EQUAL JUSTICE PROJECT

Plea Bargaining in our Justice System

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1. Introduction

The recent death of Moko Rangitoheriri, and subsequent convictions of those responsible, have brought plea-bargaining into the public spotlight. In light of such controversy, this research paper intends to examine the place of plea bargaining in New Zealand. The ultimate goal will be to consider whether plea bargaining is able to sufficiently uphold justice in our criminal justice system.

Firstly, the paper will explain how plea bargaining currently operates. It will then consider how recent reforms and budget cuts could be impacting this method. Following this, the differences between murder and manslaughter will be examined in several cases in order to demonstrate plea bargaining in practice. Finally, it will consider how best to protect justice where plea bargaining is concerned.

2. Plea Bargaining

This section will outline how plea bargaining currently operates in New Zealand. It will give an overview of how the process takes place, and examine the Solicitor General's guidelines and how these function practically.

2.1 Overview

Plea bargaining is an unofficial practice in New Zealand whereby a criminal defendant and prosecution reach an agreement on the charges that the defendant will plead guilty to.[1] This practice occurs after a defendant is charged with a criminal offence, but before trial commences.

Plea discussions usually take place at the case management stage, where a defendant has pleaded not guilty to an offence. They consist of the defendant's lawyer and the prosecutor coming together to discuss whether the matter will proceed to trial.[2] Both parties will jointly complete a memorandum about the charges, including whether the defendant intends to change their plea, and whether the prosecutor proposes to amend, withdraw or add any new charges.

[1] Law Commission *Criminal Prosecution* (NZLC R66, 2000) at 225.
[2] Criminal Procedure Act 2011, ss 54 – 59.

The aim of allowing such discussions is to reduce the amount of time taken for cases to be resolved, and increase the amount of cases where pleas are entered or charges are withdrawn outside of court.[3] These discussions can also provide for greater direction and clarity when the case proceeds to court, by offering a general pathway that both parties have agreed to follow.

2.2 Guidelines

There is no formal legislation that regulates plea bargaining in New Zealand. Under the Criminal Procedure Act 2011, the Solicitor-General is responsible for maintaining general oversight of the conduct of public prosecutions.[4] In discharging this responsibility, the Solicitor-General should comply with the Prosecution Guidelines that set out principles of best practice.

2.3 Considerations

Under the Guidelines, a prosecutor is allowed to engage in plea discussions with defence counsel when it is in the interest of justice.[5] While justice is the overriding consideration, the following considerations are also relevant:[6]

- Whether the agreed charges adequately reflect the essential criminality of the conduct; and
- Whether the charges agreed to provide sufficient scope for sentencing to reflect that criminality.

Certain kinds of prosecutorial engagement in plea discussions are considered inappropriate. It is not acceptable for prosecutors to:[7]

- Proceed with unnecessary additional charges or a more serious charge with a view to securing a negotiated plea;
- Agree to a plea of guilty to an offence not disclosed by the evidence; or
- Agree to a plea of guilty on the premise that the prosecutor will support a specific sentence.

It is also required to inform relevant victims or complainants of plea discussions wherever practical and appropriate to do so.[8] Where victims or complainants are informed, they are also to be given an opportunity to voice their position on the plea arrangement. Prosecutors are required to manage victim's expectations. However, their decisions are to be made ultimately in the broader public interest and the interests of justice.

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[3] Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013) at 17.1.
[4] Section 185.
[5] Above, n 3, at 18.6.
[6] At 18.6.1 and 18.6.2.
[7] At 18.7
[8] At 18.5.

2.4 Value of plea discussions

The Guidelines state that plea discussions between parties have "significant value for the administration of the criminal justice system".[9] The benefits include:

- Relieving victims or complainants of the burden of the trial process;
- Allowing the resources saved in Court time, prosecution costs, and legal aid to be better deployed in other areas of need;
- Providing a structured environment in which the defendant may accept any appropriate responsibility for their offending that may be reflected in any sentence imposed.

