

**CHAPTER 23 - PLEA ADJUSTMENT****23.01 INTRODUCTION**

Having taken a decision at the case marking stage to commence criminal proceedings and having selected the charges which appear at that stage to be appropriate, Procurators Fiscal remain under a duty throughout the lifetime of a case to continually consider, at each stage of the case, the action on the part of the Procurator Fiscal which best serves the public interest in the effective administration of criminal justice. Procurators Fiscal are not obliged to proceed to trial in respect of every charge libelled, or all proceedings raised, against an accused person.

The Procurator Fiscal's discretion extends to the resolution of criminal proceedings by the acceptance of adjusted pleas where this is considered by the Procurator Fiscal to be in the public interest in all the circumstances of the case, a process hereafter referred to as 'plea adjustment'.

The legitimacy of plea adjustment as a proper exercise of prosecutorial discretion was recognised by the High Court in the case of **Boyle v HMA 1976 JC 32**, where it was stated that: "In Scotland the master of the instance in all prosecutions for the public interest is the Lord Advocate. It is for him to decide when and against whom to launch prosecution and upon what charges. It is for him to decide in which court they shall be prosecuted. It is for him to decide what pleas of guilt he will accept and it is for him to decide when to withdraw or abandon proceedings."

Procurators Fiscal have a duty to consider pleas offered by the defence, short of guilty as libelled to all charges against an accused person, and to accept them where

the Procurator Fiscal considers that it is in the public interest to do so.

In a written answer given to a question asked in the House of Commons on 10<sup>th</sup> December 1981 the then Solicitor General stated that: "If satisfactory pleas can be adjusted valuable court time is freed to permit other cases to be heard. This creates speedier justice which is...a very desirable aim."

In the American case of **Santobello v New York 404 US 257 (1971)** the process of 'plea bargaining' was described as "...an essential component of the administration of justice. Properly administered, it is to be encouraged...It leads to prompt and largely final disposition of ... criminal cases."

In the English case of **R v Fraser (1982) 4 Cr. App. R (S) 254** the court commented that: "The principal way in which a plea of guilty can be prayed in aid by way of mitigation is that it can be said to demonstrate, in at least some cases, true remorse on the part of the criminal concerned...It is also desirable in...any trial...that it should not be unnecessarily or unreasonably prolonged and made unnecessarily or unreasonably expensive either for the clients or for society in general...[C]riminals should be encouraged, so far as it is possible, not to indulge in the sort of tactics which...result in the unnecessary and unreasonable prolongation of trials and consequent expenditure of public money."

From an ECHR perspective there is nothing to suggest that well-informed, responsible plea negotiation will be regarded as incompatible with the convention rights of the accused or the victim.

In **X, Y and Z v Austria 1980 EHRR 270**, the European Court of Human Rights held that Article 6 does not prevent the public prosecutor from deciding not to prosecute or to withdraw the indictment. It should also be noted that Article 6(2) imposes no general duty on the State to compensate any accused who is not finally convicted, for the period spent on remand (**Sekanini v Austria 17 EHRR 221**).

From the victim's perspective, it was confirmed in **Dubowska and Skup v Poland 24 EHRR CD 75**, that Article 6 does not confer a right to have criminal proceedings brought against a third party. Nor should any Convention right of a victim of serious crime under Article 8 to "effective criminal law provisions" (**X and Y v the Netherlands 8 EHRR 235**) be interpreted as impinging on prosecutorial discretion. The breach of the victim's Convention rights in that case arose from the public prosecutor's *inability* to take criminal proceedings, rather than a discretionary decision not to do so.

The benefits of resolution of appropriate cases by plea adjustment may be said to include:

- The prompt disposal of the case;
- The process involves the admission and acknowledgement of guilt on the part of the accused and a willingness on his part to accept responsibility for his conduct;
- The accused's acceptance of guilt permits his position to be put fully to the court in a way which contributes to the most appropriate disposal of the case by the court;
- Victims and witnesses are spared the necessity, inconvenience and potential distress of attending court and giving evidence; and
- The avoidance of an unnecessary trial allows time and resources to be

devoted to other cases in which the adjustment of pleas is not appropriate.

Irrespective of any approach from the defence, Procurators Fiscal have a duty in preparing any case for trial to consider the issue of plea adjustment so as to be able to give proper consideration to any approach ultimately made by or on behalf of the accused.

Further, Procurators Fiscal may consider it appropriate, in suitable cases, to take the initiative and approach the defence, time permitting, in order to advise them in advance of trial of the pleas which would be acceptable to the Crown as a means of resolving the proceedings. However, such an indication on behalf of the Crown should not be given in open court (see **Latto & Others v Vannet 1997 SCCR 721**).

The guidance given in this chapter relates to the adjustment of pleas, a process which necessarily involves concessions by the Crown, in the form of acceptance of pleas of not guilty to one or more of the charges against the accused or the acceptance of pleas of guilty to alternative charges or to charges subject to amendment, and by the accused, in the form of pleas of guilty to one or more of the charges against him.

