

BARGAINING WITH DEFENSIVE HOMICIDE: EXAMINING VICTORIA'S SECRETIVE PLEA BARGAINING SYSTEM POST-LAW REFORM

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[In November 2005, the Victorian government introduced a series of homicide law reforms, central to which was the implementation of a new offence of defensive homicide. The reforms followed from significant debate surrounding the use of the partial defence of provocation, particularly in relation to male-perpetrated intimate homicides. Since the new offence was implemented in 2005, a pattern of plea deals to defensive homicide has emerged, which, due to the private nature of plea bargaining in Victoria, has created difficulties in understanding how the offence is operating in practice. Informed by 63 interviews conducted with Victorian legal professionals, this article argues that greater transparency and scrutiny of plea bargaining is needed in Victoria in order to increase public confidence in the administration of justice, and to enable an informed understanding of why these cases are perceived and ultimately treated by the Crown as a less serious form of homicide.]

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I INTRODUCTION

The offence of defensive homicide was introduced in Victoria in November 2005¹ as part of a wider package of homicide law reforms recommended by the Victorian Law Reform Commission ('VLRC').² The reforms sought to provide clarity to the partial defences to murder, and to respond to growing concerns that homicide law was operating in a gender-biased way. In particular, the operation of homicide law in Victoria was seen to disadvantage women who killed their

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¹ *Crimes Act 1958* (Vic) s 9AD, as inserted by *Crimes (Homicide) Act 2005* (Vic) s 6.

² VLRC, *Defences to Homicide: Final Report* (2004).

male abusers, while simultaneously excusing the use of lethal violence committed by men against their female intimate partners.³

To date,⁴ there have been only five cases in which an accused person has been found guilty of the offence of defensive homicide following a contested trial.⁵ In the remaining 16 cases, the matter has been finalised by the Crown accepting a guilty plea from the accused.⁶ Given that a guilty plea to defensive homicide can only be entered upon the Crown agreeing to withdraw any additional homicide-related charges, it is likely that many of these cases involved plea bargaining. While the pragmatic, emotion-based and financial benefits of obtaining a guilty plea are well established,⁷ the use of plea bargaining to resolve defensive homicide cases raises concern because it limits the ability to effectively evaluate the practical application of this new offence, including its impact on gender bias in the operation of homicide law. This inability is primarily due to the hidden nature of plea bargaining in Victoria, which arises from the fact that the process is not recognised in, or controlled by, any statute. Additionally, no administrative data is kept outlining when or why a plea bargain has been made, which serves to further limit current understandings of the operation of defensive homicide. In particular, this absence of transparency hinders understanding of how decisions are being made in relation to what constitutes defensive homicide, and why the circumstances surrounding these cases allow for them to be categorised by the Crown as a less serious form of homicide.

Informed by 63 interviews conducted with Victorian legal professionals, this article provides a unique insight into the problems associated with the unscrutinised decision-making powers of prosecutors in plea bargaining, specifically in relation to the operation of defensive homicide in Victoria since 2005. In drawing from the experiences of those charged with the daily implementation of the law, this article contends that it is not the existence of prosecutorial discretion that is the key problem in evaluating the effectiveness of the offence, but rather that it is the potentially idiosyncratic nature of these discretionary decisions that

³ See, eg, Phil Cleary, 'Julie's Judicial Betrayal', *Herald Sun* (Melbourne), 29 October 2004, 20; Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told about Them' (1997) 21 *Melbourne University Law Review* 237; *ibid* 14–17.

⁴ This article is based on an analysis of the cases resolved between 1 November 2005 and 30 April 2012.

⁵ *R v Croxford* [2009] VSC 516 (16 October 2009); *R v Parr* [2009] VSC 468 (16 October 2009); *R v Middendorp* [2010] VSC 202 (19 May 2010); *R v Svetina* [2011] VSC 392 (22 August 2011); *R v Creamer* [2011] VSC 196 (20 April 2011).

⁶ See Table 1 in below Part VII.

⁷ See John B Bishop, *Prosecution without Trial* (Butterworths, 1989) 184–5; John Jay Douglass, *Ethical Issues in Prosecution* (National College of District Attorneys, 1988); Asher Flynn, 'Non-Transparent Justice and the Plea Bargaining Process in Victoria' in Marie Segrave (ed), *Australian and New Zealand Critical Criminology Conference 2009 — Conference Proceedings* (Department of Criminology, Monash University, 2009) 88, 89; Asher Flynn, 'Victoria's Legal Aid Funding Structure: Hindering the Ideals Inherent to the Pre-Trial Process' (2010) 34 *Criminal Law Journal* 48, 50; Robert D Seifman and Arie Freiberg, 'Plea Bargaining in Victoria: The Role of Counsel' (2001) 25 *Criminal Law Journal* 64, 72; JUSTICE, *Negotiated Justice: A Closer Look at the Implications of Plea Bargains* (1993) 5–6; Mike McConville, 'Plea Bargaining: Ethics and Politics' (1998) 25 *Journal of Law and Society* 562; Chief Justice Peter Underwood, 'The Trial Process: Does One Size Fit All?' (2006) 15 *Journal of Judicial Administration* 165, 170–1.

creates difficulties. Furthermore, we argue that the absence of transparency surrounding plea deals fuels public perceptions of clandestine outcomes, inequality and a lack of accountability in plea bargaining practices more generally. This article thus proposes that an improved system of plea bargaining, which incorporates the ideals of open and transparent justice, is essential in order to adequately understand how defensive homicide has operated, particularly within the context of gendered violence. Greater transparency and scrutiny would also serve to heighten public confidence in the legal process.⁸

The significance of our analysis is heightened by the postponement by the Victorian Department of Justice ('DOJ') of its review of defensive homicide. Based on the recommendations of the VLRC,⁹ the DOJ commenced a review of the operation of the offence in August 2010. Initially, this involved the release of a discussion paper,¹⁰ which questioned whether defensive homicide should be retained, reformed or abolished, and sought to examine whether the offence was operating in line with the goals and expectations of the broader homicide law reforms. In response, stakeholders were asked to submit opinions on the central issues identified by the DOJ in the first five years of the offence's operation. However, following the November 2010 state election loss by the Labor government, this review has been delayed. While the current Attorney-General, Robert Clark, has indicated that this review will continue at some stage under the Liberal-National government,¹¹ at present, the offence continues to operate without an in-depth assessment of its effectiveness and, due to the significant use of plea deals, with little transparency and understanding of its operation.

II RESEARCH DESIGN

This analysis is informed by the findings of two research studies: Project A, which examined the informality of plea bargaining and prosecutorial decision-making in Victoria between 2007 and 2009;¹² and Project B, which examined the implications of homicide law reforms in three jurisdictions (Victoria, the United Kingdom ('UK') and New South Wales ('NSW')), introduced to target partial defences to murder.¹³ As part of the research conducted in Project A, 42 Victorian legal participants were interviewed, including 11 defence counsel, 19 prosecutors, 7 members of the judiciary and 5 policy advisors/government representatives. In Project B, 81 interviews were conducted with legal partici-

⁸ See Stanley A Cohen and Anthony N Doob, 'Public Attitudes to Plea Bargaining' (1989) 32 *Criminal Law Quarterly* 85.

⁹ VLRC, above n 2, xiv-lvi.

¹⁰ DOJ, 'Defensive Homicide: Review of the Offence of Defensive Homicide' (Discussion Paper, August 2010).

¹¹ ABC Radio, 'Victoria Debating Defensive Homicide', *PM*, 4 March 2011 (Samantha Donovan) <<http://www.abc.net.au/pm/content/2011/s3155692.htm>>.

¹² This project was completed as part of a doctoral thesis: see Asher Flynn, *Secret Deals and Bargained Justice: Lifting the Veil of Secrecy Surrounding Plea Bargaining in Victoria* (PhD Thesis, Monash University, 2009).

¹³ This project was completed as part of a doctoral thesis: see Kate Fitz-Gibbon, *The Aftermath of Provocation: Homicide Law Reform in Victoria, New South Wales and England* (PhD Thesis, Monash University, 2012).

pants from NSW (comprising 8 defence counsel, 5 prosecutors and 8 members of the judiciary), the UK (comprising 20 legal counsel, 6 members of the judiciary and 3 policy representatives) and Victoria (comprising 10 defence counsel, 8 prosecutors, 8 members of the judiciary and 5 policy representatives). This article draws specifically from 63 of the Victorian interviews conducted across both projects (including interviews with 21 defence counsel, 27 prosecutors and 15 members of the judiciary), thereby excluding the comments of the NSW and UK interviewees (from Project B) and the comments of the policy advisors/government representatives (interviewed in Project A and Project B). These comments were excluded because these participants had no direct experience working with plea bargaining or homicide law in Victoria.

