



## INFORMATION / FACT SHEET

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### UNDERSTANDING PLEA NEGOTIATIONS

#### WHAT IS MEANT BY THE TERM 'PLEA NEGOTIATION'?

Negotiations are a regular part of all criminal legal proceedings.

The term '*Plea Negotiation*' refers to the process whereby the Prosecution and the Accused (via their appointed legal representative) work out an appropriate and mutually satisfactory agreement or resolution to the criminal charges laid.

It is in the interest of all parties in the Criminal Justice System for matters to be dealt with early and for an appropriate resolution to be sought that reflects the *seriousness* and *criminality* of the offences committed.

It is also expected that Prosecution staff and Defence Lawyers will talk to each other throughout the life of a criminal matter.

A common misconception is that *Plea Negotiations* in criminal matters occur in 'secret' and will always, or automatically, result in an agreement to reduce or lessen the original charges laid.

This is not case (*refer to 'Do Plea Negotiations Always Result in a Defendant Securing a Lesser Charge or Sentence?'*).

#### ARE PLEA NEGOTIATIONS A USUAL PART OF CRIMINAL PROCEEDINGS?

*Plea Negotiations* are a normal and accepted part of any criminal prosecution.

As already mentioned, it is in the interest of all parties in the Criminal Justice System for matters to be dealt with early and, if and where possible, for an appropriate resolution to be sought.

It is also inappropriate for matters to proceed to a criminal trial that, otherwise, could have been resolved in a proper, appropriate and mutually satisfactory way.

Some *Plea Negotiations* are more straight forward than others – for example in cases where an accused accepts their involvement in the offending and there is no dispute regarding the factual circumstances of the charged offences.

Even where a person accepts their involvement in the offending, they may dispute the '*factual basis*' of the offences charged - that is there is disagreement about what actually occurred. This can result in a process of sensitive negotiations or a *Disputed Facts Hearing* before a Magistrate or Judge.

In cases where an accused denies or disputes significant aspects of the offending, *Plea Negotiations* can be ongoing and lengthy.

Where an appropriate resolution cannot be reached the matter will ultimately result in a criminal trial.

#### WHY DO PLEA NEGOTIATIONS OCCUR IN CRIMINAL MATTERS?

There are many reasons why *Plea Negotiations* occur in criminal matters.

In most criminal matters a number of criminal charges will be laid by Police. The charges selected will normally reflect the nature and extent of the alleged criminal offending reported to the Police.

It is also important for the charges selected to provide the Court with an appropriate basis for sentence.

Usually, the charge or charges laid by Police will be the most serious available for that type of offending.

However, due to a number of factors, which can include:

- the strength of the available evidence,
- the probable lines of defence to a particular charge,
- statements of witnesses,
- medical or forensic evidence,
- whether new evidence comes to light as the police investigation continues,
- whether a victim wants to proceed to a trial, and
- the ability of the court to impose an appropriate sentence,

it may be appropriate to 1) proceed with the original charges, or 2) proceed with a different charge.

In some cases the charge(s) can be less serious than the original charge(s).

Depending on the strength of the Prosecution Case, an accused (via their legal representative) may direct their lawyer to enter into negotiations with the Prosecution.

Similarly, the DPP may canvass the accused's attitude (via their legal representative) to an appropriate *plea resolution*.

### **ARE THERE SPECIFIC RULES OR GUIDELINES PROSECUTORS MUST FOLLOW?**

Prosecutors have specific rules and guidelines to follow in relation to '*Plea Negotiations*' or '*Charge Bargaining*'.

Current DPP Prosecution Guidelines<sup>1</sup> state that:

*A Plea Proposal should not be entertained by the prosecution unless:*

- (a) the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused;*
- (b) those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and*
- (c) there is evidence to support the charges.*

Some victims of crime become angry or upset with the process of *Plea Negotiations*. Many feel that discussions and negotiations between Prosecutors and Defence Lawyers should not be taking place at all.

However, this is not realistic and the Courts require Prosecutors and Defence Lawyers to enter into proper and appropriate discussions and negotiations with each other.

It is also important to note that DPP Prosecutors do not speak with the accused direct, and all negotiations take place with the accused's legal representative.

### **DO PLEA NEGOTIATIONS ALWAYS RESULT IN A DEFENDANT SECURING A LESSER CHARGE OR SENTENCE?**

This is an important question.

It is a fundamental principle of the law that an accused person should not plead guilty to more than is charged or disclosed by the evidence.

