecutorM also claimed that 'it is not in a defence solicitor's interest to have their client plead to something which is either not appropriate or against the interests of their client. So I can't see how defendants could feel pressured to plead guilty when it isn't warranted'.

Nine out of eleven defence counsel participants also identified legal representation as a factor that reduces the pressure imposed on defendants in criminal proceedings. These views are based on the notion that the 'presence and advice of counsel for the defence…is expected to help guarantee that the defendant is not confused as to the nature of [their] plea' (Buckle & Buckle, 1977, p. 25), which, as Defence CounselE maintained, occurs because

'the defence provides quality advice about the offer and that helps the defendant make a principled, informed and appropriate [pleading] decision'. The extent to which legal representation offers a safeguard to protect defendants from pressures however, was questioned by two policy advisors, one prosecutor and one defence counsel participant. Expressing this view, ProsecutorS claimed:

> The obligation is on the defence representatives to make sure, as much as they can, that they minimise the pressure on their client and I am sure they do to an extent. But at the end of the day, that client may well be looking at the potential difference between going into custody and serving an actual term of imprisonment or not, depending on whether or not they plead guilty…or it might affect, to a significant extent, the amount of time they actually serve, so the defence can't really guard against that [pressure].

Defence CounselJ also maintained that 'yes, they feel pressured with representation, more so without, but they still feel pressure to plead. If they are likely to get a good discount or have monetary constraints, they just want to get it out of the way with as few hearings as possible'.

Research from both the United Kingdom (UK) and Australia (Freiberg & Seifman, 2001; JUSTICE, 1993; Mack & Roach Anleu, 2000) also recognises the possibility that legal representation can be limited in protecting defendants against such pressure and that potentially, counsel can even increase pressure on defendants in the pleading process. This is due to their obligation to instruct 'on the strength of the prosecution case and the dangers of pursuing a weak defence' (JUSTICE 1993, p. 11), which Freiberg and Seifman (2001) suggest may 'inadvertently be providing some inducement to the accused to plead guilty' (p. 64). Mack and Roach Anleu (2000) also acknowledge that in providing pleading information to defendants, the defence counsel assumes their client to be a 'rational, autonomous consumer of legal services…an equal' (p. 84). Similarly, McConville (1998) claims that 'whilst as individuals they may be weak and ineffectual and prevaricate in order to put off the evil day, once confronted with the realities they are [considered] able to making a knowing and intelligent choice…and instruct counsel to act on their behalf…to initiate plea discussions' (p. 583). However, as Mack and Roach Anleu (2000) assert, these assumptions do 'not reflect the lived experiences of most accused people, especially those disadvantaged by age, lack of education and skills, social class, unemployment or by racial and gender inequalities' (p. 75). Thus given that 'when informing a client they risk a heavier sentence…defendants are likely to be substantially influenced in deciding how to plead' (Freiberg & Seifman, 2001, p. 64), the defence counsel's role in safeguarding defendants from pleading pressures is minimised.

Policy AdvisorB agreed that legal representation is not a safeguard for minimising pleading pressures, particularly in the Magistrates' Court. She claimed that:

> Often legal representation is decided on the day of the [pre-trial] hearing. So you don't have a lot of meetings with your lawyer necessarily prior to the day… The courts take the view

> that if people are represented that is the ultimate safeguard and there isn't a lot you can do with someone who is represented to give them any more protection than that. But when you don't meet your lawyer until the day of the hearing, well I don't know how good that [protection] is.

This view is supported by McConville, Hodgson, Bridges, & Pavlovic (1994), whose observations of defence counsel over a period of 198 weeks in the UK led to the finding that 'solicitors had little personal contact with clients, even at court' (p. 167). In line with these findings, Policy AdvisorA (from the UK) claimed that legal representation does not adequately minimise pleading pressures when beneficial plea bargains are offered. He argued that:

> Unduly vulnerable people plead guilty. So there has to be safeguards and checks and balances more than just the legal representation to ensure that when a plea is entered based on a plea agreement, it is a true plea and is reflective of the defendant's wish to admit the offence.

These problems are exacerbated by the fact that guilty pleas are 'regarded as the highest form of proof…[the] equivalent to a conviction after a trial' (McConville, 2002b, p. 355), which means that 'following the guilty plea, the only concern of the court is to decide upon the appropriate sentence' (McConville, 2002b, p. 355) and little, if any, consideration is given to the potential pressures that led to the plea. As Skelton and Frank (2004) assert, 'the assumption that coercion disappears once there is consent…is dangerous and denies the nuances relating to power that are present in all human interactions' (p. 208).

The mere perception that plea bargaining's informality may contribute to the pressures confronting defendants in making a pleading decision, particularly vulnerable defendants, constitutes a significant justification for applying greater transparency and accountability to the process. Nineteen participants supported this justification on the basis that it would assist in reducing misperceptions about the extent of pressures plea bargaining places on defendants and assist in lending greater accountability to the process (n=nine defence counsel; n=two judiciary; n=five prosecutorial; n=three policy advisors).

Plea bargaining's non-transparency can also impact negatively on victims. The next section explores some key concerns for victims, which are exacerbated by plea bargaining's informality.

3.4.2 Victim Consideration

Plea bargaining can impact negatively on victims in a number of ways. As ProsecutorA 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'. In addition to charge amendments, a plea bargain will almost always involve a negotiation on the case facts, because when charges are altered the facts presented to the court for sentencing must reflect

these changes. This can result in factual elements of the crime being removed, or the severity of aspects of the crime being understated. In light of this, a significant concern for victims surrounds the consequences of the alteration of the case facts, consequences which can further be exacerbated by plea bargaining's non-transparency. As ProsecutorB 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? We can't do that if we think it is not true, but 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. Like a case involving an assault and theft of a mobile. If we consent to dropping the theft charge in exchange for a plea to the assault, then there will be no mention of the theft of the mobile in the summary that we put to the court…So 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. That whole process is obviously fraught with difficulties because you are trying to negotiate an agreement of how something is going to be put to the court. You are trying to get the court to agree to a diversion of facts that may or may not be what the court would think reading the available materials.

Aside from potentially altering the case facts, and the severity of the charges, which will in turn impact on sentence severity, this aspect of plea bargaining impacts on victims by limiting how much of their Victim Impact Statement (VIS) the judge can consider before sentencing. When determining a sentence, judges can only consider the impact of the crime on the victim for those matters with which the defendant is charged (Johns, 2002). If the facts surrounding certain elements of the crime are altered or minimised to allow a lesser charge, the full VIS is therefore not disclosed to the judge. The fact that this can occur without any legislative framework regulating prosecutorial discretion in making this decision fuels the perception that plea bargaining jeopardises victims' rights, by offering concessions to defendants at the expense of the victims' interests (Johns, 2002; Strang, 2002; VSAC, 2007c).

The potentially negative consequences of this element of plea bargaining were demonstrated in two New South Wales (NSW) cases. In *R v Laupama* [2001] NSWCCA 1082 (7 December 2001) the plea bargain reduced a murder charge to manslaughter, and as kidnapping and assault charges were also withdrawn, any references to these elements of the crime were removed from the summary of facts. The second case, *R v AEM (Snr)*; *R v KEM*; *R v MM* [2002] NSWCCA 58 (13th March 2002), involved serious sexual and physical assault, theft and kidnapping. However, the summary of facts presented to the court was significantly altered to allow guilty pleas to sexual assault charges only. An examination of this case found that both victims felt 'cheated by the justice system' (Johns, 2002, p. 8), with one victim stating:

> I did expect [proceedings] to give me some sort of closure…but it has been the exact opposite. It has 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 (Johns, 2002, pp. 4-5).

The public and media outcries following these two cases led the NSW Attorney General to commission a review of the *Prosecutorial Guidelines* (Cowdrey, 2003; Johns, 2002; Samuels, 2002). The review recommended that any changes to the summary of facts as part of a plea bargain, and the reasons for those changes, should form part of the court records (Samuels, 2002). This recommendation was later implemented in s.6 of the *Prosecutorial Guidelines 2003* (NSW). In Victoria, however, no transparency exists on prosecutorial discretion to make a decision on which facts to include in the summary. As a result, the potential consequences of inappropriate or unjust alterations to case facts, as evidenced by the two NSW cases, provide justification for increasing the transparency and accountability of the prosecutor's discretion in this aspect of plea bargaining.

The lack of scrutiny surrounding prosecutorial discretion can also create doubts over the appropriateness of any negotiated outcomes and the motivations behind the Crown's decision to plea bargain, particularly when there may have been sufficient evidence to warrant proceeding with all charges. As ProsecutorN 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, when you are talking about one victim, what you are doing is changing or downgrading the charges reparable to that victim.

In addition to negatively affecting the victim's status, the absence of transparency in the prosecutor's decision to alter charges can impact on the victim's perceptions of whether plea bargaining offers just outcomes. As ProsecutorU stated:

> There is a perception out there that plea bargaining means that it is all the defence's way. That is not true. Most of the time with plea bargaining we are withdrawing a duplicate [charge]. If we are not withdrawing a duplicate, we have to justify very seriously what we are doing…The perception is the big problem. The victim perceives that if we plea bargain, then they have been sold out to some degree, but that is not true.

ProsecutorD also argued that this misperception makes it difficult to communicate the potential benefits of a plea bargain to victims, insofar as some charges may be reduced or withdrawn. He claimed that:

> Victims will say, well why should that person get a plea bargain? Why shouldn't all the charges go ahead? Why should they get a discount? 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.

Multiple victims can also be affected by the Crown's unscrutinised decision to plea bargain, 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. There are many issues victims face when this occurs, as ProsecutorN 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, but the defence is saying to us, well Mr [sic] OPP you have a huge backlog of cases, courts are clogged, you have limited resources, trials chew up huge resources. Even if you get a conviction at trial after a contest we can always appeal. These are all good reasons as to why you should accept our offer to plead to ten of these, because at the end of the day he [sic] is not going to get three times the sentence for doing 30, and it does record the fact that he [sic] has done the crime and he [sic] will be locked up. The only real downside is that over half the victims will not get a result.

The absence of transparency surrounding prosecutorial discretion in making these types of plea bargaining decisions has to some extent been addressed in s.9 of the *Victims' Charter 2006* (Vic), which requires Crown representatives to, where possible, seek the victim's opinions on charge amendments and provide them with the reasons why the decision to amend charges was made. However, in addition to neither specifically acknowledging plea bargaining nor regulating prosecutorial conduct when plea bargaining, the *Victims' Charter 2006* (Vic) does not provide the victim with any legal rights to civil action if this consultation does not occur (s.22 1(a)). Thus, as ProsecutorN argued:

> While the *Charter* obliges us to try to explain to victims how and why things have happened in their case, and this does happen, it has only been in operation for a few months and there are still matters where plea bargaining happens, but the explanations do not.

ProsecutorJ also 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 observations indicate that accessing transparent information may still be problematic for victims even since the implementation of the *Victims' Charter 2006* (Vic). While a lack of considerations for victims was not evident in my observations, my findings do suggest that having only one statutory requirement that guides prosecutorial conduct (and only to a limited degree), in relation to victims and plea bargaining is not adequate to cover or address all of the potential issues and negative consequences that can arise from plea bargaining. In particular, one formalised requirement that fails to define, regulate or acknowledge discussions will not provide a guarantee that prosecutors will uphold their public and victim interest roles in plea bargaining. Instead, the failure to recognise plea

bargaining in statute restricts its legitimacy as a criminal justice process, because neither the process nor the conduct of those involved within it is sufficiently scrutinised.

Plea bargaining's non-transparency can also exacerbate perceptions that discussions to alleviate resource pressures, prosecutors are forced to adopt processes, like plea bargaining, that reduce court inefficiency. The following section examines this issue.

3.4.3 Pressures on the Crown

The OPP faces a number of imposed pressures to uphold public interests and reduce inefficiency by conducting prosecutions and obtaining convictions in a timely manner, the consequences of which generate misunderstandings of why prosecutors plea bargain (*Public Prosecutions Act 1994* (Vic) s.24(c)). Participants from all groups acknowledged that there are some workload pressures on the Crown which encourage them to engage in discussions. ProsecutorD claimed that 'there is pressure from the courts to resolve cases as quickly as we can because it gets it out of the court system'. Defence CounselK also maintained that because the benefits of plea bargaining are significant, it can create some pressure to resolve cases. He maintained that:

> Sometimes there is not necessarily pressure, but there are advantages to the prosecution accepting something less than they should because basically it cuts down their workload. So if you have prosecutors who are overworked they may settle for something just to clear their books. But this is perhaps more prominent in the Magistrates' Court [with police prosecutors] because they handle high volumes of cases each day.

ProsecutorJ also stated that in addition to pressures from the courts, the OPP created some pressure to plea bargain:

> There are pressures. There are caseload pressures and there are costs and resource pressures. There is more pressure now than there used to be and that pressure is now an external pressure from the courts. We have had lectures delivered to us from people at the County Court and justices from the Supreme Court encouraging us to be active in the field of plea bargaining and looking for early resolutions. So our office is setting up specialist early resolution units designed to deal with this very problem, the enormous amount of cases that we have, the backlog that we have, to try and break that down somehow. So there are pressures on prosecutors that we apply to ourselves, and there are these external pressures as well.

In a similar vein, ProsecutorI maintained that:

> There is always pressure. Too many cases, not enough resources, budgetary cuts from above, it sort of all comes down to can we get through all these cases and every now and again someone complains about the [court] backlog. There will always be that pressure as well as the fact that if we can get a nice plea [bargain] going, rather than run a two-day trial, there is incentive just from a work viewpoint.

Although defence counsel, prosecutorial and judicial participants identified pressures, the majority claimed that these pressures were not 'unreasonable' (32 out of 37 participants). As ProsecutorC argued, 'the pressure on the prosecutor is not that great, because if you do not want to bargain, you don't…There is pressure, but it is not unwarranted in any way'. Similarly, JudiciaryF claimed that there is some pressure on prosecutors, but she identified this as 'appropriate' and part of their professional role:

> There are some pressures, but there is not an inappropriate amount of pressure, because prosecutors are experienced and competent and know where it is appropriate and acceptable to make some form of compromise, without sacrificing the justice of the case they are presenting on behalf of the community.

This view was also supported by ProsecutorA, who claimed that:

> There are so many delays in the courts but that is not pressure on us…There shouldn't be any pressure and there isn't any pressure to plea bargain, it is just what we should be doing in our day-to-day business. That is, looking at the case and assessing it straight away and if it can be resolved, acting upon it. It isn't pressure, it is just the way things should be.

ProsecutorM also maintained that any pressures on the Crown to plea bargain were minimal:

> Broadly speaking, we take account of criticisms or feedback from others in terms of the way that we both approach plea bargaining generally and specifically in respect to certain cases, but as an organisation we don't view it as pressure. I have never been involved in a case where a decision has been made purely based upon the pressure exerted by others.

In a similar vein, Defence CounselB claimed that both counsel:

> may play games in the lead up, but when the bargain is struck, it has to be something that everyone is satisfied with. The prosecution will not agree to something that is not in their interests and in my experience they won't succumb to pressures if it is an outcome they are not happy with.

Like the problems arising from the notion that the Crown can be 'trusted' to manage plea bargaining appropriately, despite these claims from participants, the concern remains that the absence of formalisation or scrutiny of plea bargaining could potentially result in unjust or inappropriate outcomes, due to the imposed efficiency pressures on the Crown. Similarly to the potentially negative consequences of plea bargaining for victims and defendants, the potential for pressures to influence Crown representatives to plea bargain jeopardises plea bargaining's legitimacy and highlights the need for greater transparency and accountability of the process. In addition, like the arbitrary distinction made by participants between 'reasonable' and 'unreasonable' pressures on defendants, similar labels were applied to the level of pressure confronting prosecutors as being 'warranted' or 'appropriate'. These comments further legitimate concerns as to how one can determine

when these pressures move from being 'warranted' to 'unwarranted' or from 'appropriate' to 'inappropriate', particularly given the lack of transparency and scrutiny on prosecutorial discretionary decisions when plea bargaining.

3.5 The Importance of Clarity & Confidence

Clarity is a central requirement of any criminal justice process because it enhances victim, defendant and public understanding of the needs and aims of the process and provides some accountability to the process and the conduct of those within it. In this manner, clarity can also provide a mechanism to increase public confidence. As Hough and Park (2002) identify, low public confidence results from 'widespread and systemic public ignorance about crime and justice, which is demonstrably a source of public criticism of the courts' (p. 163). The importance of maintaining public confidence in a criminal justice process is premised on the argument that 'without widespread belief in their fairness and effectiveness, [criminal justice processes] would eventually cease to function' (Indermaur & Hough, 2002, p. 198). In order to maintain public confidence, the principle of public and open justice is enshrined within criminal proceedings (Kirby, 1998; McConville, 2002a; Spigelman, 1999). This principle serves three main purposes: (1) to act as a safeguard on criminal justice agencies' conduct; (2) to increase public understanding of the law, how decisions are made and how the legal system operates; and (3) to ensure the public has confidence in the legitimacy of criminal proceedings (Allen & Hough, 2008, p. 225; Spigelman, 1999).

The importance of upholding the principle of public and open justice has been cited in case law, statute and international covenants since the early twentieth century, as 'a sound and very sacred part of the constitution of the country and the administration of justice' (*Scott v Scott* [1913] A.C 417 at 473; see also *Charter of Human Rights and Responsibilities Act 2006* (Vic); *International Covenant on Civil and Political Rights 1966* (UN)). In particular, as Lord Hewart coined in *Rex v Sussex Justice; Ex parte McCarthy* [1924] 1 KB 256, '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' (at 259; see also *R v Webb* (1994) 122 ALR 41, at 47). The underlying aim of this, as Australian High Court Justice Kirby (1998) claims, is to 'constantly submit [legal conduct] to public scrutiny' (p. 8).

The desirability of maintaining transparent justice—in particular, the ideal of justice being seen to be done—is reinforced by Australia's ratification of Article 14 of the *International Covenant on Civil and Political Rights 1966* (UN), which requires that all persons be entitled to a fair and public hearing, and s.24(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Human Rights Charter 2007* (Vic)') which requires that each individual has the right to have the charge decided by a competent, independent

and impartial court, after a fair and public hearing. The importance of transparent justice is also recognised in s.24(3) of the *Human Rights Charter 2007* (Vic), which requires that all judgements be made publicly available.

Public and open justice is also recognised for its potential to positively impact on public confidence in criminal proceedings and in the administration of justice, particularly in terms of whether defendants and victims perceive proceedings as being fair and just (Tyler, 1984, p. 66). Therefore, when the principle is not upheld, public confidence in proceedings may be hindered and misunderstandings may develop (Doob & Roberts, 1983; Hough & Park, 2002; Hough & Roberts, 1998, 2004; Indermaur, 1987, 2006; Mirrlees-Black, 2002; Roberts, 2002; Roberts & Hough, 2002; Roberts & Stalans, 1997; Sprott, 1996; Stalans, 2002; VSAC, 2006). This concern was identified in a 1997 Victorian report which showed that a lack of accessible information on 'why certain charges were not laid or why the seriousness of the charge was reduced' (VCCAV, 1997, p. 63) was a key contributing factor to low public confidence in the justice system. On this basis, it can be argued that the absence of transparency of plea bargaining and prosecutorial discretion in making plea bargaining decisions is a factor fuelling misunderstanding and reducing public confidence, insofar as the process fails in any way to provide public and open justice. It is thus possible to conclude that public misperceptions about Victoria's criminal justice system and reduced public confidence in criminal proceedings are linked to plea bargaining's informality.

The next section examines public perceptions of plea bargaining and whether formalisation would enhance public confidence and alter misperceptions and misunderstandings of discussions.

3.6 Public Perceptions & Misperceptions of Plea Bargaining

Public misunderstanding of the plea bargaining process is potentially the most significant reason to justify its formalisation, so that public interest ideals, particularly accountability and transparency, might be seen to be upheld. While this research did not ascertain public perceptions of plea bargaining, the public perceptions identified by the participants are echoed in research findings on public attitudes towards non-transparent criminal justice processes since the early 1980s (Cohen & Doob, 1989; Doob & Roberts, 1983; VCCAV, 1997; VSAC, 2006, 2007c, 2008a). These findings, in combination with participant responses, form the basis for the following discussion.

Public misperceptions of plea bargaining were explored in Victoria in the 1990s as part of a broader study of sentencing perceptions (VCCAV, 1997). In this study, public perceptions of plea bargaining were identified as being predominantly negative due to the lack of accessible information on discussions. In particular, the report identified four

common concerns that emerged from participants' perspectives: (1) how and why plea bargaining occurs; (2) who is involved; (3) what is the basis for discussions; and (4) what information is provided to victims (VCCAV, 1997, p. 52). Cohen and Doob's (1989) examination of public perceptions of plea bargaining in Canada also found that 'plea bargaining is a practice held in low esteem by the general public…[and] this fact alone provides a significant reason for reform' (p. 91). This finding was reflected in the Victorian Sentencing Advisory Council's (VSAC) examination of specified sentence discounts and sentence indications, in which the public participants defined plea bargaining as a deal made to induce defendants to plead guilty, often at the victim's expense (VSAC, 2007c). The VSAC found that a common public misperception emerging in its study was that Victorian plea bargaining practices emulated the dramatised United States (US) systems (mis)represented on television, in which defendants make deals that include specified sentences that were often not perceived to adequately reflect their criminality (VSAC, 2007c, p. 79). While the VSAC acknowledged the potential for such bargains to occur in some international jurisdictions, its report maintained that 'the fear that such an agreement could be struck here is based on a misunderstanding of the roles of the parties in the Victorian criminal justice system, particularly the role and power of the prosecution' (p. 72).

3.6.1 The Term 'Plea Bargaining'

Negative perceptions of plea bargaining are based simply on the term itself, which suggests negative stereotypes of hidden justice and secret deals. While conducting this research, my use of this term was met with some scepticism on the part of participants, with just under one-half of prosecutorial participants claiming that it was 'too US' (ProsecutorC) and not reflective of the Victorian system (nine out of nineteen participants). ProsecutorB claimed that:

> Plea bargaining is understood in the US in a slightly different way. You have an actual deal which says I will plead to x and you say to the court, I get this sentence. It is not the same for us. Now we certainly engage in a lot of negotiations with people as to whether they will plead guilty, [but] they are not associated with sentencing.

ProsecutorC also argued that:

> The term plea bargaining connotes some sort of wheeling and dealing between the Crown and the defence to settle a matter. I prefer to call it plea resolution, which is inherently that we try to resolve the matter on the basis of what the evidence is, rather than for the sake of not having a trial. We are definitely not like the US system.

ProsecutorD asserted that 'the concept of plea bargaining has bad connotations to the general public because it has the suggestion that parties have, just for convenience sake, decided to sort a matter out. The term is not good in that sense'.

The media's use of the term was also identified as a contributing factor to public misunderstanding of plea bargaining.[43] As ProsecutorA claimed:

> The media made great use of this term plea bargaining, a very US term and they use it in a very disparaging way. We are very careful not to talk about deals or bargains, but the media do. They say a bargain was struck, well a bargain being struck sounds like you are giving sort of a bargain basement deal away.

The term was also identified as exacerbating the contentious standing of the process by two participants from the OPP's Witness Assistance Services (WAS) division. ProsecutorU stated that 'we always correct the victim when they say plea bargaining. We are very cautious with phrases. It is not a preferred term because it is not bargaining with their lives and the crimes committed against them'. Similarly, ProsecutorJ stated that:

> Victims say, offer them this many years [of a custodial sentence]. We have to explain that we don't do that. We prefer plea negotiations as a term, because the victim's perspective, the defendant's perspective, the defence counsel's perspective [and] the Crown's perspective are all sought and considered.

Despite these potentially negative connotations, the term was accepted by most participants as providing an appropriate description of the process, and as a commonly employed and recognised expression within legal culture (30 out of 42 participants). As ProsecutorO maintained:

> I don't know what you can dress it up as. That is what it is. A plea bargain. A bargain on the plea. I am not in favour of euphemisms but if I was into accurately describing what it is, you might say to resolve a matter that accurately reflects the criminality. But that is a pretty long term and really, plea bargaining outlines what happens and what we do.

In line with ProsecutorO's comments, this research also considers the term as reflective in and appropriate of the discussions and agreements that occur between counsel.

3.6.2 The Role of the Media

Aside from using a term that creates misperceptions and fuels the contentious status of discussions within the public realm, participants were also critical of the media's depiction of discussions, and highlighted this as a contributing factor to public misunderstanding.

[43] See, for example, Gold Coast Bulletin. (2007, March 3). Court justice not served by dodgy deals. *Gold Coast Bulletin* (p. 62); Nguyen, K., & Petrie, A. (2007, March 2). Deal denies Moran family justice. *The Age* (p. 2); Ross, N. (2004, March 24). Slain gran's family give all to see justice. *Herald Sun* (p. 13); Sunday Age. (2007, March 4). Victory achieved at the price of justice. *Sunday Age* (p. 17).

Without question, media representations influence how the public view criminal proceedings. However, the media's social construction of criminal proceedings is not necessarily reflective of what occurs in reality (Davies, Francis, & Greer, 2007, p. 9). This is particularly relevant for plea bargaining, because much of the process is non-transparent. Thus, as ProsecutorO claimed:

> You have the *Herald Sun* readers who are shoved information in minuscule dollops and judgemental bits, which claims that the public and the victim in particular are sold down the river. Media representations can look so bad and it is the way the information is communicated to the public that causes problems.

Similarly, JudiciaryF argued that:

> The public perceive it as these people have been charged with offences and they should be found guilty of all of the offences and probably hung, drawn and quartered and the public opinion poll of the *Herald Sun* would indicate that is the case...The public tend to think that people should be convicted, that the full weight of the law should be brought down to bear without really appreciating that the process of charging is often an alternative type of process, in that various charges are laid, varying in seriousness and really the police have gone two charges over and two charges under and everyone knows it should be the one in the middle, but the public don't understand that, and the media certainly don't help.

In line with JudiciaryF's observations, ProsecutorH claimed that 'there are elements of the public who are not fully informed of the process, particularly because of the way it can be portrayed in the media, so they don't necessarily understand how the process works and why the decisions are made in the way that they are'. Defence CounselA also identified the media as fuelling public misunderstanding, claiming that:

> It is a pity there is such a bad public opinion of this valuable process. It is considered a behind closed doors deal with a school friend. The assumption from the public because of the media is that people are sold out. They are not sold out. Plea bargaining is important. It is hard to control public perceptions because the media distort things and that creates misunderstanding.

Participants also acknowledged plea bargaining's depiction in dramatised US television shows as hindering public understandings of Victorian practices. ProsecutorD maintained that 'people see these things, plea bargaining deals in US shows, and they have a poor view about it because all the power is in the hands of the prosecution, but our system is not like that'. ProsecutorG also claimed that 'public perceptions are heavily influenced by US television and that is not a good indication of what actually goes on'. Similarly, ProsecutorC maintained:

> The public perceive it as the defence and prosecutor go up to the bench and they have a whisper to the judge and it is resolved, sentence and all. We do it quite differently here, particularly in terms of sentence. We don't say anything about sentence because that is a

> matter for the court. We will say whether we think it is a custodial or non-custodial, but we certainly don't say anything that gets quoted on TV [sic] shows like: we will offer you manslaughter with fifteen years on the bottom. That is not our style. I think the members of the public don't really understand how it really happens.

A connection between perceived leniency of sentences and plea bargaining was also reflected in participants' discussions of public perceptions. As ProsecutorG argued:

> There is a lot of misunderstanding about what it actually is because there is this idea that if you plead guilty, the OPP will just let you off with other stuff. They don't understand that we can't just say or we can't just promise a sentence or say we will let you off with this behaviour if you plead to another one. Plea bargaining is when we can let them plead guilty to a lesser charge, but it still has to cover the criminal conduct. The public believe that plea bargaining is the OPP letting them [the defendants] get away with certain elements of what they have done. But if we do have to drop certain charges or we do decide to do that, it is usually because we don't have the evidence to support it, not just because we decide to let them get away with something.

Defence CounselH also observed that 'plea bargaining affects public perceptions of justice because they think people get off too easily'. This link was similarly identified by Defence CounselI, who argued that 'with the growing attempted influence on the judicial system of victims' groups, the public see plea bargaining as being an attempt by defendants to get a sentence that they shouldn't'. In this context, plea bargaining's association with the US justice system was again identified as impacting on negative public perceptions. As Defence CounselJ claimed:

> In the US they will give you six life terms for six offences. What does that mean? You only live once. So you are in prison for 120 years. Really that doesn't mean anything. But the media show it and the public perceive it as appropriate, so when things resolve and a sentence like that isn't imposed, well then everyone looks bad to them.[44] We all look bad even though we resolved things based on the evidence and the sentence is appropriate to what the person did.

JudiciaryG further highlighted this concern, maintaining that 'the public view is that sentences are being reduced by too much, because defendants are pleading to secret deals and the result is the public loses confidence in the system'. JudiciaryG's comments about public confidence and secret deals are particularly interesting in light of Cohen and Doob's (1989) analysis, which found that when greater scrutiny was placed on plea bargaining—for example, counsel stating in open court the reasons for the plea bargain, public participants had greater confidence in discussions because all information was seen to be publicly accessible and available for judicial review.

[44] See, for example, The Age. (2008, July 3). Man sentenced to more than 4000 years in prison. *The Age*. Retrieved 24 July 2008, from http://www.theage.com.au/world/man-sentenced-to-more-than-4000-years-in-prison-20080703-311q.html.

The fact that the public remain in the dark about plea bargaining is particularly interesting given the stark contrast between this and the influence of public opinion on sentencing policy (Roberts & Hough, 2002). As Roberts and Hough (2002) recognise, 'there is little question that public opinion is increasingly given more formal consideration in shaping sentencing policy' (p. 4). This is seen in jurisdictions where mandatory minimum/maximum sentences and sex offender registrations have been implemented as 'legislative responses to [a] perceived punitive public' (Freiberg & Moore, 2009, p. 104). However, despite the connections between sentencing and plea bargaining, particularly the impact an agreement can have on the type and severity of sentence imposed, the lack of consideration given to the public's opinion of plea bargaining directly contrasts with this public policy ideal.

Using Cohen and Doob's (1989) findings as a framework, in order to redress or alter these negative public perceptions and misunderstandings of plea bargaining, it is necessary to provide additional information about and offer increased transparency and accountability to plea bargaining in Victoria. The next section examines this contention and whether formalising plea bargaining will increase its legitimacy, thereby enhancing public confidence in the process.

3.7 More Information = Public Confidence?

It is widely accepted that transparent justice significantly improves the 'level of public knowledge of crime and criminal justice' (Freiberg, 2003, p. 228), thereby improving public confidence (Mirrlees-Black, 2002; Roberts, 2002; VSAC, 2006). As a 2006 Victorian report on public myths and misperceptions found, providing more information to the public about the roles of those involved in criminal proceedings, including 'what…they are doing, and why they are doing it, [will]…reduce the likelihood that people will perceive a gulf between their expectations of the criminal justice system and the reality' (VSAC, 2006, p. 32). Thus as Roberts (2002) claims, 'an obvious step…in order to promote greater [public] acceptability…is simply to increase public awareness' (p. 44). Providing the public with more detailed, accurate information is thus recognised as a mechanism to positively alter public perceptions (Doob & Roberts, 1983; Indermaur, 1987). As such, there is a legitimate basis for claiming that public perceptions of plea bargaining, and confidence in discussions would improve, if the public were provided with more accurate, detailed information. This could be achieved by formalising plea bargaining in statute to provide some acknowledgement and control of discussions and the conduct of those involved within them.

In opposing this view, six prosecutorial and defence counsel participants argued that providing additional information to the public through formalisation may result in a restriction of the flexibility of discussions (six out of 37 participants). They also identified

the difficulties inherent to trying to explain the benefits of plea bargaining to the public as a limitation of formalisation. Representing this view, ProsecutorC claimed:

> It is difficult because sometimes a little bit of information can cause greater problems. There are certain considerations that we might have that the public might not appreciate or understand. If we resolve a case where there are four major offences, say four murders and we settle it for a guilty plea to three murders, so one of the murders is not taken into account, the public might think well what is the Crown doing? They are letting him [sic] off that murder. How do you explain to the public the benefits of this guilty plea? We know he [sic] will get a big sentence regardless of whether he [sic] pleads to three or four murders, and overall the criminality is covered by the three convictions. But how do you explain that, when one victim and their family doesn't get that recognition?

The central tenet of ProsecutorC's concerns is reflective of Stalans's (2002) discussion of the two ways in which the public process information: (1) systemic processing, which requires careful evaluation and interpretation of all issues before a decision is made; and (2) heuristic processing, when people 'do not carefully attend to all the information but use shortcuts based on cues in the decision-making context to make a judgement' (Stalans, 2002, p. 21). ProsecutorC's observations imply that a large portion of the public use heuristic processing to make sense of criminal justice issues, particularly in relation to plea bargaining. This belief is also supported by Defence CounselA, who claimed that providing the public with additional information is unlikely to increase their understanding or acceptance of discussions. He explained, 'it would not make much difference informing them. The public are difficult to educate because they want information in quick, dramatised snippets. How do you explain the benefits or the necessity in quick, dramatised snippets?'

Alterations to murder charges, due to the emotive nature of these cases, were used by three prosecutorial participants to demonstrate the difficulties that emerge out of providing the public with information on plea bargaining. As ProsecutorA claimed:

> Because they are not lawyers, they don't have a great understanding that in some cases with murder charges you would never have all the evidence to go to court and get a conviction, so in order to get that conviction we have to swap murder for manslaughter. It is just a lack of public understanding of what goes on and why. They don't understand when someone has been charged with a number of counts of something and then you settle it for less, to them that means that the victim does not get taken into account in the process. It doesn't matter what you say or what information you give them, because they will say it should never be settled.

The six participants who claimed that the provision of additional information would not benefit public understanding of plea bargaining, identified negative media depictions of discussions as exacerbating the difficulty of explaining the usefulness of the process. As ProsecutorJ claimed:

> We had a huge exposé in the *Herald Sun* a while ago of all these cases where there had been young babies killed and the *Herald Sun* were saying, why is it that our children are treated so poorly by the criminal justice system?[45] Why is it that there are so few convictions of murder for baby killers? Why are they always pleaded down to manslaughter? The exposé had about five or six cases where this had occurred. We thought it was very unfair because when we make a decision as to whether we will or will not accept an offer like that, there is a whole lot of different considerations that come into play and sometimes we have to take offers that on the face of it are seemingly unacceptable, but there are reasons, because more often than not if we ran the trial, the defendant could walk altogether. So we had this unfair exposé by the *Herald Sun* and it resulted in an ill-informed public who could only see that a man charged with murdering a little baby was suddenly having a plea to manslaughter accepted.

ProsecutorE also asserted that:

> We settle murder cases when we think there is a risk of getting no conviction at all, or we are pretty convinced that the overwhelming likelihood is that there will be a manslaughter verdict, so only when there is usually no reasonable prospect of getting a conviction for murder. We wouldn't settle cases otherwise in that sort of area. But the media generally seem to think we do it just for an easy life. We do it to get a result out of cases, that we don't do it for other reasons. So then the public perception becomes not a very good one. That is, in a sense, what they think. They have a view of sentencing that is very light and they think that it is all connected to plea bargaining.

Despite the potential difficulties in informing the public, as identified by ProsecutorE, 'a lot of it [the reason for plea bargaining's negative image] is due to an ill-informed or poorly informed public'. Therefore, providing information to ensure that the public (and media) are better informed is likely to redress some of these identified limitations in public understandings. The overwhelming majority of participants supported this view, agreeing that there is a need to provide the public with additional information (36 out of 42 participants). As Defence CounselB maintained, 'if the plea bargain was upfront and not behind closed doors, that would give the public the upfrontedness [sic] that is explicable, that they need'. Similarly, Defence CounselC claimed 'that is why you need a proper formalised process…so the public can understand the process and have more confidence in it'. This view was also supported by JudiciaryE, who maintained that:

> Accepting an offer can be an agonising decision and a lot of people get involved in making these sorts of decisions. So if we can inform the public of some of the issues that come into play in plea bargaining, it would be to the benefit of everybody…There is a role for education. We haven't been very good in explaining to them how it works and if we did provide more information and formality in statute, I think the public are capable of understanding and accepting plea bargaining.

[45] See, for example, Lapthorne, L., & Buttler, M. (2006, November 29). Tiny lives betrayed. *Herald Sun*. Retrieved from http://www.news.com.au/heraldsun/story/0,21985,20840736-661,00.html; Mitchell, N. (2006, November 30). Look at these children and ask about justice. *Herald Sun*. Retrieved from http://www.news.com.au/heraldsun/story/0,21985,20843451-5000117,00.html; Warren, M. (2006, November 30). Judging the child killers. *Herald Sun* (p. 24).

The primary motivation identified by participants for implementing increased transparency and accountability within plea bargaining was summarised in ProsecutorJ's observations:

> The public are suspicious. Their general view is that if you lay a charge that is the charge the person will either be convicted of, acquitted of, or will go to trial on. The notion that behind closed doors the two parties get their heads together and come up with something less to be charged with may trouble them. How has this come about? If that is the appropriate charge then why wasn't that laid initially? Why did you have a Committal on the higher charge? Those questions probably go through their minds, so they may see it as just a bunch of lawyers getting together to smooth things over, doing sweetheart deals and looking after their mates. It is not true. Obviously that is not the reality. But, there is probably that sort of mistrust that is probably born out of the fact that the public don't know much about the criminal justice process and how we deal with these things…You only have to see the various polls they conduct in the *Herald Sun* or letters to the editors and so on to realise there is a fundamental misunderstanding of some aspects of the criminal justice system. But nobody benefits from having an ill-informed public.

ProsecutorJ's claims are supported by the work of Jeremy Bentham (1843, as cited in *Scott v Scott* [1913] A.C. 417 at 477), who highlighted the importance of public and open justice as a mechanism to maintain public confidence:

> In the darkness of secrecy, sinister interest and evil in every shape, have full swing. Only in proportion, as publicity has place, can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice…Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself [sic], while trying, under trial. The security of securities is publicity (Bentham, 1843, as cited in *Scott v Scott* [1913] A.C. 417 at 477).

As it stands, Victoria's informal plea bargaining process does not offer 'publicity' or transparent justice; thus, it cannot work effectively to attain or maintain public confidence. As evidenced by my research findings and the many studies indicating that additional transparency and information enhances public confidence, plea bargaining must become more transparent through formalisation, in order to uphold public interest ideals and to operate as a legitimate process (Cohen & Doob, 1989; Doob & Roberts, 1983; Indermaur, 1987; Mirrlees-Black, 2002; Roberts, 2002).

3.8 Is Formalisation the Answer?

3.8.1 Resistance to Legislative Change: 'Secrecy under the guise of confidentiality' (McConville, 2007, p. 214)

In the context of plea bargaining, the two most commonly proposed approaches to formalisation are transparent guidelines aimed at controlling prosecutorial conduct, such as the *Attorney General's guidelines on the acceptance of pleas and the prosecutor's role in*

the sentencing exercise 2005 (UK) ('the Guidelines') (see Chapter Two), and legislation. When discussing whether either of these approaches is required, six of the nineteen prosecutorial participants cited the internal policies as offering a sufficient degree of formalisation to plea bargaining. These perceptions emerged despite no participants having been observed referring to the internal policies during the observation period and only three participants referring to the internal policies as an authority on their conduct in the interviews. ProsecutorM, one of these six participants, maintained that 'as an organisation we are confident in our practices, in terms of how we approach matters and plea negotiations and resolutions. We have a duty to act in accordance with guidelines and principles and we do'. Similarly, ProsecutorL claimed:

> There is already internal guidance, which is probably enough. It is made clear to prosecutors that if they think the case could be settled, they should make their position clear, so that if the case cannot be settled, it is important the defence know that at the beginning, so they say, we will not be accepting any plea less than the things you are charged with…Prosecutors are very much tied into all these policies.

A degree of resistance to formalisation also emerged in the responses of two prosecutorial participants and one defence counsel participant. Reflecting this opinion, ProsecutorG requested 'no more formality…we have good enough judgement to enter into negotiations when we want to and we don't need any more formality'. Similarly, Defence CounselB claimed that 'formalisation is cumbersome. We don't have to police every person in authority and reduce everything to a mechanical process'.

The key argument offered by participants against formalising discussions beyond the internal policies was the possibility that it would hinder plea bargaining's flexibility. As Prosecutor A claimed:

> If you formalise it too much it would be difficult for us, because every case is so different. It is a very intuitive thing too because you have so many things and people to consider. It can't be just a black and white process. Like if they are charged with this, then we will accept a resolution to this. If it were that easy then they wouldn't be charged with the offences that could be changed in the first place.

ProsecutorD also argued that 'because plea bargaining is a fluid concept it would be pretty hard to formalise it for each circumstance that may come up'. Similarly, ProsecutorQ maintained that:

> Legislation and formalisation are difficult, because it is just so individual. What maybe on one set of facts you may settle, it may be different for the next, depending on other factors. I mean, if you know that the accused is terminally ill then you may settle it differently. You could never put that into a statute. Or if you know they are about to bugger off, there are just too many different things. There are some bits that could be formalised, but really as far as variables go, we always have to have it as a case-by-case thing.

Restricting flexibility was further criticised on the basis that it may impact on the confidentiality of discussions, which is required in the event that a matter proceeds to trial. As ProsecutorE claimed:

> Really in a lot of plea bargaining, the discussion part is not intended in any sense to bind the parties. It is only the final agreement that is binding. It is an odd thing if in say a murder case you have somebody who offers to plead guilty to manslaughter, but the Crown rejects it and then they run the case at the trial on the basis that they didn't do it. So you can't have anything that is too formal entered into, in case it can be made into evidence that might be somehow used in the case. It has to be a relatively informal level and not binding or too open.

ProsecutorJ also maintained that:

> If we are going to have plea bargaining, that is, discussions between the parties about the possible resolution of a case, it has got to be as informal as possible and it has to be done at a level where it can be confidential, so if it falls over, nobody is embarrassed by it. Nobody feels constrained or restrained from being involved in those processes in the future. Once you start to try and formalise it, it will have [an] inhibiting effect on the whole notion of discussions between the prosecution and defence prior to the trial.