2.5 Reaching a decision

Once a plea arrangement has been reached, it is to be recorded in the proper form and placed before the Court. The Guidelines state that a prosecutor cannot depart from the agreed terms unless they are misled or misinformed about the facts of the case that led to the particular agreement. Even then, the departure must be acknowledged and allowed by the Crown Solicitor or another authorised government agent. In cases involving murder charges, the Solicitor-General must approve all plea arrangements.[10]

3. Recent Budget Reforms and Issues

This section will consider the suggestion that the Crown is currently more likely to initiate and accept plea bargains than in the past. This suggestion has been made by some members of the public in light of both the 2012/2013 funding changes to the Crown Prosecution Service and the initiation of the Criminal Procedures Act 2011.[11] It should be noted that these assertions are drawn predominately from popular news articles, not academic sources.

3.1 Previous Crown Prosecution Funding

Previously, Crown Solicitors were paid per day for their attendance at trial. Due to this mechanism, some contended that Crown Solicitors had motivation to progress cases to trial, or even motivation to extend the duration of a trial, in order to receive greater remuneration. Crown Solicitors have discretion regarding whether to engage in plea negotiations. If financially motivated, it has been argued that

[9] At 18.1.
[10] At 18.9.
[11] David Garett "Plea Bargaining in New Zealand – a primer" (10 May 2016) Kiwiblog <www.kiwiblog.co.nz>.

Crown solicitors were inclined to proceed to trial (instead of striking plea bargains) more regularly than was necessary for justice.[12]

3.2 Increased Costs

The above allegations are arguably supported by the cost increases seen in the 2012 Treasury paper. Between 2006 and 2011 Crown prosecution costs increased by 60%, while cases completed increased by only 2%.[13] A Cabinet Paper proposing a review of prosecution services states Crown Law and New Zealand police spent $75 million annually on prosecutions handled by Crown solicitors.[14] Reforms were needed in order to find a cost effective and efficient means of administering justice.

3.3 Reforms

As a result of the findings above, substantial changes to the Crown prosecution system were made. Crown solicitors are now 'bulk funded' rather than the pay-per-day scheme. This follows the 2012/2013 funding changes that cut 25% of Crown Prosecution Services' overall budget; a decrease from $42 million to $33 million. Funding in Auckland dropped from $17.8 million to $9.87 million, and funding in Wellington dropped from $4.19 million to $3.13 million.[15] These budgets are calculated by reference to the total number of cases disposed within each warrant during the previous financial year.[16]

The bulk funding regime provides an annual amount to utilise for all prosecutions in their district. The then Solicitor General, Mike Heron QC, stated that this was the best way forward as it "provides incentives to be more efficient" and "control costs". [17] The impact of bulk funding is that solicitors are paid the same amount whether they take cases to trial or negotiate plea bargains of lesser charges.

Since 2011, plea bargains can be negotiated and initiated by either defence or Crown, therefore making them more accessible to Crown solicitors.[18] It is arguable that these reforms in combination have the unintended effect of providing Crown lawyers a reason to side-step trials via plea bargaining.[19] Whether

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[12] Ibid.
[13] The Treasury "Budget 2012 Information Release: Towards Sustainable Crown Prosecution Services (June 2012)", at [13].
[14] Cabinet Paper "Review of Prosecution Services."
[15] Shan Cowlishaw, Sam Boyers and Ian Steward "Fear for justice after cost-cutting" *The Dominion Post* (online ed, New Zealand, 11 July 2013); Treasury, above n 13, at [7].
[16] Cowlishaw, Boyers and Steward, above n 16, at [37], [39] and [62]; Jimmy Ellingham "City jobs on the line" *Manawatu Standard* (Online ed, New Zealand, 1 June 2013).
[17] Leighton Keith "Crown prosecution cutbacks defended" *Taranaki Daily News* (Online ed, New Zealand, 25 April 2013).
[18] Criminal Procedure Act, s 55-57.
[19] Garrett, above n 11.

the previous mentioned criticisms are founded is inconclusive, and opinions have been expressed on both sides. On one hand, tighter budgets may lead to a greater tendency for plea bargaining to occur in order to save costs, consequentially undermining justice. On the other hand, it may create a more efficient system by providing an incentive to complete trials promptly.