As already stated, care must be taken to choose a charge or charges which adequately reflect the nature and seriousness of the criminal conduct.

Based on a number of factors a criminal legal matter will usually result in one of the following outcomes:

- *A Guilty Plea* as charged (on an agreed factual basis); or
- *A Guilty Plea* as charged (on a disputed factual basis); or
- *A Guilty Plea* to fewer than all of the original charges laid by Police; or
- *A Guilty Plea* to a lesser charge or charges to the original charges laid by Police (appropriate to the seriousness of the offending).
- All or particular charges being withdrawn and not proceeded with
- Particular charges taken into account without proceeding to conviction.
- Rejection of the Plea Offer and proceeding to a trial.

Any sentence imposed by the court will ultimately reflect the *seriousness* and *criminality* of the type and number of offences charged.

### **WHEN DO PLEA NEGOTIATIONS USUALLY OCCUR?**

*Plea Negotiations* can occur at any stage during the criminal legal process and can be initiated by either legal party involved - that is the Prosecution or the Defence.

Having said this, it is in the interests of justice for matters to be resolved, wherever possible, at the earliest stage possible.

Courts will expect appropriate negotiations to occur and will want to be advised about the progress and outcomes of negotiations that are taking place.

As such, the DPP will give serious consideration to any reasonable proposal that reflects the *seriousness* and *criminality* of the offences charged.

### **HOW DO PLEA NEGOTIATIONS USUALLY OCCUR? IS THERE A STANDARD PROCESS?**

As already stated, *Plea Negotiations* can be initiated by either the Prosecution or Defence (on behalf of the accused).

Defence may speak with the DPP Prosecutor who has conduct of the prosecution matter to determine the DPP's likely attitude to a possible resolution.

The Prosecution also may indicate that the DPP will seriously consider a particular plea proposal if it were put forward by Defence.

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<sup>1</sup> DPP Prosecution Guidelines

However the actual proposal must come from Defence.

Any serious proposal put to the DPP is usually received in writing for the prosecution to formally consider. This is to avoid any confusion and to keep accurate records of the negotiations that have taken place.

Having received a proposal, the allocated DPP Prosecutor will consult Senior Legal Managers who will provide specific legal instructions as to the offer made.

Resulting from any instructions they receive, the allocated Prosecutor will respond to Defence, also usually in writing.

Prior to making a decision to accept a *plea offer* or proposal the DPP has an obligation to inform and consult with a number of persons including victims of serious offences (*refer to 'Do I Get to Have a Say?'*)

Depending on the complexity of the legal matter, negotiations may be straight forward, or may involve a number of discussions, written proposals and counter offers that can take place over an extended period of time.

If agreement is reached between the Prosecution and Defence, all parties involved will be advised and the resolution will be put before the relevant Magistrate or Judge for *Pleas of Guilty* to be formally entered.

If no agreement is reached between the Prosecution and Defence, the proposal will be rejected and the matter will proceed to a Trial.

Defence Counsel must take *legal instructions* from their client prior to any resolution being finalised.

### **WHO IS INVOLVED IN THE PLEA NEGOTIATION PROCESS?**

A number of persons can be involved in the *plea negotiation* process. These include:

- *The Director (DPP)*
- *Senior DPP Managers who provide ongoing legal instructions to the prosecutor with conduct of the matter.*
- *The DPP prosecutor who has conduct of the criminal legal brief*
- *The Accused's Defence Lawyer*
- *The Accused to the extent of providing instructions to their legal representative.*
- *The Investigating Police Officer*
- *Victim or victims to whom the alleged offences relate.*
- *A Witness Assistance Officer (where one has been allocated) who will offer information and support to referred victims or witnesses.*

### **WHO MAKES THE DECISION TO ACCEPT OR REJECT A PLEA OFFER OR PROPOSAL?**

The decision to accept or reject a *plea offer* can only be made by the Director (DPP), or a small number of Senior Lawyers in the office to whom the Director has delegated this responsibility.

The decision will be made independently of any other person, stakeholder or interested party involved.

Given the large number of matters that the office handles, it is not possible for the Director to be personally involved in every decision.

However the Director is responsible for them all.

### **WHAT THINGS ARE PROSECUTORS REQUIRED TO CONSIDER BEFORE ACCEPTING OR REJECTING A PLEA OFFER?**

DPP Prosecution Guidelines explicitly state that "*agreements as to charge or charges and plea must be consistent with the requirements of justice*".