The Victorian participants were representative of a diverse range of experience and seniority within various organisations, including the Victorian Office of Public Prosecutions ('OPP'), the Melbourne metropolitan criminal courts, the Criminal Bar Association and Victorian Legal Aid. They included 1 articulated clerk, 6 instructing and junior solicitors, 16 Crown prosecutors and programme managers, 4 education and development staff, 2 witness assistance service counsellors, 4 legal aid solicitors and barristers, 20 Queen's and Senior Counsel, 1 magistrate, 4 judges of the County Court and 9 justices of the Supreme Court. In order to maintain confidentiality and anonymity, participants were assigned pseudonyms and a random sequential letter: for example, Prosecutor A, Defence A, Judiciary C. For the purposes of this article, participants also have 'PA' (Project A) or 'PB' (Project B) cited in brackets after their pseudonym, to illustrate which project they were involved in.

In both projects, the participants were asked to comment on a range of legal issues pertinent to the operation of the criminal law, including, but not limited to, homicide law reform (Project B), the operation of defensive homicide (Project B), plea bargaining (Project A) and prosecutorial discretionary powers (Project A). Participants were also asked to discuss the benefits and limitations of various suggested reforms to the criminal justice system in relation to increasing transparency and accountability in plea bargaining (Project A) and evaluating existing and proposed changes to the law of homicide (Project B). The average interview duration across both projects was 50 minutes. The data recorded included descriptions of behaviours, institutions, court processes, appearances, actions, interactions, personal narratives and accounts of prior experiences of plea bargaining and homicide law. The data was analysed in the context of its own study, before being contrasted with data obtained from the other project. This allowed the responses to be explored individually, collectively and comparatively.

Semi-structured interviews were utilised because they allow for the inclusion of both direct and open-ended questions, which permits comparative analysis of responses while still providing sufficient flexibility to seek elaboration and

clarification from the participant.¹⁴ The questions were tailored to the participant's occupation (for example, prosecutor, defence counsel, judge), allowing the researcher to draw specifically from their direct experiences with plea bargaining and homicide law. Furthermore, all participants were asked whether they considered their views to be indicative of the group that they represented. Overwhelmingly, the participants believed their views were reflective of their colleagues and, as such, there is a basis for claiming that the voices in this article are reflective of a more general Victorian legal view. Additionally, we attempt to compensate for any potential limitations of our study in relation to the number or diversity of perspectives interviewed by reference to wider research findings in the field.

Due to the lack of visibility surrounding plea bargaining and, specifically, the absence of any administrative data on plea bargaining in Victoria, the interviews offered a mechanism to understand how plea bargaining operates from the perspectives of those directly involved in the process.¹⁵ In addition, the interviews allowed for the investigation of how individuals interpret plea bargaining, and offered a way to capture the variation between what should happen according to internal policy and what does happen in practice. The data thus enables this discussion to move beyond conceptual statements, to a determination of what actually occurs in the daily operation of the law. This is particularly beneficial in the context of defensive homicide, given that 16 of the 21 cases finalised at 30 April 2012 have resulted from the Crown's acceptance of a guilty plea.

III HOMICIDE LAW REFORM IN VICTORIA

In 2004, the VLRC commenced an extensive review of the partial defences to murder, which culminated in the *Defences to Homicide* report.¹⁶ Within this report, the VLRC recommended a host of reforms to minimise the key problems identified in the operation of the law of homicide, in particular that the controversial partial defence of provocation be abolished.¹⁷ As part of this reform package, the VLRC proposed that a partial defence of excessive self-defence be implemented to provide a safety net for women who kill in response to prolonged family violence.¹⁸ When successfully used, this partial defence would reduce murder to manslaughter and would be available to persons who killed in self-defence. The VLRC reasoned that the operation of the defence would sufficiently recognise the lesser culpability of those persons, while still acknowl-

¹⁴ Fiona Devine and Sue Heath, *Sociological Research Methods in Context* (MacMillan, 1999) 189; Irving Seidman, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* (Teachers Press College, 1998) 104.

¹⁵ Asher Flynn, 'Breaking into the Legal Culture of the Victorian Office of Public Prosecutions' in Lorana Bartels and Kelly Richards (eds), *Qualitative Criminology: Stories from the Field* (Hawkins Press, 2011) 47, 50–1.

¹⁶ VLRC, above n 2.

¹⁷ *Ibid* 8–11.

¹⁸ *Ibid* 12–13. See also DOJ, above n 10, 20–32.

edging that their use of lethal violence was disproportionate to the threat posed.¹⁹ Writing in support of this recommendation, Tolmie believed that the benefits extended beyond those identified by the VLRC;²⁰ she suggested that the proposed partial defence would mean that ‘self-defence [would] no longer be an all-or-nothing proposition’²¹ and thus that battered accused would be more likely to maintain their innocence rather than plead guilty pursuant to a plea bargain.

Counter to the recommendation of the VLRC, the Victorian government implemented the offence of defensive homicide.²² Under s 9AD of the *Crimes Act 1958* (Vic), defensive homicide is defined as occurring when ‘a person who, by his or her conduct, kills another person in circumstances that, but for section 9AC, would constitute murder’. The combined effect of ss 9AD and 9AC is that a person may now be convicted of defensive homicide (rather than the more serious offence of murder) where they killed with the belief that their actions were necessary in order to defend themselves, or another, but they had no reasonable grounds for that belief. The government argued that by implementing this offence, the jury and sentencing judges would be provided ‘with more options than the [current] “all or nothing” choice ... between a murder conviction or acquittal’ in self-defence cases.²³ Additionally, the government claimed that by creating a separate offence, rather than a partial defence, there would be greater consistency between juror verdicts and judicial sentencing.²⁴ Specifically, the alternate offence would mean that judges would not have to ‘guess’ what factors led the jury to reach a manslaughter verdict; thus, with knowledge of these factors sentencing could better align with juror verdicts.²⁵

One of the key cases linked to the implementation of defensive homicide was the much debated murder conviction of Heather Osland in October 1996.²⁶ During the trial for the murder of her husband, Osland alleged that she had suffered from battered woman syndrome and had killed in self-defence after years of prolonged abuse; she cited that over 13 years, she had been the victim of repeated physical, emotional and sexual assaults.²⁷ The jury, however, rejected this claim. Instead, they delivered a guilty verdict to murder. Osland was

¹⁹ VLRC, above n 2, 101–5. See also Marcia Neave, ‘Defences to Homicide: Final Report Launch’ (Speech delivered at the Launch of the VLRC *Defences to Homicide: Final Report*, Melbourne, 18 November 2004) <<http://www.lawreform.vic.gov.au/vlrc-voice/defences-homicide-final-report-launch>>.

²⁰ VLRC, above n 2, 93–4.

²¹ Julia Tolmie, ‘Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation’ [2005] *New Zealand Law Review* 25, 41.

²² The VLRC made no mention of ‘defensive homicide’ in its report.

²³ DOJ, above n 10, 24. See also Office of the Attorney-General (Vic), ‘Hulls Announces Major Reform to Homicide Laws’ (Media Release, 4 October 2005).

²⁴ DOJ, above n 10, 25.

²⁵ *Ibid.*

²⁶ Fergus Shiel, ‘End Draws Near for Defence of Provocation’, *The Age* (Melbourne), 5 October 2005, 3. See further *R v Osland* [1998] 2 VR 636; *Osland v The Queen* (1998) 197 CLR 316.

²⁷ *R v Osland* [1998] 2 VR 636, 641 (Winneke P, Hayne and Charles JJA). See also Debbie Kirkwood, ‘Access to Justice: Heather Osland’s Fight for Justice’ (2010) 35 *Alternative Law Journal* 168.

subsequently sentenced to a maximum 14.5 years imprisonment, with a non-parole period of 9.5 years.

In the wake of the Osland trial, and amidst growing concern that the law of homicide was inadequately responding to similar situations, it was posited that through the new offence of defensive homicide, and other reforms implemented to the law of self-defence, Victorian homicide law would better cater for, and understand, the unique context within which battered women kill. As then Attorney-General Rob Hulls explained, the new offence would mean that:

Where a killing occurs in the context of family violence, the legislation will affirm that she can argue self-defence even if the threat from which she is defending herself is not immediate, and even where her response involved greater force than the harm with which she was threatened.²⁸

Hulls further clarified that the offence was not designed to provide a replacement for the arguably failed provocation defence; rather, the new offence sought to better align homicide law with the contemporary expectations of the Victorian community.²⁹

Since its implementation, however, defensive homicide has operated in ways seemingly different to those envisioned by the government. Although predominantly established for persons who kill in response to prolonged family violence, to date, convictions for defensive homicide have been overwhelmingly obtained in cases involving male offenders, with only three female offenders receiving convictions for the offence (one from a trial and two from guilty pleas).³⁰ Consequently, and as identified by the DOJ, defensive homicide cases thus far have predominantly arisen from 'one-off, violent, confrontation[s] between two males of approximately equal strength',³¹ rather than from family violence. Principally, these cases have involved young male offenders with a history of drug addiction, clinically diagnosed forms of mental illness and/or prior convictions for drug or violent offences.³² Furthermore, with the exception of one case,³³ all defensive homicide victims have been male.