3.4 Do these reforms threaten justice?

Documents released via the Official Information Act show emails and letters from worried solicitors expressing their concerns as to how their work will be impacted by the tighter budget. An article from the Dominion Post claims Meredith Connell, currently holding the warrant to act for the Crown in Auckland, lost two senior Crown prosecutors due to the changes.[20] Other Crown Solicitors in Taranaki and Palmerston North stated that the reduction in budgets would significantly diminish the resources they had available for prosecutions and lead to possible dismissals of staff, or the utilisation of junior prosecutors in cases usually dealt with by more experienced prosecutors.[21]

However, government officials contest these allegations. A 2014 New Zealand Herald article reports a former Meredith Connell prosecutor's claims that the changes encourage cases to be resolved before trial, and even led the firm to establish an early resolution group.[22] In response, the Attorney-General released a statement explaining that the Solicitor-General has general oversight of all public prosecutions and asserts that the reforms have not made a difference to prosecution outcomes, other than making the system more efficient.[23] He claims that there have been no instances of cases being reduced inappropriately, and no concerns were expressed about the new plea arrangements during the enquiries with Crown Law representatives and District Court Judges in each Crown Solicitor district.[24]

Whether these reforms threaten justice depends on how you view an incentive to complete cases faster. Mike Heron QC said the cuts were intended to lead to earlier resolutions, as there is a "benefit" to this. Conversely, Sensible Sentencing Trust expressed the view that the reforms undermined the integrity of the justice system. Labour's Andrew Little and the President of the Criminal Bar Association, Tony Bouchier, have both expressed the view that amending charges through plea bargain resolutions hides the real crime rate and ultimately encourages reoffending. [25]

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[20] Cowlishaw, Boyers and Steward, above n 16.
[21] Ellingham, above n 17; Keith, above n 18.
[22] Amy Maas "The real cost of cut-price justice" *The New Zealand Herald* (Online ed, New Zealand, 18 May 2014).
[23] "Attorney-General statement on Plea Arrangements" (29 May 2014) New Zealand Parliament <www.parliament.nz>.
[24] Ibid.
[25] Cowlishaw, Boyers and Steward, above n 16; Keith, above n 18; Maas, above n 23.

Unfortunately, there is insufficient data to analyse the impact of these reforms. The Ministry of Justice has stated they do "not hold any records of instances of plea bargaining."[26] Therefore, there is no quantifiable means to measure the impact the reforms have had on plea bargaining.

4. Cases

This section looks at the difference between murder and manslaughter and identifies the difficulty in convicting for murder in certain circumstances, notably child abuse cases. The cases discussed demonstrate how plea bargaining has been used to ensure 'justice' in such instances.

Note: This section contains descriptions of child abuse and physical violence that some readers may find disturbing.

4.1 Murder and Manslaughter

All culpable homicides are either murder or manslaughter.[27] The difference between the two is a key part of our legal system. While both can result in a sentence of life imprisonment, such a sentence is extremely rare for manslaughter charges.

Murder is defined under section 167 of the Crimes Act. For the purpose of this report, we wish to focus on section 167(b), which states that culpable homicide is murder when "the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not".[28] This requires the prosecution to prove the defendant:

1. Intended to harm the victim; and
2. Subjectively knew the harm was likely to cause death; and
3. Was reckless to the risk of death and did the harm.

If murder cannot be proved, the defendant will be convicted of manslaughter. There are two main issues faced by the prosecution in securing a murder convection under section 167(b). The first is

[26] Carol A. Brook and others "A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand and the United States" (2016) 57(4) Wm & Mary L Rev 1147 at 1169.
[27] Crimes Act 1961, s 160.
[28] Above n 1, s 167.

proving beyond reasonable doubt that the defendant subjectively knew that the harm could cause death. The second is the difficulty in finding the exact injury that was the cause of death and attributing it to a specific defendant.