Formalisation however, does not require the revelation of all plea bargaining discussions to the public, or conducting them in open court. Instead, simply acknowledging the process and implementing more transparent requirements on prosecutorial discretion and on legal conduct when plea bargaining, can be a method of formalisation. On this basis, there was majority support for a more transparent plea bargaining process that facilitates greater public awareness and accessibility to plea bargaining outcomes in participant responses, albeit it tempered by concerns around how to inform a non–legally educated audience (36 out of 42 participants). Despite identifying possible difficulties in informing the public, ProsecutorA argued that plea bargaining 'should be totally transparent to the public. The public should definitely be informed of what goes on with negotiations. How much they understand may be difficult to establish, but we should definitely try to be open and transparent to them'. ProsecutorH also claimed:

> We are representatives of the community in this regard so we do need to be able to explain why it is that something has been resolved in the way it has. In particular, the reasons why something has been settled in the way it has. There is a real desirability in the public being properly informed about that type of process.

In a similar vein, ProsecutorO asserted that 'transparency, so far as you can be, is important. We are accountable. We are working for the public—why shouldn't they know? That is what everyone deserves, some accountability. We are working for them after all'. ProsecutorE supported this view, claiming:

> We could probably be a bit more systematised so we had a bit more of an idea of what we are doing and then the public might view it as being more accountable. I do think we are in a position now where the degree of public accountability is probably greater than it has ever been in the past, so perhaps plea bargaining should be more systematised in that regard.

This majority of support for formalisation was premised on the concept identified in my earlier discussion in Chapter Two, whereby the formalisation offers a compromise between flexibility and uniformity. The potential types of formalisation that adhere to this ideal are the focus of the subsequent chapters.

3.9 Conclusion

Victoria's plea bargaining process is engulfed by perceptions of inappropriateness, misconduct and negative connotations, which is largely a consequence of its informality and the lack of public accountability and transparency of these discussions. If plea bargaining remains informal, it will likely continue to be shrouded in secrecy and contentious public misperceptions, and cynicism about its legitimacy will flourish. Although six prosecutorial participants supported the OPP's internal policies as constituting an adequate degree of formalisation and control of discussions, my findings suggest that these policies do not provide sufficient transparency to plea bargaining, nor do they appear to assist in attaining public confidence or reducing the potential negative impact of plea bargaining's informality on victims and defendants. The fact that a criminal justice process which can result in substantially negative consequences for victims, defendants and the public is allowed to remain unscrutinised provides a substantive justification for its formalisation (Cohen & Doob, 1989; Freiberg, 2003; VCCAV, 1997; VSAC, 2006). This justification is supported by my data, and research that shows increased information and transparency can enhance public confidence and positively alter public perceptions of criminal proceedings (Cohen & Doob, 1989; Doob & Roberts, 1983; Indermaur, 1987; Mirrlees-Black, 2002; Roberts, 2002). Furthermore, statutory formalisation of plea bargaining is necessary to provide a mechanism for discussions to adhere to the same principles and scrutiny applied to other criminal justice processes, including pre-trial hearings and the trial, which would also provide greater safeguards on victim and defendant interests.

The next chapter examines the impact of Victoria's adversarial legal culture on plea bargaining and the inherent contradictions that exist in an adversarial system that desires court efficiency. In particular, because plea bargaining's informality means it is not recognised as a legitimate criminal justice process, Chapter Four considers how formalising plea bargaining could provide greater consistency to counsel considerations of and approaches to plea bargaining.

CHAPTER FOUR
A FIGHT TO THE BITTER END? CONTRADICTIONS BETWEEN AN ADVERSARIAL CULTURE & EARLY RESOLUTION IDEALS

The background to how we operate is in an adversarial system. That is our law. It can be looked at like a game of football. So we have combatants on each side trying to get the best for their side. We have a judicial officer overseeing our actions in the process, like a referee. We don't help the other side score points and they don't help us score points. It is combative, in a sense, competitive. That is how our process works. And while we continue to operate in an essentially adversarial system, we will continue with adversarial game playing, which means that both sides will continue to fight and keep [information] to themselves, just because they think they should. But if the whole culture were prepared to look at cases a little more objectively, instead of always adversarially, if we were prepared to give a little in terms of communication, then we might achieve the right outcomes without the need for the game-playing. In the end, nothing is ever lost by discussing something, whereas opportunities may be lost simply because neither party has opened up the lines of communication (ProsecutorN).

Victoria's criminal justice system embodies an adversarial framework that defines criminal proceedings as a contest between two sides, before an impartial court. Adversarial theory prioritises the contested trial, conflict and secrecy, while traditionally discouraging active, early communication between counsel. It thus encapsulates a number of principles which frame the traditional operation of criminal proceedings, including the prosecution maintaining the burden of proof and defendants retaining the right to remain silent, to protect themselves from self-incrimination (Dawkins, 2001; Lubet, 2004; Jackson, 2002; Mack & Roach Anleu, 2007; Martin, 1997; McEwan, 1992; Moorhead, 2007; Sampford, Blencowe, & Condlln, 1999). Inherent to this system is a combative legal community. Within this community, a culture has developed in which traditional, adversarial principles have become dominant modes of controlling behaviour and informing attitudes.

Victoria's adversarial legal culture places great emphasis on the trial. In this context, open and early communication is given less priority, which in turn impacts on counsel approaches to and use of plea bargaining, and can exacerbate the perception that prosecutorial initiation of discussions should be discouraged. These perceptions persist despite the possible benefits of plea bargaining, and the guidance provided in the internal Office of Public Prosecutions (OPP) policies promoting early communication between parties (*Director's Policy 3.1 2007* (Vic); *Resolution of Matters & Early Issue Identification 2007* (Vic) s.2.6.6). The adversarial focus on the trial has also markedly influenced Victoria's Legal Aid funding structure, which provides financial incentives not to engage in plea bargaining and offers counsel limited access to financial resources to prepare and participate in pre-trial hearings. The adversarial focus of the funding structure

can thus negatively impact on court efficiency by encouraging the prolongment of criminal proceedings, which has emotional, financial and resource implications for all parties.

This chapter examines several key limitations that stem from Victoria's established adversarial culture. It argues that plea bargaining's informality strengthens this culture, and fuels doubts over the appropriateness of prosecutorial initiation of discussions and its own legitimacy, due to the inherent contradictions between adversarial ideals and those of the plea bargaining process. Expanding upon discussions in the previous chapter, this chapter considers the implications of adversarial traditions for early resolution ideals, and the potential benefits that could emerge by increasing plea bargaining's legitimacy through formalisation, within an adversarial context. This chapter further argues that formalising plea bargaining and altering the Legal Aid funding structure will assist in shifting legal attitudes towards an approach focused on early resolution and efficiency, the financial, resource and emotional benefits of which would extend to all parties. This argument is informed by the research data and changes in attitudes towards pre-trial disclosure following its recognition in statute (*Crimes (Criminal Trials) Act 1999* (Vic) s.25; *Criminal Procedure Act 2009* (Vic) s.182-s.183, s.185, s.188-s.190, s.200, s.358).

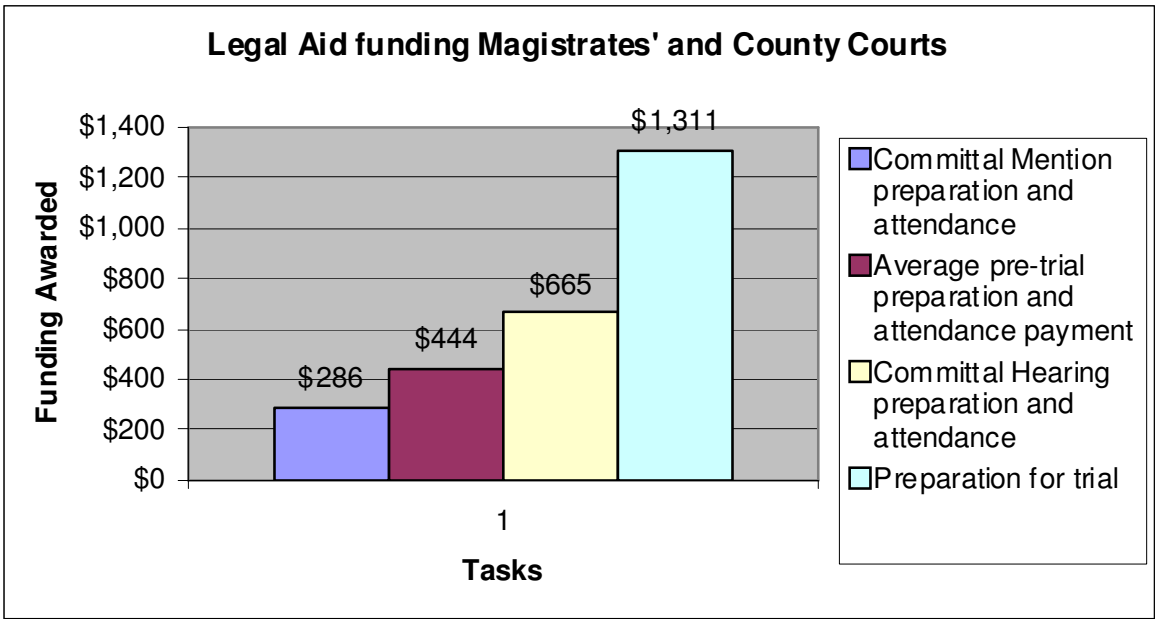
4.1 Victoria's Legal Aid Funding Structure

An adversarial justice system 'demands that the state proves its case against the accused before being subjected to sanctions and that the accused be given a meaningful opportunity to contest the case against him or her' (Jackson, 2002, p. 336). A key aspect of this system is that the proceedings are 'in the hands of the parties' (Martin, 1997, p. 2), so the two opposing counsel determine what evidence, witnesses and arguments they will put to the court (Jackson, 2002, p. 336). In principle then, both counsel control the duration and complexity of criminal proceedings, while the judiciary performs a predominantly passive role (Mack & Roach Anleu, 2007, p. 341; Moorhead, 2007, p. 406). According to Moorhead (2007, p. 406), this ideal is based on the party control theory, whereby the most effective method of resolving cases and providing transparent justice is to allow the parties, not the judiciary, to control proceedings. Importantly, in this system the 'trial is traditionally the focal point…[and] parties…devote their energies to preparing for one event at which all the relevant issues can be examined and adjudicated' (Jackson, 2002, pp. 336-337). As a consequence of this approach however, the 'procedures encompassed within the adversarial model…allow for tactics of delay and obfuscation, which do not serve the public interest of fairness or the administration of justice' (Martin, 1997, p. 2). This means that proceedings 'in the adversary process move at a measured pace rather than at maximum speed. Delay, or perhaps more accurately, deliberation, has been built into every aspect of the adversary system' (Landsman, 1988, p. 26).

Despite its potential to hinder court efficiency, this adversarial approach is very much enshrined in Victoria's legal culture. A clear example of this can be seen in the Legal Aid funding structure which prioritises the trial above early counsel preparation or attendance at pre-trial hearings. Victoria Legal Aid is an independent statutory body which provides legal representation to individuals who would otherwise be unable to access it (Victoria Legal Aid, 2007a, 2008; Vincent & Zeleznikow, 2005, p. 47).[46] Between 2006 and 2007, this equated to just under 24,800 cases or approximately 80% of all criminal matters (PricewaterhouseCoopers, 2008, p. 7).

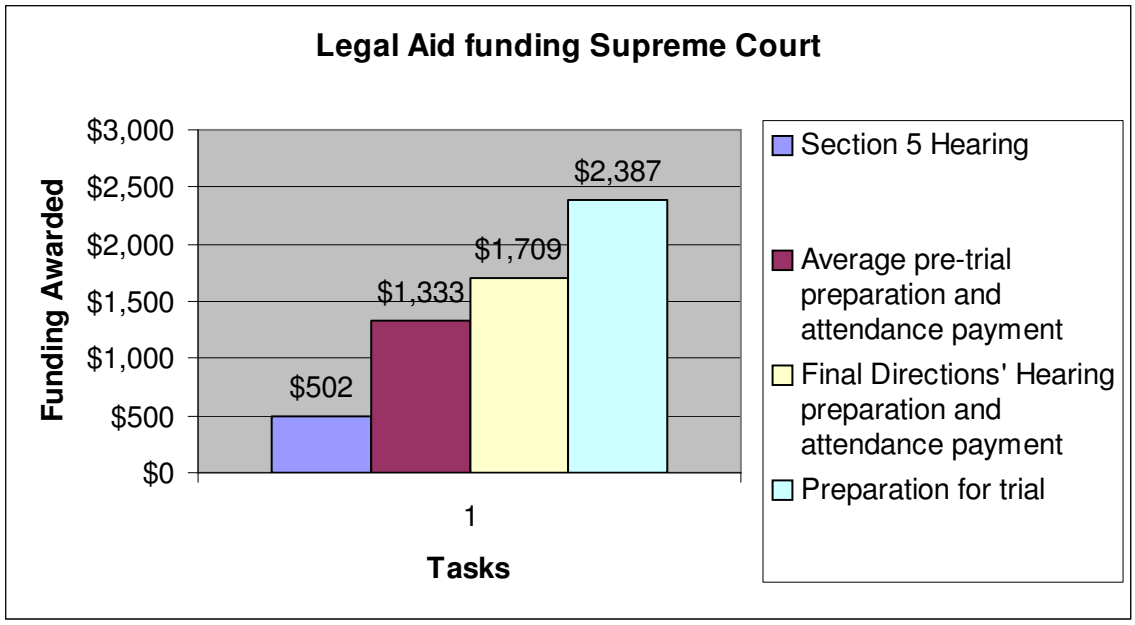
Legal Aid work is divided between counsel directly employed by Victoria Legal Aid and private counsel (Victoria Legal Aid, 2007a, p. 1).[47] All counsel are reimbursed for their work based on an approved fee that is scaled to the perceived level and complexity of the tasks performed. Thus, a substantially lesser payment is made for pre-trial attendance and preparation than for trial preparation, because the work required is perceived to be less complex. The Legal Aid funding structure for indictable offences is outlined in Figures 4-1 and 4-2 (adapted from Victoria Legal Aid, 2007b, pp. 135-139; PricewaterhouseCoopers, 2008, p. 20).

Fig 4-1: Legal Aid Funding Structure Victoria's Magistrates' and County Courts (indictable offences)



[46] Between 2006 and 2007, 92% of those awarded Legal Aid representation were unemployed and 69% were receiving government benefits (PricewaterhouseCoopers, 2008, p. 7).
[47] Between 2005 and 2006, private counsel provided legal services in approximately 67% of all cases assigned to Victoria Legal Aid (Victoria Legal Aid, 2007a, p. 1).

Fig 4-2: Legal Aid Funding Structure Victoria's Supreme Court



As Figures 4-1 and 4-2 reveal, there is a significant difference between the payment of Legal Aid counsel for their pre-trial preparation and attendance, and payment for their trial preparation. In addition, payment for preparation and attendance at the informal pre-trial hearings which facilitate early resolution ideals (County Court Case Conference; Supreme Court Section 5 Hearing) also differs in value from the payment for preparation and attendance at trial-focused hearings (see, for example, the Supreme Court Final Directions Hearing). These differences in payment thus demonstrate the adversarial focus of the funding structure, in prioritising the trial.

To place the funding structure in context with payments awarded to private defence counsel and Victorian Crown prosecutors, this research draws from the findings of a 2008 review of Victoria Legal Aid (see Figures 4-3 and 4-4, adapted from PricewaterhouseCoopers, 2008, p.3). This review found that while the income received by Legal Aid counsel had declined in Victoria's three criminal jurisdictions since 1999, this was not reflected in the salaries of their counterparts (Supreme Court = down by 25%; County Court = down by 34%; Magistrates' Court = down by 40%; PricewaterhouseCoopers, 2008, pp. 2-3).

Fig 4-3: 'Take home salaries' for Victorian Defence Counsel (Junior Level)

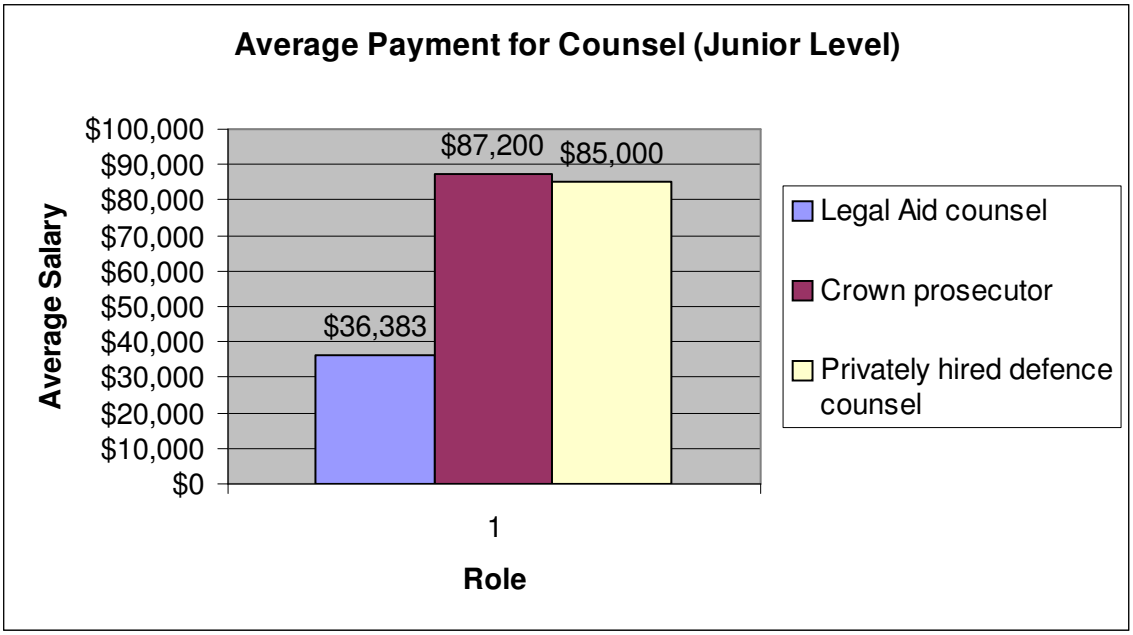
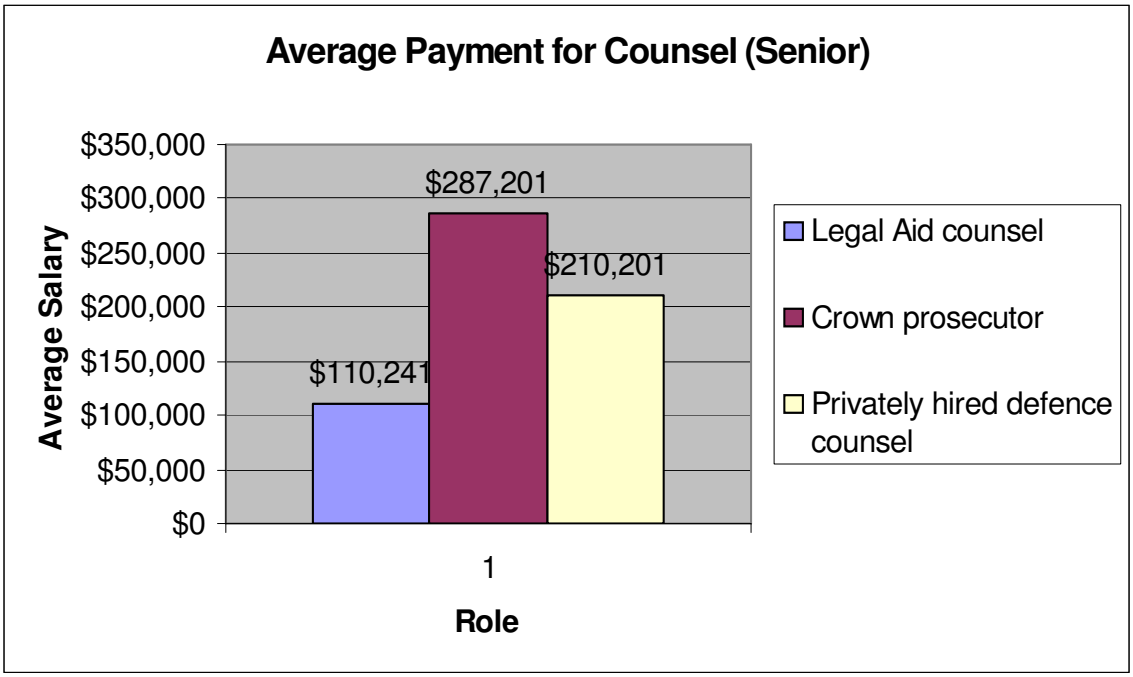


Fig 4-4: 'Take home salaries' for Victorian Defence Counsel (senior)



As Figures 4-1 to 4-4 indicate, not only is the Legal Aid funding structure inadequate in providing sufficient resources to enable defence counsel to effectively prepare and participate in pre-trial hearings, but such counsel also receive a significantly lesser payment for their work than their counterparts at all stages of their career. This concern was

identified in an Australian survey of legal representatives conducted in 2001, in which it was determined that almost 47% of Legal Aid cases were undertaken at reduced rates or without expectation of payment (as cited in PricewaterhouseCoopers, 2008, p. 8). Similarly, an Australian Law Reform Commission (ALRC) report (1999) on managing justice found that 'some lawyers equate work done at Legal Aid rates as pro bono because of the low level of remuneration' (p. 32). Some concerns have thus emerged over the quality and quantity of Legal Aid counsel and whether these payment structures encourage counsel to seek the greatest financial benefit by encouraging defendants to delay pleading decisions. As a defence counsel participant in McConville, Hodgson, Bridges, & Pavlovic's (1994) research maintained:

> In Legal Aid work you are far more restricted in the time you can spend with clients and the work you do…I always expected there would be a large volume of work that you would be working under pressure. The only thing I didn't expect was the emphasis on money (p. 67).

Somewhat in contrast to the adversarially focused payment structures, the Committal Mention in the Magistrates' Court provides an additional payment to Legal Aid counsel when a guilty plea is identified. The following section examines this 'bonus' payment and its perceived impact, if any exists, on the ability of counsel to better prepare for and participate in the hearing.

4.1.1 The 'Bonus' Payment

When a guilty plea is entered at the Committal Mention, Legal Aid counsel receive a $644 payment, as opposed to the $444 payment for their usual pre-trial preparation and attendance (Victoria Legal Aid, 2007b, p. 135). A comparable scheme was implemented in the Scottish High Court of Justiciary in 2002, whereby a set payment was given to Legal Aid counsel when a guilty plea was entered pre-trial (Samuel & Clark, 2003, p. 51).[48] For some hearings this meant a substantial increase in payment, whereas for hearings that occurred closer to the trial, the payment comprised little or no increase (Samuel & Clark, 2003, p. 51). While this reform was aimed at providing counsel with greater preparation resources and encouraging early guilty pleas, an evaluation found that the payment increased pressures on defendants to make an earlier pleading decision, with some defence counsel perceiving the payment as 'easy money' (Samuel & Clark, 2003, p. 66). As a consequence, the additional payment was considered to limit the quality and quantity of counsel who took on Legal Aid matters (Samuel & Clark, 2003, p. 51).

In line with the Scottish scheme, the bonus payment offered at the Committal Mention at the Magistrates' Court raises a number of concerns over due process, insofar as

[48] A flat fee of £1,250 was introduced for all early guilty pleas, equivalent to approximately AUD$2,472 with an exchange rate of 1AUD = 0.5056GBP (exchange rate correct at 23 August 2009).

it financially rewards Legal Aid counsel for encouraging early pleading decisions, which could result in additional pressures being applied to defendants in the decision-making process. This may also in turn place monetary pressures upon Legal Aid counsel, because they are financially punished if their client does not plead guilty. Importantly, in addition to potentially exacerbating such pressures, the extent to which the payment impacts on counsel preparation and participation is likely to be minimal. The Committal Mention is without question the most effective pre-trial hearing for identifying issues not in dispute and resolving cases (see Chapter Five). It could thus be argued that the resolution rate is connected in someway to the additional financial incentive provided to counsel. However, this attributes the occurrence of any resolutions in these hearings solely to Legal Aid counsel alone. It also implies that financial incentives are the main influence on counsel's preparation for cases and how they advise clients, a view supported by only three out of seventeen participants, exclusively from the prosecutorial group. It is also unlikely that the bonus payment is in any significant way connected to the number of case resolutions at these hearings, because such resolution is not assured. The 'bonus' payment is only awarded after a guilty plea is entered and as there is never a definite guarantee that a defendant will plead guilty, even on counsel's advice to do so, it is likely to have only a minimal impact on counsel's resource expenditure prior to the hearing. As Defence CounselB claimed, 'it doesn't really offer any great incentive to prepare beyond a usual level, particularly when you may not even get to discuss it with your client until the morning of the hearing, when you first meet them'. In addition, given the payment increase for a guilty plea entered in the hearings following the Committal Mention, or at the trial itself, the bonus $200 is unlikely to provide a significant financial incentive, or to augment resources for counsel to better prepare pre-trial.

4.1.2 Impacts of the Legal Aid Funding Structure

Defence CounselB's comments in the previous section allude to a prominent limitation of the Legal Aid structure itself, involving the timing at which counsel are assigned to cases and meet their defendants. This problem is connected to the funding structure because the limited payments provided mean counsel 'can survive in the Legal Aid market place only by handling a large number of cases at any one time' (McConville, 2002b, p. 356). When counsel take on multiple cases on a daily basis, 'they have insufficient time to prepare for cases. As a result, the quality of the representation they provide will suffer' (PricewaterhouseCoopers, 2008, p. 24). Policy AdvisorB also identified this concern, claiming that because Legal Aid counsel are:

> often decided on the day of the [pre-trial] hearing you don't have a lot of meetings with your lawyer necessarily prior to then. So, the quality of the representation can be diminished, and it is difficult for the defendant to develop any real or trusting relationship with their representative.

As a consequence, not only does the limited funding provided to counsel mean they 'have less time and resources for negotiations' (Mack & Roach Anleu, 1995, p. 30), but the quality of the defendant's representation may suffer, which impacts on the quality of justice provided and the overall efficiency of the court system. The negative impacts of Legal Aid funding structures and overworked counsel on court efficiency levels have been identified in all Australian jurisdictions and in the United Kingdom (UK) (SCAG, 2000; UK Office of the Attorney General 2007; Weatherburn & Baker, 2000). In the Victorian context, the 2008 review of Victoria Legal Aid determined that 'the impact of overstretched, inexperienced or under prepared barristers inflicts a significant social cost by decreasing the efficiency and effectiveness of the court system' (PricewaterhouseCoopers, 2008, p. 3). As a result, Victoria's Legal Aid funding structure has the potential 'to contribute to delays, inefficiencies, adjournments and waiting times in court' (PricewaterhouseCoopers, 2008, p. 24).

In addition to impacting on court efficiency and counsel preparation, seventeen prosecutorial, defence counsel and policy advisor participants identified Legal Aid funding constraints as hindering plea bargaining, by both deterring counsel from, and punishing counsel for, advising defendants to make early pleading decisions. As Policy AdvisorD maintained:

> At the moment the funding is motivated by the need to support a trial. Obviously it has to support a trial, but for delays to reduce and resolutions to occur earlier, funding also has to be driven to support a resolution of the issues and that is somewhat different to what is happening now.

ProsecutorK also pointed to the differences in the payments awarded to counsel for a guilty plea entered at a County Court Case Conference ($444) as opposed to the first day of the trial ($1,311) (see Figure 4-1). Based on this allocation of finances, she claimed that advising defendants to wait until the trial to plead guilty was the only way to ensure counsel received the highest possible funding for their involvement in the case. This somewhat cynical view of the motivations behind Legal Aid counsel preparation and advice was only identified by three of the thirteen participants, exclusively from the prosecutorial group. However, these three participants described this financial advantage as the main reason why early pleading decisions were not made in some Legal Aid cases. As ProsecutorR claimed, 'monetary incentives impact on Legal Aid solicitors not being prepared or eager to resolve cases at an early stage. There is no money in settling cases early from the defence counsel's point of view'. Similarly, ProsecutorB claimed that:

> Most defence practitioners, from the monetary point of view, the longer it drags out, the more costs they get. That maybe sounds a bit pessimistic, but I think it is a practical reality, especially when you have Legal Aid because there is just no money in the pre-trial for them, so why would or should they bother resolving cases [earlier].

There may be some basis to support the argument that defence counsel sometimes provide advice to defendants premised on their own financial incentives, because, as McConville et al. (1994) claim, Legal Aid funding structures can result in defence counsel being 'less predisposed toward concluding cases through guilty pleas' (p. 271). However, the majority of participants who identified the Legal Aid funding structure as hindering plea bargaining and the occurrence of early guilty pleas did not support the view that Legal Aid counsel withhold legal advice to receive a financial benefit (fourteen out of seventeen participants). Representing this opinion, ProsecutorD claimed that 'the detriment this would cause the defendant who wouldn't then receive the highest [sentence] discount for his [sic] guilty plea, conflicts with the rules of conduct and ethics governing their behaviour'. Instead, participants cited the minimal funding provided to counsel for pre-trial preparation as restricting their capacity to fully prepare or participate in both plea bargaining and pre-trial hearings, because they lack sufficient access to resources. As Defence CounselA claimed, 'there are instances in the pre-trial process, where defendants plead guilty because they cannot afford to run a case and neither can Legal Aid afford to run it'. ProsecutorK similarly argued that:

> You get this sort of discrepancy in what can really be done. The money doesn't carry that far. Legal Aid are reluctant to get too involved in these things, and get all the work done early to try and resolve matters, because they have so much other work to do and they only get a little bit of money for the pre-trial stuff.

As ProsecutorM further explained, 'all that time and effort in trying to resolve matters or at least considering resolution is not properly funded for Legal Aid solicitors'. In light of such considerations, as the following section explores, there is quite a significant justification for altering the funding structure to move away from its adversarial focus on the trial, towards ensuring sufficient resources are provided to counsel so they can adequately prepare and participate at the pre-trial stage.

4.1.3 Changing the Structure

The benefits of altering the Legal Aid funding structure were clearly articulated in the 2008 review of Victoria Legal Aid, which stated that:

> The continued under funding of the criminal justice system calls into question the equity and equality of the criminal justice system…Appropriate funding of the criminal justice system is fundamental to the efficient operation of the law. Without adequate funding of the defence counsel there is the potential for the erosion of confidence…Further, an adequately funded defence counsel will help in achieving the State Government's objectives of delivering just outcomes (PricewaterhouseCoopers, 2008, p. 27).

The review went on to claim that:

> A well resourced and competent defence can ensure that a case proceeds correctly through the court system and minimises the risks of an aborted trial, appeals and re-trials…Prepared counsel can also explain the hard choices that a defendant may face in deciding to plead or go to trial (PricewaterhouseCoopers, 2008, p. 22).

The importance of having an adequate Legal Aid system has also been recognised in the *Charter of Human Rights and Responsibilities 2006* (Vic) ('*Human Rights Charter 2006* (Vic)') s.25(2), and the Australian High Court's decision in *R v Dietrich* (1992) 177 CLR 292, both of which highlight the importance of all defendants having access to legal representation to ensure fair proceedings. Amending the structure is therefore likely to enhance the quality of justice by providing Legal Aid counsel with greater resources to uphold defendants' basic rights and needs throughout criminal proceedings. This would also minimise some of the concerns identified in the previous sections regarding the quality of Legal Aid representation.

It is important that any changes to the funding structure do not place pressure on counsel to compel defendants to make early pleading decisions, and do not significantly disadvantage counsel if the matter proceeds to trial. However, sufficient funding must be available to ensure counsel can adequately prepare matters and determine any issues or cases for resolution, to facilitate the potential resource, financial and emotional benefits for all parties that can emerge from reducing the duration of criminal proceedings. The bonus payment awarded for guilty pleas identified at the Committal Mention is not an effective way to achieve this, as it can be perceived to exacerbate pleading pressures on defendants and does not guarantee the resources required to assist counsel to adequately prepare for the hearing (Samuel & Clark, 2003, p. 51). Instead, any changes to the system should ensure that additional funding be made available to enable Legal Aid counsel to adequately prepare for and participate in the pre-trial process, regardless of whether a guilty plea is identified.

The potential financial benefits of altering the funding structure are also likely to be high, despite the possible public perception identified by participants that it would not be cost-effective (PricewaterhouseCoopers, 2008, p. 29; SCAG, 2000, p. 23; UK Office of the Attorney General, 2007, p. 271). As Defence CounselE claimed, 'the public perception will be that it costs money and it will be seen as costing taxpayer money for defendants, which is not politically popular'. Although initially financial costs would be incurred in altering the structure, Australian and UK research indicates that these initial costs would be outweighed by the significant financial benefits to be gained from a more effective system of Legal Aid funding (PricewaterhouseCoopers, 2008, p. 29; SCAG, 2000, p. 23; UK Office of the Attorney General, 2007, p. 271). Shifting the funding structure away from its current adversarial focus will likely enable both these financial benefits, and stronger pre-trial preparation and participation to occur; thus, the structure should be altered to place 'greater emphasis [on]…specific funding mechanisms required for pre-court preparatory and investigatory work' (McConville et al., 1994, p. 289).

As demonstrated by the Legal Aid funding structure, Victoria's criminal justice system embodies an adversarial framework that prioritises the contested trial. There are, however, a number of contradictions inherent to this approach, because in addition to upholding adversarial traditions, there is a strong desire to increase court efficiency. The next sections examine these contradictions, and provide an overview of adversarial principles and their inconsistency with plea bargaining's early resolution ideals.

4.2 Contradictions in the Adversarial Tradition

There are several aspects of an adversarial legal culture that can hinder the facilitation of early resolution ideals. These include that:

> The bulk of current practitioners were trained in a context in which the normal method of…resolution was adversarial…[and] the community assumes that is the only proper way to resolve [matters], and judicial officers still perceive their responsibility as simply to hear and determine cases in the traditional manner (Sampford et al., 1999, p. xv).

Adversarial theory holds that:

> Since the goal of defending…is to minimise the other side's benefit, the presumptive reaction is to withhold as much as possible, within the confines of the rules. In other words…there is no sense in sharing information with the other side, when there is no requirement to do so (Lubet, 2003, p. 13).

As a consequence, an adversarial legal culture is inconsistent with processes that facilitate or encourage early communication, such as plea bargaining. In this context, an environment exists where 'many lawyers seem to feel that any indication of an early willingness to initiate…negotiations would be perceived by client and opponent alike as a distinct sign of weakness' (Olsson, 1999, p. 3). For this reason, adversarial cultures can contribute to court delays. As the Victorian Director of Public Prosecutions (DPP) observed, 'the culture presently prevailing in the legal profession is tolerant of, and in fact embraces, delay' (Rapke, 2008, p. 8). As a result, 'both the courts and the legal profession have painted themselves, or been painted into, a cultural corner from which there is an imperative need to escape' (Olsson, 1999, p. 3).

In 1994, an evaluation of Australian trials determined that:

> The most significant barrier to change remains legal culture [because]…the traditional approach of the criminal justice process has stressed the adversarial nature of the proceedings and has provided little incentive for cooperation between representatives of the prosecution and defence (AJAC, 1994, p. 430).

Since the time of these findings emerging, some elements in Victorian criminal proceedings have shifted away from encouraging traditional adversarial behaviour, in the direction of

greater collaboration, as part of the move towards achieving court efficiency. This has resulted in a contradiction emerging between this move towards efficiency and adversarial traditions. Thus, while there has been some legislated progress away from adversarial behaviour, in the form of pre-trial disclosure requirements (*Criminal Procedure Act 2009* (Vic) s.182-s.183, s.185, s.188-s.190, s.200, s.358), there consequently remains a strong combative focus within Victorian criminal proceedings which works to hinder plea bargaining and prevent the courts from achieving a significant level of efficiency.

One of the main contradictions evident in an adversarial culture that desires court efficiency is the reluctance within some segments of the legal community to accept that counsel, particularly prosecutors, engage in meaningful discussions or seriously consider plea bargains at an early stage. This contradiction is also evidenced by a reluctance on the part of the legal community to accept that prosecutorial initiation of plea bargaining is appropriate, or that it occurs. This reluctance to accept early communication as part of criminal proceedings is premised on traditional approaches to justice, whereby the duty of the defence to disclose evidence before trial was much less onerous than that of the prosecution. This approach is founded on adversarial principles including the presumption of innocence and defendants retaining the right to remain silent, to protect themselves from self-incrimination (McEwan, 1992, p. 140).

The burden on the defence to disclose case information before the trial has however changed significantly. There are now extensive legislated requirements on both parties to disclose information on the evidence on which they will rely to support their cases, before and during pre-trial hearings (*Criminal Procedure Act 2009* (Vic) s.182-s.183, s.185, s.188-s.190, s.200, s.358). Significantly, under s.182-s.183 of the *Criminal Procedure Act 2009 (*Vic), not only are prosecutors required to provide a statement of their case to the defence 28 days before trial, but the defence must respond with any points of contention they have with the prosecution's statement, and disclose the identity of any expert witnesses and their testimony, at least fourteen days before the trial. Further, under s.190(2) of the *Criminal Procedure Act 2009* (Vic), the defence must provide details of any alibi defence. The importance of these disclosure requirements is strengthened by the costs liability consequences of not disclosing sufficient and timely information, embodied in s.358 of the *Criminal Procedure Act 2009* (Vic).[49]

[49] S.558 of the *Criminal Procedure Act 2009* (Vic) states that if, before the trial, counsel:

> Has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay or negligence or by any other misconduct or default…because the legal practitioner failed to file any document which ought to have been filed…or deliver any document…the court may make an order that all or any of the costs between the legal practitioner and the client be disallowed or that the legal practitioner repay to the client the whole or part of any money paid or account of costs…or all or any of the costs which the client has been ordered to pay to any party…or all or any of the costs payable by any party other than the client.

These pre-trial disclosure requirements were supported by all but three legal participants as an important part of criminal proceedings. Interestingly, the overwhelming reason for this support to emerge from participant responses was premised on the requirements being legislated. As Defence CounselC claimed, 'it is just part and parcel of the process. You have to offer some information about your case and get some back. It is a formal requirement'. In addition, participants pointed to the preparation benefits of early disclosure. As ProsecutorA explained, 'it is good because it lets us prepare better for the case, like in knowing the alibi defence, so it doesn't get to a situation where we are blinded and have to adjourn to then get information'. While the duty to disclose information was openly accepted and undertaken by participants, despite offering similar benefits for pre-trial preparation, this degree of support was not applied to plea bargaining, nor was it reflected in the participants' approaches to and use of plea bargaining, particularly in relation to prosecutorial initiation of discussions.

The main reason materialising in participant responses as to why the disclosure reforms have not created a more collaborative or communicative relationship between counsel in other areas, such as plea bargaining was due to the official recognition of disclosure in statute. This suggests that, despite contradicting adversarial theory, the formalisation of disclosure appears to imbue it with legitimacy within the legal view. Significantly, another reason that emerged for the legal community's acceptance of the disclosure requirements was that they were exclusively motivated by the move towards court efficiency, as opposed to seeking to alter the traditionally combative legal environment, towards embracing more open and collaborative exchanges. As McEwan (1992) states, 'the most consistent justification for the change of the [adversarial] approach is to shorten trial time, save costs…The concentrations of [such] reform…has been to examine the economics…and improve efficiency in dispatching cases through the system' (p. 234). Interestingly, participant responses revealed that this accepted contradiction to adversarial ideals was not universally applied to all criminal justice processes that offer efficiency benefits. Of most significance to this discussion, the participants' responses and their actions were somewhat conflicting in terms of engaging in or initiating discussions, despite all 42 participants identifying at least one efficiency benefit that can arise from plea bargaining. As ProsecutorU claimed, 'plea bargaining reduces delays. Justice has to be done and it has to be done reasonably quick, not savage or swift, but it has to be reasonably quick and that is why we should encourage negotiations'. ProsecutorL also maintained that 'plea bargaining gets matters resolved, matters that could have gone on for years and years and years'. Defence CounselI also identified the efficiency benefits of plea bargaining as extending to defendants, maintaining that:

> The system cannot cope with too many trials because the delays become horrendous. The anxiety for people waiting for trials, the whole uncertainty…If plea bargaining did not happen, then you would be finding a situation like some South-East Asian countries where defendants are locked up for ten years waiting for their trial.

ProsecutorO also highlighted the efficiency benefits of plea bargaining for victims, claiming that:

> Every day that a victim is waiting for a trial is one day of angst that they might not need, certainly do not need. If you can resolve things sooner rather than later then you should…Victims can gain a great deal and there is great satisfaction in having someone say, yes I did it, as opposed to having to prove it.

The basis for the legal participants' differentiation between openly accepting and fulfilling the disclosure requirements, and their inconsistent approaches towards, and perspectives of plea bargaining is that despite contradicting adversarial principles, the focus of the disclosure requirements on efficiency and their recognition in statute means they can be legitimised and authorised within the adversarial context—thus allowing their acceptance within an adversarial legal culture. In contrast, plea bargaining's lack of formal acknowledgement or authorisation hinders its legitimacy. As a consequence, there is inconsistency in counsel approaches to and acceptance of discussions. In particular, as the following section examines, prosecutorial initiation of discussions, while a predominantly supported ideal within Victoria's legal community, is not openly or consistently undertaken.

4.3 Prosecutorial Initiation of Plea Bargaining Discussions & Offers

In Victoria, no formal restrictions exist on who can initiate discussions; thus, both counsel have unfettered power to do so. The only guidance regarding prosecutorial initiation of discussions is cited in internal OPP policies, which encourage prosecutorial initiation of discussions, unless the defendant is not legally represented. As s.2.6.6 of the *Director's Policy 3.1 2007* (Vic) states:

> In virtually all cases the initial approach in a plea negotiation situation is made not by the Crown but by the defence. However, there is no compelling reason why, in appropriate cases, the Crown should not initiate discussions, subject to the qualification that on no account should this occur where an accused is unrepresented.

Traditionally, however, Crown solicitors have rarely initiated discussions because there was a perceived impropriety in them doing so without specific instructions from a senior prosecutor and based on their public and victim interest roles. This tradition has also fuelled perceptions that early, serious consideration is not given to plea bargains until such time as senior prosecutors are assigned to the case. Such perceptions do not extend to summary matters in the Magistrates' Court, where early prosecutorial initiation of discussions is openly supported (37 out of 37 participants); the emerging reason for which

is partially because the police prosecutor is the final authority on the case, and partially due to the sheer volume of summary cases processed each day (ProsecutorC).[50] Furthermore, summary offences can more readily be altered without significantly impacting on the defendant's level of criminality or likely sentence, thus reducing the perceived impropriety in the police prosecutor seeking early case resolution (Pegasus Taskforce, 1992, p. 30).