Any decision to agree to a plea proposal advanced by the Defence, or to put a counter-proposal to the Defence, must take into account all the circumstances of the case and other relevant considerations including:

- (a) *whether the accused is willing to co-operate in the investigation or prosecution of others, or the extent to which the accused has done so;*
- (b) *whether the sentence that is likely to be imposed if the charges are varied as proposed ..... would be appropriate for the criminal conduct involved;*
- (c) *the desirability of prompt and certain resolution of the case;*
- (d) *the accused's antecedents;*
- (e) *the strength of the prosecution case;*
- (f) *the likelihood of adverse consequences to witnesses;*
- (g) *in cases where there has been a financial loss to the State or any person, whether the accused has made restitution or arrangements for restitution;*
- (h) *the need to avoid delay in the resolution of other pending cases;*
- (i) *the time and expense involved in a trial and any appeal proceedings;*
- (j) *the views of the investigating police officers; and*
- (k) *the views of the victim or others significantly affected.*

Prosecutors are instructed that in no circumstances should a *plea negotiation* proposal be entertained if the accused maintains his or her innocence with respect to a charge or charges to which his or her legal representative has offered to plead guilty.

### DO I GET TO HAVE A SAY?

Under the **Victims of Crime Act, 2001 (SA)** a victim of a serious offence is entitled to be consulted in relation to certain decisions involving:

*a) to charge the alleged offender with a particular offence; or*

*b) to amend a charge; or*

*c) to not proceed with a charge;*

*d) to apply under Part 8A of the **Criminal Law Consolidation Act 1935 (SA)** for an investigation into the alleged offender's mental competence to commit an offence or mental fitness to stand trial.*

Where you are a victim of a serious offence, your views will be taken into account in any formal *plea offers* received by the DPP.

It is important to note however that the decision ultimately rests with the Director (DPP) who will make an independent decision to accept or reject the *plea offer* made.

### WHAT IS MEANT BY THE TERM 'DISPUTED FACTS'?

An accused can only be sentenced on an '*agreed*' factual basis.

An accused may dispute the '*factual basis*' of the offence/s charged - that is there is a difference between the prosecution case and the accused about what actually occurred.

It is important to note that an accused can plead guilty to the offences involving them but still dispute the '*factual basis*' or circumstances of the offending.

As already stated, this can result in a process of negotiations about the factual basis or a *Disputed Facts Hearing* before a Magistrate or Judge.

The DPP Prosecutor will be able to provide further information when an accused person is disputing the *factual basis* of the offences involving them.

### ARE THERE ANY BENEFITS TO ACCEPTING A PLEA OFFER?

There are a number of inherent benefits to matters resolving early and properly without the need to proceed to a Trial.

The benefits will not be the same to everyone, but can include the following:

- *It guarantees a Conviction and a Sentence Outcome*
- *It facilitates an earlier resolution to the matter than would normally occur*
- *It provides an acknowledgment of the offences committed by the accused.*
- *It relieves victims and witnesses of the need to give evidence in a Trial.*
- *It can allow the victim to present a Victim Impact Statement to the court (in indictable and prescribed summary offences)*
- *It saves the Justice System valuable time & costs*
- *It assists in reducing the numbers of matters being listed for trial*
- *It entitles the accused to a reduction in sentence on account of pleading guilty*
- *It can provide an incentive to others to also plead at an early stage.*

### WHAT IF I AM UNHAPPY OR DISSATISFIED WITH A DECISION MADE BY THE DPP?

As already stated, the decision to accept or reject a plea offer or proposal can only be made by the Director, or one of the small number of Senior Lawyers in the office to whom the Director has delegated this responsibility.

If you are not satisfied with the decision made by the DPP you have a number of avenues open to you:

- 1) *Speak to the DPP Prosecutor and / or Witness Assistance Officer involved.*
- 2) *Write to the Director requesting to have the decision reviewed (within 10 days of the decision being made)*
- 3) *Speak with the Commissioner of Victim's Rights*

**WHAT IF I REQUIRE FURTHER INFORMATION OR SUPPORT TO UNDERSTAND THE PLEA NEGOTIATION PROCESS?**

If you require further information to understand the plea negotiation process, you can:

- Speak to the allocated Prosecutor from the DPP
- Speak to the allocated Investigating Officer
- Speak to a Witness Assistance Officer if one has been provided to you

Any of the above people should be in a position to assist you with your further questions and enquiries.