4.2 Delcelia Witika[29]

Tania Witika and her partner, Eddie Smith, were both convicted of manslaughter for the death of Tania's daughter, Delcelia Witika. Delcelia had been burnt in hot water, punched in the face, and sexually abused. It could be argued the defendants must have been likely to know the combination of these injuries could cause death to a two-year-old. However, each of the accused parties blamed the other for inflicting the significant injuries on the two-year-old, making it difficult to identify the primary perpetrator of violence. Further, the failure to get Delcelia medical help was held as an operating cause of death, and this combined with her multitude of injuries made it difficult for the prosecution to prove which person, if any, held the requisite murderous intent. These factors combined made it unlikely for the prosecution to secure a murder conviction. Both were found guilty of manslaughter and sentenced to 16 years imprisonment. Life imprisonment was not appropriate as the principal offender could not be identified and both parties contributed to the offending, at the very least, by encouraging each other's actions.

This case shows the difficulties in proving murder convictions in complicated cases with multiple injuries and offenders, which tend to be typical in child abuse cases. The following cases show how plea bargaining can become a means to ensuring convictions..

4.3 Moko Rangitoheriri[30]

Moko Rangitoheriri was under the care of Tania Shailer and David Haerewa. Over a period of weeks they subjected him to abuse. This included kicking him, throwing him, and rubbing faeces in his face. The judge held that Ms Shailer's action of stomping with force on Moko's stomach was the direct cause of death. However, both parties were equally culpable for his death as both Shailer and Haerewa assaulted Moko over an extended period of time, encouraged a culture of violence against Moko, and failed to seek medical help.

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[29] *R v Witika* [1993] 2 NZLR 424.

[30] *R v Shailer* [2016] NZHC 1414.

Both parties plead guilty to manslaughter, and these pleas were accepted by the Crown. To be found guilty of murder, it would have to have be proven that they intended to harm Moko, Ms Shailer intended to stomp on his stomach with force, and that she knew this harm could cause death but ran the risk anyway. The Attorney-General stated that the pleas were accepted due to the difficulty in proving beyond reasonable doubt that Ms Shailer knew that this injury could cause death. Furthermore, a material cause of Moko's death was their failure to provide Moko with medical aid. This negligence would not have provided the basis for a murder conviction. If they had been charged with this failure, the maximum sentence would have been lower than the 17 years they were sentenced to for manslaughter.[31]

4.4 James Whakaruru[32]

Four-year-old James Whakaruru was killed in 1999 by his mother's partner, Ben Haerewa. Haerewa had previously been convicted for abusing James in 1996 when the child was 18 months old. Multiple doctors had seen James with irregular injuries such as major bruising, and cuts on his chin and genitals. His death represented a failure of the police and child protective services to collaborate to help vulnerable children. A review of the events leading up to his death led to overhauls in the procedure for handling similar cases in the future.

James was admitted to hospital after weeks of physical abuse from Mr Haerewa, including punching his head and face, strangling with an electric cord, and beating him with a small hammer and cleaning pipe. On these facts, there appears to be scope for the Crown to have pursued a murder conviction under section 167(b). Mr Haerewa clearly intended to injure James, and it is likely he knew such severe acts against a young child carried risk of death. However, Mr Haerewa plead guilty to manslaughter and the previous murder conviction was withdrawn. He was sentenced to 12 years imprisonment.

It is unclear why the Crown accepted Mr Haerewa's plea for manslaughter. However, the assumption is that, like the Moko case, there was insufficient certainty to pursue a murder charge.