One of the main reasons to emerge from participant responses for the perceived inappropriateness of prosecutorial initiation of discussions was that, as representatives of the state, and symbolic representatives of the victim, any attempts to settle matters by offering prosecutorial concessions may be seen as neglecting these roles. ProsecutorI maintained that 'it is probably best left up to the defence to initiate discussions, because at least then it cannot be seen as the Crown seeking some expedience on its part'. ProsecutorA also claimed that 'prosecutors have been actively discouraged from proactively seeking out pleas. Ringing up [the defence] and saying, well why don't you offer this, has been discouraged….So, we don't actively seek out pleas because, you aren't meant to do that as a prosecutor'.

Prosecutorial participants also identified their initiation of discussions as being perceived to place additional pressures on defendants to plead guilty, due to the existing power imbalances between defendants and prosecutors in criminal proceedings. As ProsecutorE explained:

> Traditionally the Crown has not taken the first step and a lot of that is borne out of the law as it has grown up, about inducements to get people to confess and so on, and the law of voluntariness. It really has been that the prosecution has said that it is not really for us to come forward.

ProsecutorH also claimed that:

> It is not necessarily a good idea for the prosecution to initiate. There is a potential conflict between the prosecution doing that off their own bat, with other aspects of what the prosecution should be doing. More particularly, we want to avoid any suggestion that we are putting pressure on an accused person to plead guilty. Pleading guilty has to be clearly something that the accused person does in an atmosphere where there is as little pressure being applied as possible.

In a similar vein, ProsecutorE maintained that 'because it is enshrined that everyone has a right to go to trial and be judged by their peers, prosecutors initiating [discussions] may be seen as denigrating from that right'.

Another negative perception that participants applied to prosecutorial initiation of discussions was the possibility that defendants are initially overcharged to encourage them

[50] Participants from the policy advisor group did not feel that they occupied an informed position to comment on some aspects of this topic. Most notably, they felt unable to comment upon the regularity of prosecutorial initiation of discussions. According, the discussion in this chapter is predominantly focused on the perspectives of the 37 participants from the judiciary, defence counsel and prosecutorial groups.

to accept a plea bargain. Overcharging occurs when a prosecuting agency, generally the police, initially charge a defendant with 'a more serious offence or an accumulation of offences [which] thereby sets the stage for subsequent bargaining [by the Crown]' (Douglass, 1988, p. 277; see also Breitel, 1960; Cole, 1978; Friedman, 1982; Gabbay, 1973; Galligan, 1986; Lezak & Leonard, 1985; Temby, 2000). Thus, 'bluff and tactics—rather than truth, justice, guilt or innocence' (McConville, Sanders, & Leng, 1991, p. 165) guide the bargaining process. This perception persists on the basis that any prosecutorial offers made to the defendant are only a negotiation on the multiple charges that would be unlikely to stand up to the rules of evidence applied at trial. As Defence CounselA claimed:

> The fact that someone gets charged with 160 offences, when they should be charged with two, that's a problem…In many instances, it is the inexperience of the police that causes it. They are not sure whether it is a serious assault, a common assault, a wounding or causing serious injury, so they charge with everything, so you end up with a whole heap of charges that probably shouldn't be there.

The majority of defence counsel, prosecutorial and judicial participants however, did not support the argument that overcharging occurs with the purpose of deceiving defendants into pleading guilty to unreasonable agreements (29 out of 37 participants). Rather, participants supported the understanding that multiple charges varying in seriousness are initially laid by police in order for prosecutors to determine the most appropriate charge(s) with which to proceed, either through trial or negotiation. ProsecutorB argued that 'police usually charge people with a whole range of offences that they think are appropriate, but it is not a question of overcharging. It is so we can work out what the best charge is to proceed with'. JudiciaryA also claimed that overcharging is not 'a fundamentally cynical exercise. It is a practical way of whittling away the husks and then you get into the core'. This view was also supported by Defence CounselE, who argued that although defendants may initially be charged with multiple offences 'it is not necessarily wrong, because you know it will resolve itself into a charge sheet of something more specific in the end for a trial or for a plea [bargain]'. ProsecutorI similarly claimed that:

> It is sometimes viewed as all these charges have been put in as a way of trying to make them plead to something, but it is really driven from the proposition that if we had to run a trial, we have to have individual counts. So you might end up with more counts than the case could settle for, but you do not really have any other way of doing it when you run a trial.

Although the majority perspective did not adhere to the view that overcharging is a prominent concern (29 out of 37 participants), expanding upon the arguments of the previous chapter, the absence of transparency of prosecutorial discretion in making charging decisions is still likely to impact on public perceptions of overcharging and of the reasons behind prosecutorial initiation of discussions. As Defence CounselA claimed:

> Because already the police charge with every possible charge, prosecutors can use that as some kind of bargaining device to get rid of some charges, without really affecting their case. So overcharging, the hamburger with the lot, is a possible problem from prosecutors starting discussions.

Despite participants identifying the potentially negative consequences and perceptions of prosecutorial initiation of discussions, the majority did not consider it to be 'inherently wrong' (ProsecutorM), so long as they had read the evidence, consulted with the victim and informant, and received instructions from a senior prosecutor (30 out of 37 participants). As ProsecutorM maintained:

> There is nothing in principle wrong with the Crown initiating discussions, it should be put in a particular way though. It shouldn't start off with the Crown offering to drop certain charges in exchange for the offender to plead guilty to another. It shouldn't be for example, if your client pleads to this count we will withdraw the head count. Certainly nothing wrong in principle with initiating negotiations, but it should be done in a particular form.

Similarly, ProsecutorN claimed that 'it should be couched in terms such as, have you considered offering a plea to recklessly causing serious injury, for example, and if your client were to offer to plead guilty to that offence, that is something that could be taken to a Crown prosecutor for a decision'. This view is reflective of the guidance provided to Crown representatives in internal OPP policies, which state that:

> It is essential to the efficient use of the resources of the OPP, the interests of the victims of crime, and the proper management of prosecutions generally, that every effort is made, at every stage of the prosecution process, to proactively consider and assess every matter's potential to be resolved as a plea of guilty to appropriate charges, as early as possible. Such consideration must be undertaken by the relevant OPP solicitor, at all relevant stages, and regardless of whether the possibility of settlement is raised by defence representatives (*Resolution of Matters & Early Issue Identification*, 2007, p. 3).

Strong support for prosecutorial initiation of discussions emerged in prosecutorial participants' responses, with only four of the nineteen participants directly opposing this practice. Representing the majority opinion, ProsecutorC claimed that:

> If we are armed with the appropriate information when we do speak to the defence, out front we can say we have read the brief, my instructions are that we would accept a plea to whatever, and from that point it is not negotiable, because that is your instructions. So we can put forward our bottom line, but we shouldn't deviate from that.[51]

Defence counsel participants also supported prosecutorial initiation of discussions (nine out of eleven participants). As Defence CounselB claimed, 'it is great if the Crown can start the

[51] The term 'bottom line' refers to the most appropriate plea bargain detailing the charges and, if applicable, a sentencing submission that reflects the criminality of the offence, the impact of the crime on the victim and which upholds defendant and public interests. The potential implications of this term are discussed in Chapter Five.

ball rolling, you know, give us a hint as to what they think it could resolve as, so we can talk to our client and really see where everyone is coming from'. Universal support for prosecutorial initiation of discussions was also evident in all judicial participant responses (seven out of seven participants). As JudiciaryA maintained:

> The correct course for prosecutors is to take a proactive role and really what they should do is read the brief and work out what the appropriate charges are. The idea is to settle things early, to be proactive. We want to avoid the adversarial game playing, and for them to come up with bottom lines and stick to them right throughout.

In a similar vein, JudiciaryD claimed that 'plea bargaining is a good idea. The prosecution have to be more open and say upfront what their bottom line is'.

Judicial support for prosecutorial initiation of plea bargaining was also evident in the observations of judicial participants. During one County Court plea hearing, in outlining his sentencing submission Defence CounselK referred to ProsecutorG initiating discussions and presenting an offer to the defendant. In responding to these comments, ProsecutorG stated 'Your Honour, I would like to add that I wouldn't call what we did a plea offer, because the Crown doesn't generally make offers. We usually have to wait for the defence to give us something'. In response, JudiciaryE explained that 'I'm not opposed to the Crown making plea offers, I think it is a very good idea and I think it is well done by the Crown'. ProsecutorG's need to state that 'the Crown doesn't generally make offers', supports the view discussed earlier that plea bargaining's lack of statutory recognition works in combination with adversarial traditions to discourage open and consistent acceptance of, or engagement in, discussions. JudiciaryE's responses, however, demonstrate a shift in the traditional adversarial perspective towards plea bargaining, implying that, like the pre-trial disclosure requirements, formalising plea bargaining in statute could legitimise discussions even within an adversarial context.

Despite the overwhelming support for prosecutorial initiation of discussions (30 out of 37 participants), eighteen of these participants did not believe that prosecutors initiate discussions in practice (n=seven defence counsel; n=seven judiciary; n=four prosecutorial). The main reasons for this perception of prosecutorial inaction that emerged from participant responses related to the difficulties inherent to seeking early resolutions in an adversarial system that prioritises the trial—for example, the late appointment of senior, authoritative counsel to cases. Importantly, as discussed in the next section, my findings reveal that the perceived lack of prosecutorial action, and the resulting inconsistencies in counsel approaches to and consideration of early plea bargaining is the direct result of plea bargaining's informality, which fails to provide any legal recognition or control of the process or the conduct of those involved within it.

4.4 The Impact of Adversarial Traditions on Plea Bargaining

Counsel have a duty to act both thoroughly and expeditiously in criminal proceedings (Payne, 2007). It is therefore appropriate to assume that both counsel should actively and at an early stage, communicate with each other and where appropriate engage in plea bargaining. Regardless of whether the case resolves, this communication frames the efficient administration of justice by allowing the key issues in dispute to be identified and by offering counsel a better understanding of the case's primary issues. However, not only do adversarial traditions discourage early discussions between counsel, but they also support the late appointment to cases of senior counsel who possess the authority to make plea bargaining decisions. The late appointment of senior, authoritative counsel is recognised as a contributing factor to court delay (Coates, 1998; Corns, 1997; PricewaterhouseCoopers, 2008; Weatherburn & Baker, 2000); but in the context of this research, its most significant negative impact is on plea bargaining, as discussions 'can only result in substantive agreements, if they are conducted by practitioners with the authority to conclude agreements' (Sulan, 2000, p. 6).

Participants from all groups identified the negative impact that the late appointment of senior counsel can have on plea bargaining. As ProsecutorC claimed:

> By the time the approach to plea bargain is made by the [senior] counsel, the subpoenas have been issued, witnesses have been organised. We have photos ordered. From our point of view, although it is still nice to get the offer, from an organisational point of view it is sort of a bit late, because all the work has really been done.

Similarly, ProsecutorN argued:

> From the defence point of view, they often won't have their actual trial counsel briefed and know anything about the matter until just before the trial. Whereas if they hypothetically got someone to consider the matter much earlier, it could be realised much earlier that they should be pleading or offering to plead to something.

Policy AdvisorB also observed that 'because the defence barrister is actually not briefed until the eve of the trial, all that [pre-trial] time is wasted. Equally with the prosecution they are understaffed so they do tend to stall assigning prosecutors and do discussions really late'.

Importantly, the late appointment of senior counsel was identified as hindering the effectiveness of prosecutorial initiation of discussions, as the authority required for the other side to accept any proposed agreements is not available. As ProsecutorL observed:

> As a solicitor, I might really want to get the plea bargain organised say in the pre-trial process, but if I wait for the defence solicitor to contact me it may not be until the morning

> of the contested Committal or trial that they speak to the [senior] counsel or their client. This might be due to time constraints that they have or because it may be that this is the only time they can see them [the defendant]. But the bottom line is, we won't even discuss the issues until that morning when all the pre-trial preparation has been done. But if I could ring up two weeks before the Committal, it might make a difference, because the defence solicitor would know what we are thinking and could speak to the [senior] counsel and his [sic] client earlier.

Although ProsecutorL identified the late appointment of defence counsel as hindering early and serious consideration of plea bargains, more participants attributed a lack of early, serious consideration of plea bargains to prosecutors. Nineteen out of 38 participants expressed the view that prosecutors do not plea bargain at an early stage.[52] This perception was most common among judicial participants, with all seven sharing this view. As JudiciaryE maintained, 'the prosecution have in the last few years gained a reputation in the defence community for being hard-lined and unwilling to talk and that has been unfortunate…[and] that has been problematic for [early] resolutions'. JudiciaryD also criticised the Crown for failing to engage in early discussions with defence counsel, claiming:

> If the prosecution had a more flexible approach, then [plea] bargaining would be much more common. But at the moment, the prosecution are very fixed on their views of matters. For example, intentionally causing injury and recklessly causing injury. They always seem to put both counts in and they won't accept a plea to recklessly [causing injury]. The impression I have is that a lot of the trials result because counsel are not willing to negotiate. The solicitor will go back to the OPP, to the permanent prosecutor to get authority to negotiate or to reduce the charges. It is there that you will find, not universally, but often, that they are not prepared to negotiate…The prosecution are not sufficiently flexible in their approach in some matters and it would help if that attitude could change.

A similar view was expressed by JudiciaryC:

> The idea that the prosecution sit back and wait for offers is old-fashioned, but one of the criticisms of the prosecution, which has been a fair criticism over a period of time, is that they have been reluctant to negotiate early, especially in large matters, especially in co-accused matters. But sometimes there are minor players, for example, in drug matters, who could easily be hived off and they are willing to plead and defence are just told no, we are not accepting any offers at the moment, and that has been very unproductive.

The judicial participants' concerns were reiterated by the prosecutorial group, of whom, just under one-quarter claimed that prosecutors do not initiate or seriously consider plea bargains at an early stage, despite recent changes based on the early resolution ideals

[52] Only one participant from the policy advisor group believed they were in an informed position to comment on this subject. As such, this discussion draws upon the perspectives of 38 participants (n=nineteen prosecutorial; n= seven judiciary; n=eleven defence counsel; n=one policy advisor).

of the OPP (four out of nineteen participants). Commenting on this issue, ProsecutorK maintained that:

> It often depends on the individual and their experience. I am lucky because I worked as a defence representative so I am very happy to pick up the phone and say this would be our bottom line, what do you think, because that is what I used to do as the defence. The problem we have is that the Crown often has very unrealistic instructions in relation to crimes and there will be no way we will get a plea with that attitude, but we still have to put that hard-line approach at least initially in terms of not offering deals, so to speak, to show the community that hard-lined approach. But that puts the defence off offering anything, so it is a catch-22 and we end up just delaying resolutions.

ProsecutorA also applied this view of prosecutors as inactive to inexperienced Crown solicitors, who she sees 'prefer not to plea bargain or seriously consider defence offers'. She claimed that 'a lot of the young ones are a lot more brutal and just want a conviction [on the maximum charges] at all costs, so they won't plea bargain if they can avoid it'. This view was reflected in discussions with two newly appointed junior solicitors, where the common perspective, represented by ProsecutorP was that 'we don't really have time to be chasing plea bargains because we have other work that is of greater value, like trial preparation'.

Although prosecutorial participants attributed such lack of serious consideration chiefly to junior and inexperienced solicitors, defence counsel participants argued that this inaction was also evident in some senior Crown representatives (seven out of eleven participants). Defence CounselI claimed that:

> I am disheartened and disillusioned with prosecutors and plea bargaining and on some level I wouldn't seek to go to all that trouble in future matters [to make an offer], because of there being no opportunity for dialogue and no explanation as to why the Crown refuses my offers.

Defence CounselI's claims were supported by the observations of him at work, during which he presented a plea bargain to the Crown after receiving pleading instructions from his client. The offer stated that:

> Based on the brief of evidence, my client…[name] offers to plead guilty to these counts…[offences outlined]. It is our view that the Crown cannot make out the head count due to these reasons…[reasons explained]. So in these circumstances and on this basis, my client…[name] will plead guilty to these charges…[charges outlined]. Please advise whether the Crown will accept this offer.

Defence CounselI received a facsimile response stating: 'your offer to plead guilty is rejected by the Crown'. No reasons, additional information or further communications were provided by the prosecution, so the matter proceeded to trial.

Defence CounselI maintained that this lack of communication was not unusual, claiming that:

> There is a problem because the OPP will just not accept an offer early. They wait until after the Committal or until barristers are briefed and by then it is too late. The savings are gone for us and them. The [sentence] discount is going to be less for us. It is just so frustrating.

In discussing this issue, ProsecutorM acknowledged that such weaknesses exist in the OPP, maintaining that:

> There is a problem where the Crown is seen to have a wall up, because we don't always accept early offers. So often the perception of the defence becomes that we never accept offers. So we need to have proper, better communication and dialogue with defence counsel to prevent this [perception] remaining the norm.

At times, the common perception that prosecutors do not consider or initiate early plea bargains appeared to be in direct conflict with the actions of Crown solicitors, who were observed to be enthusiastically attempting to plea bargain. In one such observation, ProsecutorB first determined 'the minimum charges that could be proceeded with, which adequately reflected the criminality of the offence, based on the available evidence', and then approached a Crown prosecutor (ProsecutorL) to discuss his recommendations. After obtaining approval from ProsecutorL, ProsecutorB contacted Defence CounselF. Although this was not observed, ProsecutorB offered a detailed account of the discussion that followed:

> I contacted the defence, even though he hadn't contacted me and I said look, what do you want to do? Do you want to talk about resolving the matter? I mean obviously I wouldn't commit anything to him until I had a formal offer, but I said, this is the way I look at it, I will put an offer of what I think is appropriate, and when that is done, you can see if it matches up with what you think is appropriate.

ProsecutorB's offer was accepted by Defence CounselF later that day and the matter resolved. While discussing the benefits that arose from initiating this discussion, ProsecutorB claimed:

> As you can see, it can work out really well. I mean sometimes you will ring the defence and you will say, can we talk about resolution and they will say not interested or only if you drop the head count, and that is not appropriate in reflecting the criminality of the offence. But one of the things it does do is get the defence to have a look at a matter, because like anyone, they put it in pigeon holes and they say, oh gee [sic] that matter is on tomorrow, I better look at it now. But if you ring up and say do you want to put a plea offer, they will often look at it right then.

In a different division of the OPP, ProsecutorF was also observed initiating discussions. After reading the evidence, ProsecutorF contacted the victim and informant to

ascertain their opinions on a possible plea bargain. She then phoned Defence CounselA and said, 'Look, is there anyway we can resolve this? Off the table, if he pleads to…[charges outlined], I will see if I can get the Crown to suggest a non-custodial sanction [in the sentencing submission]'. ProsecutorF then approached a Crown prosecutor (ProsecutorM) to explain the proposed plea bargain. ProsecutorM supported ProsecutorF's recommendations, so she phoned Defence CounselA and the defendant was arraigned five days later to plead guilty.

In addition to these two examples, throughout the observation period Crown solicitors, particularly those involved in the Committal Advocacy division, were consistently encouraged, usually by their Program Managers, but often other Crown solicitors, to approach senior prosecutors to seek instructions on whether plea bargaining was a viable option. However, as evident in the observations of Defence CounselI and from participant responses, this early consideration or initiation of discussions depended significantly upon which Crown representatives were assigned to the case.

This inconsistency in prosecutorial approaches to and use of plea bargaining was one of the most interesting findings to emerge from the data. I attributed these inconsistencies partially to the adversarial nature of the justice system, because it traditionally favours conflict and secrecy over collaboration, and partially to the 'human nature effect' inherent to any non-formalised or unregulated process. This 'human nature effect', as accurately defined by Defence CounselB, means 'it depends entirely on the individuals involved whether it will go, how it will go and how well it will be done'. This finding was reflected in the perspectives of the nineteen participants who claimed that prosecutors do not plea bargain at an early stage. Yet, most interestingly, it was also evident in the perspectives of the remaining nineteen participants who said that the Crown do plea bargain at an early stage, but that this depends almost entirely upon which Crown representatives were involved in proceedings. As Defence CounselC maintained, 'it is somewhat quirky in some ways, in that it depends who you talk to, but that is always the fact with human nature'.

These findings were particularly interesting given the existence of the three internal OPP policies that encourage prosecutorial initiation and early engagement in discussions—in particular, the *Practice Guide*, *Resolution of Matters & Early Issue Identification 2007* (Vic), which was drafted in early 2007 with the 'specific focus of encouraging Crown representatives to contact defence counsel to assess the possibility of plea bargaining' (ProsecutorN). While it might seem appropriate to presume that these policies would provide a mechanism to ensure consistency, my research found that they appear to have achieved very little in shaping consistent approaches to and use of plea bargaining among the prosecutorial participants.

ProsecutorN claimed that when the 2007 *Practice Guide* was first drafted:

> Some OPP employees thought it was superfluous, because it simply set out on paper the processes already undertaken by Crown solicitors and prosecutors. Others said it is fantastic. It is about time there is some acknowledgement on paper of what the process is and what the thought pattern should be, not only about what charges are proceeded with, but that it has to be done early and has to be proceeded with at various stages throughout the process.

The *Practice Guide* reinforces the early resolution focus of various divisions in the OPP, such as the Early Resolution Unit and the Specialist Sexual Offences Unit (see Chapter Two). As ProsecutorI maintained, this focus is based on the belief that:

> Just because you thought about settling a matter after the Committal and the defence said no, doesn't mean at the next hearing or at the trial that you shouldn't go to the defence and ask again, because they might have changed their mind, the accused might have new representatives, the accused might have decided to plead. Things change.

However, despite the fact that the *Practice Guide* provides encouragement for prosecutorial initiation and engagement in discussions—albeit informal in the sense that this policy is non–legally binding—over half of the participants from the prosecutorial, defence counsel and judiciary groups believed that prosecutors do not seriously consider or initiate early plea bargains (nineteen out of 37 participants). In addition, the longstanding perception that it is inappropriate for prosecutors to initiate or engage in plea bargaining seems to have remained within a small segment of the legal community (eight out of 37 participants). As Defence CounselH stated:

> When the prosecution have initiated the discussions, it makes you double-check how strong the case is because you immediately think it must be weak. There must be something there…It really is a matter of tactical negotiations. I know if they come to me, I am holding the upper hand, so I can be harder on my negotiations.

These findings support the contention that the internal policies have a minimal impact on ensuring consistent prosecutorial conduct, or indeed informing prosecutorial conduct.

The limited influence of the internal policies in informing prosecutorial conduct was also evident during the observations in which some prosecutorial participants displayed a reluctance to plea bargain. When these participants were asked about their apparent reluctance to plea bargain, their focus on the trial emerged as one of the main factors motivating their behaviour. As ProsecutorP claimed, 'we just have to be careful talking [to the defence] in the event that the matter proceeds to trial. Otherwise they might know our weaknesses and run the trial based on that'. Based on this and similar responses, it appeared that the incongruence between prosecutorial actions and perceptions was strongly linked to adversarial traditions in the legal culture. The data also revealed that this reluctance to take action was further linked to plea bargaining's lack of statutory recognition, which meant there was no official control or authorisation governing their conduct in discussions. These findings therefore demonstrate that if plea bargaining is to be accepted as a legitimate

criminal justice process in the context of Victoria's adversarial legal culture, there is a significant need for formalisation beyond the internal policies. In addition, as the following section explores, there is a need to alter the OPP training policies to reflect both the guidance of the existing internal policies on prosecutorial conduct when plea bargaining and any legislation introduced to prosecutorial conduct in discussions.

4.5 OPP Training

Plea bargaining's lack of formality combines with adversarial traditions to contribute to the absence of training provided by the OPP to prosecutors in relation to plea bargaining. When discussing the current training on plea bargaining and the potential for additional training to be developed with a participant (ProsecutorQ) who is responsible for implementing training policies at the OPP, he stated that 'no there is none of that…[and] there can't be too much of that'. He claimed that the reason for the lack of specific training on plea bargaining was related to plea bargaining's lack of official acknowledgement; thus, while 'there should be encouragement [to plea bargain], it should not be official encouragement'. He maintained that:

> We adhere to internal pressures to plea bargain already. Too much emphasis on it could have negative outcomes, like our case is weak or we have succumb[ed] to work[load] pressures and it has consequences for victims. So we don't officially train them on those areas and I don't know if we should.

As a consequence of this perspective, and despite clear instructions in the internal policies encouraging prosecutors to engage in and initiate discussions, Crown representatives receive no official training in this area. This absence of training contributes to the impact of the 'human nature effect' in creating inconsistent prosecutorial approaches to and use of plea bargaining. It is also a likely contributing factor to the inactions of the participants who showed a general reluctance to plea bargain. There is consequently a significant need to alter these training policies to reflect the guidance provided to prosecutors in the internal policies. As McConville (2002a) maintains, 'there is no point having a framework that encourages scrutiny and inquiry if the courtroom actors lack training or competence' (p. 3).

Six prosecutorial participants also identified the absence of training provided to prosecutors as problematic, and offered their perspectives on how this situation could be improved. ProsecutorA maintained that:

> We can do a lot more internally to improve the process. We should be on the phone, and a lot of people find that very confronting, especially the young ones, but we should. We should be encouraging our solicitors to pick up the phone and say, what about this? And that is what we should be heading to, with everyone picking up their phones. Our internal processes and training need improving.

ProsecutorM similarly argued that:

> Every solicitor that enters the OPP, every article clerk, every Crown prosecutor should be given a presentation that defines our role. The presentation should be in terms of (1) the Crown has a duty to the court and a duty to the law; (2) we are here to administer justice, so if there is material which is in favour of an accused it is provided; (3) when a person receives a brief of evidence, they should read it thoroughly and identify all of the issues and they should make an overall assessment of the strengths or otherwise of the case. If there are weaknesses, then an attempt should be made to make up for those weaknesses and gain further evidence. If that is not possible, at least attention has been drawn to it. Then, an overall assessment of the Crown case can be made because you only know how strong the case is by identifying the weaknesses; [and] (4) an assessment of what the matter could resolve for should be made and depending on the experience or otherwise of the solicitor involved, it may require a brief discussion with the Crown prosecutor, or Program Manager, but what they should be told is that they should then start the dialogue with the defence solicitor and they should communicate, certainly not the strengths and weaknesses of the case, we wouldn't tell them that, but communicate something to the effect of, in the circumstances of this case, if your client was prepared to offer a plea of guilty to whatever charge, that offer would be taken to a Crown prosecutor for consideration. That is the sort of training that should be given to everybody.

ProsecutorU supported this view, claiming that:

> Junior solicitors need to have imposed upon them that we present the case in the strongest terms consistent with our obligations to the court and to the law. We are not here as an organisation to get unwarranted convictions. We are not here to get the maximum penalty for all offences, but we are here to assist in the administration of justice as the circumstances require, and if on an objective assessment of the case there is no reasonable possibility of conviction on the head count, then all attempts should be made to resolve the matter for a lesser count. That should be done by way of training. I think defence solicitors should also be receiving the same sorts of feedback from their peers.

If the training policies within the OPP were altered in line with these participants' perspectives, such change would have a significant likelihood of delivering greater consistency to prosecutorial conduct and to ensuring that the Crown's right to initiate discussions was transparent within the prosecutorial community. As ProsecutorJ claimed:

> You do not weaken your case by speaking openly, saying these are the impediments I see to a successful prosecution, if you are a prosecutor, or if you are the defence, saying well I think we will have trouble with this, this and this. I am not sure anybody's position is irretrievably imperilled by that…[and] we could be doing more [internally] to reflect that.

The striking contradictions between the current lack of training, what is encouraged by internal OPP policies, and the contrasting perspectives and actions of the prosecutorial participants alone exemplify the impact that adversarial ideals can have on unregulated and non-legitimised processes. This provides further strong justification for formalising plea bargaining beyond the guidance offered by the internal OPP policies, if there is to be any significant or accepted change in the actions and perceptions of counsel in approaching and

considering plea bargaining. The following section expands upon this discussion by examining the benefits of external plea bargaining policy.

4.6 External Formalisation

Using prosecutorial initiations of discussions as an example, this chapter has thus far argued that a reform that extends beyond the scope of the internal OPP policies is necessary to alter counsel approaches to and perceptions of plea bargaining in an adversarial context. However, despite prosecutors being the focus of participants' criticisms, participants from both the prosecutorial and defence counsel groups were observed to display some reluctance to engage in or consider early plea bargains. Similarly, some observations of the judiciary revealed a lack of encouragement for or facilitation of plea bargaining discussions in the pre-trial process. Interestingly, while some failings of the judiciary and both counsel in this regard were identified, outside the prosecutorial group participants did not recognise that any change was needed in their group's approach to plea bargaining. Rather, it was suggested that the other groups needed to adapt to changes in the legal environment. For example, defence counsel participants argued that it was prosecutors who needed to be more flexible and ready to negotiate at an early stage (ten out of eleven participants), while the judiciary needed to more actively encourage this conduct at pre-trial hearings (six out of nine participants). All seven judicial participants claimed that the prosecution needed to shift its focus towards the possibility of resolving matters, while five targeted similar complaints on the defence counsel's approach to plea bargaining. Similarly, as observers of criminal proceedings, policy advisor participants were critical of the adversarial focus of legal participants, suggesting that there was already adequate scope within internal policies, particularly within the OPP, to facilitate early resolution. As Policy AdvisorE claimed:

> Defence lawyers go into a holding pattern of adjournment in order to give themselves time to be briefed. The prosecution will just wait for the defence and the judges and Magistrates also tend to be a bit lazy and leave it to the practitioners to sort out amongst themselves.

From a prosecutorial point of view, a common claim was that defence counsel should seek earlier pleading instructions from defendants, particularly when Legal Aid is involved (twelve out of nineteen participants). Prosecutorial participants also argued that the judiciary should play a more prominent managerial role in facilitating discussions between counsel at pre-trial hearings (ten out of twelve participants). While prosecutorial participants acknowledged some limitations within their own conduct, this was generally applied to junior and inexperienced solicitors.

The contrast among perspectives on who is to 'blame' for not initiating or considering early plea bargains was evident in the conflicting perspectives of ProsecutorH and Defence CounselF, both of whom blamed the opposing counsel. As ProsecutorH

maintained, 'most defence practitioners won't brief someone until at least the contested Committal, so we are pitching any offers against a brick wall'. In contrast, Defence CounselF argued that 'we try to resolve matters early, but a lot of the prosecutors and their solicitors won't do that. They want to wait'. This stark contrast between ProsecutorH and Defence CounselF's perspectives suggests that there is an absence of recognition between prosecutors and defence counsel that plea bargaining is an early consideration of both sides. This finding again demonstrates the minimal impact the internal OPP policies have on guiding plea bargaining, in particular, their limited ability to inform legal parties outside the OPP of the focus on encouraging prosecutors towards early resolutions. For this reason it is clear that if any significant shift is to occur in traditional adversarial attitudes or approaches towards plea bargaining, formalisation must be mandated in legislation, in a similar manner to the pre-trial disclosure requirements, as opposed to being merely a permissive or suggestive reform outlined in non–legally binding internal policies (*Criminal Procedure Act 2009* (Vic) s.182-s.183, s.185, s.188-s.190, s.200, s.358). This finding thus strengthens the justification for plea bargaining's external formalisation, to ensure it is clearly outlined that early resolution ideals should be a consideration of both counsel, and in particular, that prosecutors should be authorised to initiate and engage in early discussions. As Policy AdvisorD observed, 'until legislative changes are implemented, it is hard to see plea bargaining dramatically increasing because the focus of the parties must remain on the contest'. The internal OPP policies could however, provide a basic framework for plea bargaining's external statutory formalisation.

Although external formalisation is a desirable move, there are practical implications of altering the focus of legal parties away from the trial towards plea bargaining and early resolution. Initially, to effectively shift the focus towards early resolution, changes would need to be made to the Legal Aid funding structure to ensure counsel had access to sufficient pre-trial resources to engage in discussions. Such change would also significantly increase the initial workload of both counsel, because it takes time to read case briefs and reach detailed understandings of whether there is a reasonable prospect of resolution. As ProsecutorM maintained, 'this would take longer than it does to simply read case briefs, understand basically what the case is about and put in the relevant forms for each hearing'. However, shifting the focus of counsel towards earlier case preparation, as opposed to immediately prior to the trial, would in itself have financial, emotional and resource benefits, because regardless of whether a case resolves, identifying the issues in dispute is likely to reduce the length of any subsequent criminal proceedings, including the trial. The emotional costs that can result from a less adversarial-focused justice system are difficult to measure. However, the potential financial savings gained from shifting the adversarial focus of parties towards early resolution ideals are quite significant. The 2008 review of Victoria Legal Aid estimated that the cost of a late guilty plea was approximately $389 per hour in the Magistrates' Court, $507 per hour in the County Court and $645 per hour in the

Supreme Court (PricewaterhouseCoopers, 2008, p. 24). Based on these figures, if one five-hour day of a County Court trial is lost due to a late guilty plea, the cost can reach $2,535. Therefore, in addition to increasing court efficiency and offering emotional benefits to victims and defendants, substantial financial savings can be generated from transforming the adversarial focus of parties, towards earlier consideration of resolutions, through the external formalisation of plea bargaining in legal policy.

4.7 Conclusion

Victoria's adversarial legal culture combines with plea bargaining's informality to hinder counsel approaches to and consideration of early plea bargains. As this chapter has demonstrated, the internal OPP policies are not sufficient in their influence on prosecutorial perceptions of plea bargaining or in shaping consistent prosecutorial conduct. They also provide minimal transparency to legal parties outside the OPP of the Crown's early resolution intentions, which in turn impacts on the level of consideration that defence counsel give to early plea bargains and promotes the late appointment of senior, authoritative counsel to cases. In order to increase plea bargaining's legitimacy within the context of Victoria's legal culture, discussions must be acknowledged in statute, in a similar vein to the pre-trial disclosure requirements (*Criminal Procedure Act 2009* (Vic) s.182-s.183, s.185, s.188-s.190, s.200, s.358). Instituting legislative recognition of discussions and authority for prosecutorial initiation of and engagement with plea bargaining, will assist in altering current adversarial perceptions, which hinder some legal parties from actively engaging in discussions. To effectively achieve this shift in adversarial perspectives, the Legal Aid funding structure would also require alteration. Amending the funding structure to reflect the early resolution ideals inherent to plea bargaining would give counsel greater access to sufficient resources to adequately prepare and participate in discussions and pre-trial hearings. In combination with enhanced legitimisation of plea bargaining, such alterations could offer extensive resource, financial and emotional benefits to all parties.

The potential benefits of shifting the timing of counsel's case preparation from the trial to the pre-trial stage will also allow these hearings to more readily uphold both their early resolution, and contested trial, ideals. The next chapter examines this possibility by exploring Victoria's pre-trial process and the negative impact of plea bargaining's informality on its ability to operate efficiently.

CHAPTER FIVE
PRE-TRIAL PROCEEDINGS: ANOTHER STEP IN THE MARCH TOWARDS THE CONTEST

The pre-trial process is not effective. It simply does not focus the parties' attentions on the prospects of resolution at an early time. Most of the time it just focuses us on the contest, when instead attention should be given to the possibility of a plea. In many ways that should be the first step in the pre-trial process. What are the strengths of this case? Can it resolve by [a] plea of guilty? If not, then look at the contest, what witnesses are required to be called and so forth. That should be the focus that is taken. There should be meaningful discussions between the parties and a real attempt when reading the material to identify, once again, whether the matter can resolve. It is more an attitudinal issue, an issue of focus. That is, the parties and the bench and the process itself focusing attention on the possibilities of matters resolving and secondly, on communication between the parties…The pre-trial process needs to change in order to achieve this (ProsecutorM).

The primary purpose of Victorian pre-trial proceedings is to identify the key case issues, those in dispute and those that could possibly resolve. The reason for this is twofold: it encourages all relevant issues to be identified at an early stage to prepare counsel for the contested trial, and it allows for the resolution of any non-disputed issues. The early identification of issues can adhere to both contested trial and early resolution ideals. It adheres to contested trial ideals by reducing the number of issues that will be contested at trial, thus reducing the trial's length and minimising the likelihood of adjournments or late guilty pleas. It also adheres to early resolution ideals by encouraging early communication between parties and possible case resolution. In theory then, if both parties are sufficiently prepared for the hearings, they should offer an effective mechanism to increase court efficiency and facilitate plea bargaining. In practice however, due to the inherent conflict between early resolution ideals and adversarial traditions, and an absence of continuity of counsel or pre-trial preparation, the pre-trial process is limited in its capacity to facilitate plea bargaining or adhere to either contested trial or early resolution ideals. The inability of proceedings to achieve either of these aims has fuelled doubts over the validity of maintaining the extensive number of pre-trial hearings, and resulted in reforms aimed at regaining the perceived effectiveness of proceedings in the late 1990s and early 2000s (Coghlan, 2000; Payne, 2007; Weinberg, 2000). Somewhat ironically, however, although such reforms are aimed at increasing the pace of individual hearings, my findings suggest that they have instead prioritised adversarial traditions by focusing parties' attentions on the trial, thus further restricting the early resolution focus and efficiency levels of proceedings.

This chapter provides an overview of how Victorian pre-trial proceedings function, and analyses some major concerns arising from their operation. This discussion is framed by the recurring themes that emerged in the previous chapters within the context of pre-trial

proceedings. These include: (1) the Legal Aid funding structure; (2) the influence of adversarial traditions in shaping the conduct of counsel and the judiciary; (3) moves towards greater court efficiency; and (4) the potentially negative impacts of non-transparent justice. This chapter further examines how plea bargaining's informality and the absence of statutory recognition of the indictable pre-trial hearings that facilitate early resolution, fuel inaction in counsel preparation for pre-trial hearings and legitimise an adversarial approach towards proceedings, which consequently prioritises the trial. In addressing these issues, this chapter argues that the same justifications for formalising plea bargaining that relate to transparency and consistency can be extended to cover broader formalisation of pre-trial proceedings and counsel preparation. The chapter commences with an overview of the pre-trial proceedings in the summary and indictable streams.