IV PLEA BARGAINING IN VICTORIA

Plea bargaining refers to the discussions that occur between the prosecution and defence counsel regarding an accused person's likely plea, and the possible negotiation of the charge(s), case facts, and/or the Crown's sentencing submission. The primary aim of these discussions is to arrive at a consensual agreement, according to which the accused pleads guilty. Plea deals are generally made for utilitarian and emotion-based reasons: they save resource and financial expendi-

²⁸ Shiel, above n 26, 3 (quoting Rob Hulls).

²⁹ Rob Hulls, 'Fighting Family Violence May Require Further Reform', *The Sunday Age* (Melbourne), 30 May 2010, 21.

³⁰ *R v Black* [2011] VSC 152 (12 April 2011); *R v Creamer* [2011] VSC 196 (20 April 2011); *R v Edwards* [2012] VSC 138 (24 April 2012).

³¹ DOJ, above n 10, 36.

³² *Ibid* 35–6.

³³ *R v Middendorp* [2010] VSC 147 (1 March 2010).

ture, reduce court backlogs and prosecutorial workloads, and spare accused persons and victims from prolonged and often emotionally charged proceedings.³⁴ Due to these outcomes, much research considers plea bargaining to be a frequently used process: as McConville argues in the context of the UK, ‘plea bargaining [is] a widespread institutional practice and not isolated aberrational behaviour on the part of some maverick lawyers’.³⁵ Similarly, based on her analysis of the origin and development of prosecutorial discretion in the United States (‘US’), Krauss observes that, ‘[t]oday, plea-bargaining and prosecutorial discretion determine the outcome of the vast majority of criminal cases.’³⁶

Estimates of the frequency of plea bargaining are often made using the assumption that because, on average, over two thirds of people plead guilty, plea bargains must provide some incentive for these pleas. Johns estimates that almost 32 per cent of cases in NSW between 30 January 1998 and June 2001 were resolved by pre-trial plea bargains.³⁷ The data provided by the Australian Bureau of Statistics for Australian higher courts in the period from 30 June 2010 to 30 June 2011 indicates that 78 per cent, or 12 768 accused persons whose cases were adjudicated, were proven guilty.³⁸ Of these, 88 per cent pleaded guilty. Using Johns’s estimates as a guide for analysis, this would mean that at least 3584 of the 11 203 guilty pleas entered were due to pre-trial plea bargains.

Despite anecdotally being considered a common method of case disposition in Victoria, no administrative data on plea bargaining exists. Plea bargaining is also not recognised in, or controlled by, any Victorian legislation. The only controls that can be indirectly applied to plea bargaining in Victorian statute are located in the *Public Prosecutions Act 1994* (Vic) s 24(b), which alludes to plea bargaining by describing the importance of conducting ‘prosecutions in an effective, economic and efficient manner’, and in the *Victim’s Charter Act 2006* (Vic) s 9, which imposes statutory requirements to inform victims of any alterations to charges. However, neither statute defines or acknowledges plea bargaining.

The plea bargain agreement is to some extent subject to regulation by the courts. As part of a plea bargain, the prosecution and defence counsel determine an agreed summary of the case facts, which is then put to the court and forms the basis upon which the accused is sentenced. Given that a plea bargain will invariably reduce the accused’s culpability to some degree, this agreed summary may omit or minimise the relevance of factual elements of the crime in order to

³⁴ Bishop, above n 7, 199; Flynn, ‘Victoria’s Legal Aid Funding Structure’, above n 7, 57; Seifman and Freiberg, above n 7, 66; JUSTICE, above n 7, 11; McConville, ‘Plea Bargaining’, above n 7, 563.

³⁵ Mike McConville, ‘Development of Empirical Techniques and Theory’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 207, 211. See also Bishop, above n 7, 204–6; Douglass, above n 7; Seifman and Freiberg, above n 7; McConville, ‘Plea Bargaining’, above n 7.

³⁶ Rebecca Krauss, ‘The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments’ (2009) 6 *Seton Hall Circuit Review* 1, 26.

³⁷ Rowena Johns, ‘Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services’ (Briefing Paper No 10/02, NSW Parliamentary Library Research Service, June 2002) 52.

³⁸ Australian Bureau of Statistics, *Criminal Courts, Australia 2010–11: Defendants Finalised*, ABS Catalogue No 4513.0 (2012).

warrant a guilty plea to the altered charges. In *R v Duong*, the Victorian Court of Appeal stated that a judge is not bound to accept the version of facts agreed to by counsel as the sentencing basis if the facts are inconsistent with the evidence.³⁹ The regularity with which a court rejects the facts on this basis is difficult to ascertain, but of the participants interviewed, only two had personal experience of such a situation. Therefore, while there is some degree of judicial oversight over this aspect of the plea bargain agreement, it appears that in practice, this is not a process that is regularly used to verify the legitimacy of agreements.

At present, the High Court case *GAS v The Queen*⁴⁰ is arguably the leading case in relation to plea bargaining, as it loosely recognises the process by suggesting that both the prosecution and defence counsel should maintain written copies of any agreements that may have influenced a pleading decision, particularly if these reasons might impact on the sentence later imposed.⁴¹ In this case, the lack of control and transparency surrounding prosecutorial decision-making in plea bargaining resulted in negative consequences for all parties, particularly the victim's and accused person's family. Both the plea bargain and the prosecutor's conduct were criticised because the victim's family were not provided with accurate details of the agreement, or told there was any possibility that plea bargaining might occur, until shortly before the two accused pleaded guilty.⁴² Following a Crown appeal on the manifest inadequacy of their sentences, the two accused persons also perceived themselves as 'victims' of the unscrutinised plea bargaining process, as they believed this appeal meant the prosecution had reneged on the initial agreement that had led to their guilty plea. The subsequent increase to their sentences by the Victorian Court of Appeal⁴³ was thus perceived by the two accused to be unjust and non-reflective of their plea agreement.

The lack of transparency surrounding the plea bargain in this case became a central focus of the defence appeal,⁴⁴ which represented the first time where a court was required to specifically address issues related to counsel conduct in plea bargaining in Victoria. Upon hearing the appeal, the High Court stated that while there may be an understanding between counsel as to what evidence will

³⁹ [1998] 4 VR 68, 77–8 (Kenny JA, Tadgell and Ormiston JJA agreeing).

⁴⁰ (2004) 217 CLR 198. The case involved two offenders whose sexual and physical assault of a victim ultimately resulted in her death. Due to forensic difficulties in identifying the primary offender, the Crown entered into plea bargaining discussions with both of the accused. An agreement was then made whereby both offenders 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. This would mean that they would receive a lesser sentence than if they were charged as the principal offender. The accused were sentenced to six years' imprisonment with a non-parole period of four years: *R v SJK* [2002] VSC 94 (3 April 2002) [60] (Bongiorno J).

⁴¹ *GAS v The Queen* (2004) 217 CLR 198, 214 [42]–[43] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

⁴² See, eg, Elissa Hunt and Ashley Gardiner, 'Justice for Our Gran: Get Tough on Young Killers, Family Urges', *Herald Sun* (Melbourne), 5 April 2002, 1.

⁴³ *DPP (Vic) v SJK* [2002] VSCA 131 (26 August 2002) [70] (Phillips CJ, Chernov and Vincent JJA). In hearing the appeal, the Court increased both sentences to nine years' imprisonment, with a non-parole period of six years.

⁴⁴ *GAS v The Queen* (2004) 217 CLR 198, 210–14 [27]–[41] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

be provided or what sentencing or legal submissions will be made, this 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 by counsel.⁴⁵ The Court also noted that any agreement made between counsel ‘which may later be said to be relevant to the defendant’s decision to plead guilty’ should be recorded in writing, with copies maintained by both parties.⁴⁶ 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. ... 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.⁴⁷

In making this statement, the Court provided some recognition of plea bargaining and the negative consequences that can potentially arise from a lack of formality in agreements. However, the significance and influence of this statement is somewhat limited, given that the Court did not propose or require any regulations or scrutiny be applied to plea bargaining despite being given the opportunity to do so.

The fact that these comments made in 2004 were the first and remain the only instance of a legal authority acknowledging plea bargaining in Victoria or attempting to provide transparency to the process demonstrates a significant gap in Victorian legal policy. This gap is concerning not only because it undermines the ideals of public and open justice,⁴⁸ but also because of the negative implications that can potentially result from an unscrutinised agreement (as demonstrated by *GAS v The Queen*).

Within the OPP, internal and non-legally binding guidance on plea bargaining is detailed within two director’s policies⁴⁹ and one practice guide.⁵⁰ Within these documents, prosecutors are encouraged to initiate discussions, regardless of whether the defence approaches them, and to refrain from offering deals to unrepresented accused persons. The policies also contain information regarding what the prosecution should consider when deciding how to proceed with a case; for example, one policy states that the likely outcome of a trial, in terms of upholding victim and community interests, should be compared with that of a negotiated guilty plea.⁵¹

While providing some guidance for prosecutors, the influence of these informal, non-legally binding policies in controlling prosecutorial conduct, or monitoring any deviation, is minimal. This is because although director’s policies are considered ‘official policies’, insofar as they should be upheld

⁴⁵ Ibid 211.