4.5 Paul Edward Harris[33]

Paul Edward Harris stabbed Mr Keogh in the chest following a struggle. Mr Harris' actions were found to be excessive self-defence. Excessive self-defence is where a person initially tries to defend

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[31] "Attorney-General Outlines Crown Reasons to Accept Moko Manslaughter Pleas" (27 June 2016) <www.lawsociety.org.nz>.
[32] *R v Haerewa* [1999] HC S5-99.
[33] *R v Harris* [2016] NZHC 1687.

themselves, but then uses force that goes beyond what is necessary. Mr Harris was originally charged with murder. However, undisclosed complications arose during the trial and led to the Crown accepting a plea of manslaughter. He was sentenced to five years and nine months imprisonment with no minimum period of imprisonment. It appears that the elements for murder could have been satisfied. Mr Harris intended to harm Mr Keogh, and likely knew stabbing someone in the chest near the heart risked causing death, yet he stabbed him anyway.

This report has predominately emphasised how the characteristics of child abuse cases lead to difficulty in establishing murder conviction. However, this case demonstrates another instance where plea bargaining has led to a manslaughter conviction in a situation that appears at face value to fulfil the criteria for murder.

5. How to Best Protect Justice?

This section will examine how justice might be best protected. It will trace the advantages and disadvantages of plea bargaining, how other jurisdictions approach plea negotiations, and finally, whether there are possible areas of reform in the current New Zealand system.

5.1 Advantages of plea bargaining

One way plea bargaining preserves justice is by ensuring convictions in cases that may not have succeeded at trial.[34] There is a high level of uncertainty during trials, and there is always a possibility that the defendant will be found not guilty.[35] There are instances that clearly deserve the intervention of the criminal justice system, but technical difficulties may make it difficult to secure a conviction for the most serious charge available. Plea bargaining has a level of certainty a trial cannot offer, and thus ensures that the guilty party will not 'walk away' without a conviction. Even if it is through a less serious conviction, justice can still be achieved in the sense that defendant will face repercussions for their actions.

Another advantage is that plea bargaining can help the judicial system to better allocate resources. Sentence indications and plea bargains allow unnecessary trials to be avoided.[36] Resources can then

[34] "Plea Bargain Pros and Cons" FindLaw <www.criminal.findlaw.com>.
[35] Above n 34.
[36] Law Commission *Criminal Prosecution* (NZLC R66, 2000).

be better distributed, increasing the efficiency of the Court system in the long term.[37] However, this second advantage may not be taken into account for more serious crimes including murder and manslaughter. In the recent case regarding Moko Rangitoheriri, the Crown expressly stated that costs in prosecuting serious cases would not be a factor in serious cases due to the public interest concerned.[38]

5.2 Disadvantages of plea bargaining

Plea bargaining disallows several of the defendant's rights to be exercised, and this poses a potential risk to justice. During sentencing indications, justice could disintegrate if innocent parties feel pressured to accept plea bargains to avoid the uncertainty of a trial where they run the risk of a higher sentence.[39] Accepting a plea bargain means a defendant gives up their right to be heard by their peers, to give a defence at trial, and not to be compelled to confess guilt.[40] Therefore, a key issue of plea bargaining is whether it undermines these fundamental rights by leading to 'closed door' justice.

Plea bargaining also risks the general public losing faith in our judicial process. Society may believe a defendant should be punished to the full extent of the law and not be 'let off' easily.[41] Plea bargaining may therefore lead, not only to eroding the public's respect for the judicial system, but also to victims feeling betrayed due to a potentially more lenient sentence. These are policy considerations that cannot be discounted.

5.3 Other jurisdictions

Plea bargaining occurs across common law jurisdictions as a means to support justice. However, across these countries there is a lack of data regarding the exact number of plea negotiations that occur.[42] With that knowledge in mind, we will examine the procedural safeguards of plea bargaining in two other jurisdictions – United States and Australia.

5.3.1 United States

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[37] Crystal Lambardo "15 Advantages and Disadvantages of Plea Bargaining" The Next Galaxy <www.thenextgalaxy.com>.
[38] "Why Moko's killers didn't stand trial for murder" Stuff (online ed, New Zealand, 27 June 2016).
[39] "4 Crucial Pros and Cons of Plea Bargaining" (4 March 2015) NLCATP <www.nlcatp.org>.
[40] New Zealand Bill of Rights Act 1990, s 25.
[41] Above n 38.
[42] Carol A. Brook and others "A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand and the United States" (2016) 54 Wm & Mary L Rev 1147 at 1167.