5.1 Victoria's Pre-Trial Process

Fig 5-1: Magistrates' Court Pre-Trial Stream

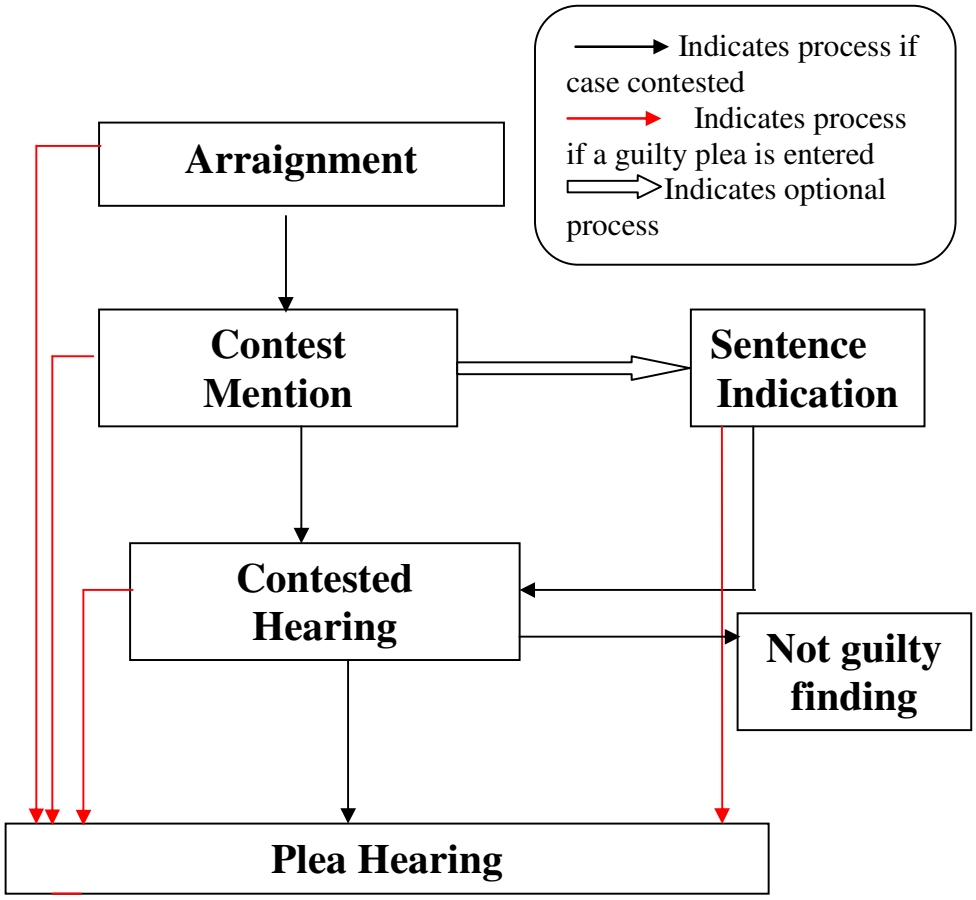


Fig 5-2: County Court Pre-Trial Stream

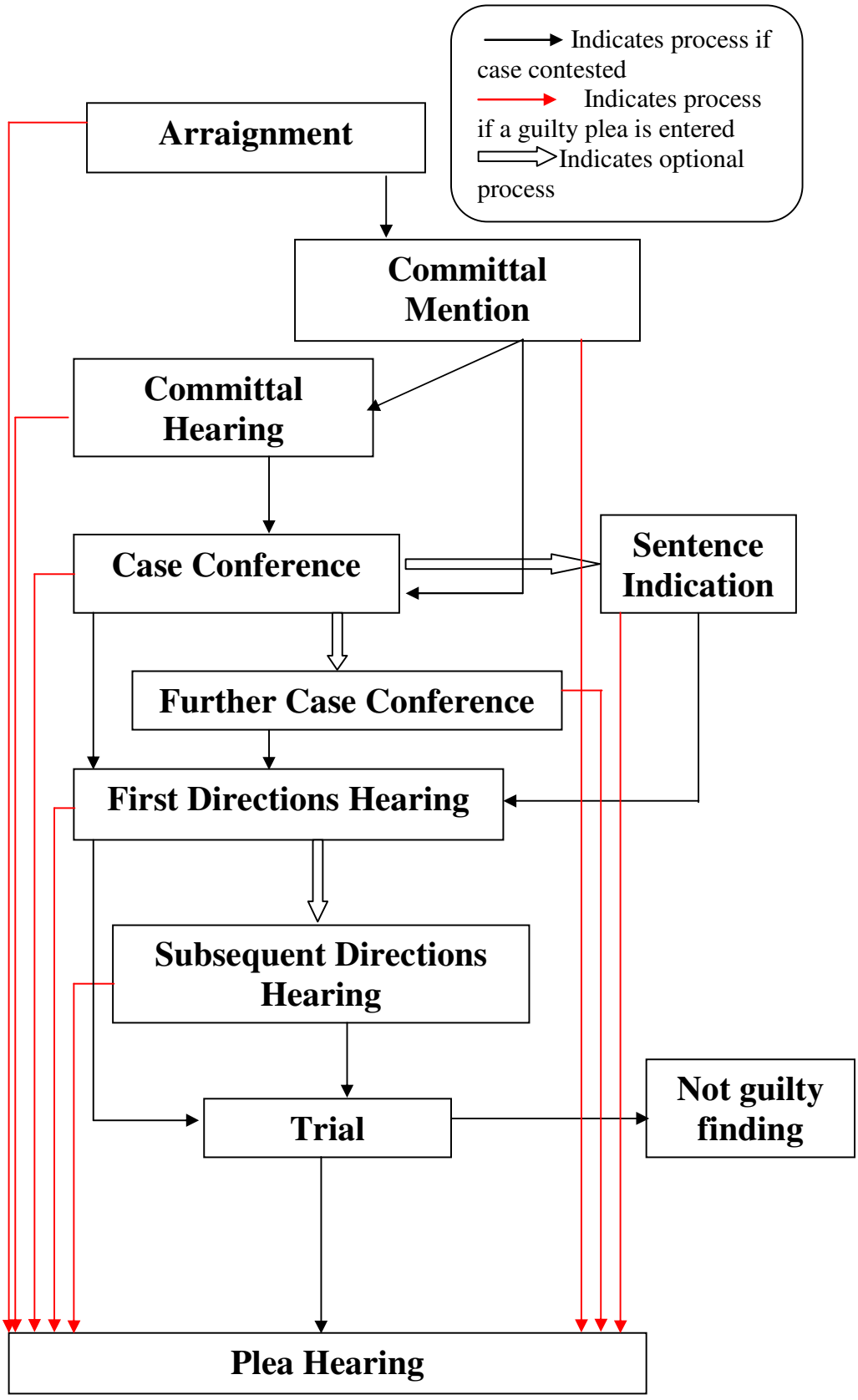
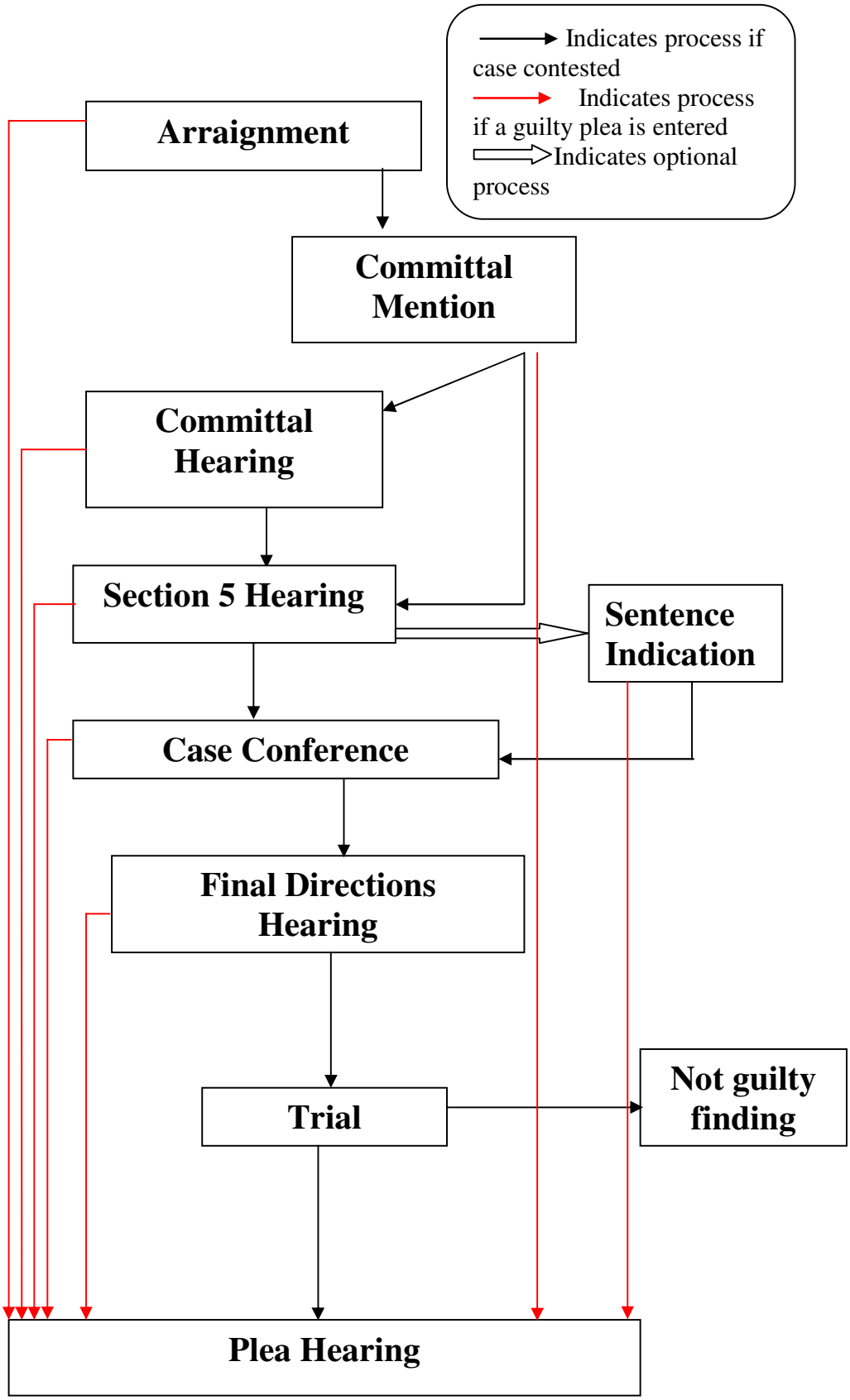


Fig 5-3: Supreme Court Pre-Trial Stream



Criminal proceedings embody multiple stages through which matters can resolve in one of four ways: (1) the Crown withdraws all charges; (2) the defendant pleads guilty prior to the conclusion of a trial; (3) the defendant is acquitted; or (4) the defendant is found guilty (Payne, 2007, p. 4).[53] Depending on the type of offence, cases proceed in the Magistrates', County or Supreme Courts. The Magistrates' Court hears all summary offences and indictable offences tried summarily.[54] The police prosecutor represents the state in these proceedings. All indictable offences commence in the Magistrates' Court, before proceeding into either the County or Supreme Court streams. Crown solicitors and prosecutors represent the state in these hearings.

Pre-trial proceedings commence when a defendant is arraigned in the Magistrates' Court. At the arraignment hearing, the Magistrate lists the offence(s) charged against the defendant, and the defendant then enters a plea and can either be remanded in custody or released on bail. If the defendant pleads guilty to a summary offence or an indictable offence tried summarily the matter may be adjourned for sentencing, or if the summary of facts and relevant evidentiary material is available, the Magistrate may sentence the defendant immediately. If the defendant pleads guilty to an indictable offence at the arraignment, the matter is adjourned to the relevant superior court for a plea hearing, at which a sentence is determined.

At a summary arraignment, if the defendant enters a not guilty or reserved plea, which means they do not indicate how they intend to plead, a Contest Mention is scheduled in the Magistrates' Court. If a not guilty or reserved plea is entered to an indictable charge, a Committal Mention is scheduled in the Magistrates' Court.

5.1.1 Summary Offences & Indictable Offences tried Summarily (Figure 5-1)

The first hearing following a summary arraignment is the Contest Mention. The Contest Mention is regulated by the *Criminal Procedure Act 2009* (Vic) div 3-div 4. It involves a Magistrate, defence counsel and police prosecutor meeting in a relatively informal manner in court to identify any matters or issues that could resolve, without having to proceed to a contested hearing.[55] In the Contest Mention hearing, the police prosecutor is expected to have the offence details prepared, including a case summary, evidence brief, information about the victim and the impact of the offence upon them, and any evidence of the

[53] This chapter explores the hearings that occur prior to trial. Criminal proceedings extend beyond the trial to plea hearings, appeal processes, imprisonment and parole. This thesis does not address the processes beyond the plea hearing in any detail, other than to provide an account of why defendants might be reluctant to plead guilty, for example, because of the *Sex Offenders' Registry* (*Sex Offenders Registration Act 2004* (Vic)). The plea hearing process is outlined in Chapter Six.

[54] A list of the indictable offences triable summarily is included in sch.2 s.28 of the *Criminal Procedure Act 2009* (Vic).

[55] In the Magistrates' Court, the trial is referred to as a contested hearing.

defendant's criminal history. The defence counsel is required to provide all relevant mitigating material, such as rehabilitative or work reports. The aims of this hearing are to refine the key case issues and, where relevant, to determine an estimate of the likely length of a contested hearing. During the hearing, at the defendant's request, the Magistrate can provide a sentence indication of whether the defendant is likely to receive a custodial sentence to commence immediately or a sentence of a specified type (for example, a community-based order) if they were to plead guilty. Once the indication has been given, either the defendant can plead guilty or, if they decide to plead not guilty, the case is assigned to a new Magistrate, unless all parties agree otherwise (*Criminal Procedure Act 2009* (Vic) s.61 2(a)-s.61 2(b)).

If the matter resolves by guilty plea at the Contest Mention, an immediate plea hearing may be conducted, or adjourned if presentencing reports are required. If the matter does not resolve by guilty plea, the case proceeds in the Magistrates' Court to a contested hearing.

The complex nature and often the seriousness of indictable offences means indictable pre-trial proceedings in both the County and Supreme Courts are significantly more extensive than those required for summary matters. The next sections provide an overview of these proceedings.

5.1.2 Indictable Offences (Figures 5-2 & 5-3)

Many of the indictable pre-trial hearings were originally introduced by the *Crimes (Criminal Trials) Act 1993* (Vic). However, due to a number of limitations involving stringent prosecutorial pre-trial disclosure and the consequent resource pressures arising from these requirements, the legislation was revised and re-introduced with amendments in 1999 as the *Crimes (Criminal Trial) Act 1999* (Vic) (Dawkins, 2001; Pedley, 1998). The *Crimes (Criminal Trials) Act 1999* (Vic) outlines instructions for the judiciary and both counsel in regards to indictable pre-trial hearings, contested trials and issues such as cost liabilities. In addition to the *Crimes (Criminal Trials) Act 1999* (Vic), matters relating to indictable pre-trial hearings were previously listed in the *Crimes Act 1958* (Vic) and the *Magistrates' Court Act 1989* (Vic). In order to consolidate the pre-trial information contained within these pieces of legislation, the *Criminal Procedure Act 2009* (Vic) was enacted in March 2009 to provide all relevant information on pre-trial and trial proceedings. The *Crimes (Criminal Trials) Act 1999* (Vic) was therefore repealed, and the *Criminal Procedure Act 2009* (Vic) now governs pre-trial proceedings in combination with the relevant County and Supreme Court *Practice Notes* (*Practice Note 1 of 1999* (Vic); *Practice Note 4 of 2004* (Vic); *Practice Note 5 of 2006* (Vic)). Together, the statute and *Practice Notes* comprise the *Crimes Listing Management System*, which incorporates all County and Supreme Court pre-trial hearings.

5.1.3 Step One: Committal Mention

Following the arraignment, the first pre-trial hearing for all indictable offences, regardless of whether they will proceed to the County or Supreme Court, is the Committal Mention. The Committal Mention is regulated by s.95-s.126 of the *Criminal Procedure Act 2009* (Vic). For non-sexual offences, Committal Mentions must generally occur within six months of the arraignment, while for sexual offences they must occur within three months (*Criminal Procedure Act 2009* (Vic) s.126 (1)(a)(b)-s.126 (2)). Forty-two days prior to the Committal Mention, the Crown provides a hand-up brief to the defence counsel and the court, outlining its case and version of the facts (*Criminal Procedure Act 2009* (Vic) s.107-s.108). The Crown also completes a *Form 7A*, which discloses all admissible evidence that will be used to prove the defendant's guilt, and any orders that may be made against the defendant, such as an ancillary or confiscation order.[56] The defence counsel must respond to these documents no later than seven days before the Committal Mention by providing the Crown and the court with a document identifying any issues of dispute with the Crown's version of the case and/or case facts, and the basis for that disagreement. Their response must also include a *Case Directions Notice*, detailing any application for leave to cross-examine witnesses at the Committal Hearing (*Criminal Procedure Act 2009* (Vic) s.118). If the defence seeks to cross-examine witnesses, in addition to completing the *Case Directions Notice* they must orally justify their reasons to the Magistrate during the Committal Mention. The Magistrate then determines whether cross-examination will be permitted (*Criminal Procedure Act 2009* (Vic) s.123-s.124).

The Committal Mention provides a forum for counsel to identify the key case issues and to resolve any non-disputed issues. This is achieved by the Magistrate questioning both counsel on whether any meaningful discussions have commenced and whether any plea bargains proposed by the defence have been considered by a Crown prosecutor (ProsecutorH). If a matter resolves by guilty plea, it is adjourned to the relevant superior court for a plea hearing. If the case does not resolve, it proceeds in the Magistrates' Court to the Committal Hearing (*Criminal Procedure Act 2009* (Vic) s.126).

5.1.4 Step Two: Committal Hearing

Committal Hearings were enacted 'to ensure that an accused [would] not be brought to trial unless a prima facie case is shown or there is sufficient evidence to warrant his or her being put on trial' (AJAC, 1994, p. 414). The idea behind the Committal Hearing is that an intense examination of the Crown's case will filter out matters with insufficient evidence, thereby avoiding any further waste of resources. This process is also seen as informing a

[56] A list of the orders that can be made against the defendant is detailed in the *Criminal Procedure Act 2009* (Vic) div 3.

defendant's pleading decision, as they can gain a better understanding of the strength of the case against them (Victorian Attorney General's Department, 2004, p. 29). The Committal is regulated by the *Criminal Procedure Act 2009* (Vic) s.128-s.144. An oral Committal involves a Crown prosecutor and solicitor, prosecutorial witnesses, the victim, defence counsel and the defendant in a process akin to a mini-trial. The Crown commences by presenting its evidence, which includes witness testimonies, the accuracy of which can be cross-examined by the defence if approval was received at the Committal Mention. If cross-examination occurs, the defence is subject to stringent limitations on the types of questions that can be asked (*Criminal Procedure Act 2009* (Vic) s.132). In cases involving sexual offences, the Magistrate must close the court to all parties other than the defendant, both counsel, the victim and a supporter(s), the informant, and any other relevant court authority, while the victim provides testimony (*Criminal Procedure Act 2009* (Vic) s.133). At the conclusion of the hearing, the Magistrate must determine whether the Crown has presented sufficient evidence to support a conviction at trial. If desired, a defence can be offered; however, no obligations are imposed on the defence to contest their guilt. Instead, the burden is on the Crown to prove there is sufficient evidence to support a conviction in the relevant superior court. If at the hearing's conclusion, the Magistrate does not consider there is sufficient evidence to support a conviction, the case is dismissed (*Criminal Procedure Act 2009* (Vic) s.141). However, under s.156(a) of the *Criminal Procedure Act 2009* (Vic) the Director of Public Prosecutions (DPP) retains the power to override this decision and can proceed with the case by giving notice of trial. If this occurs, the case proceeds to the superior court.[57] Alternatively, if at the hearing's conclusion the Magistrate considers that a conviction could be supported, they must commit the defendant to trial and the defendant is required to enter a plea (*Criminal Procedure Act 2009* (Vic) s.144 (1)(a)).[58]

One of the most common ways in which the Committal Hearing is run in Victoria is referred to as 'proceeding on the papers' (ProsecutorD), whereby no oral evidence, arguments or testimony are given.[59] Instead, the Crown submits written evidence and the defence counsel provides a written response, and the decision as to whether to commit the defendant to trial is then determined based on this written advocacy (*Criminal Procedure Act 2009* (Vic) s.139-s.143). A full hand-up brief can also be used as an alternative to an oral hearing (ProsecutorN).[60] This approach is used if the defendant waives their right to the hearing, or indicates an intention to plead guilty (*Criminal Procedure Act 2009* (Vic) s.141-s.143). In this instance, the Magistrate can commit the defendant to trial, or discharge

[57] An example of this occurred in *R v Debs* [2007] VSC 220. The Magistrate determined that there was not sufficient evidence for the case to proceed. The Victorian DPP gave notice of trial and the case proceeded to the Supreme Court. The defendant was ultimately found guilty.

[58] Under s.156(b) of the *Criminal Procedure Act 2009* (Vic), the DPP also retains the power to override this decision and can elect to discontinue with any prosecution.

[59] No records are kept detailing the number of Committal Hearings that 'proceed on the papers'; however, the observation and interview data indicate that this is a common occurrence, particularly in matters involving Legal Aid counsel (Defence CounselB; ProsecutorD; ProsecutorK).

[60] The hand-up brief is also referred to as a straight hand-up brief.

them. Alternatively, if an intention to plead guilty is indicated, the Magistrate adjourns the matter to the superior court for a plea hearing.[61]

If the case resolves by guilty plea at the Committal Hearing's conclusion, the matter is adjourned to a plea hearing in the relevant superior court. If the case does not resolve, it is transferred to the County or Supreme Court pre-trial streams.

5.2 County Court Pre-Trial Stream

5.2.1 Step One: Case Conference

In the County Court, a Case Conference generally occurs ten weeks after the Committal Hearing. A Case Conference is used for all cases except those involving sexual offences, which proceed directly from the Committal to the First Directions Hearing. The Case Conference, in a similar vein to other initiatives evolving from the *Crimes (Criminal Trials) Act 1999* (Vic), was introduced in response to increasing delays within Victorian County Courts, where at the time, over 40% of defendants entered late guilty pleas, and another 40% requested at least one trial adjournment (Weinberg, 2000, p. 5). The Case Conference, however, was not introduced by legislation. Instead, it was informally established by the Chief Judge of the County Court in *Practice Note 1 of 1999* (Vic) s.6. The Case Conference is therefore a relatively informal hearing run outside official court hours, usually in the early morning (ProsecutorF).[62]

Case Conference judges are referred to as Listing Judges, and are restricted from presiding over the trials or plea hearings of any matters they manage as Case Conferences. During a conference, the Listing Judge facilitates discussions between counsel to provide judicial assistance in determining the key case issues (Coghlan, 2000, p. 5; Weinberg, 2000, p. 5). This early resolution focus means that Crown prosecutors are asked to attend conferences to ensure that the authority to endorse any agreements is available. However, often Crown solicitors attend on their behalf, on the basis that they can obtain binding authority from a prosecutor to commit to a plea bargain with minimal delay (*Practice Note 1 of 1999* (Vic) s.6.5.8).

Fourteen days before the Case Conference, the Crown must file a *Crown Summary for the Case Conference* with both the court and defence counsel (*Practice Note 1 of 1999* (Vic) s.6.4.2). This document details the crime, the charges and the evidence that will be used to establish guilt. The defence counsel must then provide a *Defence Response* no later than seven days before the conference (*Practice Note 1 of 1999* (Vic) s.6.4.3). This response outlines any questions on the reliability of the Crown's evidence, and, where

[61] No records are kept detailing the number of Committal Hearings at which hand-up briefs are used; however, the observation and interview data indicate that this is a common occurrence, particularly in matters involving Legal Aid counsel (Defence CounselB; ProsecutorD; ProsecutorK).
[62] The official County Court hours are 10am until 4pm, Monday to Friday.

relevant, any arguments as to why charges should be dismissed or any plea bargains they are prepared to discuss. Due to the potential for implied guilt to be inferred from the information detailed in the *Defence Response*, it remains without prejudice and cannot be used as evidence in subsequent proceedings (*Practice Note 1 of 1999* (Vic) s.6.4.4-s.6.4.5).

Compared to other pre-trial hearings, the Case Conference entails an inherent level of flexibility. Listing Judges often remain unrobed, at least initially, and can leave the bench to sit with the parties to facilitate off-the-record discussions (Weinberg, 2000, p. 5). During such discussions, the Crown and defence counsel must be prepared to discuss the case in detail, as the Listing judge may:

> draw out salient points, ensure that such points are fully explored, direct the discussion to important issues, keep matters on topic, and generally speaking, do all things necessary to fully explore the case at hand with a view to providing impartial assistance and guidance to the parties in discussions and thus helping them to reach resolution in their discussions and reconciling their differences (*Practice Note 1 of 1999* (Vic), s.6.5.6).

Any discussions that occur during the Case Conference are not binding on either party. However, if an agreement is reached, the judge convenes the hearing formally for the defendant to plead guilty (Coghlan, 2000, p. 5). If the parties consider the matter to be capable of resolution through additional discussions, a date for a Further Case Conference is scheduled. The Further Case Conference follows the same procedures as the initial Case Conference, and is only used in matters where there is a strong possibility of case resolution. Cases that resolve at either the Case Conference or Further Case Conference are adjourned for a plea hearing. Cases that do not resolve proceed to a Directions Hearing.

5.2.2 Step Two: Directions Hearings

One or more Directions Hearings can be conducted prior to the trial (*Criminal Procedure Act 2009* (Vic) s.179). The primary focus of these hearings is to ensure that all parties are prepared for trial. S.5 of the *Crimes (Criminal Trials) Act 1999* (Vic) initially established Directions Hearings for non-sexual offences; however, s.180 of the *Criminal Procedure Act 2009* (Vic) requires that Directions Hearings be used in all criminal matters that do not resolve at the Case Conference, or for cases involving sexual offences, those that do not resolve at the Committal.

The Directions Hearing generally occurs four weeks before the trial, outside regular court hours. The Crown prosecutor, defendant, defence counsel and a Listing Judge (preferably the judge who conducted the Case Conference) attend. At the hearing, the defendant is arraigned, which entails each offence being announced, and the defendant indicating how they plead. If a guilty plea is entered, the matter is adjourned for a plea hearing. If a not guilty plea is entered, the judge asks both parties to provide an estimate of the trial length, advise on the number and availability of witnesses and put forward any

requirements, such as interpreters (*Criminal Procedure Act 2009* (Vic) s.181(1), s.181(2)(a)-s.181(2)(k)). Defendants must also advise the judge on their legal representation, including whether representation is organised for the trial and if applicable, whether they have access to Legal Aid funding (*Criminal Procedure Act 2009* (Vic) s.181(2)(a)-s.181(2)(k)). The hearing also offers both parties the opportunity to amend any documents or evidence previously presented to the court. If the matter resolves by guilty plea at the conclusion of the hearing, the case is adjourned to a plea hearing. If it does not resolve, the case proceeds to trial, or if the judge believes that more issues could be resolved prior to trial, a Subsequent Directions Hearing is scheduled.

A Subsequent Directions Hearing is also attended by the Crown prosecutor, defence counsel, the defendant, and preferably the Listing Judge who conducted the First Directions Hearing. This hearing aims to clarify and resolve any questions of law or procedure, and finalise any issues prior to trial that were not previously resolved. If the case resolves by guilty plea at the Subsequent Directions Hearing, the matter is adjourned for a plea hearing. If it does not resolve, the matter proceeds to trial (*Criminal Procedure Act 2009* (Vic) s.181).

5.3 Supreme Court Pre-Trial Stream

5.3.1 Step One: Section 5 Hearing

If an indictable offence proceeds in the Supreme Court, a Section 5 Hearing will take place generally within fourteen days of the Committal. Like the County Court Case Conference, Section 5 Hearings are not sanctioned in statute, but they were introduced on 1 January 2007 in *Practice Note 5 of 2006* (Vic). Section 5 Hearings are particularly significant in Victoria, because for the first time in the Supreme Court's history, counsel are required to focus their attention on possible case resolutions within a pre-trial hearing. The purpose of the Section 5 Hearing is to identify and resolve issues that may cause trial adjournments, and to encourage early guilty pleas (Victorian OPP Annual Report, 2007, p. 39). Thus, during the hearing the Crown prosecutor and defence counsel must be prepared to engage in discussions on 20 key areas, ranging from the anticipated issues and length of the trial to the availability of legal representation. Most significantly, and unlike any previous type of Supreme Court pre-trial hearing, the judge is expected to adopt a managerial role and assist parties to identify any non-disputed issues or any issues that may prevent an expeditious trial. The judge also takes an active and unique role by enquiring about the possibility of plea bargaining and asking 'whether the prosecution and the accused intend to enter into negotiations in relation to the plea of the accused' (*Practice Note 5 of 2006* (Vic) s.2). The judge can also enquire about the likelihood of the defendant pleading guilty (*Practice Note 5 of 2006* (Vic) s.1).

If the case resolves by guilty plea, the matter is adjourned for a plea hearing. If the case does not resolve, dates for the Case Conference and Final Directions Hearing are scheduled.

5.3.2 Steps Two & Three: Case Conferences & Directions Hearings

Unlike Case Conferences in the County Court, Supreme Court Case Conferences do not have any resolution focus. They were introduced in part 4 of the *Supreme Court (Criminal Procedure) Rules 1998* (Vic) and are held one week prior to the Final Directions Hearing, with the primary purposes being that parties must advise the court on witness availability and estimates of trial length, and that the court obtains a tentative trial date (*Supreme Court (Criminal Procedure) Rules 1998* (Vic), part 4). These matters are confirmed at the Final Directions Hearing.

The Final Directions Hearing was introduced through *Practice Note 1 of 2004* (Vic) and, like the Case Conference, does not have any resolution focus. The hearing takes place within seven to ten days of the trial and is used to finalise trial arrangements in order to limit the likelihood of an adjournment. The court may ask both parties during the hearing to clarify a number of issues involving evidence and any issues requiring approval prior to being presented to a jury, as well as estimated trial lengths (*Practice Note 1 of 2004* (Vic) s.1-s.10). Where possible, the Final Directions Hearing is held before the same judge who will oversee the trial. Following the conclusion of the hearing, the matter proceeds to trial.

5.3.3 Sentence Indications

In Victoria, case law previously prohibited indictable sentence indications (*R v Bruce* (Unreported, High Court, 21 May 1976); *R v Marshall* [1981] VR 725; *R v Tait* [1979] 24 ALR, at 473; *R v Turner* [1970] 2 QB 321). However, in July 2008 a formal system of indictable sentence indications was implemented in s.23A of the *Crimes (Criminal Trials) Act 1999* (Vic), based on the recommendations of the Victorian Sentencing Advisory Council (VSAC). This system is now governed by s.208–s.209 of the *Criminal Procedure Act 2009* (Vic), which allows judges in both the County and Supreme Courts to inform a defendant of the likely sentence order (custodial or non-custodial) they would receive if they were to plead guilty. An indication can be given anytime after the filing of the presentment, at the defendant's request (s.208 (1)(a)). In the County Court, this means the request can be made any time after the Case Conference, and in the Supreme Court, any time after the Section 5 Hearing. The request for an indication can generally only be made once (s.208 (1)(b)). A detailed critical analysis of this recent amendment to Victoria's pre-trial process is presented in Chapter Six.

5.4 Victoria's Pre-Trial Process: Concerns

5.4.1 A Loss of Effectiveness

As revealed in the previous sections, Victoria's pre-trial process is extensive, with many hearings run in an attempt to facilitate early resolutions and expeditious trials. When many of the hearings were initially introduced, they were perceived to be very effective in advancing efficiency, by offering a formal opportunity for early communication between parties (Coghlan, 2000; Sulan, 2000; Weinberg, 2000). In particular, the County Court Case Conference was identified as productively facilitating early resolutions, with estimates that between 40 and 50% of conferences held between 1999 and 2000 resolved by guilty plea (Weinberg, 2000, p. 7). Thirteen participants also identified the County Court Case Conference as being particularly effective in case resolution in the early 2000s. One of the main reasons for this was attributed to the structure of criminal proceedings before conferences were introduced, whereby three to six months following a Committal Hearing, cases would proceed to an arraignment at which a trial date was scheduled, usually for within a twelve-month period. As a consequence, there were no official opportunities before the trial for parties to meet to identify the key case issues or discuss resolution options. As ProsecutorM identified, 'in the old days, the barristers were still trying to get on top of the material at the trial and the process seemed to last longer, because there was no resolution of any issues…because there was no real opportunity there'. Eleven participants also attributed the Case Conference's successful resolution rates to the nature of Listing Judges (eleven out of thirteen participants). As ProsecutorC claimed, 'because the judges only handled between two and three matters each, they were able to develop an in-depth knowledge of the cases…so they could really manage the case during the hearing'. Policy AdvisorB also maintained that:

> There were some brilliant judges doing Case Conferences in the County Court in the late 1990s and they sorted out so many of the late pleading cases. They did massive amounts of reading and put a lot more effort into their preparation and so cases managed to resolve.

Eight of the thirteen participants identified one specific judge who was 'renowned for having a very proactive approach in conducting hearings' (Policy AdvisorB). ProsecutorC maintained that 'one judge in particular was quite informal. He would come down from the bench and sit at the bar table to discuss the case with counsel. He was very proactive in trying to isolate the issues and if a resolution was possible, he got it'. Defence CounselC also claimed that this judge would 'unrobe and sit at the bar table with counsel to help identify the strengths and weaknesses of the case from both perspectives, and he would suggest that the Crown get further instructions or that we speak to our clients to resolve matters'. ProsecutorN similarly stated that:

> You walked away from the hearing with this judge, even if it didn't resolve, feeling as though at least at that stage everything had been canvassed in order to obtain a plea or to resolve the matter, but it was unsuccessful. You walked away knowing all issues had been canvassed and it was not going to resolve, so you knew you needed to prepare [for] a trial.

The 2007 Victorian Office of Public Prosecutions's (OPP) Annual Report (p. 23) indicates that the pre-trial process remains a successful mechanism for early resolutions, citing an increase of almost 10% in the number of guilty pleas entered before trial from 2005 (55.9%) to 2007 (64.1%). The report predominantly attributes this increase to 'a stronger focus on resolving cases before trial [particularly] in pre-trial processes in the County Court' (Victorian OPP Annual Report, 2007, p. 23). Eight out of 29 participants supported these claims; however, these participants attributed successful case resolutions to early communication between counsel, as opposed to viewing the hearings or active case management of the judge as the main contributing factor. As ProsecutorA claimed:

> Resolutions can happen, but it really depends on how proactive the judge is in encouraging pleas. At the moment, all the intentions are there from the defence solicitors and us and if we have discussed issues but we want to try to resolve it, we will definitely let the judge know to encourage more discussions. But sometimes the encouragement from the judge just isn't there. If we don't say anything, more often than not they won't either, and so in that case, the process doesn't achieve much.

In stark contrast to the intentions of many pre-trial hearings, the majority of participants disputed the claims in the OPP's Annual Report (2007, p. 23), arguing that pre-trial hearings do not provide an environment that facilitates early resolution (21 out of 29 participants). Instead, participant responses pointed towards increasing workloads, inadequate Legal Aid funding and an absence of formal controls informing consistent legal conduct as contributing to the hearings losing the efficiency levels they once had. Reflecting this view, JudiciaryE labelled the pre-trial process as 'severely limited in its effectiveness to attract early guilty pleas'.

The next section explores one of the main reasons for this reduction in effectiveness that emerged from the data, involving the conflicts inherent to hearings that attempt to uphold early resolution and contested trial ideals simultaneously.

5.4.2 Early Resolution versus Contested Trial Ideals

A key limitation preventing pre-trial hearings from achieving either their desired resolution ideals or the efficiency rates reflective of the late 1990s and early 2000s is that underlying these processes are contradictory aims and roles. Pre-trial hearings 'act as a framework within which to minimise the issues in contention and to minimise the evidence to be relied on at trial' (Corns, 1997, p. 111). The previous legislation governing the pre-trial process outlined the primary aims of pre-trial hearings as being 'to improve trial procedures by

empowering the judiciary to effectively manage cases, enable the issues in dispute to be defined prior to the trial commencing, and also to facilitate productive discussions between parties' (*Crimes (Criminal Trials) Act 1999* (Vic) s.1). Similarly, the purpose of the *Case List Management System*, which incorporates all indictable pre-trial hearings, is cited in *Practice Note 1 of 1999* (Vic) s.1.5 as being to provide for just, efficient case resolution; to minimise the impact and inconvenience of criminal proceedings on parties; to reduce pending case lists; to provide trial date certainty; and to assist in reducing the complexity and duration of trials. Thus, on the one hand Victoria's pre-trial process is designed to focus on the trial by attempting to reduce trial lengths and address issues like witness availability and legal representation, and on the other hand it is designed to attract early pleas and resolve non-disputed issues and cases. The pre-trial process therefore aims to uphold early resolution ideals, while at the same time seeking to uphold adversarial traditions by focusing the attention of the parties on the trial.

A clear example of this contradiction is the requirement that both counsel submit forms that solely focus on trial issues as part of their preparation for hearings that embody early resolution ideals, such as the Committal Mention and County Court Case Conference. The focus of parties in these hearings has consequently been redirected from early resolution options towards the contested trial. As ProsecutorC claimed:

> The focus has changed. When we started to get involved in the Committal Mentions, it was all about talking. The defence didn't have to fill out any forms about who they wanted to cross-examine, you could just focus on the issues and things seemed to settle more readily. Now the focus has shifted. People don't actively turn their mind at the first instance to settling. It's about let's get my form in on time and once that happens it just seems to automatically go to a Committal and no-one is really talking until much later in the process.

Defence CounselB also argued that:

> Sometimes I can't see the point of things going to a trial, whereas other barristers who are more adversarial will take something to a fight just because they think they should, even if they expect to lose…A lot of people just do it by steps and they don't think how it can be resolved and they are not prepared to give up on tiny little things that in the overall scheme don't make any difference. A lot of this comes out of the fact that we have changed from looking at resolving [issues] to getting this form in for this part of the trial.

Somewhat ironically given the perceived impact of this procedure, JudiciaryE claimed that the requirement on counsel to complete trial-focused forms for the Committal Mention was originally designed to increase communication between counsel and to assist them in the identification of non-disputed issues. She maintained that:

> One of the things we talked about extensively when pre-trial reform was introduced was that the process had been focused on a march towards the contest. Everything had been designed as what is the next step in this process for me to get to a contested hearing? But the reform didn't change that. Now it is still what is the next step to get to a contested

> hearing? Oh, put in my [Form] 8A. Which witnesses don't I agree with? Let's talk about all of them. What are the areas in dispute? Rather than, OK there must be some commonality here, what is it? So it has just been absolutely backwards and that is the problem.

Importantly, a key consequence of this contradiction is that the extent to which individual hearings can adequately address issues involving both the trial and early resolution is limited, which inturn impacts on the hearing's perceived usefulness as it can become simply another mechanism that prolongs proceedings. This has severe resource and human cost implications for all parties, as well as impacting on the court's level of efficiency. For this reason, recommendations have been made in Western Australia (WA), New South Wales (NSW), Canada and the United Kingdom (UK) supporting the abolishment of some hearings (Bishop, 1990, p. 48; Brereton & Willis, 1990, pp. 14-15; Hayne, 2008). Similarly, reforms aimed at reducing the length of individual hearings have been proposed and/or implemented in NSW, the UK and Victoria (Bishop, 1990; Brereton & Willis, 1990; Payne, 2007; Pegasus Taskforce, 1992; VLRC, 2004, 2006; Weinberg, 2000). In Victoria, these reforms have included re-directing sexual offence cases so they proceed directly from the Committal Hearing to the County Court First Directions Hearing, thus reducing the length of the pre-trial process. Time restrictions have also been placed on the pre-trial process in sexual offence cases, with requirements that Committal Hearings proceed within three months of the arraignment, and trials commence within three months of the Committal (*Criminal Procedure Act 2009* (Vic) s.126 (1)(a); s.212).

Attempts have also been made to shorten the duration of Committal Hearings by encouraging parties to 'proceed on the papers' (ProsecutorD) or by producing a hand-up brief, such that no oral evidence is provided (Coghlan, 2000). This practice dramatically reduces the length of a traditional oral hearing; however, it can also limit active communication between counsel insofar as parties focus on providing written information addressing trial issues, as opposed to considering resolution ideals. As a consequence, despite the potential benefits of reducing the duration of the hearing, 'proceeding on the papers' has sparked criticism over the purpose of the hearings and doubts about whether they should be retained at all, particularly given the potential efficiency benefits of removing a hearing from the extensive pre-trial process (Bishop 1990; Coghlan, 2000; Mack & Roach Anleu, 1998, p. 270; Payne, 2007; Weinberg, 2000). As the Victorian DPP claimed, 'abolishing Committals would eliminate much of the delay between when an accused was charged and when the trial was heard [as] Magistrates would have a lot more capacity to push through with their [other] work' (as cited in Kissane, 2008, p. 10).[63] This view was similarly identified by Policy AdvisorE in my research, who claimed:

> The Committals are a hugely controversial thing because they are not doing much. They upset victims because it is a dress rehearsal for the trial or they are [dealt with] so fast that it

[63] 3,253 Committal Hearings were heard between 2005 and 2006; 3,260 between 2006 and 2007 and; 3,068 between 2007 and 2008 (Magistrates' Court of Victoria Annual Report, 2008, p. 22).

> doesn't benefit anyone. Everyone wants to get rid of them, [including] the DPP and the police, because they don't serve their real purpose. It is harder to see weak cases and this might be the reason we are seeing such high rates of cases committed to trial.[64]

As Policy AdvisorE's response indicates, the main reason for the critical view of Committal Hearings is that the primary aim of the hearing in testing the strength of prosecutorial evidence, has been restricted by allowing written advocacy to replace oral argument.

Amendments requiring defence counsel to justify their cross-examination of witnesses at Committal Hearings, while potentially offering benefits to victims, have also exacerbated the ineffectiveness of the hearing in upholding its primary aims (*Criminal Procedure Act 2009* (Vic) s.123-s.124). Prior to the introduction of these amendments, the defence had the right to cross-examine all prosecutorial witnesses and only limited restrictions existed on the types of questions that could be asked. Moreover, the defence were 'obliged to cross-examine…and it [was] regarded as…indispensable…[and] unfair not to challenge a witness on his or her statement if it [were] to be contradicted later' (McEwan, 1992, p. 16). As ProsecutorC argued, a consequence of the current restrictions on cross-examination is that 'the strength of the Crown's case cannot be tested at an early stage, so defendants may as well wait until the trial to make a pleading decision'. ProsecutorB similarly maintained that:

> Witnesses on paper may seem perfect, but that can all change once they get in the witness box. They may change their story or lose the plot. You might also have victims that change their mind about wanting to cooperate with a prosecution, particularly with de-facto type relationships where they are hot and cold with each other. The defence would be crazy to plead even though our evidence may appear extremely strong until they test that person and if that can't be at the Committal then it will be [done] at the trial.

The essence of ProsecutorB's and ProsecutorC's claims indicate that despite the intentions of these reforms to benefit parties by alleviating delay, they instead fuel the problems arising from the inherent contradictions of the Committal Hearing in trying to achieve efficiency and to uphold both early resolution and contested trial ideals.

These contradictions between early resolution and contested trial ideals are perhaps most noticeable in the contrast between the legislated recognition of the trial-focused hearings and the absence of statute governing the two superior court pre-trial hearings which almost exclusively focus on early resolution ideals: the County Court Case Conference and the Supreme Court Section 5 Hearings.[65] As established in the previous

[64] Between 2005 and 2006, over 82% of Committal Hearings resulted in the defendant being committed to trial (Magistrates' Court of Victoria Annual Report, 2006, p. 21). Similarly, between 2006 and 2007, almost 80% of Committals resulted in the defendant being committed to trial (Magistrates' Court of Victoria Annual Report, 2007, p. 18). The statistics for the 2007–2008 period were not published.

[65] See, for example, the primary purpose of the Supreme Court Case Conference, regulated in the *Supreme Court (Criminal Procedure) Rules 1998* (Vic) s.4.09, which is 'to facilitate an efficient trial' (s.4.09 cls.4); in contrast to the central aim of the non-legislated County Court Case Conferences which is to:

chapters, in an adversarial context the informality of an early resolution-focused process can reduce its legitimacy and the level of consideration given to the process by either counsel. As a consequence, the absence of statutory recognition of the Supreme Court Section 5 Hearing and County Court Case Conference impacts on the legal community's perceptions of these hearings and the consistency of counsels' conduct within them. As ProsecutorI identified:

> Case Conferences were introduced for a reason, but they tend to just become a formal process that people work their way through to get to trial. There just isn't really any emphasis that the point of the conference is to settle issues. Sometimes one or the other side isn't as well briefed as they should be [and] they are not in a position to actually seriously negotiate or settle. They have a Case Conference listed so they turn up and go through the motions, nothing settles so they go away and wait for the next step before the trial. Have they done the Case Conference? Yes, but it didn't really achieve much.

The absence of statutory recognition of the County Court Case Conference and the Supreme Court Section 5 Hearing also fuels adversarial perceptions that seek to promote pre-trial hearings as merely a step towards the real focus of criminal proceedings—the trial. As Reinhardt and deFina (1999) claim:

> The traditional adversarial system encourages a particular mindset or culture amongst [legal] practitioners. This mindset or culture…encourages inefficiency, sharp practice, deliberate delay and…a lack of focus on the real issue or issues to be determined [and] these practices are widely encouraged (Reinhardt & deFina, 1999, p. 48).

Reflecting this adversarial view, JudiciaryE maintained that 'Case Conferences don't do anything, because by this stage we are thinking more about the trial than resolution and this is reflected in the lower clearance rate that is emerging from these hearings'. The impact of such adversarial attitudes has been identified in UK (Baldwin & Bottomley, 1978) and Australian research, whereby the 'main barrier to early guilty pleas were [identified as] pre-trial processes which did not support early and effective plea discussions' (Mack & Roach Anleu, 1998, p. 266).