⁴⁶ Ibid 214.

⁴⁷ Ibid 214–15.

⁴⁸ See, eg, the right to a fair hearing in *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1).

⁴⁹ OPP, *Policy 9 — Director’s Policy as to the Role of the Crown upon Plea and Sentence* (2012); OPP, *Policy 22 — Director’s Policy as to the Early Resolution of Cases* (2012).

⁵⁰ OPP, *Policy 2 — The Prosecutorial Discretion* (2008).

⁵¹ See, eg, OPP, *Policy 22*, above n 49, cls 22.5–22.9.

whenever possible, there are no penalties applied for deviation from them. Further, no mechanisms exist to monitor whether the requirements of the policies are followed. The lack of scrutiny surrounding the OPP internal policies is perhaps even more evident in relation to the practice guide, which is considered to be 'less official' than the director's policies. The only scrutiny applied to the practice guide is a suggestion from the Director of Public Prosecutions ('DPP') that prosecutors avoid deviating from them whenever possible.⁵² Thus, as evident in the comments of Defence E (PA), prosecutorial adherence to the OPP's policies relies upon 'trusting' the Crown: 'we have to put some degree of faith in legal counsel to do their job in that regard'.

The policies also provide very little transparency to the public when plea bargaining occurs; thus, regardless of whether or not any misconduct transpires, doubt is created over the legitimacy of any plea deals made. As a result, criminal cases in Victoria, including those involving the most serious homicide offences, appear to be resolved on the basis of unscrutinised decisions in a largely unregulated and non-transparent process.

V PROBLEMS WITH PLEA BARGAINING IN VICTORIA

The secrecy surrounding plea bargaining fuels a number of concerns regarding the 'just' nature of plea agreements and their potentially negative impact on the parties most affected by them. In particular, concerns arise in relation to the potential pressures that plea bargaining can create, which may compel accused persons to plead guilty. While some form of pleading pressure would likely exist in a transparent plea bargaining system simply due to the benefits of a plea deal (for example, conviction on a reduced charge and/or lower sentence), this pressure becomes more concerning in Victoria due to the absence of scrutiny or transparency applied to the process, the prosecutor's decision, and the agreement. This is because an absence of transparency reduces one's ability to test the 'justness' of the outcome and the motivations of the accused in pleading guilty, which leads to the distinct possibility that an accused person may plead guilty to an offence they did not commit.⁵³ This concern is highlighted in McConville and Mirsky's analysis of plea bargaining in the UK, where they asserted that:

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 guilty.⁵⁴

Pleading pressures arise from a multitude of factors. One such factor is the general financial constraints of a trial, which may appear particularly onerous when contrasted with the benefits that can be obtained from plea bargaining. For

⁵² As stated by Prosecutor N (PA).

⁵³ John Baldwin and Michael McConville, *Negotiated Justice: Pressures to Plead Guilty* (Martin Robertson, 1977) ch 4.

⁵⁴ Mike McConville and Chester L Mirsky, *Jury Trials and Plea Bargaining: A True History* (Hart Publishing, 2005) vi.

example, plea bargaining can result in a conviction for a less serious offence and a reduction in the sentence length and/or type.⁵⁵ These benefits can effectively force an accused person to accept a plea agreement in order to forgo the high costs associated with going to trial. This environment of pressure was identified by Defence C (PA), who explained that:

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 ... So there is a fair bit of pressure on them just to plead guilty, especially when it is sweetened with a bargain.

A related concern, which is more pressing in an unscrutinised plea bargaining process, is the potential for the accused to initially be 'overcharged' (whether that involves more offences, or more serious offences, or a combination of both) in order to strongly encourage them to plead guilty to a 'bargained' version of these charges. Freedman defines overcharging as the situation in which a prosecuting agency charges an accused with 'a more serious offense or an accumulation of offenses', which creates a strong incentive for the accused to enter into plea bargaining.⁵⁶ As a consequence, 'bluff and tactics — rather than truth, justice, guilt or innocence'⁵⁷ — guide the bargaining process, with offers made to the accused often being 'hollow' compromises of charges that would be unlikely to stand up to the rules of evidence applied at trial.

The possibility of the prosecution using overcharging as a negotiation tactic was explored with the participants in Project A. While 29 participants acknowledged that overcharging does occur, they attributed this not to deviousness of the prosecution, but rather to the inexperience or the overzealousness of the police. As explained by Defence A (PA):

The fact that someone gets charged with 160 offences, when they should be charged with two, yes that happens ... In many instances, it is the inexperience of the police that causes it. ... They charge with everything, so you end up with a whole heap of charges that probably shouldn't be there.

Observing the existence of 'cautious' charging practices, Prosecutor B (PA) 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'. This view was supported by Judiciary A (PA), who maintained that overcharging was not 'a fundamentally cynical exercise', but rather was used as 'a practical way of whittling away the husks and then you get into the core'.

Although the majority perspective did not support the notion that overcharging is a prominent concern (only eight participants recognised it as a limitation of plea bargaining), the lack of scrutiny surrounding prosecutorial discretion in

⁵⁵ Defence A (PA). See also *Sentencing Act 1991* (Vic) s 6AAA, which governs sentence discounts for guilty pleas.

⁵⁶ Monroe H Freedman, *Lawyers' Ethics in an Adversary System* (Bobbs-Merrill, 1975) 88. See also Douglass, above n 7, 277.

⁵⁷ Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution* (Routledge, 1991) 166.

making charging decisions can still impact on a perception of (in)justice. Prosecutor I (PA) surmised:

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. But the problem is that you can't really explain this and it can lead to that perception that the police overcharge and we use this to our advantage.

A similar concern was identified by Defence E (PA), one of the eight participants who expressed the opinion that overcharging can compel an accused to plead guilty:

Because the police already 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 real problem, especially as there is no real way to track it and they can always just say 'well we don't know what we are going to proceed with at this stage if it goes to trial'.

The implications of pleading pressures and overcharging existing in an unscrutinised plea bargaining process increase in seriousness in light of the number of vulnerable people who come before the law. As Prosecutor H (PA) identified, 'in the justice system, you are often dealing with people who have substance abuse problems or psychological or psychiatric problems'. This concern was also considered in Stubbs and Tolmie's analysis of 55 Australian cases involving battered women charged with homicide offences from 1991 to 2007. They found that women using battered woman syndrome as a defence were under immense pressure to plead guilty to any plea bargain offers, due to factors such as

the problematic nature of [battered woman syndrome] evidence that can undermine a self-defence case, the uncertainty of the law on self-defence as applied to these situations, a lack of appellate decisions giving clear guidance in this respect, the trauma involved for the accused in having the details recounted publicly, possibly in the presence of the deceased's family and any children, and the potential trauma to her children if they are needed to testify.⁵⁸

A similar view was expressed in Miller's examination of battered women who use force in response to partner violence in the US, where she claimed that such women were more likely to accept a plea bargain 'without regard for their guilt or innocence but in relation to their fears of jail or losing custody of their children.'⁵⁹

⁵⁸ Julie Stubbs and Julia Tolmie, 'Battered Women Charged with Homicide: Advancing the Interests of Indigenous Women' (2008) 41 *Australian and New Zealand Journal of Criminology* 138, 149–50.

⁵⁹ Susan L Miller, *Victims as Offenders: The Paradox of Women's Violence in Relationships* (Rutgers University Press, 2005) 137.

Of most importance in the context of this article, Stubbs and Tolmie found that the pressures on battered women to plead guilty were exacerbated by the 'opaque' nature of plea bargaining, because the process

shifts the determination of guilt from the judicial to the prosecutorial realm, to be negotiated in private between the defence and the prosecution. The process is not overseen by a judge, and there are no jurors to inject community values into the decision-making. There is no way to identify or challenge misconceptions about domestic violence, or other factors, that may shape the decisions and little chance for the public to learn how a decision was reached.⁶⁰

This concern touches on perhaps the central problem surrounding plea bargaining in Victoria: that it undermines the established principle of public and open justice — justice should be seen to be done, and the public should have access to criminal proceedings except under exceptional circumstances.⁶¹ Public and open justice is a central requirement of the criminal justice system because it enhances victim, accused persons' and public understandings of the needs and aims of the system, while also providing some accountability to proceedings and the conduct of those who operate within them.⁶² In this manner, public and open justice can also provide a mechanism to increase public confidence in the criminal justice system more generally.⁶³ Furthermore, this principle has been acknowledged in case law, statute and international covenants since the early 20th century as 'a sound and very sacred part of the constitution of the country and the administration of justice'.⁶⁴

The link between public confidence and transparency was explored in a 1997 report produced by the Victorian Community Council Against Violence.⁶⁵ In this report, the Council found that a lack of accessible information on 'why certain charges were not laid or why the seriousness of a charge was reduced'⁶⁶ significantly contributed to low public confidence in the justice system. In particular, they found that public perceptions of plea bargaining were predominantly negative due to the lack of accessible information about how plea bargaining happens, who is involved and the basis for negotiation.⁶⁷ A 2007 Victorian Sentencing Advisory Council report examining specified sentence discounts and sentence indications found similar perspectives among the participants, who

⁶⁰ Stubbs and Tolmie, above n 58, 149.