In the United States, plea bargaining is used more than 90% of the time.[43] Plea agreements are governed by Rule 11 of the Federal Rules of Criminal Procedure, which outlines procedural safeguards that aim to protect justice.[44] Rule 11(b)(1) states that before the defendant accepts the plea, the Judge must address the defendant in open court to inform him or her about their available rights. Rule 11(c)(3) outlines that the Court can reject the agreement reached by both parties. These rules aim to preserve the integrity of the criminal justice system by giving the Court the power to impartially assess the agreement.

5.3.2 Australia

Australia does not have any particular rules to guide plea bargaining. However, in the leading judgment of *Barbaro v The Queen*, the High Court unanimously held that Judges have the final say on sentencing, and they are not required to follow sentence recommendations by the Crown.[45] This suggests that in a similar sense to the United States, the court in Australia may disregard any plea agreement. In addition, the parties are recommended to keep a record of the discussion during the plea negotiation to ensure transparency.[46] These guidelines aim to reduce the scope of plea bargaining and ensure a more transparent procedure to support justice in the sentencing process.

5.4 Potential Reform in New Zealand

If it is accepted that there is a place for plea bargaining in New Zealand, we can use analyses of other jurisdictions to show what sort of reforms may be adopted to better protect justice throughout the process.

5.4.1 Improving data collection

It is unclear exactly how many cases are resolved using this process, and this highlights a lack of transparency in plea agreements. As previously mentioned, the Ministry of Justice do not keep records regarding plea bargaining.[47] Collecting data on the number of plea bargains performed would provide the evidence required to understand the process and its pros and cons. Additionally, it would signal

[43] *Missouri v Frye* 132 US 1399 (2012).
[44] Above n 44, at 1175.
[45] *Barbaro v The Queen* [2014] HCA 2, (2014) 253 CLR 58.
[46] *GAS v The Queen* [2004] HCA 22, (2004) 217 CLR 198.
[47] "Plea Bargaining" (29 January 2013) FYI <www.fyi.org.nz> (Obtained under Official Information Act 1982 Request to the Ministry of Justice).

increased transparency in the plea bargaining procedure, a crucial element associated with justice. However, this solution may only be effective in the long term, due to costs of data collection and time taken to gather substantive evidence.

5.4.2 Plea jury

Another potential solution to combat the lack of transparency associated with plea bargaining is to introduce a plea jury.[48] A jury of the public would be informed of the terms of each plea deal. If they determined it was fair, then the plea bargain could be accepted. This system allows the public to be involved in a process that currently only involves the plaintiff and defendants' lawyers, therein increasing fairness and justice.[49] Despite these benefits, a plea jury might be difficult to implement. It would lead to more costs both in terms of seeking and obtaining members of the plea jury, and a lengthier Court process overall.

6. Conclusion

It is clear that plea bargaining plays a significant, yet controversial, role in our judicial system. This research paper has attempted to clarify how plea bargaining functions, and highlight areas where justice may be at risk. Some problems arise due to external factors, such as the wording of criminal statutes, which make it difficult to satisfy requirements for a conviction where the facts of the case are more complex. As with anything, the disadvantages of plea bargaining are generally well publicised. However, as the last section has made clear, there are also important advantages to having plea bargaining available as an option. Therefore, it would be inaccurate to suggest plea bargaining cannot uphold justice. Due to its potential to act as a double-edged sword, as with most aspects of our criminal justice system, the practice of plea bargaining should be actively monitored to ensure that it is being used responsibly, and in a manner congruent with society's best interests.

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[48] Laura Appleman *Defending the Jury: Crime, Community, and the Constitution* (Cambridge University Press, Cambridge, 2015).
[49] Leon Neyfakh "No Deal - Should prosecutors be forced to have their plea bargains approved by juries?" (7 April 2015) Slate <www.slate.com>.