



## Director's Instruction No. 7

### Charge Negotiation in the Supreme Court

#### Aim of Instruction

The Aim of this Instruction is to regulate the way in which charge negotiations are conducted on behalf of the Office, and how they are to be authorised. This Instruction relates specifically to the Supreme Court and must be read subject to Director's Instruction No. 1, Discontinuing Prosecutions and significantly amending Statements of Facts in the Supreme Court.

This instruction deals with the **procedure** within the office for conducting charge negotiations, including the **level** at which particular decisions may be taken, and how the process will be **documented**.

#### To which matters does this instruction apply?

The charge negotiations referred to in this Policy are:

- charge negotiations relating to matters that have been committed to the Supreme Court; and
- matters that are only able to be dealt with indictably, wherever they are in the system.

#### Background

The Prosecution Policy recognises that charge negotiations may take place from time to time. The relevant principles are set out at paragraphs 3.11 to 3.15 of the Prosecution Policy.

Charge negotiation is to be distinguished from private consultations involving the court which are anathema to our system. As the Full Court of the Supreme Court of Victoria in *R - v- Marshall* [1981] VR 725 at 732 said:

*Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely the defendant, it is embarrassing to the Crown and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice.*

A written record of the charge negotiation must be kept in the interests of transparency and probity.

The Director will from time to time authorise senior prosecutors to engage in plea negotiations. This authority will typically be given during pre-trial consultations, with an indication of the parameters of the negotiation.

Those prosecutors who are authorised will conduct such negotiations in accordance with the principles, and taking into account the factors to be considered, that are set out herein. All charge negotiations are subject to the approval of the Director.

### **Factors to be considered in charge negotiations**

As set out in the Prosecution Policy, a plea of guilty may be accepted following appropriately authorised plea negotiations if the public interest is satisfied on consideration of the following matters:

- (a) whether the plea reasonably reflects the essential criminality of the conduct and provides an adequate basis for sentencing;
- (b) whether it will save a witness, particularly a victim or other vulnerable witness from the stress of testifying in a trial;
- (c) the desirability of prompt and certain dispatch of the case;
- (d) the need to avoid delay in the dispatch of other pending cases;
- (e) the time and expense involved in a trial and any appeal proceedings;
- (f) any deficiencies in the available evidence;
- (g) in cases where there has been a financial loss to any person, whether the defendant has made restitution or arrangements for restitution;
- (h) the views of the police or other referring agency; and
- (i) the views of the victim if known.

An alternative plea will **not be considered** where its acceptance would produce a distortion of the facts and create an artificial basis for sentencing, or where facts essential to establishing the criminality of the conduct would not be able to be relied upon, or where the accused person asserts or intimates that he or she is not guilty of an offence to which they are pleading guilty.

## **Consultation**

Where appropriate, the views of the investigating officer and the victim or the victim's relatives, should be sought and considered before the plea is accepted. In cases of sexual offences, the complainant will be consulted in every case unless there are compelling reasons why this should not be done.

However, it should be noted that the views of those consulted are not determinative. It is the public interest that must be served, not any private individual or sectional interest.

In non-sexual offence proceedings, consultation is not required when a negotiated outcome does not significantly change the facts or Crown Case. For instance, where the Crown substitutes another appropriate charge for an existing charge based on the application of known facts to questions of law (e.g. matters pertaining to proof of the accused's state of mind including substituting elements such as intention or recklessness – which generally can only be inferred from all the known facts; e.g. the legal distinction between grievous bodily harm and actual bodily harm). Furthermore, consultation is not required in instances where an offence simply cannot be proved on the facts – as a question of law.

## **Facts**

If a version of the facts is negotiated and agreed as part of a plea negotiation, the prosecutor involved must prepare or obtain a written statement of agreed facts to be signed on behalf of both parties. A copy must be kept on file with an explanation of how and when it came into being.

## **Record of Negotiations**

Any offer by the defence must be recorded clearly, including any offer that is rejected.

It is often not possible for the same prosecutor to have the conduct of the one matter throughout the course of the proceedings. Consequently, records must be made (and recorded on CASES) as events occur for the assistance of prosecutors coming into the matter at later times and for transparency and probity.

## **Sexual offences**

The setting up of the Sexual Offences Unit of the office was a recognition of the need in sexual offence cases for early, sustained and appropriate contact with complainants; continuity of prosecutor in such cases; thorough and timely brief evaluation and assessment; and a reduction in delays in matters wherever possible.

Where there is the possibility of charge negotiations in sexual offence cases, it is vital that the complainant be fully consulted. This is best done by the prosecutor within the Sexual Offences Unit allocated the matter.

Accordingly, for sexual offence cases, charge negotiation will be carried out by the Supervising Lawyer of the Sexual Offences Unit or under his or her supervision.

### **Authority**

#### **(a) Who may negotiate**

Prosecutors authorised in particular cases by the Director.

The Practice Manager Supreme Court.

In relation to sexual offence cases, the supervising lawyer of the Sexual Offences Unit or prosecutor under his or her supervision.

#### **(b) Who may approve**

All charge negotiations must be approved by the Director and are not effective until that approval has been obtained.