⁶¹ For example, the court may be closed to public viewing when a protected witness is testifying: see *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(2).

⁶² Flynn, 'Non-Transparent Justice', above n 7, 91.

⁶³ Mike Hough and Alison Park, 'How Malleable Are Attitudes to Crime and Punishment? Findings from a British Deliberative Poll' in Julian V Roberts and Mike Hough (eds), *Changing Attitudes to Punishment: Public Opinion, Crime and Justice* (Willan, 2002) 163, 163–5.

⁶⁴ *Scott v Scott* [1913] AC 417, 473 (Lord Shaw). See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14; *Webb v The Queen* (1994) 181 CLR 41, 51–2 (Mason CJ and McHugh J).

⁶⁵ Victorian Community Council Against Violence, *Community Knowledge and Perceptions of Sentencing in Victoria: A Report on the Findings of the Consultations* (1997).

⁶⁶ *Ibid* 63.

⁶⁷ *Ibid* 52–4.

were drawn from the broader Victorian community.⁶⁸ In particular, the report found that the participants defined plea bargaining as a deal made to induce accused persons to plead guilty, often at the victim's expense.⁶⁹ Specifically, the Council found that a common misperception was that Victorian plea bargaining practices emulated the dramatised US systems (mis)represented on television, in which accused persons make deals that include specified sentences and often do not reflect the level of their criminality.⁷⁰ While the Council acknowledged the potential for such deals to occur in some international jurisdictions, it 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.'⁷¹ Such misapprehensions are particularly problematic following the implementation of the Victorian homicide law reforms, given that an understanding of the true operation of the law is essential to gauge the reforms' success and initial effect. These misapprehensions are also concerning given the volume of plea deals that have been made since defensive homicide was introduced.

VI ADVANTAGES AND DISADVANTAGES OF PLEA BARGAINS IN THE DEFENSIVE HOMICIDE CONTEXT

In order to allow a plea of guilty to defensive homicide, the Crown must consent to the withdrawal of any additional homicide-related charges. This is because the offence is not used as a sole charge; rather, it is applied as an alternative charge to murder. When a trial occurs, it is the jury who are tasked with this decision. They must first assess the level of the accused's culpability, based on the factors outlined in s 9AD of the *Crimes Act 1958* (Vic), and, following this, they must decide whether to find the accused guilty of murder or the lesser charge of defensive homicide (or any other possibilities that may be outlined by the judge). Because the decision to enter a guilty plea is made by the prosecution and the accused, the public is left simply to trust that these parties have upheld the same judicial principles which would apply to a trial.

In commenting on whether the volume of plea bargains occurring in defensive homicide cases was a strength or weakness of the operation of the new offence, the majority of participants interviewed in Project B supported the use of plea bargains, primarily due to the potential benefits of an early guilty plea. As Defence C (PB) commented, 'I think that [defensive homicide] has been a very good introduction, and already people are kind of pleading to that and ... that's a part of the compromise process and that's worked well'. In a similar vein, Prosecutor H (PB) described the use of plea bargaining in defensive homicide cases as being 'good for the community, good for the court system, ... [and]

⁶⁸ Sentencing Advisory Council (Vic), *Sentence Indication and Specified Sentence Discounts: Final Report* (2007).

⁶⁹ *Ibid* 67.

⁷⁰ *Ibid* 71–2.

⁷¹ *Ibid* 72.

good for the victim, and if the accused is satisfied with the outcome, everybody's a winner'.

Such comments are not unusual when exploring the possible justifications and advantages of plea bargaining, especially given the resource pressures facing those involved in the court system.⁷² In fact, reducing court backlogs by increasing clearance rates and saving victims and accused persons from drawn-out proceedings were consistently offered as the primary justifications for plea bargaining by participants in both projects. As Prosecutor M (PA) explained, 'there are the practical benefits of not only costs saved in terms of emotional and psychological [costs], but also the costs in terms of financial costs, which can be extreme'. Defence C (PA) similarly noted that, 'from a defence point of view, [plea bargaining] 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, and it saves a significant backlog of cases in the system and reduces delay'.

Importantly, one of the main potential benefits identified, particularly by those participants from the prosecution sample, was that plea bargaining offered a guaranteed conviction. Participants perceived this benefit as equating with public interests being upheld because the accused was ultimately held accountable, at some level, for his or her conduct. This perception supports McConville and Baldwin's analysis of plea bargaining in the UK, which found that it is 'in the public interest that those who are indeed guilty should admit their guilt'.⁷³

The public benefit of obtaining convictions through plea bargaining is, however, questionable, and depends upon how 'upholding interests' is defined. This is particularly so because the conviction recorded as part of a plea deal is not necessarily reflective of the full extent of an accused person's culpability or of the crimes they have committed. As Defence F (PB) explained:

It has probably saved the community a lot of money because a lot of people have pleaded to defensive homicide — they've settled. But then, with that, you have to look at the issue of expediency, [that it comes at] the expense of justice. 'It's quicker and cheaper, so let's not worry about justice.'

The perceived 'benefit' to the public from obtaining convictions through plea bargaining is also questionable due to the sentence discount often applied in exchange for a guilty plea. Statute and case law establish that this discount is applied primarily based on the timing at which a plea was entered.⁷⁴ This process is thus utilitarian in that it values a guilty plea whether or not such a plea is indicative of an accused person's remorse. Consequently, 'the operation of the

⁷² See Janet Chan and Lynne Barnes, *The Price of Justice? Lengthy Criminal Trials in Australia* (Hawkins Press, 1995); Flynn, 'Victoria's Legal Aid Funding Structure', above n 7, 59; Jason Payne, 'Criminal Trial Delays in Australia: Trial Listing Outcomes' (Research and Public Policy Series No 74, Australian Institute of Criminology, 2007).

⁷³ Michael McConville and John Baldwin, *Courts, Prosecution and Conviction* (Oxford University Press, 1981) 66.

⁷⁴ See, eg, *Sentencing Act 1991* (Vic) s 5(2)(e) (requiring a judge to consider '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'); *Cameron v The Queen* (2002) 209 CLR 339.

discount system has ... little to do with justice; it exists primarily because of administrative expediency.⁷⁵

The guilty plea discount has been an object of significant criticism, particularly when that plea is entered after a plea agreement has been reached.⁷⁶ This is primarily because if an accused pleaded guilty as part of a plea bargain and, in addition, received a sentence discount, they are effectively rewarded twice. Such a result is significant because in most plea bargains, while the efficiency benefits of the guilty plea may still be present, the accused has already received certain leniencies in their charges and/or case facts.⁷⁷

Concerns surrounding the application of a sentence discount are of particular relevance to defensive homicide cases, where an examination of the sentences imposed thus far illustrates that those who have pleaded guilty have received, on average, a two year reduction.⁷⁸ Such discounts have typically been justified on the basis of the pragmatic benefits of a plea. For example, in sentencing Benjamin Wilson in 2009, the judge noted that the accused had 'saved the community the cost of a trial and the witnesses the ordeal of one.'⁷⁹ This reasoning is mirrored in the sentencing comments for Karen Black in April 2011, where the judge specified that the accused's guilty plea had 'served the interests of justice [and] saved the community the costs of a trial'.⁸⁰

Despite these benefits, the fact that the accused receives both a plea deal and a sentence discount raises some concern as to whether justice is achieved and whether the seriousness of the offence is adequately recognised, particularly in light of sentences in defensive homicide cases, which have tended to fall well below the maximum penalty set by Parliament.⁸¹ As a level 3 penalty offence, defensive homicide can attract a maximum penalty of 20 years' imprisonment.⁸² Between 1 November 2005 and 30 April 2012, however, the maximum sentences imposed in defensive homicide cases have ranged between 6 and 12 years' imprisonment, with the average maximum sentence being roughly 9 years' imprisonment. The imposition of sentences far below the maximum penalty has led to criticisms of the new offence.⁸³ As one observer argued: 'Plead defensive homicide and you will get a really low sentence. It is not justice.'⁸⁴

Participants in Project A also identified the public view of a 'double benefit' as a common criticism of the application of a sentence discount after plea bargaining: as Judiciary G (PA) noted, 'the public view is that sentences are being

⁷⁵ Baldwin and McConville, *Negotiated Justice*, above n 53, 109.

⁷⁶ See, eg, *ibid*; Bishop, above n 7, 184; McConville and Mirsky, above n 54, 1–14.

⁷⁷ See Andrew Ashworth, *The Criminal Process: An Evaluative Study* (Clarendon Press, 1994) 266–70; Baldwin and McConville, *Negotiated Justice*, above n 53, 106–9.

⁷⁸ DOJ, above n 10, 35.

⁷⁹ *R v Wilson* [2009] VSC 431 (21 September 2009) [43] (Curtain J).

⁸⁰ *R v Black* [2011] VSC 152 (12 April 2011) [24] (Curtain J).

⁸¹ See Table 1 in below Part VII.