Informality also emerged as a theme in ten participants' explanations as to why the effectiveness of Case Conferences has decreased since 1999. In particular, these participants pointed to the fact that the required managerial role of the judge is jeopardised by the informality of the hearings, because it strongly contradicts the traditionally passive

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> subject the case to close and informed analysis at an early stage; to provide an opportunity for the defence to discuss with the prosecution the charges considered appropriate; to provide an opportunity for the defence to make plea offers and for the prosecution to respond to such offers; and to achieve an early focus on the direction the case is likely to take (*Practice Note 1 of 1999* (Vic) s.6.6.1-s.6.6.5).

ProsecutorR identified the similar primary purpose of the non-legislated Section 5 Hearing as being 'to flush out [guilty] pleas and issues at an appropriate time well before the trial, to get resolutions early'.

role of the judge within adversarial systems (McEwan, 1992). As adversarial theory dictates, 'not only must judges be impartial, but they are not involved with the preparation of the case or the content of the evidence' (McEwan, 1992, p. 4). In contrast however, the guidance provided to judges by internal court policy states that in the Case Conference they should 'direct the discussion to important issues and…do all things necessary…to provide assistance and guidance to parties in discussions, and thus help them to reach resolution in their discussions' (*Practice Note 1 of 1999* (Vic) s.6.5.6). Without any statutory authority to adopt this managerial role, like prosecutorial initiation of plea bargaining, some judges are unlikely to perceive this conduct as appropriate and are therefore unlikely to actively adopt this role. This consequence was evident in JudiciaryC's observations that:

> I see transcripts in every trial from Case Conferences. They do not result in a resolution of many trials because it is not our role to try and persuade people to plead guilty. It is up to them [counsel] to sort out those issues. It is also not our role to be telling the Crown or the defence to settle cases. So, for the routine cases, the conferences are a waste of time.

Similar to the limitations of the internal OPP policies in terms of their influence on perceptions or in shaping consistent approaches to plea bargaining, the internal court policy also does little to shape or control judicial conduct in these hearings. This finding thus further highlights the importance of external statutory formalisation of early resolution-focused processes, as identified in Chapter Four, if consistent and transparent conduct is desired.

In addition to the inability of the internal court policy to shape judicial conduct due to the inherent informality of the Case Conference and the overriding adversarial attitude that supports an impartial judicial role, another consequence of the informality of the County Court Case Conference and Supreme Court Section 5 Hearing as revealed from participant responses and observations, is the lack of pre-trial preparation and participation on the part of the judiciary and both counsel. Following a discussion of the term the 'bottom line', the next sections explore this impact of informality, in the context of the pre-trial process.

5.5 Pre-Trial Preparation & Case Management: Concerns

5.5.1 The 'Bottom Line'

The research data revealed that most resolutions of non-disputed issues and cases are achieved when both counsel for the first time seriously read the evidence brief and consider what their bottom lines should be. The 'bottom line' refers to the format of charges and facts that most appropriately reflect the evidence, the seriousness of the offending behaviour, the impact on the victim and community, and which upholds public and defendant interests. This term is commonly used in the legal community, but like plea

bargaining, it has negative connotations and is to some degree misleading. This is because the term creates a perception that the agreement is the most lenient possible outcome and one that most likely favours the defendant and undermines victim and public interests. It also suggests that whatever the bottom line is defined as, no deviation from it will occur. My research data, however, suggests that neither of these perceptions is correct, and that if they were plea bargaining would effectively cease to function.

The bottom line may include the withdrawal of charges, a reduction in the level of severity of charges and/or alterations to the summary of facts to reflect any charge amendments. It may also include an agreement that the Crown makes certain statements in its sentencing submission to the court—for example, that it considers a non-custodial sentence order appropriate. Importantly, the bottom line may also be the original charges laid because no alterations would allow for the criminality of the offence to be reflected. From the defence's perspective, the bottom line will usually incorporate the charges and facts which they perceive most appropriately reflect the defendant's involvement in the crimes, but which may be slightly more positive for the defendant than the original charges and facts. The Crown's bottom line will generally be the charges and facts that most appropriately reflect public interests, consider the impact of the crime on the victim and community and that will allow an appropriate sentence to be imposed. As a result, two differing bottoms lines are usually initially determined: one by the Crown, and one by the defence. Therefore, if both sides wish to resolve the matter, both, or at least one side, must alter their bottom line. As ProsecutorG claimed:

> If they [the defendant] have indicated that their client might plead guilty, you will discuss what an appropriately drafted presentment would look like. So that might mean rolling up some charges, or if there are some charges that are weak, getting rid of those. It maybe means that the matter stays in the summary stream. So basically it is trying to come to a compromise of a presentment that will appropriately cover the offending behaviour, but maybe more favourable to the accused than what was initially on the charge sheet.

During the observations, both defence and prosecutorial counsel were observed shifting from their bottom lines to allow for a compromised plea bargain that usually fell somewhere between their two original proposals. Most often, the defence were observed to alter their bottom lines, by agreeing to plead guilty to a more serious charge or a greater number of charges than were initially proposed. The Crown was also observed to deviate from its bottom line; however, this was usually a smaller shift than that of the defence. For example, in one observation, ProsecutorG did not alter the charge or facts, but agreed to state in the sentencing submission that the discount applied in exchange for the plea should be calculated on the basis of it being entered at the earliest possible opportunity. In another observation, ProsecutorJ, in consultation with the victim and Crown prosecutor (ProsecutorM), had determined a bottom line, which he proposed to Defence CounselE. Defence CounselE later responded with an offer that included withdrawing one of the five

charges on the presentment. As this did not specifically reflect the bottom line previously determined, ProsecutorJ contacted ProsecutorM and said 'this is what we discussed earlier in terms of the minimum, this is what they've offered. Can we come to an agreement or should we stick to what we say is the minimum?' Based on the circumstances surrounding the case, ProsecutorM agreed. Thus although deviating from their original position, both ProsecutorJ and ProsecutorM considered the shift to be warranted. As ProsecutorJ claimed, 'it was a good result in the end. The sentence is going to be much the same, and the criminality is reflected, so it is a good result'.

There were no observations—nor was this an issue identified by participants—of prosecutorial participants significantly deviating from their bottom lines, for example, by withdrawing all but one charge or allowing a very serious matter to be tried summarily. When discussing this with ProsecutorB, he maintained that:

> We might ring the defence and say, is there any chance of an early resolution in this matter? And they might say yes if you drop such and such a charge and you can say, that is not within the ballpark so it looks like we are going to have a contest. And we have no hesitations doing that.

This view was also supported by ProsecutorL, who said, 'we won't simply plea bargain for the sake of it'. Similarly, as ProsecutorU claimed:

> We don't give something up when it doesn't serve any purpose. I mean, plea bargaining is a bargain, in the sense that we may give something up, like removing one charge or two, but we will never settle cases for something less than what it should be. We only accept it if it serves public interest and if the prospects of getting a conviction are remote or it is likely to be the same sentence after trial anyway.

In theory, then, pre-trial hearings, particularly County Court Case Conferences and Supreme Court Section 5 Hearings, provide an ideal opportunity for counsel to determine mutually acceptable bottom lines. However, neither the interviews nor the observations indicated that this was a regular or consistent outcome of such hearings. The next two sections address this issue, in particular by asking the question: If determining a bottom line is as beneficial as participants indicated, why is it not a consistent focus of counsel pre-trial preparation?

5.5.2 Counsel & Judicial Pre-Trial Preparation

One of the main factors hindering the effectiveness of pre-trial proceedings that emerged from this research is the limited preparation undertaken by counsel and the judiciary, prior to the hearings, which severely limits the possible identification of mutually acceptable bottom lines. This problem is not limited to Victoria, and as research in the UK has established, without active and consistent case preparation by counsel, pre-trial hearings are

'largely ineffective and…become simply another date at which we [counsel] fix a date for trial' (Whittaker, Mackie, Lewis, & Ponikiewski, 1997, p. 5; see also Samuel & Clark, 2003). Seventeen out of 29 participants, three of whom were judges from the County Court, considered ineffective judicial management and participation to impact negatively on the effectiveness of pre-trial hearings. In particular, participants identified the County Court Case Conference as severely lacking efficient judicial management, especially when compared to its reign in the early 2000s. Reflecting this perspective, ProsecutorI maintained that:

> The judge who has looked at the material might say are you sure this can't be settled? But that is it. They might look towards the prosecutor as if to indicate, you are not serious this is going to proceed as this particular count or they look towards the defence as if to say, you know your client hasn't got a chance, but they don't go into any greater detail.

Defence CounselB also supported this view, claiming that 'it is now mainly a pre-trial system of trying to assess where a case is and quickly find out whether the matter is possible for resolution or not. There is no detailed or extensive questioning of solicitors by the judges. It just gets booked in for a trial and that is that'. JudiciaryE similarly maintained that 'judges don't read the [evidence] brief in the Case Conferences. If it hasn't settled by the time it gets to the County Court, it is not going to resolve at one of the conferences as a result of that process, because the judge usually hasn't even read the brief'.

Increasing workloads were identified as a key factor contributing to the absence of judicial pre-trial preparation and management. As Defence CounselB claimed:

> While the number of Case Conferences has substantially increased, the number of judges involved in managing them has decreased, so their level of preparation and knowledge of each case and their ability to manage conferences and facilitate discussions has been restricted.

ProsecutorL also maintained that 'the Case Conference is not really now as effective as it was when first introduced and a lot of that is because of the judges and their workloads. They just don't have time to go into as much detail as they once did'. In response to such concerns, ProsecutorK argued that the courts need to:

> either put more judges in or don't bother having it. Either they are going to invest more resources in it, or get rid of it, because it just seems to be wasting more of our time doing summaries and appearances and these sorts of things, and we could be spending more time on matters, getting on top of them and perhaps spending more time entering into negotiations, which I suspect the defence could as well.

In addition to the lack of judicial preparation and management being identified as a limitation, the limited pre-trial preparation of counsel was another key issue identified by nineteen participants (nineteen out of 29 participants).[66] As ProsecutorE claimed:

> We work hard towards getting ourselves ready so that hopefully at any pre-trial hearing we know what we can settle a case for, know what our sentencing instructions are, know the whole thing in advance. But this is not always done. It also doesn't mean the defence will be ready or that the courts are willing to apply any pressure to the situation either. So quite often there is not enough preparation from all parties to make the process worthwhile.

The importance of counsel pre-trial preparation has been clearly identified in research, with some studies claiming that its importance exceeds that of the presentation of a case in court (Napley, 1975, as cited in McConville, Hodgson, Bridges, & Pavlovic, 1994, p. 48). As Napley (1975, as cited in McConville et al., 1994) claims:

> The extent and quality of preparation is infinitely more important, significant and essential than the manner of presentation…the decisive factor lies in the initial preparation; the material which is so disclosed; the incontrovertible facts which are marshalled; and the care and patience which go into ensuring that no stone is left unturned. These are by far the most significant factors (p. 48).

McConville et al. (1994) recognise that, in absence of such preparation, there is a 'danger of defence counsel having to rely upon their own perceptions and assumptions about clients and facts gleaned from prosecution papers in order to construct their own case' (p. 68). In addition to impacting on the quality of defendant representation, inadequate pre-trial preparation has also been identified as contributing to 'an increased number of applications for adjournments, delaying the completion of hearings [in the County Court]' (County Court of Victoria Annual Report, 2006, p. 8).[67]

In the minority, five out of 29 participants claimed that counsel are proactive in their pre-trial preparation. As Defence CounselB maintained, 'when you are coming up to a Case Conference, you stop and think about things, because it is an opportunity to talk to prosecutors about the case and how or if we can resolve the matter'. In contrast to this minority view, ProsecutorD claimed that pre-trial hearings are 'less about being proactive and more about being reactive to the defence [counsel's] statements…the problem is people are enthusiastic at the start but things fall down at the end'. For all solicitors, the resource implications of preparing and participating in pre-trial hearings are immense, a consequence of which is that their preparation is not always undertaken beyond a very basic level. As ProsecutorC claimed, 'really it is only some private defence counsel that have the

[66] This concern was applied to all counsel involved in pre-trial hearings, except Crown solicitors and defence counsel in Committal Mentions whose pre-trial preparation was perceived to be sufficient. The potential reasons for this exception are explored in a later section.

[67] Although an increase in adjournments for some hearings was identified in the 2006 County Court of Victoria Annual Report (2006), records on the number of trial adjournments that occur each year are not available.

time and resources to prepare'. ProsecutorC's concerns touch on a prominent limitation of early resolution ideals being desired within an adversarial system, whereby the accepted belief is that the contested trial should be prioritised above all other proceedings (Lubet, 2006). As a consequence, 'it is, more often than not, the case that important facts come to light only at the time of or shortly before the trial…because practitioners simply do not…carry out the research and investigations earlier' (ALRC, 2006, p. 416).

In addition to the adversarial focus impacting on counsel preparation, limited resources can also hinder the capacity of counsel to prepare pre-trial (Aronson, 1992; Freely, 1978). This perhaps most significantly impacts on Legal Aid counsel due to the inadequacy of the funding structure in providing sufficient resources to counsel. As McConville (2002b) claims, 'there are very few, if any, jurisdictions in which the income defence lawyers obtain, usually from the state through a system of Legal Aid, allows them to devote the time they feel they need to prepare the case for trial' (p. 356). In a similar vein, ProsecutorK stated: 'Legal Aid don't pay their solicitors to read all the briefs and then thrash something out for half an hour. They only get like one hundred bucks [sic] for a Case Conference, with all that work that goes into it'.[68] The minimal funding provided for pre-trial preparation thus restricts Legal Aid solicitors from fully preparing and participating in hearings, because they simply do not have access to sufficient resources to do so (see Chapter Four for further discussion).

The availability of funding and the level of priority awarded to Legal Aid defendants are also structured on the notion that the trial is of primary importance and pre-trial hearings play a secondary role (Pegasus Taskforce, 1992, p. 8; Coghlan, 2000; Weinberg, 2000). As a consequence, defendants may only have sufficient funding for representation at the trial. Defence CounselB identified this as a particular concern in Committal Hearings, at which some defendants waive their right to an oral hearing, 'because they have no funding and they are only given funding for the trial'. Similarly, ProsecutorA claimed that 'at the moment they need to change Legal Aid because there just isn't any money there and there just isn't any focus on pre-trial. It is all about the trial'. These comments are strengthened by the Australian High Court's decision in *Fuller and Cummings v DPP (Cth)* (1994) 68 ALJR 611, which determined that the rights afforded to the defendant in *R v Dietrich* (1992) 177 CLR 292, which requires a judge to stay proceedings if through no fault of their own the defendant cannot obtain legal assistance, do not apply to Committal Hearings. In light of these considerations, not only can the Legal Aid funding structure impact on the ability of counsel to prepare for pre-trial hearings, but its focus on the trial potentially means counsel may not even be available for defendants in these hearings. The consequences of this extend beyond the ineffectiveness of pre-trial

[68] As outlined in Figure 4-1 on page 126, the Legal Aid payment for preparation and attendance at a County Court Case Conference is $444, not $100 as suggested by ProsecutorK.

hearings in upholding early resolution ideals, to fundamentally undermining a defendant's access to justice.

5.5.3 Continuity & Late Appointments of Counsel

Participants identified the use of junior solicitors in pre-trial hearings as a contributing factor to the inability of hearings to facilitate plea bargaining or to achieve early resolution ideals. Four out of seven judicial participants expressed this view, including JudiciaryD, who claimed that:

> If negotiation is going to happen, it won't happen at a Case Conference, because it is usually a very junior member of the legal profession that turns up. They don't know what they are talking about and they have no authority to talk anyway. It is the trial counsel that gets the brief the night before the trial starts who has authority and can negotiate, not the junior solicitor at the Case Conference.

ProsecutorB also highlighted this concern, stating that:

> A lot of them [defence] like to leave the decision [on plea bargaining] to the senior counsel, so until they have actually briefed someone, and they won't brief someone until the trial…so they will say, let's see how we go then and see what [the senior] counsel says when they get it and then we will start talking. That is why a lot of matters are resolved at the door of the court or during the trial and not much before.

In addition to counsel lacking the authority to make decisions in pre-trial hearings, participants pointed to the absence of continuity of counsel as hindering the effectiveness of the hearings to facilitate plea bargaining or to achieve early resolution ideals. The capacity for pre-trial hearings to help counsel resolve issues or cases prior to the trial relies upon both counsel having a detailed and complete understanding of the case. As JudiciaryE claimed, 'if the prosecutor won't be able to attend, or a different [Crown] solicitor has been assigned to take over, there is an evident limit on how much they really know about the case and how much can get done'. In order to avoid a lack of continuity of counsel or inexperienced counsel attending hearings, the Section 5 Hearings require that the Crown prosecutor who appears at the Committal Hearing or who is retained for the trial also appear at the Supreme Court hearing. However, as this request is governed by internal policy only, adherence to this requirement is not consistent. Since the commencement of Section 5 Hearings in January 2007, the Crown prosecutor who appeared at the Committal Hearing had only appeared at the Section 5 Hearing in 68% of matters at June 2007 (Victorian OPP Annual Report, 2007, p. 39). Thus as ProsecutorR claimed, as a result, 'the Section 5 Hearing is already losing its impact. Already five months in…[with] issues such as solicitors replacing barristers, its effectiveness is already questionable'. Similar requirements are in place for County Court Case Conferences, such that the Crown

prosecutor assigned to the case is asked to attend the conference. However, the informality of this process, as regulated by internal court policy only, again provides scope for this requirement to be ignored and both the interviews and observations in this research revealed that Crown solicitors generally attend Case Conferences on behalf of the relevant prosecutor.

On occasion, it is impossible to ensure continuity of counsel, particularly prosecutors, because they are assigned to multiple cases and have to attend various processes for all of them. A lack of continuity however, jeopardises the effectiveness of pre-trial hearings because they must either be adjourned, or the hearing continues but the process is largely futile, as no significant issues can be resolved or identified. The significant impact of this was demonstrated by a number of observations of County Court Case Conferences. In one example, ProsecutorV appeared at the conference on behalf of ProsecutorD, who could not attend because he was involved in another case. ProsecutorV had received the file only 30 minutes before the hearing, and when asked about the prospect of early resolution she said, 'not likely. This should only last a couple of minutes and then I can get back to my own work'. ProsecutorV's assessment was correct. The matter was called before JudiciaryG who asked both counsel: 'Is there any possibility of resolution in this matter?' ProsecutorV and Defence CounselL both replied 'no Your Honour', so JudiciaryG scheduled a Directions Hearing date and the next matter was called. The entire hearing lasted less than three minutes. As the case's primary Crown solicitor (ProsecutorD) was unable to attend the hearing, no case issues were identified or resolved. This observation was not isolated. In three other Case Conferences observed, two were finalised in a similar manner, while only one was adjourned for counsel to engage in discussions. There was consequently a limited justification for three out of these four conferences proceeding, other than to schedule a date for the next stage in the pre-trial process.

Based on these findings, and their potential implications for the quality of the administration of justice, my research reveals that there is a significant need and a degree of support, for greater transparency and scrutiny of pre-trial proceedings. The next sections explore possible formalisation methods, with a particular focus on how these could facilitate plea bargaining.

5.6 Formalisation of the Pre-Trial Process

5.6.1 Preparation Requirements on the Crown

In discussing the potential for formalisation of the pre-trial process, ProsecutorE claimed:

> We should have it more systematised and the way it can be more systematised from our point of view is by us generally being in a position of knowing what we would settle for

> and having the defence know that, yes, we are actively seeking to settle if we think it is appropriate to. A system of better, clear preparation is what is needed.

The ideal inherent to ProsecutorE's comments is also evident in the Australian High Court's recommendations in *R v GAS; R v SJK* (2004) 206 ALR 116 that both counsel prepare written copies of any agreements which may have impacted on, or influenced, the defendant's decision to plead guilty (at 42). In response to this court's suggestion, the *Practice Guide*, *Preparing for a Case Conference in the County Court 2007* (Vic) advises that when completing the *Crown Summary for the Case Conference*, which is presented to the court and defence counsel, Crown solicitors should also complete an internal form identifying any issues or elements of the case that could potentially resolve. The policy also suggests that Crown solicitors should seek instructions from a senior prosecutor on an appropriate bottom line, and record this on the internal form, as well as whether there is a possibility of negotiations on any of the case facts. While reflecting the importance the OPP appears to place on early resolution ideals, the same limitations of internal policies previously identified emerge within this context. As the observation of the Case Conferences seem to indicate, this internal form does not appear to be used as a basis for encouraging discussions with defence counsel at conferences. This observation was also supported by ProsecutorD, who claimed that 'when the form is completed, it is really used just for internal discussions between solicitors and Program Managers and the prosecutors. It isn't really used for discussions with the defence'. Thus, while this form offers a potentially effective mechanism to address some of the limitations arising from the lack of continuity of counsel, because it is only governed by internal policy its effectiveness in facilitating plea bargaining or consistently shaping prosecutorial conduct is limited.

This research therefore supports recognition of the guidance offered by the Australian High Court's decision in *R v GAS; R v SJK* (2004) 206 ALR 116 in a statutory framework that requires comprehensive file notes to be recorded within the OPP from a case's initiation, until its resolution. In line with the internal form, these notes would include detailed information on any plea bargains made, and the reasons why they were accepted or rejected; the case facts; any issues open to negotiation; and the Crown's bottom line. In addition, if an agreement is reached, in line with the Australian High Court's recommendations, the basis of the agreement should be recorded including any charge or fact alterations and, importantly, any agreements on the Crown's sentencing submission. This formalisation would actively counterbalance the difficulties of seeking to ensure continuity of counsel within pre-trial hearings, because regardless of which Crown representative attends, they would have access to the record and thus could actively participate in any discussions and the hearing itself. This transparency would also be beneficial to the OPP. As the OPP's criminal division is divided into twelve sections, during one case's progression a number of Crown representatives will be assigned to the case at different stages. Formalising a procedure that requires detailed file notes be

recorded would thus assist the OPP in ensuring that a clear record of the case and any relevant issues or offers are available throughout the case's transition across these divisions. In support of this formalisation, ProsecutorB stated:

> There should be a written record because there can be divergent views six months down the track when it eventually comes up for a plea hearing in the County Court. Often if an agreement is agreed to orally, because of the organisation, I may do the Committal Mention, but then it goes down to General Prosecution and that person hasn't been a party to the factual agreement as far as the parties are concerned, so it has to be in writing really. I think ideally just confirming in writing internally and even to the defence saying, I confirm that you are pleading to x, y and z on the basis of this, this and this. So you can put that on the file and the person later on down the track has a record of it.

A transparent record of the case's progression could also assist in sentencing and in appeal hearings once a plea bargain has been reached, particularly in helping to ensure the accuracy of the sentence. As ProsecutorN claimed:

> The fact that it is on the record that you tried to plea bargain is important, not only from our management point of view, but it is actually important from a technical, legal point of view, under the *Sentencing Act* [*1991* (Vic)], because the point of the process in which the plea of guilty was first offered can affect the sentence, it is a mitigating factor. A plea of guilty at the Case Conference is worth less than a plea of guilty at the Committal Mention. So a record of these things could help in that regard.

ProsecutorE similarly argued that:

> It is not unreasonable to expect the deal that is finally agreed upon be reduced to writing, so when someone else looks at the file as a document later, be it for the plea [hearing] or in case of appeal, they can more readily understand the subtleties of the plea negotiation and how it came to be.

As identified in the earlier discussion of the formalisation of prosecutorial initiation of discussions, statutory formalisation of this process would also have the benefit of providing transparency to the legal community outside the OPP. The benefits of this, in the context of formalised pre-trial preparation, was identified by JudiciaryE, who maintained that 'the real advantage to this [formalisation] is we can be sure people have read the [evidence] brief very early on and the prosecution has come to the table with a bottom line if they have one'. ProsecutorJ also claimed that 'if it is in statute that things should be written down, then everyone is aware that it happens and that it must happen'. External formalisation would thus ensure that judges are aware that although it may be a different Crown representative who attends a pre-trial hearing, they can still actively manage the hearing and facilitate discussions between counsel, because the representative will have access to the recorded file notes. Similarly, defence counsel would be able to more actively participate in the hearings and, where relevant, offer plea bargains, because the authority

for the Crown representative to discuss issues and accept an offer if it corresponds with the Crown's bottom line would be recorded in the notes.

There was some degree of resistance from five prosecutorial participants who believed it was unnecessary to keep detailed records of every case's progression, particularly all communications that can occur between counsel. As ProsecutorC argued, 'sometimes there are discussions just to see whether there is any possibility of negotiation, but some of these, I mean you have to laugh at some of the stuff you are discussing at the start'. When asked to expand on this response, ProsecutorC said, 'OK, say they are charged with ten counts of assault and they are willing to plead guilty to one count of recklessly causing injury. There is no way we would accept that on any grounds, so recording it [in file notes] would seem a waste of time'. Similarly, ProsecutorB argued that:

> You shouldn't forget the defence may make an offer that is not really justifiable on the materials themselves. They are just testing the waters to see what you will accept. Often with negotiations you test the waters and can speak to each other any number of times until you get to where you need to be.

This criticism of the formalisation of prosecutorial pre-trial preparation is justified to an extent. In line with previous studies (Freiberg & Seifman, 2001; Mack & Roach Anleu, 1995), this research supports that plea bargaining is commonly used, and that the level of seriousness of discussions can at times be limited. However, while it may be unnecessary to record every informal discussion that occurs, it is not unreasonable to require that a record be made of any plea bargains officially offered, and the reasons why they were rejected. This is because, as ProsecutorM maintained:

> Simply having a record of any offers to plead and the reasons why it was rejected can save time, because we know their bottom line and where it fits with ours, and if it really is out of the question then we know we should prepare for trial. But if it is not too far apart then maybe the prosecutor might be willing to consider the offer at a later stage, especially as evidence may not be as good later down the track as it seemed initially. Because we might think our primary witness is going to do a good job in the box, but when they are up there, it is difficult. They might not perform well. They might not be believable. There is always that chance. So having a record of where the discussions were at may help.

ProsecutorN also claimed that this type of formalisation is likely to 'encourage earlier resolutions, and that has immense resource benefits for all'.

5.6.2 Legislative Recognition of Informal Hearings

In addition to supporting the formalisation of the Crown's pre-trial preparation requirements, prosecutorial participants were supportive of the formalisation of Case Conferences and Section 5 Hearings, which would inturn provide greater encouragement to the judiciary to actively prepare and manage these hearings (ten out of twelve participants).

These participants also asserted that this type of formalisation would positively impact on the defence counsel and their own preparation and participation within the hearings. As ProsecutorJ claimed:

> Without some kind of intervention, both parties tend to put matters on the backburner unless some pressure is applied…There is something to be said for the court keeping its eye on the case and encouraging the parties to keep it moving if it can't resolve, or to encourage discussions if there is a possibility of resolution. There is some utility to a court-supervised process where the court says, well how is this case? When is it going to be ready for trial? Is it going to go to trial? What are the issues? Are they serious issues? Have you explored this? There is a big benefit to that.

In a similar vein, ProsecutorL claimed, 'there is a benefit in parties knowing there is a judicial officer interested in the case as an oversight, because left to our own devices we probably wouldn't apply our minds to it as early as that'. Participants also noted that formalisation could engender efficiency benefits for the courts, with ProsecutorL stating that the 'effectiveness of the actions of the Listing Judges in the early Case Conferences could re-emerge'. ProsecutorM also maintained that 'simply having a formal process that confirms the key trial issues will assist in reducing the occurrence of last-minute guilty pleas and trial adjournments'. ProsecutorL also identified the potential benefits for defendants of the judge playing a more active role, claiming:

> If the matter is likely to resolve, it is usually not the defence and the prosecution who don't realise it, it is usually the accused. So if the judge says in court, these are the issues, these are the weaknesses and these are the benefits of resolving this case, it would definitely benefit the accused by giving them a better understanding of the case and the benefits of a plea.

While there was evident support for increased judicial management of these hearings, participants from all groups identified the importance of ensuring the judge does not play an active role in trying to convince parties that a matter should resolve (eighteen out of 21 participants). Instead, as Defence CounselE claimed, 'after reading the material it would be good for the judge to draw upon their own experience to make suggestions to the parties about the strengths or weaknesses of their cases, and to not push, but encourage negotiations'.

Formalising the Case Conference and Section 5 Hearing would also allow for greater legitimacy to be placed upon early communications between counsel in an adversarial context. As such, it could offer a formal opportunity for plea bargaining to occur, after the case had left the Magistrates' Court pre-trial stream. This would ensure that in cases where resolution only becomes an option late in proceedings, for example, because the cooperation of Crown witnesses has diminished, a formally acknowledged process whereby resolution is the primary focus could draw the parties together to discuss resolution options. ProsecutorB claimed that this would be particularly beneficial insofar as

it ‘allows for the resolution of cases without having to rely solely upon us with our busy workloads to contact each other’. The importance of external formalisation of these two hearings is further demonstrated by the inability of the OPP and court internal policies to effectively shape or control legal conduct, due to their informality.

Both the interviews and observations indicated that the most effective pre-trial hearing for achieving early resolution ideals is the Committal Mention in the Magistrates’ Court. The next section examines the reasons for this, and how, or whether, this focus on early resolution could be transferred to the superior courts’ pre-trial streams. While the next section acknowledges the Committal Mention’s effectiveness, it argues against implementing any restrictive formalisation measures into the Magistrates’ Court that placing additional requirements on those involved in the hearings.

5.7 The Committal Mention

5.7.1 Effective & Efficient

On the basis of both the observations and participant responses, the Committal Mention without question appeared to be the most efficient pre-trial hearing. The high degree of preparation and participation evident on the part of Crown solicitors, defence counsel and the Magistrates involved, allows these hearings to consistently identify early guilty pleas and to confirm the key case issues, those disputed and non-disputed. As JudiciaryB claimed, ‘the court moves more quickly and many negotiations take place…There is a fairly high rate of cases resolving, because the court uses an interventionist approach throughout its pre-trial hearings’. ProsecutorH also claimed that Committal Mentions are effective in facilitating plea bargaining, explaining that:

> Often you get phone calls from solicitors who are at the hearing when it has been stood down, because as a result of the discussions that have taken place, a plea offer has been made by the defence and needs to be considered by a Crown prosecutor. I know from personal experience that they do result in pleas occurring at an earlier time than what they otherwise may do at the door of the court, when a trial is ready to go.

The early resolution focus of the Committal Mention is evident in the courtroom’s layout and surrounding environment, which includes a sign located in the hallway directly outside the courtroom that states in large, black lettering that both counsel ‘must make themselves available from 9:30am on the morning of the hearing for discussions’. The courtroom design also facilitates discussions between counsel. Crown solicitors, of which there are usually two or three handling the entire day’s caseload, and any number of defence counsel (each case may involve a different legal representative) sit facing each other on a long rectangular table with six to eight chairs in the centre of the courtroom. Throughout the hearings, Magistrates allow discussions between counsel to continue

quietly at this table; thus there is continual residual movement and noise throughout proceedings as defence counsel approach the table before their matter is called to discuss issues with the relevant Crown solicitor. The main courtroom seating also facilitates such discussions. The left-hand side of the courtroom is generally where the solicitors sit when not at the centre table. This section is detached from the main seating area where members of the public view proceedings. It thus offers another location for counsel to continue discussions. Consultation rooms are also located directly outside the courtroom, where either counsel may consult with a Crown prosecutor, defendant, informant or victim, as needed.

The presiding Magistrate's actions during the hearing also demonstrate the early resolution focus of Committal Mentions. Magistrates actively encourage counsel to engage in plea bargaining by offering to adjourn matters. For example, during one observation of this court, JudiciaryB addressed ProsecutorI by asking, 'I assume this one can be resolved?' ProsecutorI stated, 'Your Honour, we are anxious to get it over with, but I need to seek instructions from upstairs [a prosecutor]'. JudiciaryB stood the matter down pending instructions from the relevant Crown prosecutor. When the matter resumed approximately two hours later, JudiciaryB stated, 'I assume this one has now been resolved [nod of head from ProsecutorI]? Good'. In another observation, JudiciaryB asked whether a resolution was possible, to which ProsecutorI replied 'no'. JudiciaryB then replied 'Well, I have read this, and I have notes all over this document saying that this matter should settle, that it should not go to a contested [Committal]. What do you have to say to that?' ProsecutorI indicated that the Crown had rejected a plea bargain and that no further instructions had been sought. JudiciaryB replied, 'Well, I am going to stand the matter down for the time being so you can get some fresh instructions'. When the matter resumed, ProsecutorI indicated that discussions had occurred, but there remained no possibility for resolution. In response, JudiciaryB stated, 'Well, I still think it could [resolve], but let's talk about a Committal date'.

These types of observations occurred regularly—indeed in all of the observations of Committal Mentions, the Magistrate would ask at least one variation, if not more, of the following four questions: (1) Can this matter resolve? (2) Have the parties considered resolution? (3) Has there been any discussion on these issues? and (4) Is there any room to move on this? In addition, Magistrates were noted on several occasions as asking the defence counsel whether the defendant understood the benefits of a guilty plea. In one three-hour observation, this question was asked in two of the six hearings, which resulted in both defence counsel requesting sentence indications. In this context, the Magistrate appeared to be actively reminding the defence counsel to advise the defendant of the possible sentence benefits of a plea, to encourage an early pleading decision. Similar findings emerged from Roach Anleu and Mack's (2009) evaluation of Australian Magistrates' Courts, which found that the Magistrate 'can play a significant role in the

production of guilty pleas' (p. 2) by offering to adjourn matters, as well as by directly informing the defendant that a guilty plea will lead to a sentence discount (Roach Anleu & Mack, 2009, p. 17). In comparison to the observations of the indictable pre-trial hearings, particularly the County Court Case Conference, the actions of the Victorian Magistrates observed in this research demonstrated the focus of these hearings on early resolution ideals and their ability to facilitate plea bargaining.

Another reason for the Committal Mention's effectiveness lies in the preparation and focus of the Crown solicitors on identifying issues and resolving cases. The actions and intentions of these solicitors were supplemented by the evident awareness of the Magistrates and defence counsel that the Crown maintains this approach. Part of the reason for this is that this early resolution-focused hearing is governed by the *Criminal Procedure Act 2009* (Vic); thus all parties are aware of the Crown's transparent focus on resolutions. As a result, greater communication occurred between parties and there was more encouragement from Magistrates to adjourn matters to facilitate discussions than was evident in the observations of other pre-trial hearings. In addition to demonstrating the effectiveness of the Committal Mention, this finding also strengthens the argument that formalising the County Court Case Conference and Supreme Court Section 5 Hearing in statute is likely to increase the usefulness of these hearings in attaining their early resolution ideals.

During observations, the early resolution focus of both counsel was evidenced by their active participation in responding to the Magistrate's questions, where they perceived resolution as a possibility. This was a common occurrence in Committal Mentions, but was seemingly absent from the observations of County Court Case Conferences. An example of this occurred in the observation of ProsecutorB, who had attempted to communicate with Defence CounselI prior to the Committal Mention, but had been unsuccessful in initiating discussions. During the hearing, ProsecutorB addressed JudiciaryB by stating, 'Your Honour, they are talking about going to a contested Committal. We can't see what benefit having a Committal is, because he [the defendant] has made full admissions [of guilt]. This is really a matter where we should be talking about resolving'. JudiciaryB addressed Defence CounselI by asking, 'Well, what do you say about that?' The matter was then adjourned to facilitate discussions. When asked about this process, ProsecutorB claimed that bringing the possibility of resolution to the Magistrate's attention is a positive element of proceedings in which both counsel regularly engage. He maintained that when the Magistrate's attention is drawn to a particular issue:

> the Magistrate will then take that up with the defence, or us if the defence says something, and so that often prompts the Magistrate to do something that they wouldn't have done otherwise…At times our caseloads hinder us from having full knowledge of matters, so if the defence can say something and get the Magistrate to get us thinking about it, that works well too.

The immense differences evident between the efficiency of the Committal Mention and that of the County and Supreme Court pre-trial hearings, particularly the County Court Case Conference, highlight the importance of case preparation and transparency, to the success of early resolution. This thus further supports the earlier justification identified for formalising the Case Conference and the Section 5 Hearing, as well as formalising the Crown's pre-trial preparation.

5.7.2 Increasing the Early Resolution Focus through Formalisation

The perceived ability of the Committal Mention to attain high resolution rates led five judicial and prosecutorial participants to propose reforms that place greater requirements on counsel to resolve matters at the Committal Mention, as opposed to waiting until the case enters the superior courts' pre-trial streams. This support was based on the notion that placing stronger requirements on parties to resolve matters in the Magistrates' Court, as opposed to formalising or increasing the focus on resolution in the superior courts would increase court efficiency and offer benefits to all parties. As ProsecutorD argued:

> Obviously the best time to resolve cases is in the Magistrates' Court. They should try to resolve it there rather than in the Case Conference. It would be cheaper to resolve issues there, or at least get the negotiations resolved there. The Magistrates' Court is where it should be done, rather than waiting two or three months for a Case Conference.

JudiciaryC also claimed that 'counsel should be trying to resolve cases prior to them coming to the County Court. Matters that can resolve should be coming to the County Court as a plea, not for further pre-trial discussions'. ProsecutorC also maintained that 'anything that resolves at the Case Conference stage is still a good result for us, but really most of these issues should be addressed earlier at the Magistrates' [Court], so there should be a greater focus on negotiation and resolutions there'.

In discussing the potential reform of Committal Mentions, JudiciaryE argued that there should be a greater emphasis placed on Magistrates and both counsel to proactively identify resolutions. She claimed that 'in order to identify early guilty pleas and encourage communication and discussions between counsel, the Magistrate must actively manage their pre-trial hearings to facilitate early resolution'. Similarly, ProsecutorB argued that 'if Magistrates were more proactive there would be increased pressures, in a good way, on the prosecutor to bring any issues that could resolve at the pre-trial hearings to the attention of the relevant parties and maybe cases could resolve earlier'. It was thus suggested that a beneficial formalisation might involve placing more stringent requirements on counsel and Magistrates to engage in early resolution discussions at the Committal Mention, and thereby abolish some of the hearings in the superior courts, and replace them with written advocacy.

The main perceived benefit of requiring more intense preparation through these two reforms was that it could increase the number of earlier resolutions, as opposed to delaying these until the case reaches the superior courts (JudiciaryE). In addition, if the case did not resolve during this intense early resolution-focused process, JudiciaryE claimed 'it would be likely that it needed to proceed to a contested trial for resolution'. Consequently, any pre-trial hearings occurring after the Committal Mention could focus on the trial, as opposed to trying to adhere to the conflicting aims of identifying early resolutions and upholding contested trial ideals, which participants identified as a key factor fuelling inefficiency in pre-trial proceedings.

While there are evident benefits in limiting the number and aims of pre-trial hearings, and requiring early case preparation, this type of restrictive formalisation may itself create complications. There are already immense caseload pressures facing Magistrates and counsel in the Magistrates' Court. The court deals with a vast number of cases in a very fast-paced environment. For example, between 2007 and 2008 over 156,300 cases were initiated in the criminal jurisdiction of the Magistrates' Court (Magistrates' Court of Victoria Annual Report, 2008, p. 22). During this time, over 3,068 indictable pre-trial hearings and 7,258 summary pre-trial hearings were heard and finalised (Magistrates' Court of Victoria Annual Report, 2008, p. 22). During the observations of Committal Mentions over seven days, Magistrates conducted hearings for approximately five hours daily. Each hearing lasted for between three minutes and one hour, with the mean approximately fifteen minutes. A single Magistrate could thus, in essence, hear up to four Committal Mentions per hour, 20 hearings per day. As such, the workloads, particularly of the Crown solicitors, of which there are generally two to three handling the entire day's caseload, and of the single Magistrate hearing these matters, are already heavy. This observation was also supported by ProsecutorK, who claimed that 'at a Committal Mention there are so many issues being called, that it is difficult for them to stay on top of the briefs'. Similarly, Defence CounselF maintained that 'it is a huge list and it is a lot of work already'. Defence CounselB similarly claimed:

> It is all a bit of a rush really in the Magistrates' Court. There is definitely pressure when the full weight of the law is on you. That is a definite concern as a defence representative. There is pressure on us to get things done, because your boss says one thing, then the prosecution offers something else. Do you accept? I don't know, sometimes it is in the best interests of your client. There really is pressure all round, and it moves so fast.

With such workload pressures evident in the Committal Mention, placing additional requirements on parties to resolve matters and have all pre-trial preparation and discussions undertaken by this early stage could result in further pressures being placed upon counsel to plea bargain. This view was supported by sixteen out of 21 participants. Reflecting this perspective, ProsecutorD claimed:

> One of the main benefits [of the Magistrates' Court] is its flexibility and although things move quickly we have time to stop and discuss matters if we need. But as with anything, once you increase the workload or the pressures then it is likely to have the opposite effect—becoming stringent, inflexible and not a very effective process.

Reducing the focus on resolution in the superior courts' pre-trial hearings was also opposed by participants because it might place unreasonable pressures upon counsel to resolve matters in the Magistrates' Court. Furthermore, inefficiency problems similar to those existing before the introduction of the Case Conference (at which time 40% of defendants entered late guilty pleas and 40% requested at least one adjournment) could result, because there would be no formal opportunities for counsel to meet as part of an early resolution-focused process to discuss the main case issues, outside counsel themselves initiating communications (Weinberg, 2000, p. 5). Removing formal opportunities for early resolution in the superior courts' pre-trial hearings could also be problematic because the strength of both sides' evidence can diminish throughout proceedings. Therefore, cases that are appropriate for resolution may proceed to trial and result in late guilty pleas. As ProsecutorM claimed, 'we might find we are going to a contested trial, even though a resolution should or could have occurred'. As a result, the potential benefits of this type of formalisation are unlikely to exceed the probable limitations. Perhaps instead, given that this research reveals that the Committal Mention already works effectively, it would be more beneficial for the superior courts' pre-trial hearings that have an early resolution focus to emulate Committal Mentions, particularly in ensuring there is a transparent understanding of the early resolution focus of all parties within such hearings.

5.8 Conclusion

Victoria's pre-trial process is extensive, and although there is evident support and justification for its two primary aims—to facilitate early resolutions and to consolidate the key trial issues—the contradictory nature of these aims limits the effectiveness of many of the hearings in achieving either aim effectively. In this light, the four recurring issues to emerge from this examination of plea bargaining involving adversarial traditions, Legal Aid funding, moves towards court efficiency and the impacts of non-transparent justice remain prominent factors that negatively impact on perceptions of, and consistent legal conduct in, pre-trial proceedings.

Without statutory formalisation, the 'human nature effect' inherent to unregulated processes will result in some counsel and judges being more active, committed and prepared than others to participate in, and manage, pre-trial hearings, to reject or accept plea bargains, or to identify the key case issues. The most effective way to reduce this inconsistency and the inequality that can arise from informality is to provide some degree of external legislative formalisation and accountability to informal processes and the

conduct of those within them. As this chapter has shown, like plea bargaining, in order to increase the efficiency and consistency of Victorian pre-trial proceedings, transparency and scrutiny of the required preparation and conduct of parties, beyond internal OPP and court policies, are required.

While the formalisation of the informal pre-trial hearings, the Crown's pre-trial preparation requirements and plea bargaining itself is partially motivated by the potential efficiency benefits, there is a danger in recognising efficiency-driven reform in statute. This danger emerges when the desire to attain court efficiency and expeditiousness is prioritised above victim, defendant and public interests. An example of this type of reform exists in s.208-s.209 of the *Criminal Procedure Act 2009* (Vic), which authorises pre-trial sentence indications in Victoria's County and Supreme Courts. Despite identifying three key motivations for implementing indictable sentence indications (Victorian Attorney General's Department, 2005, 2007), this reform prioritises court efficiency over considering victims or the impact of the crime upon them. It also fails to recognise the possible limitations arising from the potential additional pressures that might compel defendants to plead guilty in such a scheme, and the likely inappropriate sentencing outcomes resulting from the limited evidentiary material upon which the indications are based. The next chapter examines the trial sentence indication scheme operating in Victoria's superior courts. By drawing comparisons to this research's justifications for formalising plea bargaining, it highlights the potential dangers of implementing efficiency-driven reform in the pre-trial process and argues against the continued implementation of indictable sentence indications in Victoria.

CHAPTER SIX
SENTENCE INDICATIONS: INCREASING COURT EFFICIENCY AT THE EXPENSE OF JUSTICE?[69]

This [legislation] is going to be an absolute disaster! They tried it in New South Wales and that didn't work and now we have it here and the process is very hard to work in a practical sense. It is fraught with a lot of difficulties, it is very resource intensive. The sentencing process is a very delicate one and very difficult and this process is just creating more steps, more confusion, more difficulties. It will never be a viable scheme in the higher courts (JudiciaryD).

Sentence indications involve a judge informing a defendant of the likely sentence order and/or range that could be received if a guilty plea were entered. Sentence indications and plea bargaining share similar intentions, limitations and potential benefits. Both offer a mechanism to encourage early guilty pleas and provide the emotional, resource and financial benefits that can flow from early resolution. Both are consequently criticised for their potential to increase the pleading pressures on defendants, and to undermine public interests for the sake of greater court efficiency. As a result, sentence indications are some times labelled as plea bargaining, by extending the definition to incorporate indications as part of the negotiation and incentive elements of discussions (Freiberg & Willis, 2003; Mack & Roach Anleu, 1995; Verdun-Jones & Hatch, 1987; VSAC, 2007a, 2007b, 2007c). As established in the introduction, this research does not recognise sentence indications as plea bargaining. Instead, it recognises the important link between sentence indications and plea bargaining, given the potential for sentence indications to influence a defendant's pleading decision, and the possible impact of a plea bargain on the indication itself. As such, this research considers sentence indications to be a process used by the courts, with the aim of attracting early guilty pleas, independent of the discussions that occur between counsel.

It is for this reason that this research does not equate the statutory formalisation of summary and indictable sentence indications in Victoria with recognising plea bargaining in statute (*Criminal Procedure Act 2009* (Vic) s.61, s.208-s.209). What this research does consider to be significant about this formalisation is that a decision was made to override case law prohibiting sentence indications, in favour of legitimising them as part of the pre-trial process, while plea bargaining remains non-transparent, despite involving similar intentions, limitations and potential benefits (*R v Bruce* (Unreported, High Court, 21 May

[69] This chapter provided the framework for Flynn, A. (2009, forthcoming). Increasing efficiency at the expense of justice? A response to the Victorian Sentencing Advisory Council's proposal for sentence indications in Victoria's indictable courts and the subsequent legislative changes. *Australian and New Zealand Journal of Criminology*, *42*(2) (10,800 words).

1976); *R v Marshall* [1981] VR 725; *R v Tait* [1979] 24 ALR at 473; *R v Turner* [1970] 2 QB 321). In this context, the motivations behind this reform, or more specifically the prioritisation of certain potential benefits over others, are of significance to this analysis, particularly the potential for court efficiency to be prioritised at the expense of justice.

This chapter critically analyses the indictable sentence indication scheme introduced into Victorian superior courts in July 2008 (*Crimes (Criminal Trials) Act 1999* (Vic) s.23A (repealed); *Criminal Procedure Act 2009* (Vic) s.208-s.209). Drawing from national and international commentary and participants' experiences with sentence indications in Victoria, New South Wales (NSW) and the United Kingdom (UK), it argues that while this reform provides transparency and may offer some potential benefits, these are far outweighed by the potential limitations which are likely to jeopardise the rights and interests of victims, defendants and the public.

6.1 Sentence Indications: Background

Sentence indications are essentially a systems-oriented reform, that is, they focus on 'strengthening and increasing the efficiency of existing criminal justice processes' (Harris, 2003, p. 31). Although systems-oriented reforms have the potential advantage of increasing 'the operation, efficiency, effectiveness, or accountability of criminal justice processes' (Harris, 2003, p. 31), as Harris (2003) argues 'this approach ignores the political, economic and social aspects of crime…Furthermore, it offers, at best, only limited, short-term utility in dealing with [inefficiency]' (p. 31). The two most common sentence indication models involve running a dedicated hearing for indications or inputting the option for indications to be sought within an existing pre-trial hearing (ALRC, 2006; New Zealand Law Reform Commission (NZLRC), 2005). Within these two models, five types of indications can be given: (1) the sentence order (custodial/non-custodial); (2) the sentence order and general outline of severity (short custodial term); (3) the sentence order and specific range (six years imprisonment); (4) the maximum sentence that could be imposed; or (5) the likely sentence if the case proceeded to trial and the defendant were found guilty (ALRC, 2006, p. 419). For indictable offences, indications are usually requested once the case enters the pre-trial stream in the relevant superior court. Indictable indications cannot be given in summary courts, as Magistrates do not possess the sentencing power for offences that fall outside their criminal jurisdiction (see, for example, *Magistrates' Court Act 1989* (Vic) s.25).

A number of sentence indication schemes have been implemented in both summary and indictable courts. The next sections briefly outline three examples of indication schemes: (1) the once unregulated, but now formalised summary indication system operating in Victoria's Magistrates' Court; (2) the indictable system in the UK Crown

Courts; and (3) the indictable scheme implemented into NSW District Courts in 1993, which was disbanded in 1996.

6.2 Three Sentence Indication Schemes

6.2.1 Victoria's Magistrates' Court Scheme

Summary sentence indications informally operate in a number of Australian jurisdictions, including the Contest Mention in Tasmania's District Court and the Case Management hearing in the Australian Capital Territory (ACT) (ALRC, 2006, p. 412). They also operate informally in New Zealand (NZ) pre-trial status hearings, which are equivalent to Contest Mention hearings in Victoria (Johnson, 2008, p. 11; NZLRC, 2005).[70] Under the guidance of the *Magistrates' Court: Guidelines on Contest Mention 1994* (Vic) s.6, summary sentence indications have been informally given in Victoria's Magistrates' Court since the introduction of Contest Mentions. During my observations, it was evident that informal indications were commonly provided during these hearings—for example, in one three-hour observation of Contest Mentions, two of the six cases sought an indication.

In one such observation, prior to an indication being requested, JudiciaryB asked ProsecutorB if they had considered withdrawing any of the charges. ProsecutorB responded by requesting 'some time to discuss the matter with the defence'. The case was then adjourned. When the matter was recalled, JudiciaryB again asked ProsecutorB, 'Is there any possibility of an amendment to the current charges? [*Then directed towards the defence*] Does your client understand the benefits of a guilty plea?' Defence CounselL replied, 'Yes Your Honour. Perhaps Your Honour could offer an indication [of the sentence]?' JudiciaryB asked ProsecutorB for their case summary and Defence CounselL for a brief outline of the relevant mitigating factors. In providing this information, Defence CounselL also stated that the defendant had already served time in custody, and that 'perhaps time served and a community-based order would be an appropriate sanction'. JudiciaryB asked the defendant to stand, and said:

> If you fought the case and lost, there would be a significant chance of jail time. But a guilty plea, well that has a lot of other options. That is a different disposition…In that case, the two charges could be accumulated to result in two months imprisonment, with time already served, plus a community-based order and continuation on the rehabilitation program.

This sentence would mean that the defendant would not face any additional time in prison. Defence CounselL discussed the indication with the defendant for approximately one minute. A guilty plea was then entered and the sentence imposed. The whole process,

[70] The New Zealand Ministry of Justice has announced that it will commission an examination into formalised sentence indication processes for summary and indictable offences (Johnson, 2008, p. 18).

excluding the adjournment, took less than eight minutes. When asked about this specific indication, JudiciaryB claimed that not only was the process 'fairly quick and efficient, [but] it was likely to have saved at least a half-day hearing'.

This observation and JudiciaryB's comments allude to the connection that exists between sentence indications and possible efficiency benefits. This link was also made in the Victorian Sentencing Advisory Council (VSAC) final report (2007c) as a justification for recommending its formalisation in statute. This recommendation was implemented in legislation in July 2008, and amended in March 2009 (*Criminal Procedure Act 2009* (Vic) s.61; *Magistrates' Court Act 1989* (Vic) s.50A).

The summary sentence indication scheme officially permits Magistrates to offer indications of whether the defendant is likely to receive an immediate custodial sentence or a sentence of a specified type (*Criminal Procedure Act 2009* (Vic) s.61). The decision over whether to provide an indication is conclusive and determined by the Magistrate's discretion (s.61(4)). If the defendant pleads guilty at the first available opportunity after the indication is given, the Magistrate is prohibited from imposing a more severe sentence than was originally indicated (s.61(1)(a)-s.61(1)(b)). If the defendant pleads not guilty, a new Magistrate must be assigned to hear and determine the case, unless all parties agree otherwise (s.61(2)(a)-s.61(2)(b)). The subsequent Magistrate is not bound in any way by the indication in determining the defendant's sentence, and the defendant's request for an indication is not admissible as evidence of guilt (s.61(3); s.61(5)). Importantly, the indication does not affect the right of either party to appeal any sentence imposed (s.61(6)).

The majority of participants from the prosecutorial, defence counsel and judiciary groups in their follow-up interviews (conducted after the scheme's implementation) supported this reform (thirteen out of fifteen participants). The main reasons for this support that emerged from participant responses were linked to the potential efficiency benefits of the reforms and the types of matters handled in the court, namely minor summary offences such as traffic violations (*Magistrates' Court Act 1989* (Vic) s.53, sch. 4). As Defence CounselC claimed, 'sentence indications work effectively in the court because it deals with minor matters that don't really need a trial to have their issues sorted out'. JudiciaryB similarly maintained that:

> Because many summary matters don't involve direct, primary victims and neither the Crown nor defence generally relies upon extensive argument or forensic evidence, the indication is typically straightforward and uncomplicated and it saves going through the motions when if the defendant had a better understanding of the outcome he [sic] would plead guilty.

In a similar vein, JudiciaryC claimed that 'at the Magistrates' Court a summary is read out, you see what the priors [criminal record] are and you give an indication…the indications are generally jail, no jail, licence, no licence, non-custodial so it is pretty straightforward'.

He also pointed to the potentially significant efficiency benefits of indications as a basis for supporting the reform, claiming:

> The Magistrates' Court would collapse if there were no sentence indications in the Contest Mention, because people go there, they get their indication and they plead. And if all those matters listed for contest went to contest, they would be snowed under like we are in the County Court.

The potential efficiency benefits of summary sentence indications and their perceived effectiveness within the lower courts have resulted in their introduction in indictable courts, with the hope of attaining similar outcomes (ALRC, 2006; VSAC, 2007c). While indictable sentence indications are not common in Australia, they are used in some international jurisdictions, including informally in NZ and by case law authority in the UK (NZLRC, 2005, p. 92). The following section explores the existing UK system.

6.2.2 UK Crown Court Scheme

The English Court of Appeal's decision in *R v Goodyear* [2005] EWCA Crim 888 (at 54) allows defendants to request an indication of the highest possible sentence type and range that could be imposed if they pled guilty. To obtain an indication, the prosecution and defence counsel must present an agreed basis of plea (summary of facts), which the court uses as the basis for determining the indication. In discussing this process, Policy AdvisorA claimed that:

> The defence have to come to the prosecution and say this is what we want to plead [to] and this is the basis for which we will plead, and then there is a discussion around whether the plea and the basis on which they want to plead guilty is acceptable, or is in conflict with what the case is, or what the victims say. So you have to go into the sentence indication with an agreed basis of plea. It is supposed to be, here is a plea on these facts, what will you give him [sic]?

The judge retains full discretion to refuse to provide an indication even when an agreed basis of plea is presented by both counsel.

The *Attorney General's guidelines on the acceptance of pleas and the prosecutor's role in the sentencing exercise 2005* (UK) ('the Guidelines') extend upon the decision in *R v Goodyear* [2005] EWCA Crim 888 by dictating structured requirements for both counsel to follow when the defendant seeks an indication. S.D1 of the Guidelines requires the defence counsel to provide the prosecution with seven days notice of their intention to request an indication. During this time, the prosecution must inform the victim of this and provide information on the agreed basis of plea. The prosecution must ascertain the victim's opinion on these matters and obtain their Victim Personal Statement (VPS) to assist the judge in deciding whether to grant an indication and, if an indication is given, to

assist the judge in determining an appropriate maximum sentence range. The sentence indication hearing is similar to a mini-plea hearing, in that the agreed basis of the plea and the VPS are presented to the judge and the defence counsel must outline the relevant mitigating material. Using this information, the judge indicates the maximum sentence that could be imposed if the defendant pled guilty. If the defendant then pleads guilty, the court runs a full Plea and Sentence Hearing to determine the specific sentence. If the defendant pleads not guilty, a new judge is assigned to the remaining pre-trial hearings and the trial.

Two of the UK policy advisor participants involved in structuring the Guidelines were highly supportive of the process and the ideals behind the sentence indication scheme, identifying two key aims; transparency and efficiency. Policy AdvisorC claimed:

> It is a bit too early to assess whether we have had more guilty pleas through sentence indications, or if the public are happy with it, but to my knowledge, when the indications are used, people generally tend to accept them, because you get a discount for entering a guilty plea at an early stage. So it is working well in the efficiency side of things. I think in the past before we had it, there were a number of situations where the defence would try it on and try to see the judge. The common thing was you would go to court and the defence would say, I have spoken to my client and I want to see the judge. They would go see the judge and say, look Fred, he [sic] might plead guilty, if he [sic] pleads guilty to x what would you give him [sic]? The judge would say if he [sic] pled guilty, it would save the trial. I would probably give him [sic] eighteen months. And then they turn to the prosecutor and say, this is what we are doing, accept the plea. That is not the way to do things. It is not appropriate. You have then got the defence and the judge putting pressure on the prosecutor to accept the plea on no real basis, because you haven't had the chance to discuss what the basis of the plea is and it is more to expedite the hearing than it is on the basis of justice. That is not acceptable and prosecutors are being told you do not go and see the judge with the defence unless you have an accepted basis of plea, and then you go through the sentence indication process as stipulated in the Guidelines.

Policy AdvisorA similarly argued that:

> The Guidelines have formalised the process to prevent backroom, non-transparent situations where deals are allegedly done, which are not transparent to anybody else. Not transparent to victims who don't understand why all of a sudden they come to court and there has been some kind of deal done behind the scenes, as far as they are concerned, and somebody has walked away free [from a custodial sentence] when they should have gone down for fifteen months. It is to prevent that type of allegation and perception of the criminal justice system that sentence indications have been brought in. Of course, they also offer immense advantages for the court in terms of resources too.

While the transparency and efficiency benefits of the UK scheme were positively discussed by the two policy advisors from the UK, a scheme implemented in NSW in the 1990s, based on similar ideals, was strongly criticised by participants, reflecting much of the existing research into the scheme (Spears, Poletti, & MacKinnell, 1994; Weatherburn & Lind, 1995; Weatherburn, Matka, & Lind, 1995). The next section briefly outlines the failed NSW sentence indication scheme.

6.2.3 NSW District Court Scheme

An indictable sentence indication scheme was implemented in NSW in the *Criminal Procedure (Sentence Indication) Amendment Act 1992* (NSW). The scheme was initially introduced in Parramatta District Court in January 1993 and, by February 1994, it had been expanded to all NSW District Courts. The scheme was introduced in response to court inefficiency, at a time when 40% of trials were pending for over twelve months (Weatherburn et al., 1995, p. 1): thus the purpose of the scheme was to increase early guilty pleas by offering defendants 'the benefit of a discount for a guilty plea in a tangible and precisely calculated form…without unacceptably encroaching upon the rights of the accused' (Spears et al., 1994, p. 2). Similarly to the UK system, the NSW scheme adopted a mini-plea hearing approach, whereby after the defendant requests an indication, the Crown presents a case summary and the defence details any relevant mitigation (Weatherburn et al., 1995). The judge then considers the evidence and offers an indication of the likely sentence order and range (Spears et al., 1994, p. 11).

The initial extension of the scheme coincided with reports claiming that between June 1993 and November 1993, 31% percent of defendants applied for indications, with an 81% acceptance rate (Spears et al., 1994, p. 27; Weatherburn & Lind 1995, p. 212). In terms of sparing resources, estimates ranged from between five and six years of judge time being saved, and up to 376 weeks of trial time (Weatherburn & Lind, 1995, p. 212; Weatherburn et al., 1995, p. 2). However, while these findings suggest positive impacts in terms of improved efficiency, no research could determine whether the scheme was the main factor in reducing court delays. There was also no significant evidence that fewer trials were occurring solely due to the scheme (Weatherburn & Lind, 1995). Thus despite the seemingly positive statistics, the evaluations could not confirm the effectiveness of the reform. They did all, however, identify multiple limitations of the scheme (Spears et al., 1994; Weatherburn & Lind, 1995; Weatherburn et al., 1995).

A major limitation of the scheme identified involved the significant sentence discounts and perceived leniency of sentences being offered to defendants to encourage their acceptance of indications (Weatherburn et al., 1995). This was considered a principal limitation, because 'a large percentage of guilty pleas [were entered] on the basis of inappropriate, disparately shorter sentences' (Sulan, 2000, p. 5). The scheme was also criticised for awarding defendants greater discounts than those who pled guilty at the earlier Committal Hearing. This was a major concern because it undermined the NSW Court of Criminal Appeal's decision in *R v Warfield* (1994) NSWLR 2020, which dictated that sentences should be more lenient for those who plead guilty at the earliest opportunity, which is generally at the Committal, than those who plead after receiving a sentence indication. This issue was also addressed in *R v Hollis* (1995) (unreported, NSW Court of

Criminal Appeal, 3 March 1995), during which the NSW Court of Criminal Appeal stated that:

> A plea of guilty entered when the trial is called on for hearing is treated as a matter in mitigation…upon the basis that the plea shows some contrition by the accused…A plea of guilty entered after a sentence indication, however, should not be thought to disclose any such contrition at all…The extraordinary leniency being shown by some of the judges in the sentence indication process placed an unfair pressure upon others to follow such a course…The scheme will be brought into disrepute if irresponsible sentences…continue to be imposed in such cases (at 7).

Three prosecutorial participants who had some involvement in the NSW scheme also identified sentence leniency as a major limitation. ProsecutorE maintained:

> When they implemented this in NSW, the main reason was to clear the backlog, to actually work at clearing it and there was a very big one that needed desperate measures. So the judges offered bargain basement deals. One problem that came out of that was that the Director [of Public Prosecutions] of NSW started appealing at least half of them. Trouble was, they couldn't really have the Director bound by them, when you didn't know what was going to come out in the wash at the end of it all, when all the relevant material for the sentence was made available.

ProsecutorD similarly claimed:

> The NSW scheme suffered from the leniency of some of the judges involved. NSW struggled a lot with the practical implications of the sentence indications and they had all these complicated *Practice Notes* about how it would work. It wasn't easy. You don't want a process that is going to double the cost and that was one of the biggest problems for NSW that they didn't actually find that it was worth it. That they weren't making the savings that they hoped they would. So they deserted it.

The extent of limitations identified in the evaluations of the scheme and in the perspectives of my participants, alludes to the ineffectiveness of the scheme, which was ultimately abandoned in 1996, on the basis that inappropriate sentences were being indicated and that it failed to achieve its desired efficiency aims (Spears et al., 1994; Weatherburn & Lind, 1995, p. 212; Weatherburn et al., 1995).

Although differing in style, the common motivation linking the Victorian Magistrates' Court scheme, the UK Crown Court scheme, the NSW scheme, and indeed the Victorian indictable sentence indication scheme is efficiency. Efficiency was one of the main justifications for the Victorian Attorney General (2005, 2007) commissioning research into sentence indications initially, and for their implementation in statute. Three motivations have since been adopted as the main aims of the Victorian indictable indication scheme including: (1) efficiency; (2) transparency and clarity; and (3) the potential benefits for victims. The following section examines these motivations to demonstrate the context in which the Victorian indictable indication scheme was introduced.

6.3 Victorian Sentence Indications

6.3.1 Efficiency

An interest in indictable sentence indications emerged in response to one of the key contributing factors fuelling delays in Victorian courts—late guilty pleas (Victorian Attorney General's Department, 2004; VLRC, 2004, 2006). The negative consequences of late guilty pleas within Victorian criminal proceedings are not new and have been a focus of research and reform since the establishment of the Victorian Shorter Trials Committee (1985) in August 1982. Ten years following the creation of this committee, the impact of late guilty pleas were the basis of a report, *Reducing Delays in Criminal Cases* (Pegasus Taskforce, 1992). This report examined the negative consequences of cracked trials, in which a case is prepared for trial but the defendant changes their plea to guilty on the day or within two days of the trial commencing (Ashworth, 1994, p. 259). The participants identified cracked trials as wasting the resources of all parties. ProsecutorK further argued that they negatively impact on victims by 'causing increased inconvenience and anxiety because the process is prolonged'. The report (Pegasus Taskforce, 1992, p. 8) determined that each month, on average 55 defendants reserved their plea at the Committal Hearing, yet 81% of these defendants ultimately pled guilty before their trial commenced. It also concluded that 45% of cases prepared for trial by the Office of Public Prosecutions (OPP) resolved by guilty pleas after this preparation had taken place. In response, among other proposals, the report (Pegasus Taskforce, 1992) suggested implementing sentence indications to alleviate these efficiency concerns.

Sentence indication schemes have been a common response to inefficiency in both summary and indictable jurisdictions (ALRC, 2006). For example, NZ Chief District Court Judge Russell Johnson (2008) claims that sentence indications were initially implemented in NZ to 'overcome the problem of cracked trials clogging the courts' schedules' (p. 10). Similarly, the NSW scheme was introduced in response to increasing delays (Weatherburn et al., 1995, p. 1). In Victoria, the County Court Annual Report (2004, p. 4), released just prior to the commission of the VSAC review, showed a concerning pattern of delay, with an almost 8% increase in the number of criminal cases pending (n=1,601) for over twelve months since 2003. The most recent examination of County Court delays released in January 2009, revealed that these delays have continued to increase since June 2005, during which time the number of cases pending for more than twelve months had risen by 13.4% to 27.4%, and those pending for more than two years had increased by 2.7% to 5.7% (Payne, 2007, p. 10; SCRGPS, 2009, p. 27). Similar patterns were evident in Victoria's Supreme Court prior to the VSAC's commission, and recent statistics indicate these have also continued to increase (SCRGPS, 2009). At June 2008, the number of cases pending for more than twelve months in the Supreme Court had increased since 2006 by approximately

20% to 33.7%, and those pending for more than two years increased by over 2%, to 10.2% (SCRGPS, 2008, p, 26; VSAC, 2007c, p. 18). As a result, in accordance with the three schemes previously outlined, one primary motivation for the VSAC's commission and subsequent implementation of legislation allowing sentence indications in Victoria's superior courts was to minimise the extent of these delays, and thereby alleviate inefficiency.

6.3.2 Transparency & Clarity

In addition to potentially increasing court efficiency, indictable sentence indications support moves towards greater transparency in discretionary decisions, in turn improving accountability in sentencing (Cotterrell, 2004, p. 21; Kagan, 2004, p. 212). Sentence indications arguably achieve transparency because when given in open court they can provide clarity to the seemingly mysterious sentencing process, which, as established in Chapter Three, can contribute to public understanding and confidence levels (Doob & Roberts, 1983; Hough & Park, 2002; Hough & Roberts, 1998, 2004; Indermaur, 1987, 2006; Mirrlees-Black, 2002; Roberts, 2002). Such perceived benefits therefore provided a powerful motivation for commissioning the VSAC review and implementing the legislated scheme (Victorian Attorney General's Department, 2007).

The transparency in providing sentence indications can also help inform a defendant's pleading decision. One of the main influences on a defendant's pleading decision is what their sentence might be, and any uncertainty around this impacts significantly on when, or whether, a defendant will plead guilty (JUSTICE, 1993). While Victorian legislation and case law requires that a guilty plea be considered as a mitigating factor in sentencing, such that a discount is applied, because there are no specifications on the discount amount, fourteen participants in the initial interview period identified this ambiguity as a main factor hindering early pleading decisions (*Sentencing Act 1991* (Vic) s.5(e); *Penalties and Sentences Act 1985* (Vic) s.4; *R v Gray* [1977] VR 147; *R v Morton* [1986] VR 863). Although since the initial interview period legislation has been introduced requiring judges in sentencing to also state the sentence they would have imposed but for the guilty plea, before the formalisation of sentence indications there was no transparent mechanism enabling defendants to fully understand the benefits of their guilty plea prior to pleading, outside relying solely upon their representative's estimates (*Sentencing Act 1991* (Vic) s.6AAA.) The Attorney General (2005) identified this issue as one of the primary motivations for commissioning the VSAC research, claiming:

> Currently there is a trend for lawyers to advise their clients against pleading guilty, as there is a perception held by the legal profession that there is no discernable benefit for doing so. Accused people are often reluctant to plead because they don't know what sort of sentence they will receive and doubt whether a guilty plea will reduce their sentence (Victorian Attorney General's Department, 2005, p. 1).

Sentence indications can arguably address these transparency and efficiency issues by better informing pleading decisions, by offering an outline of the likely sentence or sentence order to be imposed, which will also indicate a sentence discount (Freiberg, 2008; Freiberg & Willis, 2003; Mack & Roach Anleu, 1995). This is supported by statistics from the Magistrates' Court, which show that since 1993 when informal summary sentence indications commenced operating in Contest Mentions, there has been an increase in early guilty pleas and a decrease in cases listed for trial (Magistrates' Court of Victoria, 2006, p. 21; VSAC, 2007b, p. 57). In this regard, there is a basis for claiming that similar results could be achieved with indictable sentence indications, which constitutes another motivation for their implementation in statute.

6.3.3 Beneficial for Victims

The victim has been a motivating factor in law reform in Victoria since the late 1980s and their increased recognition and role within criminal proceedings were key drivers of both the VSAC's commission and the legislation (VLRC, 2004, 2006). The Attorney General identified the importance of the victim within the VSAC's research in a media release in 2005, in which he claimed that 'while the arguments for and against a sentence indication scheme are complex, this issue should be explored if such a scheme may reduce the trauma experienced by victims of crime in the criminal process' (p. 1). In introducing the legislation, he also pointed to upholding victim values and reflecting initiatives such as the *Victims' Charter Act 2006* (Vic) ('*Victims' Charter 2006* (Vic)') as strong motivations for implementing indictable sentence indications. The Attorney General further cited the potential benefits for victims of indications as a strong motivation for their implementation in statute, given that they could minimise the duration of criminal proceedings and spare victims from testifying or facing defendants in the trial setting (Victorian Attorney General's Department, 2007).

Although these three motivations can be seen to provide a legitimate basis for implementing indictable sentence indications, the next sections provide an overview of Victoria's 'normal' sentencing process, the VSAC proposal (2007c) for sentence indications and the subsequent legislation, to demonstrate the significant and potentially negative impact indictable sentence indications can have on the established sentencing process.

6.4 The 'Normal' Sentencing Process

Victoria's sentencing process requires a full plea hearing to be run after a defendant has pled guilty or a guilty verdict is delivered. Plea hearings assist judges to determine appropriate sentences by having the defence provide evidence of all mitigating factors that may have impacted on the defendant and contributed to their offending behaviour, and

requiring the Crown to detail any aggravating factors and the impact of the crime on the victim. The materials provided by both counsel generally include a statement of the case facts, and any information that could impact on the sentence as dictated in the *Sentencing Act 1991* (Vic) s.5-s.6. This may include the Victim Impact Statement (VIS), psychological or psychiatric reports, drug and/or alcohol and other rehabilitative reports, work reports, the defendant's criminal history and pre-sentence reports. After all material is provided, the judge imposes a sentence and details how and why it was determined (*Director's Policy 4.7.1 2008* (Vic) s.1.17-1.36).

6.5 The VSAC Proposal

The VSAC proposal (2007c) recommended the introduction of a sentence indication pilot trial in Victorian County Courts, which would significantly alter this sentencing process. The proposed scheme would allow the defence to request an indication during County Court pre-trial proceedings, which could generally only be made once (VSAC, 2007c, p. 3). Approval to grant the indication was subject to non-reviewable judicial discretion and to prosecutorial approval, such that if the Crown disputed the request, it was required to inform the defence, and both sides would then attend the indication hearing with submissions as to why an indication should or should not be given (VSAC, 2007c, p. 5, 118). The indication would be based upon the materials prepared for the first County Court pre-trial process, the Case Conference. The judge would therefore not have access to the same materials that would be available to them at a plea hearing, and would not consider a VIS or personal mitigation before determining an indication.

The proposal recommended that the indication outline only whether or not the defendant should receive an immediate term of imprisonment if they were to plead guilty. No sentence ranges would be given. In the rare circumstance that life imprisonment would be the likely sentence, the indication would simply state whether a minimum parole period would be set. To provide transparency to the sentence discount, the proposal also recommended that if the judge were to provide a non-custodial or non-parole indication, they would be required to state 'whether, but for a guilty plea being entered at that stage of the proceedings, a more severe type of sentence would have been imposed' (VSAC, 2007c, p. xvi). If a guilty plea were entered based on a non-custodial or non-parole indication, the court would not then be 'permitted to impose an immediate servable term of imprisonment (or life without parole)' (VSAC, 2007c, p. xvi) following the revelation of all materials at the plea hearing. If an indication were given but rejected, the indicating judge would be retained for the subsequent pre-trial hearings and trial.

In considering victim interests, the proposal recommended restrictions be placed upon the types of crimes eligible for indications. Thus, sexual offences were excluded, while defendants involved in drug, fraud and/or property offences were considered the

primary targets of the scheme, due to the potential efficiency benefits in attracting early guilty pleas in matters that are usually resource intensive (VSAC, 2007c, p. 128). The proposal also required prosecutors to, where practical, consult with victims to ascertain their perspectives on the defence's request for an indication, and use that opinion to inform their decision as to whether to challenge the request.

6.6 The Legislation

The legislated indictable sentence indication trial was introduced on 1 July 2008 (*Crimes (Criminal Trials) Act 1999* (Vic) s.23A). The provisions governing the scheme were amended in March 2009 (*Criminal Procedure Act 2009* (Vic) s.208-s.209). A sunset clause in s.384 of the *Criminal Procedure Act 2009* (Vic) requires the effectiveness of the trial to be reviewed by July 2010. This review will be undertaken by the VSAC, and based on its recommendations, the scheme will either be abolished or enacted in statute as a permanent criminal justice process (Parliament of Victoria, 2007, p. 4355).

The legislation adopts many of the recommendations of the VSAC proposal (2007c), yet includes four significant differences, including permitting indications to be given in both the County and Supreme Courts, as opposed to only the intermediate jurisdiction. The legislation does adopt the recommendations that protect the defendant to some degree, whereby if a non-custodial indication is given and the defendant pleads guilty at the first opportunity, the judge is not permitted to impose a custodial sentence following the plea hearing (s.209(1)(a)-s.209 (1)(b)). However, it extends beyond this safeguard to require that if the defendant rejects an indication or the judge rejects the defendant's request for one, a new judge must be assigned for any subsequent pre-trial hearings and the trial, unless all parties agree otherwise (s.209(2)). If a new judge is assigned, they are not bound in any way by the indication in ultimately determining a sentence (s.209(3)).

Significantly, the legislation also departs from the VSAC proposal (2007c) on when an indication can be requested. As such, defendants are only permitted to request indications after the presentment is filed (s.208). This means that an indication will generally not be sought until after the County Court Case Conference and after the Supreme Court Section 5 Hearing, which is somewhat surprising given that the early resolution focus of these hearings could have provided a fitting environment for the indication scheme. A notable contrast between the legislation and the VSAC proposal (2007c) is also that no restrictions are placed on the type of crimes eligible. Thus, sexual offenders can request indications. Furthermore, it does not specifically require prosecutors to consult with victims prior to the indication hearing.

In an (unexpected) attempt to encourage plea bargaining prior to the indication hearings, the legislation also allows defendants to request an indication for charges not listed on the presentment (s.208(3)). This request can only be made if there is a strong

possibility of a plea bargain, whereby the charges for which the defence requests an indication will replace the charges on the presentment. This process is subject to strict prosecutorial approval, as the Crown must not only consent to the indication being given, but must also be willing to alter the charges should the defendant accept the indication (s.208(3)). The judge retains full discretion to refuse to grant any indication, even when supported by the Crown (s.208(4)).

The remaining sections of the legislation generally reflect the recommendations of the VSAC proposal (2007c), including that indication requests can generally only be made once (s.208(1)(b)) and the Crown must approve, and can challenge, a request, and the decision over whether to provide an indication is based on non-reviewable judicial discretion (s.209(4)). The right of either party to appeal the ultimate sentence imposed is also not affected by the indication process (s.209(6)).

6.7 Potential Benefits of the Legislation

There has been considerable support expressed for sentence indications, both nationally and internationally (ALRC, 2006; Freiberg & Willis, 2003; Mack & Roach Anleu, 1995; NZLRC, 2005; Spears et al., 1994; UK Office of the Attorney General, 2007). In its evaluation of trial reform in Australia in 2000, the Standing Committee of Attorneys General (SCAG) (2000, p. 6) recommended that all Australian states consider implementing indications. Similarly, in 2006 the Australian Law Reform Commission (ALRC) (2006, p. 419) recommended that sentence indications be introduced for federal offences. In the UK, support for sentence indications first emerged in 2002 (UK Home Office, 2002), and, following their implementation into Crown Courts in 2005, a key recommendation of the UK Fraud Review (2007) was to increase the scope and timing of the existing process. The New Zealand Law Reform Commission (NZLRC) (2005, p. 109) have also recommended formalising the existing indication process that operates in their summary jurisdiction.

The support for sentence indications is based largely upon their potential to attract early guilty pleas and thus to increase court efficiency (Freiberg & Willis, 2003; Mack & Roach Anleu, 1995; Spears et al., 1994; VSAC, 2007b, 2007c; Weatherburn et al., 1995). One of the main objectives of any justice system is to avoid delay. Research has continually shown that justice systems cannot cope with too many trials, as delays become unmanageable, increasing anxiety and pressure on all parties (Fitzgerald, 1990; Freiberg & Seifman, 2001; JUSTICE, 1993; Pegasus Taskforce, 1992; VSAC, 2007c). As Klein (1976) maintains, ‘the most efficient means of processing a large number of offenders, thus keeping the system fluid and intact, is to encourage defendants to plead guilty’ (p. 59). Therefore, if s.208-s.209 of the *Criminal Procedure Act 2009* (Vic) can increase early

guilty pleas, it could serve the aims of both justice and efficiency by enabling courts to get through their busy lists and reduce resource expenditure and delays.

When discussing the potential formalisation of sentence indications prior to the enactment of the legislative provisions, Policy AdvisorC claimed, that like the UK, indictable sentence indications could have a positive impact on Victorian court efficiency. He argued that 'the courts are so desperate to reduce court time that they are looking at ways they can prevent a trial, and something that gets these late pleading defendants to do so earlier is a great idea'. Similarly, after the legislation's enactment JudiciaryD asserted that 'sentence indications were introduced to increase the number of guilty pleas and to facilitate the settlement of listed trials…If it can help resolve cases, then it is of use to us'. ProsecutorC also claimed that 'having a sentence indication will force prosecutors and [the] defence to think about plea bargaining earlier'.

The public could also benefit from the reduced costs associated with contested trials, with these resource benefits further extending to both counsel (Buckle & Buckle, 1977, p. 8; Douglass, 1988, p. 268; Jenkins, 1994, p. 115). As Defence CounselF maintained, 'if the defendant likes the indication then they will plead guilty and dispose of the case without having to go to trial and there is a huge benefit to the participants in the system and for the court listings. That is the benefit, if it works'. Participants also indicated that public interests could be upheld through the transparency of indications, on the basis that 'indications given responsibly in open court, with the rights of the accused and the public carefully observed, would not bring the system of criminal justice into disrepute. They would enhance it' (Hampel 1985, as cited in Mack & Roach Anleu, 1995, p. 272). This view was similarly supported by JudiciaryC in my research, who argued that the legislation could increase court efficiency, because:

> providing indications in terms of custodial or non-custodial would reduce the number of trials. It would reduce delays and provide a degree of certainty to the accused who are currently not well informed of the [sentence discount] situation. It would offer informed reality to defendants and to the public and avoid unnecessary trials, reducing the backlog of nonsense cases.

Sentence indications can also benefit defendants by better informing their pleading decisions. As Mack and Roach Anleu (1998) argue:

> An important indicator of fairness for an accused person is the opportunity to make an informed decision. It seems unjust for an accused to plead guilty on the basis of inaccurate advice as to the likely sentence. Judicial sentence indication is consistent with the overall goal of giving an accused person the greatest information as early as possible (p. 272).

Providing additional clarity on the likely sentence order also has the potential benefit of reducing some of the limitations hindering Victoria's existing sentence discount practice

from attracting early guilty pleas. Based on the VSAC's proposal (2007c) for the sentence indication scheme, ProsecutorL maintained that:

> If an accused person says to their legal advisor, well you say that the law says I am going to get a discount if I agree to this and plead guilty and the judge will factor that into account, well what I want to know is, what I'm going to get as a result of that. Can you explain that to me? Having been involved in that sort of process from the other side, while we are more at arms distance here, well you often can't go that extra step and give them more detail on the sentence outcome, which is often all that they want. If we have indications, that will shed some light on this for the accused.

Defence CounselB also claimed that indications 'would provide them [defendants] with certainty and offer them a good reason to plead. It would be useful, rather than having them have to rely on an estimate from their counsel. It would remove the pressure from the unknown'. Similarly, Policy AdvisorB argued, 'it will get defendants who are withholding their pleas because of [sentence] uncertainty to plead earlier'. This view was also supported by JudiciaryC, who stated that:

> It should be made very clear to the defendant what their guilty plea will give them. It is very important to minimise the backlog of cases we have in the County Court. It is best to have a court system where defendants can avail themselves if they want to and providing indications and some clarity may help do that.

Increasing the number of early guilty pleas could also avoid some of the negative consequences for victims of drawn-out proceedings. Mather (1979) argues that reducing the length of criminal proceedings, and having defendants accept responsibility for their actions by admitting guilt, allows victims to experience earlier emotional restoration. In addition, it can spare victims from facing defendants in court or having to experience potentially distressing cross-examination (Douglass 1988; Johns 2002; Mack & Roach Anleu, 1995), the benefits of which were identified by the NSW Court of Criminal of Appeal in *R v Thomson* (2000) 49 NSWLE 383, during which the court stated that:

> A plea permits the healing process to commence. A victim does not have to endure the uncertainty of not knowing whether he or she will be believed, nor the scepticism sometimes displayed by friends and even family prior to a conviction. A victim will also be spared the personal rumination of the events (at 120).

In a similar vein, in *R v Cameron* (2002) 187 ALR 65, Kirby J claimed:

> A plea of guilty may also help the victims of crime to put their experiences behind them, to receive vindication and support from their families and friends and possibly assistance from the community for injuries they have suffered. Especially in cases of homicide and sexual offences, a plea of guilty may spare the victim or the victim's family and friends the ordeal of having to give evidence (at 67).

The potentially negative impacts of cross-examination have been well documented, particularly in cases involving child or sexual assault victims (Brereton, 1997; Lees, 1997; McConville, 2002b, p. 373; Rock, 1993). However, the true benefit of removing the victim's ability to testify in terms of how it affects their sense of closure has been heavily debated (Cook, David, & Grant, 1999; Flatman & Bagaric, 2001; Johns, 2002; Sebba, 1996; Strang, 2002). As the NSW Court of Criminal Appeal went on to note in *R v Thomson* (2000) 49 NSWLE 383, the benefits for victims in not testifying 'like the element of remorse…depends on the specific circumstances of the offence and overlaps to a substantial extent with other aspects of the specific case' (at 120).

Prior to the introduction of either the summary or indictable sentence indication scheme in legislation, 29 out of 31 participants supported formalising a summary scheme in the Magistrates' Court. However, despite identifying possible resource, financial and emotional benefits, when discussing the potential formalisation of indictable sentence indications, nineteen out of 31 participants raised concerns, predominantly relating to the nature of the cases handled in the superior courts. Reflecting this view, ProsecutorE claimed:

> In the Magistrates' Court, an indication can be given by the Magistrate in a fairly simple straightforward matter, because there isn't that much room to move on sentence anyway. It is not like indictable offences, where it is much harder to give an indication of the sentence or sentence order because you have five- and ten-year maximums for your bottom level offences, before you start going up to 25 years.

JudiciaryD also argued that:

> In the Magistrates' Court you get your indication and you plead 30 seconds later. Done. Finished. Done. That wouldn't work in the County Court. It would require a shift in thinking and it would also require a significant resource in the sense that it would come before the judge, you would give the indication, inevitably they wouldn't want to plead that day so it would be adjourned off to another day, it has to stay before the same judge, that is very difficult.