⁸² *Crimes Act 1958* (Vic) s 9AD. See also *Sentencing Act 1991* (Vic) s 109.

⁸³ Shaye Beck, 'Family Defeated Again', *Herald Sun* (Melbourne), 20 May 2010, 21; Georgie Pilcher, 'Psychotic Killer Out in Two Years', *Herald Sun* (Melbourne), 16 October 2008, 4.

⁸⁴ Pilcher, above n 83, 4 (quoting Nicole Plowman).

reduced by too much, because defendants are pleading to secret deals, and the result is the public loses confidence in the system'. In light of these public interest concerns and the criticisms surrounding the sentences imposed in defensive homicide cases more generally, the double benefit provides a further justification for increasing the transparency of plea bargaining. The double benefit also provides justification to increase the transparency surrounding the prosecutor's discretion in accepting the guilty plea because this decision has an increased level of significance at the sentencing stage.

VII LACK OF TRANSPARENCY IN DEFENSIVE HOMICIDE CASES

A *The Need for Transparency*

In our view there is also a need — particularly in the case of charges as serious as murder or manslaughter — for better accountability and transparency in the plea negotiation process. ... We hope this may promote greater public confidence in how these matters are dealt with, and a better understanding of the basis upon which these important decisions are made.⁸⁵

The private nature of plea bargaining in Victoria makes it extremely difficult to determine the effects of the implementation of defensive homicide. This is particularly so in relation to understanding how or why prosecutorial decisions are made and whether the offence is working effectively and as intended in practice. The importance of understanding the workability of defensive homicide, and its effect more broadly upon the criminal justice system, was highlighted during the initial implementation of the homicide law reforms in 2005. The government described the changes as 'the most significant reforms to homicide laws since the death penalty was abolished 30 years ago'.⁸⁶ However, without a transparent plea bargaining system it becomes difficult, if not impossible, to examine the operation of this offence in any significant quantitative or qualitative manner. Thus, in line with recommendations of the VLRC,⁸⁷ this article contends that there is a need for greater transparency in plea bargaining.

Discussions over the restriction of prosecutorial discretion have been a common feature of legal research over the past several decades.⁸⁸ Indeed, much of the literature supporting plea bargaining's legal recognition and/or the curbing of

⁸⁵ VLRC, above n 2, 110.

⁸⁶ Office of the Attorney-General (Vic), above n 23.

⁸⁷ VLRC, above n 2, 110 (recommendations 11–12).

⁸⁸ See, eg, Katja Franko Aas, *Sentencing in the Age of Information: From Faust to Macintosh* (Glasshouse Press, 2005) ch 1; Abraham S Blumberg, *Criminal Justice* (Quadrangle Books, 1970) 3–12; Roger Cotterrell, 'Law in Social Theory and Social Theory in the Study of Law' in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell, 2004) 15, 21; Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969); David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press, 1997) ch 7; Oonagh E Fitzgerald, *The Guilty Plea and Summary Justice: A Guide for Practitioners* (Carswell, 1990) ch 7; Robert A Kagan, 'Regulators and Regulatory Processes' in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell, 2004) 212; Cyrus Tata, 'Transformation, Resistance and Legitimacy: The Role of Pre-Sentence Reports in the Production (and Disruption) of Guilt and Guilty Pleas' (Paper presented at the European Society of Criminology Annual Conference, Edinburgh, 2 September 2008).

prosecutorial discretion within this process maintains that statutory acknowledgement is essential if plea bargaining is to be used to resolve cases. Statutory recognition of plea bargaining would increase transparency and thereby enhance its accountability to the public.⁸⁹ As Littrell 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’.⁹⁰ Temby similarly claims:

There seems to be every reason why 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.⁹¹

In the late 1960s, Davis asked: ‘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?’⁹² When asked to respond to this question in the context of Victoria’s plea bargaining process, an emerging theme in participant perspectives was that retaining an absence of control over prosecutorial discretion was necessary to facilitate reasonable outcomes and to consider the individual circumstances of each case. However, problems arise from this ideal because without some uniformity, the prosecutor’s flexible, unscrutinised powers have the potential to be abused or, perhaps as significantly, to create a perception of abuse, which can negatively impact upon public confidence in the criminal justice process.⁹³ As Bibas rightly observes, ‘discretion is bad only when it becomes idiosyncratic, unaccountable, or opaque’;⁹⁴ these are all terms that could be used to describe Victoria’s current system of plea bargaining.

Without transparency, prosecutors can effectively be viewed as ‘the key gatekeepers who ration criminal justice’,⁹⁵ as their discretionary powers allow them to play a more prominent and significant role in the delivery of modern justice than the traditional involvement of the community in a jury trial. As a result, the

⁸⁹ Paul Byrne, ‘Criminal Law and Justice’ (1988) 62 *Australian Law Journal* 799, 801–3; Chan and Barnes, above n 72, 56–60; Peter Clark, ‘The Public Prosecutor and Plea Bargaining’ (1986) 60 *Australian Law Journal* 199, 211–13; Ian Temby, ‘Prosecution Discretion and the Use of Appropriate Charges’ (Speech delivered at the Australasian Institute of Judicial Administration: Criminal Trial Reform Conference, Melbourne, 24 March 2000) <<http://www.ajja.org.au/ctr/TEMBY.pdf>>; J R Sulan, ‘Defence Co-Operation in the Trial Process’ (Speech delivered at the Australasian Institute of Judicial Administration: Criminal Trial Reform Conference, Melbourne, 24 March 2000) <<http://www.ajja.org.au/ctr/SULAN.pdf>>; Don Weatherburn and Joanne Baker, ‘Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court’ (Report, New South Wales Bureau of Crime Statistics and Research, 2000) 32–41.

⁹⁰ W Boyd Littrell, *Bureaucratic Justice: Police, Prosecutors, and Plea Bargaining* (Sage Publications, 1979) 190.

⁹¹ Temby, above n 89, 6.

⁹² Davis, above n 88, 189.

⁹³ Flynn, ‘Non-Transparent Justice’, above n 7, 93.

⁹⁴ Stephanos Bibas, ‘The Need for Prosecutorial Discretion’ (2010) 19 *Temple Political and Civil Rights Law Review* 369, 372.

⁹⁵ *Ibid* 369.

jury, and hence community input, is largely silenced. Lynch refers to this power as ‘prosecutorial adjudication’,⁹⁶ a process in which the prosecutor

serves as the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues[...]) ... evaluates culpability and chooses the charge for which he will accept a guilty plea ... [and offers] an ‘advisory’ sentencing guideline ... [resulting in] the exercise of prosecutorial discretion affect[ing] almost every step of the criminal justice process, from charging to sentencing.⁹⁷

The need for community input in decisions relating to convictions is particularly relevant to debates surrounding defensive homicide. This can be seen from research that has examined the roles of both the jury and community input in relation to the now abolished partial defence of provocation.⁹⁸ As Judiciary H (PB) maintained, ‘juries are a good barometer for what the community thinks about these things.’ In a similar vein, Defence J (PB) claimed that jury verdicts are ‘the one area ... where the community has a real input into who it wants to call a murderer.’ As the opportunity for community input through jury trials in defensive homicide cases has been minimised by the high rate of guilty pleas, it is essential that there is greater transparency in the process of attaining such pleas.

Greater transparency is also of relevance given that, prior to the implementation of defensive homicide, a key concern in the operation of the partial defence of provocation was that men were effectively getting away with a conviction less than murder.⁹⁹ This concern underpinned the 2005 homicide law reforms, particularly the abolition of the partial defence of provocation and the introduction of a new offence more specifically designed to cater for women who kill in response to prolonged family violence, rather than to provide an avenue of excuse for men who kill. Over six years into the operation of defensive homicide, it is unclear, largely because of the dominant use of unscrutinised plea deals, whether this alternate category of homicide is having the same effect as did provocation in diminishing the seriousness of lethal violence committed by men.¹⁰⁰

Transparency is also important because prosecutors may be motivated by efficiency¹⁰¹ rather than justice considerations when accepting guilty pleas. Court delays and resource inadequacies have consistently been identified as significant problems confronting Australian criminal jurisdictions since the

⁹⁶ Gerard E Lynch, ‘Our Administrative System of Criminal Justice’ (1998) 66 *Fordham Law Review* 2117, 2141.

⁹⁷ Krauss, above n 36, 8–9.

⁹⁸ Joshua Dressler, ‘Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject’ (2001) 86 *Minnesota Law Review* 959.

⁹⁹ VLRC, above n 2, 27–30.

¹⁰⁰ Within the context of defensive homicide this refers to lethal violence perpetrated upon both male and female victims.

¹⁰¹ The DPP must have regard to ‘the need to conduct prosecutions in an effective, economic and efficient manner’ under *Public Prosecutions Act 1994* (Vic) s 24(b).