Following its implementation, less than one-third of the participants in the follow-up interviews supported the indictable indication scheme, and those that did supported it purely for its potential efficiency benefits (four out of fifteen participants). As ProsecutorN maintained:

> With sentence indications as law, guilty pleas will happen at an early stage in the process. The system is clogged with matters that ultimately resolve, but that resolve far too late. If you analyse it, it is hard to find anything that may have happened from the point of time it could have resolved to when it actually does, except that people have actually sat down and thought about it. So the idea is to get them sitting down and seriously thinking about it at an early stage instead of ten minutes before you are due to empanel a jury…Sentence indications have upsides and downsides, but at the end of the day, it is more of an upside.

Similarly, Defence CounselC claimed that 'if they only care about jail, this process can work'.

As implicit in Defence CounselC's claims, although there is the potential for benefits to emerge from the legislated reform if a custodial outcome is the only factor preventing a defendant from pleading, my findings suggest that s.208-s.209 of the *Criminal Procedure Act 2009* (Vic) is not an effective or necessary formalisation. This argument is particularly applicable to the Supreme Court, where it is anticipated that indications will have limited, if any, impact on the number of early guilty pleas. This argument is also supported by JudiciaryE, who in December 2008 maintained that 'no requests have even been made for indications at this point in the Supreme Court'. Official statistics gathered between July 2008 and April 2009, revealed that three indication requests had been made in the Supreme Court; one of which was not granted due to prosecutorial argument, and the other two of which were rejected by the respective defendants—both were custodial indications (Victorian OPP, 2009). Over the same period, eighteen requests were made in the County Court. Fourteen were accepted, of which eleven were non-custodial indications. While three custodial indications were accepted, two of these were ultimately altered to non-custodial sentences following the revelation of all materials at the plea hearing, which raises significant questions over the accuracy of the process. Of the remaining indication requests, two custodial indications were rejected and two requests were refused due to prosecutorial argument (Victorian OPP, 2009). While these statistics indicate that there is the potential for some early guilty pleas to be identified in the County Court as a direct result of indications, the broad nature of the indications (custodial or non-custodial) limits the likelihood of the legislation from achieving a significant increase in the number of early guilty pleas, particularly as reflected in the statistics, when a custodial indication is given. The following sections outline the legislation's significant potential disadvantages, to demonstrate that despite three motivations being proposed as the basis for implementing legislative reform, the primary aim of the legislation is to increase efficiency, and this is prioritised above victim, defendant and public interests. Significantly, the following sections also show, that despite being aimed at improving efficiency, the legislation is unlikely to assist the courts in significantly increasing their efficiency levels.

6.8 Potential Disadvantages of the Legislation

6.8.1 The Defendant: Clarity or Additional Pressure?

There is limited evidence to suggest that the legislated indication scheme will be effective in influencing pleading decisions through providing additional clarity, particularly if defendants are told that an immediate custodial order is likely. This is because there is a strong possibility that some defendants will continue to trial in the hope of an acquittal, as

they face a period of imprisonment regardless of their plea. In theory, this concern is somewhat reduced by the sentence discount incentive, whereby if the defendant rejects the indication, proceeds to trial and is found guilty, they should receive a heavier custodial sentence than had they accepted the indication initially. However, due to the limited transparency in the discount amount applied for an early guilty plea and when faced with a custodial sentence either way, the potential discount is unlikely to provide a significant incentive to plead (Payne, 2007, p. 52; Weatherburn & Baker, 2000, p. 37).

This problem persists despite s.6AAA of the *Sentencing Act 1991* (Vic), enacted at the same time as the indication trial, which requires greater specification of the discount applied to a defendant's sentence. This is because the way in which the discount is specified in the indications simply requires the court to make a statement of whether a more severe type of sentence would likely be imposed were a guilty plea not entered (VSAC, 2007c, p. xvi). Thus, in the delivery of the indication, there is no required specification of the amount of discount applied, thereby reducing its ability to provide an incentive for defendants. As Defence CounselB claimed, 'the justification for this statement is to show that pleas do play a part in the indication, but without any real evidence of the discount, as an incentive it becomes less useful, especially for custodial orders'.

A sentence discount is also only likely to influence those defendants whose motivation to plead guilty is premised on receiving a discount. As McConville (1998) identified, a defendant's pleading decision may be influenced by 'a whole variety of reasons, such as to protect a third party, to get the matter over with, or out of inner feelings of guilt unconnected with the alleged crime' (p. 266). For some defendants, the motivation to plead guilty may depend on post-sentence orders or whether they are on bail or remand. If the defendant is facing a likely custodial sentence and they are on bail, there may be no real incentive to plead guilty at any stage prior to the trial, regardless of any possible discount. All seven prosecutorial participants in the follow-up interviews identified this potential limitation. As ProsecutorA claimed, 'nobody wants to go to jail straight away, so they drag it out till the last bitter end'. ProsecutorO argued that these concerns are 'especially [applicable] with sex offenders. They just string it out until they get to the door of the court. A defence friend of mine who has acted for so many sex offenders over the years said they just have to wait until the door of the court to say I am guilty'. ProsecutorD similarly maintained that:

> A lot of cases do drag out unnecessarily, and pleas are resolved at the day of the court but really, quite often that is because the accused has come to the day of reckoning and they can't put the plea off any longer, so it might not have anything to do with the ultimate outcome.

Even prior to its enactment in statute this potential limitation was identified by Policy AdvisorB, who claimed:

> There are always going to be defendants who go into denial or waste people's time or who are just being difficult. There is no reason why they shouldn't be amongst the criminal population as they are amongst the rest of us, and there is no reason that they will stop because of sentence indications.

As demonstrated by these responses, the likelihood of the indications significantly attracting early guilty pleas is somewhat questionable.

Alternatively, if the provision on the court to show evidence of a sentence discount can attract early guilty pleas, by the judge stating that a more severe type of sentence would be likely were the indication rejected, then there is a possibility that the legislation may exacerbate the pressures on defendants to plead guilty. This is because defendants may interpret indications such that they should plead guilty to a non-custodial indication today, or face a more severe sentence by contesting the case. The mere perception that a harsher sentence may be received if the indication is rejected may pressure defendants into pleading guilty. When this fact is stated to the defendant by the judge, the potential for coerced guilty pleas is increased. The negative impacts of judicial involvement in any process that provides pleading incentives to defendants were recognised by Baldwin and McConville (1977) in their analysis of plea bargaining in the UK, where they claimed, 'if the judge involves himself [sic]…all talk of the voluntariness of the defendant's plea is meaningless. So far as the defendant is concerned, the question of guilt or innocence is no longer an issue' (Baldwin & McConville, 1977, p. 33). When applied to sentence indications, this concern is also significant insofar as defendants may be encouraged to revoke their right to have the prosecution prove their guilt beyond reasonable doubt at trial, due to the threat of being punished for doing so. As McConville and Baldwin (1981) later claimed, 'it hardly needs stressing that faced with inducements…the weak, naïve, or less resilient might well be tempted to forego their right to trial and instead plead guilty' (p. 67).

The implication that defendants are punished for proceeding to trial emanates from the sentence discount itself (Frankel, 1982; Henry, 1992; Huff, Rattner, & Saragin, 1996; Newman, 1966; Pincus, 1987). However, the requirement for judges to provide evidence of a sentence discount in their indications was justified in the VSAC proposal (2007c) because the 'revelation from the judiciary that a more severe sentence would be indicated if a guilty plea was not entered at this point in the process…[will] increase the transparency of the sentence indication' (p. 89). This clarification, however, is likely to have a substantially negative influence on the defendant's pleading decision. As Willis (1985) notes, 'even for an innocent defendant, the guilty plea with an expectation of leniency can be an attractive soft option' (p. 141). This concern was identified by Defence CounselC, who claimed that:

> The indications will work even if they [the defendant] think they can win the case because there is not enough evidence against them, because if there is no jail involved, they won't hold out pleading guilty, because there is no jail involved. So it could, in those instances, be seen more as a pressure than advice.

This concern was also recognised in Parliamentary Debates (2007) on the proposed legislation, at which it was stated that:

> What this legislation will do is introduce a system where people who are disadvantaged and not able to make the judgements which are so fundamental to their future will be under enormous pressure to plead guilty, simply because they think that course of action is better than going to trial—the discount they are being offered and the indication that has been given to them convinces them to think, although I didn't commit this crime, I'm better to take this option of pleading guilty to the charge because it will spare me the effects of a trial in all its forms, personal, financial and otherwise (p. 4348).

The potential for the legislation to coerce defendants into pleading guilty is particularly concerning given s.208(3), which stipulates that the defence can request an indication for charges not listed on the presentment. The main justification for this, as identified by JudiciaryB is 'to encourage counsel to consider early plea bargains and to provide clarity on the possible sentencing outcome [of any such agreements]'. However, the potential for pressure to be applied to a defendant when an indication on altered charges is given, particularly when combined with a statement that a more severe sentence is likely if the case proceeds to trial, is high. When engaging in plea bargaining, defendants already face pressure based on the immense benefits of an agreement that alters the charges and case facts and can reduce the severity of the recorded conviction(s). This pressure is compounded by the legislated reform, because if a non-custodial indication to altered charges is given, there is extreme pressure on defendants to accept this outcome from which derives the additional benefit of the less severe conviction. Pressures are also placed on defendants who receive custodial indications, as the advantages of pleading guilty to altered charges remain significantly high when compared with the threat of a more severe outcome resulting from contesting the original charges. When these pressures are combined with any additional vulnerabilities that may impact on a defendant's capacity to make decisions, such as mental illness or drug addiction, the potential pressures confronting defendants as a direct result of the legislation are exacerbated (ProsecutorH). This element of the legislation could also result in indications becoming a sounding board for potential plea bargains, which could lead to a dangerous bargaining arena involving the judge. As ProsecutorC claimed, 'it'll become just a process of, if we plead to x what will you give him [sic]? If he [sic] pleads to y what will you give him [sic]?'

6.8.2 Is a Little Pressure Appropriate for the Sake of Efficiency?

As those in favour of sentence discount incentives maintain, it is not entirely inappropriate for the courts to provide incentives to encourage early guilty pleas (VSAC, 2007b, 2007c). Encouragement does not automatically equate to pressure, and if people are legally

represented this should provide a safeguard to prevent defendants from being pressured into accepting indications. In its evaluation of sentence indications, the NZLRC (2005) determined that concerns about coerced pleas can 'be largely ameliorated by the standard judicial comment that parties (in particular the defendant) always retain the right for the case to go to a defended hearing' (p. 90). The NZLRC (2005) found that there were no differences between the pressures defendants face from a sentence discount and those from an indication, and that 'the giving of a sentence indication in itself cannot be criticised as exerting undue pressure on a defendant' (p. 94). The NZLRC's report (2005) claimed:

> In the absence of a sentence indication, defence counsel would be expected to advise their client of the likely sentence or range of sentences. An indication from a judge is merely providing the same advice in more accurate form, thus enabling the defendant to enter a plea in full knowledge of the consequences…We realise the defendant may be presented with a choice between two evils and see a guilty plea as the lesser of the two. However, that is the reality that flows from the existence of the sentencing discount principle (p. 94).

However, when one of the main purposes of sentence indications as outlined by NZ Chief District Court Judge Russell Johnson (2008) is 'that the carrot dangled in front of the defendant will be sufficient to deter him [sic] proceeding to a defended hearing' (p. 13), there remains a strong possibility that defendants will face increased pressure to plead guilty as a result of indications. This argument is supported by Byrne's (1995) discussion on the NSW sentence indication scheme, in which he claims that 'providing sentence indications creates the distinct impression, if not the undoubted reality, of strong pressure to plead' (p. 212).

6.8.3 Broad Indications in the County Court: Will They Attract Guilty Pleas?

Notably, the broad nature of the indications limits their usefulness in providing sufficient information or clarity to inform pleading decisions. The success of the legislation relies heavily upon the main factor preventing a defendant from pleading guilty being an indication of whether they will go to jail. In the VSAC proposal (2007c, p. 123), introducing broad indications into the County Court was justified on the basis that on average, 50% of defendants receive non-custodial sanctions, yet a large portion of these defendants do not realise this until after the fact, and this is therefore a primary factor preventing them from pleading.[71] However, this argument does not account for the other 50% of defendants who receive custodial indications who will be in no better position to assess the length of time they will spend in custody before or after receiving an indication,

[71] The VSAC final report (2007c, p. 123) shows these figures as 51.4% in 2005–2006, 49.5% in 2004–2005 and 53.2% in 2002–2003.

especially if prison is already a likely outcome of the crime given the minimum penalties outlined in the *Crimes Act 1958* (Vic).

Participants identified the use of broad indications as a main disadvantage of the legislation. As JudiciaryD claimed, 'if we are not going to give numbers then it is useless. If the judge says you are going to go to jail, the defendant will say, yeah thanks, I knew that. But how much jail time are we talking, and we can't tell them. Well that is a problem. That is a real limitation'. ProsecutorD also argued that 'at the end of the day, if the indication is that it still involves incarceration, but there is no indication of how long, well that might not be an attractive answer'. ProsecutorN similarly claimed:

> If someone knows that they are looking at a sentence of between five and ten years if they are convicted after trial and the judge indicates that if you plead now you will get one, two or four years off what you would have got, they look at that and weigh up their chances of getting off altogether at trial and have a think and come back and plead guilty to get their discounted sentence. But just having a broad indication of custodial or non-custodial, well that is really not going to move the bulk of the delay. It is not likely to encourage those defendants to plead.

The legitimacy of the VSAC's justification for the broad indications in the County Court is further diminished by the potential phasing-out of suspended sentences, which is likely to reduce the number of defendants receiving non-custodial orders (VSAC, 2005a, 2008b). In part one of its final report (2005a) on suspended sentences, the continued implementation of Intensive Correction Orders (ICO) was recommended as an alternative to suspended sentences.[72] An ICO is categorised as a prison sentence that is served in the community, whereby the defendant complies with certain conditions imposed on them by the court, such as undertaking some form of education, supervised treatment or unpaid community service. S.19(1) of the *Sentencing Act 1991* (Vic) states that 'the court, if satisfied that it is desirable to do so in the circumstances, may impose a sentence of imprisonment of not more than one year and order that it be served by way of ICO in the community'. Importantly, s.19(4) of the *Sentencing Act 1991* (Vic) dictates that an ICO can only be used where the 'period of imprisonment imposed in respect of all the offences does not exceed one year'.[73] This severely restricts the number of indictable offences eligible for an ICO, as many require minimum imprisonment lengths of greater than twelve months (*Crimes Act 1958* (Vic)). Restrictions are therefore placed on the number of non-custodial sanctions that can be applied to a large number of matters heard in the County Court, which will further limit the number of defendants likely to receive non-custodial orders. The

[72] *Part One of the Suspended Sentences Final Report* (2005) released in October 2005 recommended the phasing-out of suspended sentences in Victoria by December 2009. *Part Two of the Suspended Sentences Final Report* (2008b) released in April 2008, has since recommended that any final decision over whether to abolish suspended sentences be deferred until after other reforms recommended by the VSAC in relation to sentencing orders have been implemented and assessed.

[73] The VSAC (2008b, p. xxvii) has recommended that the length of an ICO be increased to two years.

strength of the justification for having broad indications is consequently reduced, making it unrealistic to expect the legislation can achieve significant increases in the number of early guilty pleas entered in the County Court.

6.8.4 Broad Indications in the Supreme Court: Will They Attract Guilty Pleas?

The inadequacy of the indications in terms of informing pleading decisions is most evident in the Supreme Court. The Supreme Court hears only the most serious indictable offences that by law cannot be heard in the lower courts, such as treason, murder, serious sexual offences and attempted murder. The maximum penalties that can be imposed for indictable offences are outlined in the *Crimes Act 1958* (Vic) and most involve custodial punishments. For example, between 2001 and 2006, of the 152 defendants sentenced for murder in the court, all 152 received a custodial order, with 91% receiving a period of imprisonment (VSAC, 2007d, p. 1).[74] Similar sanctions were given in the same period for attempted murder, with only one of the 21 defendants receiving a non-custodial sanction (VSAC, 2007e, p. 1). For the offence of rape, only combined sentencing statistics from the County and Supreme Courts are available. However, as the legislation is implemented in both courts, the combined imprisonment rate is relevant to determine whether an indication of a custodial or non-custodial sentence order is likely to inform a defendant's pleading decision in these cases. The statistics show that between 2004 and 2006, 83 defendants were sentenced for rape in Victoria's superior courts and, of these, 89% received a term of imprisonment (VSAC, 2007f, p. 1).

As these statistics indicate, a large proportion of defendants in the Supreme Court are likely to receive custodial sentences if they plead or are found guilty, and given the serious nature of matters heard in this court, it is likely that the majority of defendants, or at least their legal representatives, will be aware that a custodial penalty is likely. Thus, most defendants will not be in a more informed position to make a pleading decision as a result of the legislation. As Defence CounselB claimed:

> Any practitioner worth his [sic] salt is able to tell his client in a fairly narrow margin of error what the sentence is likely to be, especially at the higher courts. We have the precedents and authorities and we know the track records of judges and we know what certain crimes attract so you can tell them. There is not much guesswork in it and when you are facing serious charges, like murder or serious indictable charges, well there is a pretty high chance it will end in prison.

JudiciaryD also argued that:

[74] A custodial order may include a period of imprisonment, custodial supervision order, hospital supervision order or home detention order (*Sentencing Act 1991* (Vic) Div.2.

> Sentence indications between immediate custodial or not are and will remain an extremely rare occurrence in the Supreme Court. Nearly every case heard by the Supreme Court involves offending which is likely to attract an immediate custodial sentence. Those which are on the brink will be pretty obvious.

These issues were also the main reason identified by the VSAC for recommending that indications not be implemented into Victoria's superior jurisdiction. The VSAC's report stated that:

> Sentence indications would be unlikely to have a significant impact on the timing of defendants' plea decisions in the Supreme Court or that court's case load, and for this reason, [we] have recommended against the introduction of such a scheme in that court (VSAC, 2007c, p. 9).

There is consequently a limited justification for the legislated indication scheme in the Supreme Court. Indeed, its implementation appears to do little more than offer a mechanism to prolong proceedings, which negatively impacts on court inefficiency and the parties involved in the case; which almost universally undermines the three motivations for implementing the reform initially. This argument is supported by the opinions of JudiciaryD, who claimed, 'the scheme is very limited in its scope and will have little benefit to the Supreme Court…I can confidently state that it will not have an impact on guilty pleas in the Supreme Court'.

6.9 Sentence Leniency

In addition to the questionable ability of indications to attract guilty pleas, five participants raised concerns about judges' general sentencing practices impacting on the legitimacy of the legislation and identified the possibility that indications will promote judge-shopping. Judge-shopping occurs when the defence deliberately rejects an indication in order to have the case heard by a different judge. This was a major limitation identified in the NSW scheme, because when lenient judges were indicating the scheme worked effectively as defence counsel were more likely to advise their clients to accept indications, yet, when non-lenient judges were indicating, indications were still sought, but were more commonly rejected, and the cases moved to alternate judges (Weatherburn et al., 1995). Based on the sentencing practices of Victorian judges—about which ProsecutorC said, 'there are some judges who are known as compassionate sentencers and some who are firm sentencers'—similar outcomes could arise in Victoria. ProsecutorC further claimed:

> If a compassionate sentencer is giving sentence indications and a firm sentencer is giving indications, then there may be extreme differences between the indications given by the judges, which could pose difficulties for those involved, particularly the accused. And if the defence is assigned to a firm sentencer, seeking an indication and rejecting it may allow them a chance to get a more lenient judge for the trial.

ProsecutorM also identified potential judge-shopping concerns, arguing:

> We know what the sentencing practices of the different judges are, so it could be a way for the defence when they get a judge that might be known as being a bit harsh, they could request an indication whether it will be of benefit or whether they are even thinking about pleading, and then if they don't like it, well they will get another judge.

Adopting a similar perspective, ProsecutorN observed, 'I'm not saying this would always happen, but there's a chance that some [defendants] might try their luck getting a new judge, say if you know you have a severe sentencer'. ProsecutorA also identified this concern, claiming that 'at the outset, indications might look like all involved in the judicial process would have a more realistic idea of what the benefits are of the defendant pleading guilty, but when you can swap judges around, it gets it back into the NSW realm of well, it depends on this judge'.

As alluded to by these five participants, sentence leniency is a problem surrounding indications because they 'often incorporate the full discount that would have been available upon a guilty plea at first appearance' (NZLRC, 2005, p. 94). Despite the broad nature of the indications, ProsecutorC recognised the potential for lenient indications to be offered in Victoria, claiming that:

> The defence can say no, don't wanna [sic] go to jail Your Honour, so we are going for an acquittal at trial. Which of course then means there is a bit of pressure on the judge for future matters to consider the non-custodial option and this is where we get into problems.

ProsecutorJ also maintained that:

> What troubles me about it, is even if you do it in open court in a transparent way, it can only work if you give light indications. If the idea of giving indications is to encourage people to plead guilty, which I assume it is, it will only ever work if you are giving lenient indications. Otherwise there is no benefit. I am not sure that is a good thing.

Judges may thus face pressures to indicate non-custodial sanctions, particularly given that the VSAC final report (2007c, p. 123) determined that non-custodial indications are the most likely to be accepted. This concern was also identified during Parliamentary Debates (2007) on the proposed legislation, during which it was stated that:

> There is going to be enormous pressure on judges to give indications of non-custodial sentences in order to clear case backlogs and reduce workloads, and that is echoed by the fact that, as the Council itself made clear, one of the main motivations for this reference was the Government's desire to address problems of delay and heavy workloads (p. 4345).

As a consequence, the legislation may fuel public distain and distrust of sentencing, creating the perception that unjustly rewarding defendants is a primary outcome of indications (Mack & Roach Anleu, 1995, p. 159).

Six prosecutorial participants identified negative public perceptions as another likely consequence of the legislation. As ProsecutorR claimed, 'sentence indications are politically unpopular because of victims groups, particularly in the County or Supreme Courts when you are dealing with serious offences'. In this regard, ProsecutorO claimed that sentence indications are:

> a bit like auctioning things off and it would create the atmosphere that they do have in the US where people are pleading to things that they shouldn't be pleading to. I just don't know if indications would be any less amorphous and create any less difficulties than the current process.

The fact that indications are based on limited information, alongside their aberration from the 'normal' sentencing process, could also exacerbate existing public beliefs that sentencing is a simplistic process, made with little consideration of victims. The significance of this concern is heightened by the element of secrecy that would have to surround the indications, at least initially. Suppression orders need to be in place preventing the media from publicly revealing indications, to allow defendants to reject them without prejudice of implied guilt should they proceed to trial (Byrne, 1995). This secrecy may further harm public confidence in the process (Ashworth, 1994; Kirby, 1998; Spigelman, 1999). To address these concerns in NZ, the NZLRC (2005, p. 101) recommended that restrictions be placed upon media reporting until after cases resolve. A similar recommendation was proposed by the ALRC (2006) to 'ensure the defendant receives a fair trial or hearing' (p. 424). However, there remain immense public confidence issues that arise from the media reportage of indications at any stage. Although transparency and openness are desired elements of criminal proceedings, when a defendant seeks an indication, rejects it and is ultimately found not guilty at trial, the public may lose confidence in the ability of proceedings to offer just outcomes, due to the implication of guilt inherent to the defendant initially seeking an indication.

6.10 Resource Concerns

There are a number of potential resource problems inherent to the legislated reform. For example, although requiring that a new judge be assigned to the case when an indication is rejected avoids some of the potential pressures and consequences of implied guilt that could emerge if the indicating judge were maintained, this requirement is faced by resource limitations (*Criminal Procedure Act 2009* (Vic) s.209(2)). This is because the process requires either that additional judges be employed solely to conduct indication hearings, or that judges be 'on standby' to be allocated to cases should indications be rejected. This requirement creates complications within metropolitan courts, but more substantial problems emerge for circuit courts, for which arranging standby judges is logistically more difficult.

The timing of sentence indications is another potential resource limitation. Indications can be sought at any time after the filing of the presentment; thus, in both the courts, the defendant has to wait until three pre-trial hearings have occurred before they can request an indication. This can result in defendants withholding guilty pleas at the earlier hearings to wait for the opportunity to seek an indication. In addition, by inserting another hearing into the pre-trial process, sentence indications could inadvertently create delays, becoming yet another step before the trial (ALRC, 2006, p. 416).

Six of the fifteen participants identified this concern, arguing that indications are likely to exacerbate delays by offering defendants another mechanism to extend proceedings. As ProsecutorM claimed, there is a 'potential for sentence indication hearings to simply become another procedure used to prolong cases'. Similarly, ProsecutorN maintained that 'defendants who are fully aware that the seriousness and criminality of their conduct will result in a term of imprisonment may request an indication despite knowing it won't assist their [pleading] decision, just to delay the trial'. This concern was validated within the OPP in December 2008, when their internal policy on sentence indications was amended to address deliberate delay tactics (*Director's Policy 4.7.1 2008* (Vic)). ProsecutorN maintained that these amendments were made due to concerns arising from a specific case. He claimed:

> There were two changes to the policy this month. They arose from a high-profile matter, which involved several co-accused and was listed for trial for a significant period of time. The circumstances were such that an immediate custodial was the only possible disposition. One of the accused sought a sentence indication. It was our view that this did not appear to be a bona fide request for an indication, as immediate custodial was the only possible disposition, but merely an attempt to delay the proceedings, as the judge would have had to have disqualified himself if an indication was given. This would have led to an adjournment and lengthy delay, as the courts cannot accommodate such large matters at short notice. The application was opposed by the Crown and our *Director's Policy* was amended to try and prevent such things happening in the future.

As amended, the internal policy now states that the Crown should challenge applications for sentence indications if:

> the prosecutor in the matter has reason to suspect that the accused person is seeking a sentence indication for a reason which is not bona fide or which is improper (for example, to seek a sentence indication in a case in which a custodial sentence is likely as a strategic device in the trial of co-accused); or the listing of the trial of the accused or that of the co-accused would be significantly affected if, in the event that a sentence indication were given, it is probable that the accused would not plead guilty (*Director's Policy 4.7.1 2008* (Vic) s.4.7.1.84).

It is therefore likely, given the requirements of this policy, that the Crown will challenge most indication requests in the Supreme Court, and some in the County Court, on the basis that custodial outcomes are likely. The implications of this are also likely to create

additional delays in pre-trial proceedings, as a result of the courts being required to hear these challenges.

Requiring both counsel to undertake significant case preparation prior to the indication hearing will also require a significant shift in adversarial attitudes. As established, Victoria's existing adversarial culture promotes the trial as the primary focus of proceedings, and pre-trial hearings thus receive less consideration (Lubet, 2006; Weinberg, 2008). While it may be anticipated that cultural change is implicit in the legislation, and this may well mean that cases are prepared at an earlier stage, in order for the process to work effectively it must avoid many of the limitations inherent in the pre-trial process, such as the absence of continuity of counsel. The legislation's ability to shift adversarial approaches towards more of a focus on the pre-trial process is also heavily reliant upon the funding structure of Legal Aid being altered to provide additional resources to counsel to prepare for indication hearings. Without a significant boost in the pre-trial funding awarded, it would be unlikely that Legal Aid counsel would have access to sufficient resources to fully prepare and participate in indication hearings. The availability of Legal Aid funding and the level of priority awarded to defendants would also require amendment away from the notion that the trial is of primary importance, in order for Legal Aid defendants to be given equal access to seeking indications (see Chapter Four for further discussion on Legal Aid funding structure).

The most significant concern emerging from my findings that arises from the legislated reform is the lack of evidentiary material available to judges to inform their sentencing decisions. The following sections explore this significant disadvantage, with a particular focus on personal mitigation and VIS.

6.11 Evidentiary Concerns

6.11.1 Absence of Personal Mitigation

A sentencing decision requires a judge to consider a range of evidence and factors (*R v Wong* (2001) 207 CLR 584 at 75). In order for them to provide an accurate indication then, it would be appropriate for the court to acquire similar materials to those available at a plea hearing, particularly the VIS and personal mitigation. One of the main resource concerns identified in the VSAC proposal (2007c), however, was that if all relevant sentencing material were provided to the judge the process would no longer have efficiency benefits and might instead become an overly time-consuming exercise. This is of particular concern because a great deal of effort would be required to run a preliminary plea hearing, yet the defendant could still reject the indication and proceed to trial. Based on this concern, the legislation requires that only the material available after the presentment is filed be used to

inform the judge's determination. It is then up to non-reviewable judicial discretion to determine whether that material is sufficient (*Criminal Procedure Act 2009* (Vic) s.209(4)).

Although some of these evidentiary concerns surrounding inadequate information are reduced by the broad nature of indications, the ability of the judge to make an informed decision as to whether a custodial or non-custodial order is appropriate remains restricted. This concern was explored by the NZ Court of Appeal in *R v Gemmell* [2000] NZLR 695 (CA), in which the court stated that:

> The matter of judicial sentence indications presents difficulties. In principle it seems inappropriate for matters of sentence to have any judicial consideration prior to conviction and without the aid of essential pre-sentence and victim impact reports. Any indication given in such circumstances must be so qualified as to be no real indication at all and certainly no reliable basis on which to plead (at 13).

This aspect of the legislation is particularly problematic, as all relevant personal mitigation will not be available to the judge prior to their sentencing decision. The importance of personal mitigation in the sentencing process was clearly demonstrated by a 2007 study conducted in the UK by Jacobson and Hough (2007), which analysed the effect of personal mitigation on sentences. In this research, judges cited at least one factor of personal mitigation as relevant to the sentence in almost half of the 162 cases observed (Jacobson & Hough, 2007, p. 12). In addition, personal mitigation resulted in shorter custodial sentences being imposed in just over one-quarter of 127 cases in which the role of mitigation was explicitly stated (Jacobson & Hough, 2007, p. 12). In 34 of these cases, personal mitigation was stated as the primary reason that 'a shorter custodial sentence was imposed than would otherwise be imposed' (Jacobson & Hough, 2007, p. 12).

Most significant in the context of this discussion is that personal mitigation was identified as a decisive factor in a judges' decision to impose a non-custodial penalty as opposed to imprisonment. Jacobson and Hough (2007, p. 12) found that in almost one-third of cases where the sentence was reduced from immediate custodial to non-custodial, the major reason cited was personal mitigation. These findings were supported in their interviews with judicial respondents, who identified personal mitigation as the most important factor in determining a sentence order (Jacobson & Hough, 2007, p. 43). Importantly, they also found that personal mitigation was a primary factor that could increase an order from non-custodial to custodial. For example, if at the plea hearing the defendant failed to address the problems that led to their criminal behaviour, such as drug or gambling addictions, they were more likely to receive a custodial than a non-custodial sanction (Jacobson & Hough, 2007, p. 40).

Jacobson and Hough's (2007) study thus provides a strong basis for arguing that without all relevant personal mitigation, Victorian judges can not be seen as in an appropriate position to indicate a custodial or non-custodial order. This is a particular concern in cases where a non-custodial order is indicated, in light of the certainty assured

by the legislation, which binds the court to this indication. As ProsecutorN claimed, the legislation 'puts unfair pressures on the judges because they are stuck with their initial indication'. ProsecutorN also maintained:

> The limited [evidentiary] basis is terribly dangerous. If the judge gives an indication based on half or not even half the information, it is probably bound to be wrong. Essentially, it is a very bad practice getting quotes from judges, because you will never know whether he or she has all the facts to make the right decision.

ProsecutorG similarly claimed that 'without a lot of the plea material it would be very difficult to have meaningful indications'. In this regard, ProsecutorD stated that:

> On the basis of it, sentence indications may encourage an early guilty plea, but that requires the judge to be very abreast of the brief…If the defence themselves aren't putting through their plea material it is not going to be an effective indication. It sounds like a good idea but if you think about how it will work in practice, it is not so good. What information is going to be available to the judge to make this decision? Is it going to be sufficient? It just seems like a half attempt.

The absence of personal mitigation is also significant in cases when a custodial sentence is indicated, yet after the plea hearing the judge imposes a non-custodial sentence. While the flexibility of the legislation allows a judge to impose a less severe sentence, this reduction in the sentence order could impact severely upon a victim who has previously been informed that a custodial sentence would be imposed. Participants also identified the alteration of the custodial sentence order as potentially impacting on public confidence in the legitimacy of the sentence indication process. As JudiciaryB maintained:

> Although they are not saying what the sentence will be, if they are stuck with their initial indication of no jail, well they may not have been able to tell from the information that they had. That is not a good result for us, for the victim, or for the public if that initial indication turns out to be the wrong choice, especially if they indicate jail and then change it to non-custodial, because this is bound to induce public and media criticisms.

The concerns identified by participants relating to the absence of evidence also related to the potentially negatively impact on victims, insofar as information on the crime's impact upon them will not be disclosed before an indication is determined. These concerns are explored in the next section.

6.11.2 Consideration of the Victim

S.5(2daa), s.5(2da) and s.5(2db) of the *Sentencing Act 1991* (Vic) require that 'in 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 victims of the offence; and any injury, loss or damage resulting directly from the offence'. Thus, prior to imposing a sentence, a

VIS is read to or by the judge which details the effects the victim has experienced physically, financially and emotionally as a result of the crime (Buruma, 2004, p. 8; Sebba, 1996; Wallace, 1989). In Victoria, prosecutors do not acquire a VIS until late in proceedings (ProsecutorJ). This is because it typically contains information about the victim's personal circumstances and there is a risk of it being used by the defence in cross-examination. For example, if the victim claims they suffered psychologically because of the crime, they could be cross-examined about the crime's impact on their mental state, and the credibility of their testimony could be questioned as a result of their suffering from psychological damage. As ProsecutorJ maintained:

> If the VIS says, he hit me in the face and then in the stomach and this has led to me having plastic surgery and being frightened leaving my house, and then when they testify they say, he hit me in the stomach and then the face, then that small alteration may become a turning point for the defence who can then use that as a basis for claiming the victim is lying or doesn't remember and their testimony is then not as reliable.

In direct contrast with the NZ, UK and (previous) NSW systems, in which victim statements are/were provided to the judge before indications are/were determined, the Victorian legislation attempts to redress this problem by not specifically requiring that the prosecutor provide a VIS before the indication is determined (NZLRC, 2005, p. 97; Policy AdvisorC). However, this creates its own significant concerns.

The VIS is one of the most significant yet highly contentious victim-focused reforms. Victims' needs are complex and shaped by differing considerations, including the crime, their injuries and their psychological state (Goodey, 2005; Strang, 2002). The (in)effectiveness of the VIS in addressing these needs has been a focus of much research and debate (Booth & Carrington, 2007; Cook et al., 1999; Erez, 2000; Fattah, 1998; Garkawe, 2006**;** Goodey, 2005; Sebba, 1996; Strang, 2002; Wallace, 1989). A primary criticism of the VIS is that it is not uniformly taken into account or referred to by judges when sentencing (Erez, 2000; Strang, 2002). It has also been criticised because its effectiveness can depend on the victim's capacity to articulate the extent of their trauma (VCCAV, 1997, p. 52). Moreover, for vulnerable victims the VIS may actually be a mechanism that 'places a victim on trial for a second time for her [sic] victimisation' (VCCAV, 1997, p. 52). While not immune to such criticisms, the VIS does provide an avenue for victims' voices and needs to be addressed and considered in sentencing, and in line with recent reforms advocating victims' rights in Victoria, it offers an opportunity for victims to play a greater role than simply that of prosecutorial witness (*Victims' Charter 2006* (Vic); VLRC, 2004, 2006). The importance of completing a VIS as part of the recovery process has also been recognised as a primary need of victims, because it gives them the 'opportunity to explain what happened to them, the impact the crime had on their lives, and what resources they need to get back on track' (Herman, 2004, p. 80).

The legislation, however, to a large extent removes the opportunity for the victim, or the impact of the crime against them, to influence indications. This may consequently reduce the perceived seriousness of the offence and affect the victim's status (Cook et al., 1999; Walklate, 1989). This was a major concern identified by JudiciaryD, who claimed that 'the inability of the judge to consider the impact of the crime on the victim by way of VIS or other is a huge downfall'. Although the victim has the opportunity to have their VIS read by the judge at the plea hearing when a defendant accepts an indication, if a non-custodial order is indicated there is no scope for the judge to change the sentence order to custodial following the revelation of this material; therefore the impact of the crime on the victim is not considered by the judge prior to indicating a sentence order (VSAC, 2007c, p. 117). This was a prominent concern identified during Parliamentary Debates (2007) on the proposed legislation, during which it was stated that 'a judge is bound not to hand down a sentence higher than the sentence indication; therefore one can only assume that the influence of VIS, which are so important and vital for people who are victims of crime, will be diminished as a consequence of this piece of legislation' (p. 4351).

In addition to impacting negatively on the victim, the failure to have a VIS considered prior to an indication may reduce perceptions of the crime's seriousness. A study conducted in Western Australia (WA) found that determining the impact of the crime on the victim was a primary mechanism used by judges to measure the seriousness of an offence (Indermaur, 1990, p. 35). As a result, if the VIS is not considered by the judge prior to an indication being given then not only are victim interests not upheld, but the indication is also unlikely to offer a true reflection of the seriousness of the crime.

6.11.3 Power Imbalances

Another concern arising from the limited consideration of the victim in the indication process is the possibility that it may fuel existing power imbalances between victims and defendants in proceedings. This is because the legislation almost entirely favours the defendant's discretion over that of the victim, with the only real exceptions being that the judge can refuse to grant an indication and the prosecution can challenge the defence's request for one. The legislation gives defendants the power to decide whether to proceed to trial, accept the indication, or reject the indication and plead guilty at a later stage, without any consideration of the victim. Victims, in contrast, have no determinative say in vetoing the defendant's indication request and receive limited, if any, consideration in the indication given. The only power available to the victim seems to lie in the symbolic recommendation in the VSAC proposal (2007c, p. 119) that the prosecutor's decision over whether to challenge the defence's indication request be informed by the victim's opinion. Although in practice this provision may do little to rectify power imbalances, as all prosecutorial decisions are ultimately made in the state's best interests as opposed to those of individual victims (Cook et al., 1999, p. 54), even this symbolic recognition of the victim

has not been implemented in the legislation. This concern was identified by ProsecutorE, who claimed that:

> Victims would want us to have the chance to say we don't accept the indication and we would like to say from the prosecution's viewpoint that the indication the judge has given is unacceptable. But the way that it is outlined means we would have to wait to air those grievances after the plea at an appeal.

This concern was also highlighted during Parliamentary Debates (2007) on the proposed legislation, at which it was argued that:

> If the victim is to have any input into the process, as follows from good principle as well as from some of the sentiments in the government's own *Victims' Charter* [*2006* (Vic)], then it is vital to ensure the victim has a proper say, through the prosecution, as to whether or not the accused is able to apply at that particular stage for a sentence indication. Yet none of that is addressed in what has come before the House (p. 4343).

Despite such concerns being raised, they were not addressed in the legislation. Instead, when detailing the beneficial aspects of the proposed legislation, a Government representative stated:

> The prosecution, in making the case, and the judge in determining the sentence that will be imposed will still be required to give consideration to the impact of that crime on the victim…The [Liberal] member for Box Hill says this is not in the bill. [However] there is nothing in the bill that changes whatsoever the consideration that the court will give to the VIS…There is nothing in the bill that extinguishes that. There is nothing in the bill that in any way limits those provisions (Parliament of Victoria, 2007, p. 4352).

However, the problem is just that. There was nothing in the bill for victims, and there is nothing in the legislation for victims. This absence of victim recognition has been exacerbated by the government's decision not to implement the VSAC's recommendation that the use of indications be restricted in cases involving sexual offences, despite the 'particular sensitivity of proceedings relating to [such crimes]' (VSAC, 2007c, p. 128) identified in the VSAC final report (2007c). Sentence indications may thus result in extensive revictimisation, particularly in cases where the victim accepts that an indication will be given and potentially no trial conducted, yet is told at a later point that the defendant rejected the indication and that a trial will therefore proceed.

Even within the VSAC final report (2007c), participants representing Victoria Police highlighted power imbalances and the exclusion of victims as potential outcomes of indictable sentence indications. A participant representing Victoria Police maintained that many victims 'may feel frustrated, as there will no longer be the opportunity for the defendant to have to confront the victim's accusations' (VSAC, 2007c, p. 77). Similarly, a submission from the West Victorian Centre against Sexual Assault (CASA) stated that there 'would not be any significant advantage to its clients [victims] through the

introduction of sentence indications' (VSAC, 2007c, p. 78). These concerns were also identified by JudiciaryC following the legislation's implementation, who claimed that 'it [the legislation] doesn't focus on the victim. [Instead] the focus is essentially on increasing pleas, thereby reducing backlog. The victim is not a driving factor in this reform'. As a consequence, the reform appears to fuel the perception that 'the offender has taken power from [the victim] and now, instead of returning power to them, the criminal law system also denies them power' (Zehr, 2003, p. 69).

The Attorney General (as cited in Gregory, 2008, p. 5) disputes the notion that the victim is not a prominent consideration in the legislation. Instead, he states that 'it [is] wrong to suggest that courts could not consider a VIS before deciding whether an indication would be given…Prosecutors could veto sentence indications and would do so if it was not in victims' interests' (as cited in Gregory, 2008, p. 5). While a provision exists for the prosecution to challenge the defendant's application for an indication, the government failed to include any requirement in the legislation that this decision be informed by the victim's opinion, despite this being recommended by the VSAC and identified as a key limitation of the proposed legislation in Parliament (Parliament of Victoria, 2007, p. 4343). In addition, as identified in the previous section, due to the potential consequences of a VIS being provided to the defence before the plea hearing, they are not obtained during pre-trial proceedings and are not therefore available for judicial consideration prior to an indication being determined (ProsecutorJ). ProsecutorM identified the inaccuracy of these comments made by the Attorney General as a serious concern, claiming:

> Whoever is advising the AG [Attorney General] is not doing their job properly. From what he has said, it means we should veto any application for an indication that is not in the victim's interests. Well, I can tell you that it would never be in the victim's interests for the offender to get an indication based on this scheme. There is not enough evidence available to the court before they make a decision. So, how could this ever be good for the victim? Even if it benefits them because they won't then have to testify, the scheme itself is flawed, which means that using that scheme even to get that benefit is not in the victim's interests…I guess if that is what he thinks, then we will be challenging every application.