1980s, leading to pressures being placed on prosecutors to clear the court lists.¹⁰² The extent of delays in Victoria was commented upon by participants in Project A, who cited delays of over a year from committal to trial.¹⁰³ Prosecutor V (PA) maintained that these delays created 'pressure from the courts to resolve cases as quickly as we can'. Prosecutor I (PA) similarly claimed that 'there is always pressure. Too many cases, not enough resources, budgetary cuts from above ... As well as the fact that if we can get a nice plea bargain, rather than run a two-day trial, there is incentive just from a work viewpoint'.

While participants stated that these efficiency pressures were 'not that great' (Prosecutor C (PA)) and 'appropriate and acceptable' (Judiciary F (PA)), a concern remains that in the absence of any transparency surrounding prosecutorial discretion, plea bargaining could result in unjust or inappropriate outcomes due to efficiency pressures. The potential for plea bargaining decisions to be based on idiosyncratic reasoning, such as the desire to clear workloads, means that the community may, as Bibas argues, 'rightly fear that justice will vary from prosecutor to prosecutor, with each one a law unto himself and his own whims, biases, and shirking.'¹⁰⁴ The potential for such problems was anticipated by the VLRC in its 2004 report:

One of the dangers of plea negotiations is seen to be that they shift decisions about guilt and criminal responsibility from the public realm of courts and juries, to the private realm of prosecutorial and police discretion. ... It can be argued that, at the very least, there is an important public interest in proper records being kept of these negotiations to allow the basis on which these decisions are made to be better understood.¹⁰⁵

As highlighted by Bibas and the VLRC, the need to redress the concern surrounding unscrutinised prosecutorial discretion provides further justification for greater transparency of plea bargaining, particularly if the process continues to be used as the predominant resolution method in cases of defensive homicide.

B Analysis of Defensive Homicide Cases

As discussed, in the majority of cases in which the Crown has accepted a guilty plea to defensive homicide, the circumstances of the offence have involved a young male victim and accused perceived to be of similar strength,

¹⁰² See, eg. Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994) 420–30 ('*Sackville Report*'); Bishop, above n 7, 4–5; Chan and Barnes, above n 72, 1–12; Payne, above n 72, 8–10; Weatherburn and Baker, above n 89, 6. See generally Paul Coghlan, 'Committal: Post Committal' (Speech delivered at the Australasian Institute of Judicial Administration: Criminal Trial Reform Conference, Melbourne, 24 March 2000) <<http://www.aija.org.au/ctr/COGLAN.pdf>>.

¹⁰³ Prosecutor D (PA) stated that 'the delays on trials have blown out ... For a short trial, you are looking at at least a 12 month waiting period before it will get up and for a long trial, not until the following year'. Judiciary B (PA) similarly maintained that 'delays are a real problem ... There is an average 13 month delay from the committal [hearing] to trial ... There are [also] delays in issues involving forensic analysis, which can involve between ten months and one year'.

¹⁰⁴ Bibas, above n 94, 371.

¹⁰⁵ VLRC, above n 2, 108.

and the death has resulted after a single violent altercation.¹⁰⁶ Table 1 provides a closer analysis of the circumstances of each defensive homicide case in which the Crown has accepted a guilty plea.

Table 1: Defensive Homicide Convictions Resulting from the Crown's Acceptance of a Guilty Plea (1 November 2005 – 30 April 2012)

Case	Event that induced fear	Sentence max/min
<i>R v Smith</i> [2008] VSC 87 (1 April 2008)	Violence	7 years/ 5 years 6 months
<i>R v Edwards</i> [2008] VSC 297 (13 August 2008)	Verbal exchange including threat of violence	10 years/8 years
<i>R v Giammona</i> [2008] VSC 376 (26 September 2008)	Violence	8 years/6 years
<i>R v Smith</i> [2008] VSC 617 (15 October 2008)	Unclear	7 years/ 4 years 6 months
<i>R v Taiba</i> [2008] VSC 589 (23 December 2008)	Unclear	9 years/7 years
<i>R v Baxter</i> [2009] VSC 178 (12 May 2009)	Violence	8 years 6 months/ 5 years 6 months
<i>R v Trezise</i> [2009] VSC 520 (31 August 2009)	Unclear	8 years/4 years
<i>R v Spark</i> [2009] VSC 374 (11 September 2009)	Verbal exchange	7 years/ 4 years 9 months
<i>R v Wilson</i> [2009] VSC 431 (21 September 2009)	Violence	10 years/7 years
<i>R v Evans</i> [2009] VSC 593 (16 December 2009)	Violence	10 years/7 years

¹⁰⁶ See above Part III; DOJ, above n 10, 33–40.

<i>R v Black</i> [2011] VSC 152 (12 April 2011)	Verbal exchange	9 years/6 years
<i>R v Ghazlan</i> [2011] VSC 178 (3 May 2011)	Violence	10 years 6 months/ 7 years 6 months
<i>R v Martin</i> [2011] VSC 217 (20 May 2011)	Sexual assault	8 years/5 years
<i>R v Jewell</i> [2011] VSC 483 (27 September 2011)	Verbal exchange	8 years/5 years
<i>R v Monks</i> [2011] VSC 626 (2 December 2011)	Violence	8 years/5 years
<i>R v Edwards</i> [2012] VSC 138 (24 April 2012)	Violence	7 years/ 4 years 9 months

Table 1 shows that in nine of the 16 cases, the basis for the accused's fear of death or really serious injury was an incident of actual violence committed by the victim. In four of the 16 cases, the basis for the accused's fear was a verbal exchange between the accused and the victim; however, only one of these cases involved an actual threat of violence by the victim. In three cases, the basis for the accused's fear was unclear.

The law stipulates that the offence of defensive homicide applies only where an accused believed that their lethal actions were necessary in order to defend themselves or another person.¹⁰⁷ Where the accused was not the subject of violence or violent threats from the victim, it would seem less likely that the accused believed that it was necessary for them to respond with lethal force. Thus, the three cases in which non-violent exchanges precipitated the accused's use of lethal force are of particular concern, because the facts in those cases may have established the more serious crime of murder — although it is impossible to tell because the full facts are not available due to the accused's guilty plea. Here, lack of transparency not only raises the risk that accused persons' convictions will not match their culpability, but it also hampers the public's ability to assess if that risk is realised.

Similarly, it is concerning that in three of the cases there is very little information as to what precipitated the accused's lethal violence towards the victim. Again, the lack of transparency means that it is impossible for the public to determine if the accused persons in those cases were appropriately convicted. Furthermore, it raises concerns as to the motivations underpinning the prosecu-

¹⁰⁷ *Crimes Act 1958* (Vic) ss 9AC–9AD.

tion's decisions to accept many of the guilty pleas. This is particularly relevant given (as discussed above) the resource pressures faced by courts and prosecutors and the potential efficiency benefits of a guilty plea.

VIII ACHIEVING TRANSPARENCY

The desire to formally control prosecutorial discretion emanates from the quest to increase accountability, reduce opportunities for misuse (or a perception of misuse) of power, and secure public confidence in the administration of justice.¹⁰⁸ Controlling discretion also aims to provide, at least in theory, all individuals with the same set of rules, thereby allowing them to receive like treatment regardless of factors such as race, age, socioeconomic status and gender. Accordingly, outside of plea bargaining, there has been a shift in many aspects of Victoria's criminal justice system away from instinctive and intuitive judgments towards an expansion of policies.¹⁰⁹ This has been achieved through the use of statutory and formal requirements, for example, by implementing legislative controls on the previously informal sentence indication hearings operating in Victoria's Magistrates' Court, and by establishing oversight and advisory bodies, such as the Victorian Sentencing Advisory Council.¹¹⁰

The most effective way to eliminate the potential for idiosyncratic reasons to negatively affect plea bargaining, or to appear to affect 'just' outcomes, is to develop a formal policy in Victoria that can influence prosecutorial culture. This culture should encourage prosecutors to use their discretion consistently and in line with the ideals of justice. Such an outcome was observed by Miller and Wright where, in the context of examining discretionary charging decisions in the prosecutor's office in New Orleans, they found consistent patterns of decision-making emerging in response to formalised requirements on conduct.¹¹¹ This included cases of a similar nature being handled similarly by different prosecutors, due to an office culture where formal rules helped bring about a singular approach to discretionary charging decisions.¹¹²

One way in which plea bargaining in Victoria could attain greater transparency and adopt this office culture is to implement formal guidelines equivalent to the *Attorney-General's Guidelines on the Acceptance of Pleas and the Prosecutor's*

¹⁰⁸ Charles D Breitel, 'Controls in Criminal Law Enforcement' (1960) 27 *University of Chicago Law Review* 427; William C Louthan, 'The Politics of Discretionary Justice among Criminal Justice Agencies' in Carl F Pinkele and William C Louthan (eds), *Discretion, Justice, and Democracy: A Public Policy Perspective* (Iowa State University Press, 1985) 13; Samuel Walker, *Taming the System: The Control of Discretion in Criminal Justice 1950–1990* (Oxford University Press, 1993).

¹⁰⁹ Asher Flynn, "'Fortunately We in Victoria Are Not in That UK Situation': Australian and United Kingdom Legal Perspectives on Plea Bargaining Reform" (2011) 16 *Deakin Law Review* 361, 369–70.

¹¹⁰ See generally *ibid* 370; Sentencing Advisory Council (Vic), above n 68. See also *Criminal Procedure Act 2009* (Vic) s 61, replacing *Magistrates' Court Act 1989* (Vic) s 50A.

¹¹¹ Marc L Miller and Ronald F Wright, 'The Black Box' (2008) 94 *Iowa Law Review* 125.

¹¹² *Ibid* 129.

Role in the Sentencing Exercise ('Guidelines'),¹¹³ which operate in the UK.¹¹⁴ The *Guidelines* were first implemented in 2000 in an attempt to more clearly define prosecutorial discretionary powers in relation to charging decisions, the sentencing hearing and plea bargaining.¹¹⁵ They supported the principles enunciated in s 7 of the *Human Rights Act 1998* (UK) c 42, which identified transparency and fairness as vital components in the effective administration of justice. The *Guidelines* have since been revised three times,¹¹⁶ with the most recent version released in March 2009. The *Guidelines* operate in conjunction with a number of other legislative and formal controls that regulate prosecutorial conduct and discretion in the UK, all of which aim to provide transparency to legal conduct and thus better uphold public interests.¹¹⁷

The *Guidelines* are divided into five areas, which outline the required conduct and responsibilities of prosecutors and, where relevant, those of judges and defence counsel, in plea bargaining. Specifically, the *Guidelines* identify the main factors that should be considered when deciding whether to plea bargain.¹¹⁸ They also explain what is required of both the prosecution and defence counsel when determining the facts upon which the plea bargain will be based and from which the court will sentence.¹¹⁹ Significantly, the *Guidelines* require that once an agreed basis of facts is made, this must be recorded in a document, which is signed by both counsel and lodged as part of official court records.¹²⁰ This process provides transparency to the plea bargain and ensures the judge can accurately determine whether there is a basis for accepting or rejecting the guilty plea.

The *Guidelines* are not themselves incorporated in statute. However, they are endorsed by the courts as best practice, which means that while breaching the *Guidelines* would not result in a case being dismissed, deviation from them could be a factor influencing an appeal court in ruling against the Crown.¹²¹ This system of control, Watson argues, enables the *Guidelines* to 'act as a safeguard against unregulated and occluded discussions that eschew fairness for the accused, by creating a wholly transparent procedure which stands up to judicial

¹¹³ Attorney-General's Office (UK), *Attorney-General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise* (2009).

¹¹⁴ For a detailed analysis of the *Guidelines*, see Flynn, 'Fortunately We in Victoria Are Not in That UK Situation', above n 109.

¹¹⁵ Duncan Watson, 'The Attorney General's Guidelines on Plea Bargaining in Serious Fraud: Obtaining Guilty Pleas Fairly?' (2010) 74 *Journal of Criminal Law* 77, 85.

¹¹⁶ *Ibid* 78.

¹¹⁷ See, eg, Crown Prosecution Service (UK), *The Farquharson Guidelines — The Role and Responsibilities of the Prosecution Advocate* (2002) (directing conduct within the prosecution process); Crown Prosecution Service (UK), *The Code for Crown Prosecutors* (2010) (controlling conduct in relation to the criminal justice process, from the laying of charges to the plea and sentencing hearings); Criminal Justice System (UK), *The Code of Practice for Victims of Crime* (2005) (outlining prosecutorial obligations to victims and recognised in s 32 of the *Domestic Violence, Crime and Victims Act 2004* (UK) c 28); Serious Fraud Office (UK), *The Prosecutors' Pledge* (2005).

¹¹⁸ *Guidelines* pt C.

¹¹⁹ *Ibid* paras C4–C11.

¹²⁰ *Ibid* paras C1–C4.

¹²¹ Flynn, 'Fortunately We in Victoria Are Not in That UK Situation', above n 109, 373–4.

scrutiny'.¹²² It thereby seeks to create the transparent, structured and accepting culture explored in Miller and Wright's research,¹²³ whereby prosecutors use their discretion consistently and in line with the ideals of justice. Thus, as Watson observes, '[t]he plea-bargaining system ... in England and Wales manages to avoid becoming an American-style pressure cooker by comparatively slight reductions in prosecutorial discretion'.¹²⁴

Further to implementing mandatory guidelines, another mechanism to achieve greater transparency and accountability is expanding on the single legislative change introduced in Victoria which (somewhat) guides prosecutorial conduct in relation to plea bargaining and victims.¹²⁵ Section 9 of the *Victims' Charter Act 2006* (Vic) ('*Charter*') requires prosecuting agencies to provide victims, as soon as reasonably practical, with the following information:

- (a) the offences charged against the person accused of the criminal offence;
- (b) if no offence is charged against any person, the reason why no offence was charged;
- (c) if offences are charged, any decision —
 - (i) to substantially modify those charges; or
 - (ii) not to proceed with some or all of those charges; or
 - (iii) to accept a plea of guilty to a lesser charge; ...

Thus, for the first time in Victoria's history, a statutory obligation exists on prosecutors to, in effect, explain when and why they resolved a case through plea bargaining.

Fourteen of the 19 prosecutorial participants interviewed in Project A acknowledged the significance of s 9 of the *Charter* both in providing greater victim recognition and consideration, and in altering their approaches to plea bargaining, in terms of increased victim consultation. The remaining five prosecutorial participants, while disregarding the *Charter's* impact on their personal conduct in plea bargaining, did note the significance of these requirements being incorporated into legislation and acknowledged that it appeared to have had a positive impact in increasing the consistency and number of victim consultations that occurred across the OPP more generally. As Prosecutor D (PA) observed, 'when I started [prosecuting], [formal] victim consultation wasn't something that happened. That has been a concept which has been a welcome development ... [and] I'd say it is largely because of the *Charter*'. Such findings demonstrate the potential for formalisation to positively alter prosecutorial conduct in line with Miller and Wright's office culture.

While the interview data secured in Project A indicated a largely positive change in prosecutorial conduct in relation to victim consultation, some com-

¹²² Watson, above n 115, 90.

¹²³ Miller and Wright, above n 111.

¹²⁴ Watson, above n 115, 90.

¹²⁵ For a detailed analysis of the *Victims' Charter Act 2006* (Vic) and plea bargaining, see Asher Flynn, 'Bargaining with Justice: Victims, Plea Bargaining and the *Victims' Charter Act 2006* (Vic)' (2011) 37 *Monash University Law Review* (forthcoming).

ments implied that these outcomes were not always reflective of plea bargaining in practice. For example, Prosecutor N (PA) observed that, 'while the *Charter* obliges us to try to explain to victims how and why things have happened in their case ... there are still matters where plea bargaining happens, but the explanations do not'. Prosecutor J (PA) similarly claimed that 'in most cases ... the victim is consulted and their opinion considered before we accept an offer, but not always'.

These comments suggest that when plea bargaining occurs, the provision of transparent information may still be unobtainable for some victims. Thus while s 9 of the *Charter* provides an avenue for prosecutors to explain to victims why certain decisions were made, thereby possibly reducing the potential for victims to feel alienated and disempowered by plea bargaining, we believe that there is scope to expand upon this requirement: there should be further guidance and formalisation of prosecutorial conduct in relation to plea bargaining. This is particularly so because one formalised requirement that fails to define, regulate or even acknowledge plea bargaining is unlikely to provide a guarantee that prosecutors will uphold their public interest roles in the process, or offer a mechanism to respond to the limitations surrounding plea bargaining's non-transparency.

We believe that expanding on this existing legislative requirement and drawing from the mandatory *Guidelines* used in the UK would achieve greater transparency and control of the conduct of prosecutors in making plea bargaining decisions. Furthermore, recognising in statute that the practice of plea bargaining actually occurs will offer greater benefits in terms of granting a level of scrutiny to the process and its outcomes. This is particularly beneficial within the context of defensive homicide, if the strong pattern of plea deals continues.

IX CONCLUSION

Analysis of the operation of defensive homicide since its introduction in 2005 illuminates key concerns regarding plea bargaining practices. While plea bargaining offers a mechanism through which matters can be dealt with promptly and without a trial, when deals are made, there is limited transparency and accountability in both the exercise of the prosecution's discretion and the process more generally. Justice is not seen to be done. As a consequence, the legitimacy of any plea agreements reached between counsel are questionable, particularly when the prosecutor's motivations are shrouded in secrecy and their basis for accepting a guilty plea may not reflect the stipulated law. If plea bargaining continues to be a common practice used to resolve cases, particularly those involving homicide offences, a greater level of transparency is required.

For practical, pragmatic and emotion-based reasons, there is a significant need to evaluate the effectiveness of changes in the criminal justice system post-reform. In the context of defensive homicide, one such reason is to sufficiently understand how decisions are made relating to the lowering of the accused's level of culpability, particularly given that three quarters of the convictions to date have resulted from the Crown's acceptance of a guilty plea. Without greater

transparency in the plea bargaining process, public confidence in the criminal justice system is negatively affected and significant and important questions pertaining to equality, justice and the effectiveness of Victorian homicide law remain unanswered.