These strong comments condemning the legislation clearly highlight its potentially negative impact on victims, which is ironic given that this directly contrasts with one of the primary requirements that the Attorney General initially imposed on the VSAC review: to ensure that any recommendations for sentence indications consider the victim and attempt to reduce the trauma for them often associated with criminal proceedings (Victorian Attorney General's Department, 2005). ProsecutorM's comments also allude to another disadvantage of the legislation based on the Attorney General's interpretation of the Crown's role in the process. There are likely to be quite significant financial, resource and emotional costs incurred if the OPP challenged a defendant's application on the basis that it would not be in

the victim's interests, as suggested by the Attorney General. Importantly, this would not only disadvantage victims and defendants by prolonging proceedings, but it would also limit the effectiveness of the legislation in achieving its desired efficiency aims.

6.11.4 Absence of Safeguards

The lack of consideration given to both victims and defendants in the legislation is also demonstrated by the absence of any safeguards preventing counsel from using materials presented at indication hearings in subsequent proceedings, other than disallowing that the defendant's indication request be later used as evidence of their guilt. This is despite concerns identified in a VSAC discussion paper (2007a) that this might 'expose the parties to the risk that material prejudicial to their cases is used in subsequent proceedings' (p. 84). Guidance on this issue is only provided to the Crown through its own internal policy, which as this research has established, regardless of its attempts to provide greater victim recognition or safeguards is unlikely to shape consistent prosecutorial conduct because it is a non–legally binding document (*Director's Policy 4.7.1 2008* (Vic)). The policy outlines the importance of Crown representatives consulting with victims to ascertain their opinions on the defendant's indication request. It also requires them to obtain evidentiary material to inform their decision as to whether to challenge the defendant's request, and to assist the court in making an informed and appropriate indication. However, while acknowledging the importance of obtaining evidentiary material and using the victim's opinion to inform their decision to adequately prepare for the hearing, the policy also states that the Crown must be aware that 'there is nothing in the legislation that limits the application of any written materials to the sentence indication hearing and thus any materials provided to defence may be utilised if a trial proceeds' (*Director's Policy 4.7.1 2008* (Vic) s.81). In other words, the Crown must be cautious not to present material in the indication hearing that may jeopardise its case, should it proceed to trial. This aspect of the policy clearly highlights the gap in the legislation, in terms of providing an adequate safeguard for evidentiary materials.

The failure of the legislation to prevent the potential for material to be used in later hearings, or even to consider addressing this potential limitation, demonstrates a lack of consideration of the rights and interests of both victims and defendants within the process. In addition, this lack of safeguard may result in both counsel, through necessity, having to withhold evidentiary information that may impact on the type of sentence order indicated. This places both counsel in a no-win situation, because if they do not provide the material the defendant may receive an inadequate indication. This is particularly problematic if a non-custodial indication is accepted, given the certainty provisions preventing the court from imposing a custodial sentence upon later hearing all material at the plea hearing. Alternatively, if either counsel provides all evidentiary material and the defendant rejects

the indication, the material can later be relied upon at trial to help the opposing side's case—for example, to discredit witness testimony. As ProsecutorA claimed, 'a statutory safeguard would prevent the information from being used in later hearings and it could be set up so that anything presented could be challenged if it were obtained as a result of the earlier process, but at the moment it does not offer this'.

The lack of recognition of such vital issues and safeguards within the legislation highlights a significant contrast between the VSAC recommendations and the legislation ultimately enacted, particularly in regards to the consideration initially given to victims by the Victorian Attorney General in commissioning the VSAC review. It also highlights the importance the indication process places upon achieving efficiency, and allows it to fit the description applied to the failed NSW scheme in 'plac[ing] expediency before principle in the administration of criminal justice' (Byrne, 1995, p. 213).

6.11.5 Judicial Discretion: Safeguard or Limitation?

The main safeguard inherent to the legislation is the provision allowing the judge to reject a defendant's indication request, if there is insufficient evidence to make an indication (s.209(4)). However, like the effectiveness of internal OPP and court policies, the lack of specified parameters detailing what is and is not sufficient evidentiary material is likely to create inconsistencies in the indication process. In addition, the potential efficiency benefits of indications may create negative public perceptions about the judiciary's motivations for granting indications, in a similar vein to those surrounding the prosecutor's unscrutinised plea bargaining decisions. As a consequence, ProsecutorA maintained, 'there are so many delays in the courts…it wouldn't be totally out of the question that judges would face pressure to give indications, especially if there is a plea bargain deal already in the works'. ProsecutorN also identified this issue, claiming:

> The judge might be facing pressures to clear the list and give an indication. But after hearing the matter he [sic] might feel differently after he [sic] has heard everything and wish he [sic] could go back on his [sic] indication, but he [sic] can't. So you have an aggrieved victim, most likely an aggrieved prosecutor and most likely an appeal on the manifest inadequacy of the sentence.

Like trusting counsel to engage in plea bargaining appropriately without any formal scrutiny, some participants claimed that the judiciary could be trusted to make this discretionary decision based solely on their public interest roles and obligations to 'uphold the law and what is just' (ProsecutorD). As JudiciaryB claimed, 'we have a responsibility to the public and to the law, and we uphold those responsibilities to the best of our ability. We do'. The fact that the legal participants believed the judiciary could be 'trusted' to appropriately conduct themselves, however, does not resolve the fundamental issues or concerns surrounding the lack of specification and scrutiny on their indication decisions.

Like the Crown's role in plea bargaining, this concern exists because when an indication decision is made, there is no public accountability on that decision and no opportunity for redress, given the provision that this decision is conclusive (s.209(4)).

The lack of specified parameters on what evidence should be available before an indication is granted is also likely to impact on the consistency and number of indications given. This mirrors the problems surrounding plea bargaining's informality revealed in this research, whereby some counsel were perceived and observed to be engaging in plea bargaining, while others showed a general reluctance to do so (see Chapter Four). This concern was demonstrated by the inconsistencies in the responses of three judicial participants on what evidence they would require before offering an indication. JudiciaryD claimed that all witness statements and evidence would need to be presented; JudiciaryC required only that the primary witnesses' statements be presented; and JudiciaryA explained that a general outline of the case facts would suffice. When these participants were questioned about such possible inconsistencies, the 'human nature effect' inherent to unregulated processes again emerged as the prominent reason. As JudiciaryC claimed, 'it is individual. It is as much as the individual judge calls for, so there will be differences, but that is just human nature'. Similarly, JudiciaryA maintained that 'it really depends on the judge what evidence is required. It is individual like that'.

The judge's discretionary powers provided by s.208(4) thus do little to safeguard the indication process. Instead, this process demonstrates that the failure of the legislative reform to provide specified parameters on the basic standard of evidentiary material that should be ascertained prior to an indication decision being made could potentially result in indications being offered when there is no sufficient evidentiary basis for doing so. It could also result in immense inconsistencies among the indications delivered by judges. These impacts, particularly when combined with the potentially negative consequences of indications for victims and defendants, provide another basis for questioning the legislation's legitimacy, and also allude to efficiency benefits being the predominant aim of the scheme.

6.12 Formalising Plea Bargaining: Similar Concerns?

Although similar justifications to those identified in this research for formalising plea bargaining were proposed as the basis for formalising indictable sentence indications, allowing premature sentencing decisions to be made without a sufficient evidentiary basis or any basic safeguards highlights the potential dangers of implementing efficiency-driven reform. While plea bargaining can also offer potential efficiency benefits by identifying early guilty pleas, saving resources and reducing the duration of criminal proceedings, in contrast to the sentence indication process, these are not the main justifications for its formalisation.

Plea bargaining is already used as a mechanism to resolve cases at an early stage in Victorian criminal proceedings (Freiberg & Seifman, 2001; Mack & Roach Anleu, 1995). The problem is however, that these discussions occur without any statutory or case law authority and, while it is likely that formalising plea bargaining will increase its occurrence because counsel will have the authority to engage in discussions, statutory formalisation would not be implemented purely for the potential efficiency gains. It would be implemented to increase the transparency, scrutiny and accountability of the process and of the conduct of those involved within it.

Similar motivations were identified by participants prior to the enactment of summary or indictable sentence indications in legislation, when 29 out of 31 participants identified formalising the informal summary sentence indication process as a positive initiative in terms of providing authority for parties to engage in the process. As JudiciaryD claimed, 'Magistrates know there is room to give sentence indications, but they want some kind of court authority to do that before we see it done across the board'. Similarly, JudiciaryC maintained that 'at the moment, the intentions are there from some Magistrates, but without it being sanctioned, not all Magistrates will provide indications. Sanctioning it will provide those Magistrates with a legal basis for doing it'. As a result, not only was formalising the process perceived as beneficial for increasing the likely occurrence of indications but, more importantly, it was supported for providing the informal sentence indication with a statutory framework that offers authority, consistency and transparency to the process. Given the underlying motivations and potential benefits of formalisation, similar justifications could therefore be applied to legitimate formalising Victoria's plea bargaining process. As Mack and Roach Anleu (1998) assert:

> Efficient early resolution does not require pressure inducement, or coercion for the accused, nor does it require taking away rights which are a significant component in a fair process. There are enough pressures for a defendant to plead guilty, without adding to them in the name of administrative efficiency (p. 276).

Thus, in line with these claims, while formalising plea bargaining may offer efficiency benefits, it would do so without prioritising these interests above transparency ideals, or above the benefits of transparency for victims, defendants and the public.

6.13 Conclusion

The major problems confronting Victoria's criminal justice system appear to emanate from a lack of efficiency, certainty and clarity in criminal proceedings. While these problems must be addressed, a system of sentence indications that jeopardises victims' needs and rights—a group which really only received significant statutory recognition in Victoria in 2006 (*Victims' Charter 2006* (Vic))—and which may place excessive pressure upon defendants to plead guilty, all on the basis of very limited evidentiary material is not and

can not be the desirable way to do so. Furthermore, while in theory sentence indications may appear to be a powerful mechanism to assist in minimising inefficiency, offering all the resource, financial and emotional benefits that arise from early guilty pleas and shorter proceedings, these potential benefits are only likely to be attained because sufficient evidentiary material is not available to the judge before indications are granted. Thus, in contrast to the anticipated outcome from formalising plea bargaining, the likely disadvantages of the legislation far outweigh the potential benefits, and the compromise of principles required to continue to run the process is not an appropriate exchange.

Although differing from the failed NSW scheme in some regards, the same underlying problems that surround indictable sentence indications are present within the Victorian scheme. It is also not as transparent, efficient or victim-focused as the Victorian Attorney General (2005, 2007) claims, which generates considerable doubt over its necessity and appropriateness. The legislated indictable sentence indication trial in Victoria tampers significantly with the sentencing process, and the desire to increase court efficiency at the expense of victim, defendant and public interests is not worth the potential benefits, which in any case, appear highly unlikely to eventuate.

CHAPTER SEVEN: CONCLUSION
TRANSPARENCY IS THE KEY TO LIFTING THE VEIL OF SECRECY SURROUNDING PLEA BARGAINING IN VICTORIA

We have more obligations to public accountability than we have had previously. An informed public is an important thing and by public I mean everyone, victims, the accused, juries, everyone. And to the extent that there are these misconceptions and wrong perceptions, this is not a good thing…In the end, I guess formalising plea bargaining or systematising prosecutorial conduct or making it more visible, it is all about whether we, within the OPP [Office of Public Prosecutions], are accountable or not, whether the defence are accountable or not, whether the whole system is accountable or not. At the moment, it may be that we are not as accountable as we should be and no-body can benefit from that (ProsecutorE).

A criminal justice process which works badly is unfortunate; one that works badly because its design is faulty is a blot on our system of jurisprudence (McConville & Baldwin, 1981, p. 212).

This thesis has examined plea bargaining's informality in the Victorian context by identifying and analysing the justifications for its formalisation. This research has sought to stimulate debate about the absence of transparency and scrutiny of plea bargaining and the Crown's discretionary powers in making charging decisions, and has established the extent to which court delays impact on the very foundations of Victoria's criminal justice system. Furthermore, this research has demonstrated the influence of adversarial traditions and plea bargaining's informality in fuelling these delays. In this context, this research has also sought to demonstrate the importance of accountability and transparency in processes like plea bargaining, when one of its primary purposes is to attract early guilty pleas.

To reach these findings, this research drew upon the observations of 51 judicial, prosecutorial and defence counsel participants engaging in criminal proceedings, with a particular focus on the pre-trial stage. The perspectives of 42 participants involved in both plea bargaining and policy-making were also obtained in 57 semi-structured interviews. This research focused on plea bargaining issues in the context of legal policy and public interest ideals, drawing on the observations, experiences and voices of these participants to substantiate the main themes and recommendations. This methodology allowed for this analysis to penetrate Victoria's legal culture, and to relate patterns of experience and opinions to specific rationales, objectives and internal requirements on plea bargaining and the conduct of those involved in discussions, with a particular focus on the inadequacy of internal policies to shape consistent legal conduct. Using this approach to understand plea bargaining, its informality and Victoria's legal culture, allowed the discussion to move from opinions and statements of law and policy, to determinations of what happens in practice.

In analysing the justifications for formalisation, the methodological approach and conceptual framework demonstrated how the absence of formal authorisation within an adversarial culture can shape legal conduct, and that the only way to shift this is through a combination of external statutory reforms. This research thus argued that there is a need to acknowledge and authorise plea bargaining in statute, in order to uphold public interest and transparency ideals. It argued that the pre-trial preparation of Crown representatives in keeping detailed file notes of any discussions and/or offers, and their right to initiate and engage in discussions, should also be governed in statute. This study further identified the need to reform the Legal Aid funding structure to ensure Legal Aid counsel have access to sufficient resources to engage in pre-trial preparation and discussions. In line with these recommendations, this research maintained that formalising the early resolution-focused County Court Case Conference and Supreme Court Section 5 Hearing would offer similar advantages to those that would emerge from plea bargaining's formalisation, namely those associated with increased transparency and consistency in legal conduct, as well as efficiency benefits, like reduced delays. The findings also revealed that plea bargaining's formalisation could transgress the traditional dualism between victim- and defendant-focused law reform, by offering benefits to both groups through the provision of transparency and scrutiny of discussions. Importantly, through a critique of the indictable sentence indication trial governed by s.208-s.209 of the *Criminal Procedure Act 2009* (Vic), this research demonstrated the importance of ensuring accountability in efficiency-driven processes, and that efficiency should not be the primary motivation or aim of law reform, as this can result in victim, defendant and public interests being overlooked for efficiency gains.

In this thesis, I chose to focus on issues of hidden justice, public interest and accountability ideals, and non-transparency, as I believe these to be of greatest significance in an analysis of plea bargaining's informality. As such, themes of transparency, accountability, consistency, discretion and scrutiny figured centrally in the arguments used to justify plea bargaining's formalisation and were used as the primary basis for exploring formalisation issues. These themes also provided a framework from which to extend the discussion to include a consideration of the potential disadvantages of efficiency-driven reform. Importantly, these themes allowed this research to highlight the potential advantages of formalising plea bargaining, beyond simply increasing court efficiency.

This Conclusion Chapter outlines this research's main themes, issues, findings and recommendations. It also considers the potential limitations of this study, and possible areas for additional research. The contribution of this research to the legal and criminological fields, and the important policy implications that arise from its findings, are also identified.

7.1 Court Efficiency

The impacts of court delay have been well documented in all Australian criminal jurisdictions (AJAC, 1994; Bishop, 1989; Chan & Barnes, 1995; Coghlan, 2000; Mack & Roach Anleu, 1995; Payne, 2007; SCAG, 1999, 2000; Shorter Trials Committee, 1985; VSAC, 2007c; Weatherburn & Baker, 2000; Weinberg, 2000). As this research has shown, this problem is particularly significant in Victoria, as at January 2009 the County and Supreme Courts had the longest list of pending cases nationally (SCRGPS, 2009, p. 27). Delays can impact on all parties by causing emotional, resource and financial disadvantages, which importantly can deny both defendants and victims access to expeditious justice. Evidentiary limitations can also result from delays, such as witnesses losing their memory, which can then impact on the administration of justice. Delays can also create immense resource and cost pressures for the courts in listing and hearing matters, and for counsel in preparing and participating in cases.

The extent and impact of court inefficiency thus provides a significant justification for plea bargaining's formalisation. Importantly, however, while recognising the many potential efficiency benefits of formalising plea bargaining, my findings demonstrate that this is only one significant outcome likely to transpire, and ought not to be the main motivation for formalisation. As my analysis of Victoria's indictable sentence indication scheme revealed, efficiency-driven reforms can have significantly negative outcomes, in terms of increasing pressures upon defendants to plead guilty and reducing the amount of consideration given to victims, which in turn decreases public confidence in criminal proceedings and the administration of justice. While there is a possibility that formalising plea bargaining could result in similar outcomes, as this research has shown, this is highly unlikely given that this reform would not be purely driven by efficiency motivations, and because formalisation will provide the process with the transparency and accountability it is currently lacking. In its current unregulated format, plea bargaining can be perceived as a means of merely saving resource expenditure at the expense of public, defendant and victim rights, the impacts of which weaken public confidence in the justice system and jeopardise the principle of public and open justice. Thus, while formalisation may offer efficiency benefits for the courts and counsel, this research has argued that it will also, most importantly, apply greater transparency and scrutiny to this process, which is likely to assist in increasing its legitimacy as a criminal justice process, providing benefits for victims, defendants and the public.

7.2 Hidden Justice & an Absence of Transparency

Despite empirical evidence indicating that plea bargaining is regularly used, there are no official records outlining how often or why plea bargaining occurs in Victoria (Freiberg & Seifman, 2001; Mack & Roach Anleu, 1995). In addition, plea bargaining is not recognised

in any statute, and no legislative controls scrutinise or inform the conduct of those involved in discussions. Instead, plea bargaining falls under the Crown's discretionary powers, which as this research has demonstrated is concerning, given the moves towards increasing efficiency at almost any cost within criminal proceedings and the fact that plea bargains can impact not only on the seriousness of the conviction(s) recorded against a defendant, but can also significantly alter the type and severity of sentence imposed.

As this analysis has shown, Victoria's plea bargaining process undermines the principles of public and open justice, whereby justice is seen to be done and the public have access to criminal proceedings, except in rare cases under exceptional circumstances. Plea bargaining's aberration from this principle impacts on public confidence and understanding of discussions, insofar as the process and the conduct of those engaging in it are engulfed by perceptions of inappropriateness, illegitimacy and misconduct. Drawing from the numerous studies (Mirrlees-Black, 2002; Roberts, 2002; VSAC, 2006) demonstrating the positive outcomes of an informed public, which include improving public understanding and perceptions of criminal proceedings, and enhancing public confidence within them, this analysis argued that plea bargaining's aberration from the principle of public and open justice constitutes a substantive justification for its formalisation. Although some criticisms of formalisation were identified, particularly the inherent difficulties in explaining the benefits of plea bargaining to a non–legally educated audience, the overwhelming majority of participants in this study supported greater formalisation to increase transparency and accountability of discussions, on the basis that an informed public is a primary requirement of any criminal justice process (36 out of 42 participants).

This research has also demonstrated that providing plea bargaining with greater transparency will have the additional benefit of upholding both victim and defendant interests. It has been suggested that due to the conflicting interests of victims and defendants, law reform can not simultaneously adhere to the ideals of both groups. However, a significant outcome of my analysis is that, as is achieved through restorative justice ideals, my recommendations for plea bargaining's formalisation can adhere to both victim and defendant interests, because greater transparency in criminal proceedings is a primary need of these groups. Thus, as this study revealed, formalising plea bargaining in statute would not only offer greater accountability to the public by upholding the principle of public and open justice, but would also transgress the dualism between defendant- and victim-focused reform to offer benefits to both groups.

The main argument to emerge from participant responses against plea bargaining's formalisation, related to the inherent tension between flexibility and uniformity. In this regard, participants felt that in order to facilitate reasonable outcomes and consider the individual circumstances of each case, a level of prosecutorial discretion was required when plea bargaining. However, without some uniformity, the flexible discretionary powers of prosecutors could potentially be abused; result in the unequal or unfair treatment of

defendants; or at the very minimum, create public perceptions of unfairness, hidden justice and abuse. In contrast to suggestions that discretion is not a necessary element of a prosecutor's function, I believe discretion is an important and vital aspect of their role, and, as this study demonstrated, it can be controlled without becoming unduly restricted and inflexible. This can be achieved by implementing formalisation that seeks to control discretion within the parameters of legal principle and due process, by recognising the practice of plea bargaining and basic prosecutorial conduct requirements in statute. This would allow Crown representatives to maintain a degree of flexibility when making discretionary decisions, while also providing greater transparency and accountability to their decisions. A move which would in turn reduce misperceptions and misunderstanding of plea bargaining.

7.3 Statutory Recognition

No valid reason was identified by participants or emerged during observations to legitimise introducing stringent, inflexible controls on plea bargaining, such as requiring that discussions be conducted in open court or with judicial supervision. Instead, the data indicated that if plea bargaining continues to be used it should be recognised and authorised in statute, in order to provide accountability and understanding to the process. Statutory recognition of plea bargaining would also provide a mechanism for discussions to adhere to the same principles and scrutiny applied to other criminal justice processes, such as the trial, which would provide some safeguards on victim and defendant interests. In my view, if formal recognition is not provided, plea bargaining will continue to be engulfed by secrecy while public cynicisms and misperceptions that early resolution is the primary focus of the process will remain.

Importantly, the research findings demonstrated that formalising plea bargaining in statute would enable a balance between the need to offer flexibility and the need to ensure consistency in counsel approaches to and use of discussions. Significantly, my analysis of the participants' perspectives and actions revealed that the three main internal Office of Public Prosecution (OPP) policies regulating plea bargaining do not provide sufficient transparency to the process, nor do they assist in attaining or maintaining public confidence, or reducing the negative impact of plea bargaining's informality on victims and defendants. The data further revealed that these policies do not significantly impact on consistent prosecutorial conduct when plea bargaining, particularly in initiating discussions, and that they provide little, if any, scrutiny on this conduct when counsel do not adhere to the policy requirements. The lack of clear authority on these issues, and the confusion identified among some participants from the prosecutorial group around their authorisation to initiate or engage in discussions at an early stage, further highlights the importance of providing external statutory controls to promote transparency, prosecutorial accountability

and consistency. Statutory formalisation of plea bargaining could also shape consistent legal conduct by impacting on the actions and perceptions of legal parties outside the OPP in considering and facilitating early plea bargaining, particularly in the early and serious consideration of plea bargains. If all parties were to possess the authority to engage in discussions, this would likely impact positively on consistent approaches to and use of discussions, in a similar vein to the legislated Committal Mention system in the Magistrates' Court pre-trial stream.

The judiciary could also play a greater role in pre-trial hearings by being prepared to encourage and facilitate early resolution. As my analysis has demonstrated, this could be assisted by the formalisation of the two informal, early resolution-focused hearings: the County Court Case Conference and the Supreme Court Section 5 Hearing. Formalising these two processes would not only provide them with greater authority and standing in the pre-trial process, but would also likely reduce some of the inefficiencies this research identified in the existing pre-trial process, by focusing the attention of both counsel on consolidating the key case issues at an early stage.

7.4 Adversarial Legal Culture & Recommendations

One of the key themes to emerge from this analysis involved Victoria's adversarial legal culture and its impact on the pre-trial preparation and participation of the judiciary and both counsel. As a result of adversarial traditions framing the operation of criminal proceedings, with its focus on the trial, this study uncovered a reluctance on the part of some counsel to focus on the possibility of early resolution, which in turn impacted on their actions, or more accurately, their inactions in considering or engaging in early discussions. As a consequence, despite the encouragement in internal OPP policies of prosecutorial initiation of discussions, my findings revealed that a strong perception persists among a section of the legal community, including some prosecutorial participants, that the Crown will not initiate discussions or meaningfully consider plea bargains until a senior counsel is (later) assigned to the case. This adversarial approach also frames the Legal Aid funding structure, which hinders the capacity of Legal Aid counsel to prepare and engage in pre-trial hearings or early discussions, because the funding is prioritised to support contested trials. This study thus argued that reformation of the Legal Aid funding structure away from its adversarial focus is required, in order to provide counsel with the necessary resources to adequately undertake pre-trial preparation and participation.

Interestingly, outside of the prosecutorial group, the legal participants in this study did not recognise that their group required a change in attitude and approach to plea bargaining. However, as evidenced by the observations and perceptions of participants, all three legal groups demonstrated some inadequacies in their pre-trial preparation and participation levels. In my view, in order to shift the longstanding adversarial attitudes

prevalent in the legal community, both counsel should consider the possibility of plea bargaining and of resolving issues when they first read the case briefs and assess the evidence. To achieve this, in addition to altering the Legal Aid funding structure, this research argued that plea bargaining must be authorised in statute to provide the process with some level of legitimacy, in a similar vein to the pre-trial disclosure requirements (*Criminal Procedure Act 2009* (Vic) s.182-s.183, s.185, s.188-s.190, s.200, s.358). This would address some of the inconsistencies in counsel approaches to and use of discussions, and could offer possible resource, emotional and financial benefits to all parties by increasing the effectiveness of pre-trial hearings.

7.5 Improving Communication & Awareness

A key theme in this analysis was the importance of improving plea bargaining's legitimacy and to achieve this, it argued that there must be an increase in the public's and the legal community's awareness and understanding of discussions. While this study is not an analysis of plea bargaining's benefits and limitations, the findings suggest that discussions are a vital element of Victorian criminal proceedings. In my view, in light of the fact that plea bargaining appears to be poorly regarded and misunderstood by the public, the media and sometimes the legal community itself, it is necessary for plea bargaining to be recognised in statute in order to enhance the flow of communication and understanding within the legal community specifically, and among the public generally. The research findings suggested that the formal acknowledgement of the Crown's approach to plea bargaining in legislation would increase the legitimacy of plea bargaining within the legal community, as is the case with the pre-trial disclosure requirements dictated in the *Criminal Procedure Act 2009* (Vic) s.182-s.183, s.185, s.188-s.190, s.200, s.358. This would in turn benefit all parties by reducing the levels of resource expenditure and the emotional costs involved in preparing matters for trial that ultimately resolve. Legitimising early plea bargaining is also likely to substantially reduce the occurrence of late guilty pleas or trial adjournments, thus working to reduce the duration of criminal proceedings. Therefore, in contrast to literature that supports informal regulations as an appropriate mechanism to monitor and provide accountability to plea bargaining, this research argued on the basis of the observations and interview data that formalisation must be mandated by legislation, as opposed to being merely permissive or suggestive through informal, internal mechanisms (Byrne, 1988, p. 800; P. Clark, 1986, p. 210; Freiberg & Seifman, 2001, p. 68). Perhaps most significantly, this research argued that the statutory formalisation of plea bargaining is likely to enhance public understanding and awareness of the process, thus lifting the veil of secrecy surrounding discussions.

7.6 Future Research

The decisions I have made in conducting this research—in particular, to exclude victim and defendant participants, and to focus strongly on prosecutorial participants and indictable offences involving victims—indicate the lines of inquiry that remain unexplored and the potential limitations of the study. The decision not to include victim and defendant participants in favour of a strong focus on the prosecution was made on the basis of the careful placement of this research in the legal and policy context. There are immense consequences that can arise from an inappropriate plea bargain. Most significantly, as this study revealed, it is not necessary that these consequences actually occur for low levels of public confidence to exist; simply allowing the perception of misuse to persist can fuel doubt. It is for this reason, given the accountability and public justice ideals purportedly inherent to the operation of Victoria's justice system, that I chose to focus specifically on plea bargaining based on the observations and voices of legal participants directly involved in plea bargaining and policy-making. It is also for this reason that the study had a strong focus on the observations and perspectives of prosecutorial participants, given their primary role in plea bargaining and their public interest responsibilities.

While these decisions may mean that this analysis potentially overlooks some of the key victim- or defendant-focused concerns surrounding plea bargaining, or the potential benefits of plea bargaining's informality in the lower jurisdiction where the case resolution rate is significantly higher than that of the superior courts, my chosen focus enabled a unique analysis of plea bargaining within the indictable courts from a viewpoint inside Victoria's legal culture. This decision also has the benefit of ensuring that the recommendations made within this study fit within the framework of existing pressures and policies within Victoria's legal community. Thus the strong focus on the views and conduct of prosecutorial participants is justified, as they will be the group most affected by the recommendations for policy-based reform.

This research has responded to a significant gap in the literature on plea bargaining's informality and potential formalisation. It has not, however, consisted of a detailed ethnography of the experiences of victims and defendants in plea bargaining or other criminal proceedings. How victims and defendants experience different aspects of the criminal justice process, in particular, how they experience plea bargaining, provides a basis for further comprehensive research. A study of this type would require in-depth consultations with victims who have experienced plea bargaining, in cases involving both individual victims and multiple victims, and in which one or more victims has had their specific crime removed in order for the defendant to plead guilty to fewer counts. The extent and timing of information provided to victims, and their role, if any, in the ultimate decision made, would also provide an interesting point of discussion. This study could also

extend upon my discussion of the *Victims' Charter Act 2006* (Vic) ('*Victims' Charter 2006* (Vic)'), by offering a detailed analysis of its impact on victims.

Plea bargaining's impact on defendants is also a significantly under-researched topic in Victoria, and in Australia more broadly. Following in the direction taken by Baldwin and McConville (1977) in their ground-breaking research in the United Kingdom (UK), a study in this area could focus on defendants' experiences with and understanding of plea bargaining, on their role in making offers, and importantly, on the reasons underlying the plea bargain agreements. My research did not include an in-depth analysis of why defendants plea bargain or how often plea bargaining leads to a guilty plea. In this regard, research examining why defendants plead guilty, particularly when prosecutorial concessions are provided as an incentive, is necessary to monitor the existing pressures and influences on defendants' pleading decisions, and to map the evolving reliance on efficiency-driven reform as a means to resolve cases. Such a study would require consultations with legal participants and defendants to ascertain the reasons why both parties resolve cases, and in particular, why defendants make their pleading decisions. Although this type of research would rely heavily upon the voices of defendants, which as evident in Baldwin and McConville's (1977) examination appears to engender a degree of cynicism on the part of certain community and government groups (Baldwin & McConville, 1977; 1979b), there is a significant gap in our understanding of why such decisions are made in the Victorian context. This type of study would also require critical analysis of prosecutorial decision-making in order to determine any patterns of pressure and to assess levels of consistency in prosecutorial decisions.

The global dimensions of court inefficiency and the increasing use of efficiency-driven reforms suggest a range of hypotheses for study, including comparative analysis between the delays confronting Australian and other criminal jurisdictions, with a particular focus on the experiences of legal participants, victims and defendants. There is also a basis for exploring public perceptions of efficiency-driven processes. In the context of this research, the next step in analysing efficiency-driven reform will be the Victorian Sentencing Advisory Council (VSAC) review of the legislated sentence indication process governed in s.208-s.209 of the *Criminal Procedure Act 2009* (Vic), scheduled for 2010. Based on my analysis of this reform, the VSAC review is likely to lead to significant changes and the possible abolition of the scheme, at least in the Supreme Court. Due to the scheme's recent implementation, my analysis is somewhat limited in scope, relying predominantly upon the perspectives of fifteen participants. However, this discussion was also shaped by participant perspectives prior to the scheme's implementation and many of my predictions of its ineffectiveness identified prior to its implementation in statute were supported by the findings obtained in the follow-up interviews. Once the final review of the scheme is undertaken by the VSAC in 2010, there will be another worthwhile basis for

comparative analysis between the seemingly successful UK process and the Victorian scheme.

Importantly, the impacts of any plea bargaining policy on the public, on victims, on defendants, and on shaping consistent legal conduct, would require sustained consideration in order to establish the effectiveness of the reform(s). Benefits would also be gained by directly considering its impact on public perceptions; victim and defendant perceptions and experiences; defence counsel, prosecutorial and judicial perceptions and experiences; and court efficiency levels.

7.7 Significance of this Research

As outlined by the Honourable Justice LT Olsson, 'despite its acceptance within the system [plea bargaining] has not…been [a] subject of detailed empirical research and analysis in Australia' (as cited in Mack & Roach Anleu, 1995). My research has responded to this significant gap in literature and legal policy by providing a detailed analysis of this highly under-examined area in a Victorian context. In particular, the qualitative data and through it my penetration of Victoria's legal culture provided a unique opportunity to analyse the contentious and significant issues surrounding plea bargaining, which, due to its informality, are often beyond the reach of researchers and the general public. My empirical, qualitative research, thus comprises the first analysis of its kind to scrutinise the issues surrounding plea bargaining's formalisation from a direct viewpoint within Victoria's legal culture.

My findings increase the level of knowledge about plea bargaining in Victoria and the issues confronting criminal proceedings in the context of hidden justice, adversarial traditions, the structure of the pre-trial process and court (in)efficiency. Through its examination of plea bargaining's informality in the context of transparency and public accountability ideals, which hold that justice and legal conduct should be visible, consistent and accountable, my research has critical policy implications. These are particularly significant due to the increasing consideration given to victims and to upholding human rights and equality in criminal proceedings in recent years, and the increased importance and attention being placed upon transparency and efficiency-driven reform, evidenced by the introduction of the *Victims' Charter 2006* (Vic), the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Human Rights Charter 2006* (Vic)') and the Victorian Government's ten-year projections released in 2004, all of which highlight the need to modernise justice systems to respond to increasing delays (Victorian Attorney General's Department, 2004, p. 8). Similarly, as identified by the Victorian Director of Public Prosecutions (DPP) in November 2008, the extent of court inefficiency in Victoria means 'the necessity to speed up litigation assumes a new urgency' (Rapke, 2008, p. 6). In addition to having policy implications for the Victorian system, my findings are also

relevant to the broader Australian and global adoption of plea bargaining. This research can thus inform broader discussions about plea bargaining's formalisation and efficiency-driven reform, given the extent of court inefficiency confronting common law justice systems and the increasing consideration given to victims and human rights within criminal proceedings internationally.

In conclusion, I believe that in order to establish plea bargaining as a legitimate criminal justice process, it must be recognised and authorised in statute. In order to effectively achieve this, particularly given the ineffectiveness of internal OPP policies in regulating or consistently shaping prosecutorial conduct, a number of mechanisms should be implemented in statute. These include formally acknowledging the County Court Case Conference and Supreme Court Section 5 Hearing, in order to increase their importance and validity as pre-trial processes; formally authorising prosecutorial initiation and engagement in discussions; and in line with the High Court recommendations in *R v GAS; R v SJK* (2004) 206 ALR 116, formally requiring that detailed file notes be made from the case's initiation into criminal proceedings through to finalisation, including any plea bargain offers made, reasons for their rejection or if accepted, the basis upon which agreements are made, including any concessions on the charges, facts or prosecutorial sentencing submission.

In the introduction of this thesis, I explained that the most effective mechanism to increase efficiency in the criminal courts is to eliminate the number of trials proceeding that could resolve by an early guilty plea. One of the most effective mechanisms for achieving this is through plea bargaining. However, the fact that the comments made in *R v GAS; R v SJK* (2004) 206 ALR 116 in 2004 comprised the first, and to date remain the only, authority to acknowledge plea bargaining in Victoria demonstrates the significance of this research in analysing this highly under-examined, unscrutinised and secretive process, particularly given the potentially negative consequences and implications that can result from an inappropriate plea bargain for victims, defendants and the public. Transparency is the key to lifting the veil of secrecy surrounding plea bargaining in Victoria, and this can only be achieved, as this research strongly suggests, by its formalisation in statute.

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APPENDIX A
Interview Schedule A

Introductory Statement – outline the aims of the research project. Respond to any questions the participant has about the research. Confirm how much time they have available.

The first questions will explore the practical elements of plea bargaining

1. How would you define the process of plea bargaining?

2. Do you prefer or use a term aside from plea bargaining to describe the process you just defined?

3. What is the aim or purpose of plea bargaining?

4. Is plea bargaining necessary?

5. Have you ever been directly involved in plea bargaining?

IF NO: Go to Question 6

IF YES:

   a. At what stage is a plea bargain initiated?

   b. Who initiates the plea bargain? [How?]

   c. Roughly estimating, out of the last ten guilty pleas you have been involved with, how many resulted from some form of plea bargaining?

   d. How long does plea bargaining generally last? [minutes/days/months?]

   e. What are the main factors taken into account when considering accepting a plea bargain?

   f. Are all these considerations taken into account in practice or is there one that carries the most weight?

   g. Is the possible sentence the defendant may receive discussed during plea bargaining?

6. In respect to plea bargaining outcomes, who is responsible for making the final decision on whether to accept or reject an agreement?

7. Should the prosecution initiate plea bargaining discussions and/or offers?

8. Do you believe there should be more 'official' encouragement either internally or through legislation for prosecutors to consider the resolution of cases at the earliest possible opportunity? [How should this be implemented?]

9. What are the main factors taken into account when considering accepting a plea bargain agreement?

10. Is there any pressure on prosecutors/defence counsel to engage in plea bargaining?

11. Is there any pressure on prosecutors/defence counsel to avoid using plea bargaining?

12. Do any guidelines, protocols or regulations exist on plea bargaining?

13. Are there any checks of the prosecutor's charging decision?

14. What do you consider the main benefits of plea bargaining to be?

15. Who benefits the most from plea bargaining?

16. What do you consider the main weaknesses of plea bargaining to be?

17. Who benefits the least from plea bargaining?

The next questions are going to explore victims and plea bargaining

18. Are victims adequately considered in plea bargaining?

19. As you are aware the *Victims' Charter Act 2006* (Vic) was introduced in November 2006, I would like to discuss the Charter with you, particularly s.9, which requires the prosecuting agency to provide the victim, as soon as reasonably practical, with information on the charges filed against a person and any decision to substantially modify these charges, not to proceed with some or all of the charges, or to accept a guilty plea to a lesser charge.

    a. What is the purpose of the Charter?

    b. Does the Charter increase victims' rights in plea bargaining?

    c. Has the Charter increased the number of consultations occurring with victims specifically in relation to plea bargaining?

    d. When does victim consultation occur, specifically in relation to plea bargaining?

    e. Should or does this consultation occur in every case specifically in relation to plea bargaining?

    f. What form does this consultation take? [phone/person/letter]

g. What does the consultation involve?

h. Have any policies being implemented within the OPP to ensure the requirements outlined in the Charter are upheld?

i. Is the Charter a practical and/or effective reform?

20. Should victims have an influential say in whether a plea bargain agreement accepted by the prosecutor?

21. Should victims' opinions on the plea bargain be officially recorded by prosecutors and form part of court records?

The next questions are going to explore the concept of sentence leniency as an element of plea bargaining

22. Do you believe defendants may feel pressured to plead guilty?

23. Should there be specified sentence discounts be introduced in Victoria?

24. Would plea bargaining still occur regularly if sentence discounts for a guilty plea were abolished?

25. Are you aware of the Victorian Sentencing Advisory Council's proposal for a sentence indication scheme in Victoria? [If not, outline the process]

26. Would you support the introduction of this proposal in Victoria?

27. What do you consider the main benefits of sentence indications to be?

28. What do you consider the main limitations of indications to be?

The following questions explore the informal nature of plea bargaining discussions

29. Why is the plea bargaining process informal?

30. Is the informality of the plea bargaining process required to maintain its effectiveness?

31. Does any aspect of plea bargaining need to be formalised?

32. Why do you think Victoria has not introduced any sort of reform or formalisation initiative when compared to other Australian states and internationally?

33. What would the benefits of formalising plea bargaining be?

34. What would the weaknesses of formalising plea bargaining be?

35. If a formalised process was introduced;

    a. What should its purpose be?

    b. How should it be implemented? [prosecutorial guidelines/legislation]

    c. Should it be aimed at all courts or only focus on specific courts?

36. Do you believe the Case Conferences in the County Court and/or Section 5 Hearings in the Supreme Court are effective in the early resolution of cases?

37. How do you think the public perceive plea bargaining?

38. Is the public perception of plea bargaining important?

39. Should more information about why plea bargaining occurs and the process in general be made available to the public?

40. Are there processes currently in place that you believe adequately address plea bargaining's limitations and any potential abuses of the plea bargaining system? If yes, what are they?

41. Is there anything currently wrong with the present system of plea bargaining?

42. Are there any practical and effective initiatives involving plea bargaining that could be introduced in Victoria?

To conclude

43. Do you believe that the views and opinions you have expressed are widespread among your colleagues?

44. Is there anything further you would like to add or clarify in relation to anything we have discussed during this interview?

END INTERVIEW

APPENDIX B
Interview Schedule B

These questions relate specifically to the indictable sentence indication trial operating in the County and Supreme Courts. Please answer the questions based on which court you currently preside over.

1. In your opinion, why was the legislation introduced?

2. Does the indication process have any limitations from the court's perspective?

3. Does the legislation have any significant benefits from the court's perspective?

4. Do you believe an indication of the sentence order will inform the defendant's pleading decision?

5. Do you think this system places any pressure on defendants to plead guilty?

6. Are there any resource implications from this system?

7. Have you given a sentence indication since the enactment of the legislation? [If yes, in what circumstances and what type of evidentiary material was available?]

8. What evidentiary material and how much material do you consider must be available to the court before an indication can be given?

9. Should personal mitigation be available to the court prior to the indication being given? [Why/Why not?]

10. Should the Victim Impact Statement be available to the court prior to the indication being given? [Why/Why not?]

11. Is the sentence discount evident in the indication given?

12. Do you believe that sentence indications may have (or have had) an impact whereby defendants withhold their guilty pleas in the Magistrates' Court to wait for an indication in the relevant superior court?

13. Do you have any concerns that judge-shopping could occur?

14. Increasing victim satisfaction with the criminal justice process was one of the main motivations for the legislation. Do you believe the indications are a victim-focused reform? [If yes, in what way? If no, why not?]

15. Do you believe the indication system has any possible negative impacts on defendants and/or victims? If yes, what are they and why?

16. Do you believe the indication system has any possible benefits for victims and/or defendants? If yes, what are they and why?

APPENDIX B
Interview Schedule B

17. Do you believe the introduction of sentence indications will impact (or has impacted) on the number of defendants pleading guilty in the courts?

18. To your knowledge, have there been many sentence indication requests in the courts?

19. To your knowledge, have there been many indications not given as a result of the court rejecting the defendant's request or due to Crown disapproval?

20. Do you believe that this type of indication scheme should continue to operate in the County Court? If yes, why? If no, why not?

21. Do you believe that this type of indication scheme should continue to operate in the Supreme Court? If yes, why? If no, why not?

To conclude

22. Do you believe that the views and opinions you have expressed are widespread among your colleagues?

23. Is there anything further you would like to add or clarify in relation to anything we have discussed during this interview?

END INTERVIEW