Procurators Fiscal should bear in mind that, whilst the unjustifiable acceptance of pleas of not guilty and the unjustifiable deletion of aggravations by the Crown may give rise to liability in relation to any perceived failure to adequately protect and enforce the convention rights of victims, the justifiable acceptance by the Crown of adjusted pleas is a means of safeguarding such rights and of establishing their breach by the accused and of enabling the court to impose an appropriate sentence.

The acceptance by the Crown of pleas of not guilty to one or more charges or the deletion by the Crown of aggravations as conditions of securing pleas of guilty to other charges against an accused person is proper and justifiable so long as the prosecutor's decision is informed by consideration of all of the relevant facts and circumstances, the applicable law and any applicable departmental guidance.

Plea adjustment can be distinguished from the acceptance of pleas of not guilty to all charges or the discontinuation of proceedings in their entirety (in which case guidance is given in chapter 3 above) and from situations in which the accused pleads guilty as libelled to the only charge or to all charges against him.

The court should ensure that pleas of guilty are confirmed personally by the accused where he is present in court, even where he is legally represented (see **McGowan v Ritchie 1997 SCCR 322**).

### **23.02 ASSESSMENT OF THE PUBLIC INTEREST IN PLEA ADJUSTMENT**

Procurators Fiscal are under a duty in relation to the adjustment of pleas to act in the public interest. Where in all the circumstances of a case the Procurator Fiscal judges that it is in the public interest to accept pleas which the accused is prepared to offer, the pleas must be accepted. Where such acceptance is judged by the Procurator Fiscal not be in the public interest, the pleas offered must not be accepted and the Procurator Fiscal must allow the case to run its course, whatever the outcome may be.

Irrespective of any other considerations, it can never be in the public interest for the Crown to accept a plea of guilty to any charge, in any form, in the knowledge that the accused maintains his innocence in

relation to that charge and that the plea is tendered out of ignorance or misunderstanding. It is to be presumed that a person who tenders a plea of guilty accepts their guilt and it will seldom, if ever, be necessary to inquire if a represented accused who tenders a plea accepts their guilt. More care should be taken where the accused is unrepresented and is perhaps unfamiliar with the system or where the prosecutor has reason to believe that the accused requires some assistance or protection.

As a general proposition, Procurators Fiscal must ensure that any pleas accepted, and any narration of facts agreed with the defence, will enable the Procurator Fiscal to narrate to the court such facts as will allow the court to gain an adequate and accurate picture of the accused's conduct and of any other relevant matters, such as the background to the accused's conduct, any motive therefor and the consequences of that conduct for those affected by it.

Subject to the Crown's limited right to appeal against an unduly lenient sentence, (as to which see **chapter 11**), disposal of the case will thereafter be a matter for the court.

The importance of ensuring that any adjusted plea represents an adequate and accurate reflection of the offence extends beyond the instant case. Procurator Fiscals are reminded of the decision in **HMA v Riley 1999 SCCR 644** which indicates that a prosecutor can provide additional information regarding a previous conviction but that such information should be restricted to the terms of the charge on which the conviction is based.

The factors which contribute to the Procurator Fiscal's assessment of the public interest will vary from case to case.

Although some similar factors may be relevant both at the stages of case marking and plea adjustment, it must be remembered that the processes of case marking and charge selection are concerned with identification of the appropriate mode of disposal of a case and, in the event that prosecution is considered appropriate, with the giving of fair notice to the accused of the charges against him and of the evidence which the Crown may lead in the event of the case proceeding to trial.

The process of plea adjustment is distinguished, as already noted, by the willingness of the accused to make some admission of guilt which avoids the necessity for proof in relation to one or more of the charges against him.

Accordingly the processes of case marking/charge selection and plea adjustment are approached from different perspectives even though some similar factors may be relevant to each.

### **23.03 FACTORS TO BE CONSIDERED IN PLEA ADJUSTMENT**

Procurators Fiscal must have particular regard to the following general factors in determining whether an offer of pleas by the defence ought to be accepted.

- (i) The nature and quality of the evidence available or likely to be available

The evidence available to the Crown when consideration is given to the adjustment of pleas may be less than that which appeared to be available at the stage of case marking and charge selection.

As the trial approaches additional evidence may be made available, either by the Crown or defence, which the Procurator

Fiscal regards as significant in the context of the potential for resolution of the case without trial.

The public interest would clearly not be served by the Procurator Fiscal electing to proceed to trial in respect of a charge or charges in relation to which, in the professional judgement of the Procurator Fiscal on the basis of the available evidence, conviction would not be a realistic possibility on the basis of the available evidence.

Such acceptance need not wait until the date of trial or until the trial is imminent. The Procurator Fiscal should be prepared at any stage of the case where the conclusion is reached that there is and will continue to be insufficient admissible and apparently credible and reliable evidence to justify continued proceedings in respect of one or more charges to accept pleas of not guilty in respect of those charges. If necessary Procurators Fiscal will instruct any relevant further inquiries before reaching this conclusion.

This situation can be distinguished from the case in which the Procurator Fiscal, having reached the decision during the course of proceedings that conviction in respect of one or more of the charges against an accused person is not a realistic possibility on the basis of the available evidence, considers that the charge or charges affected remain necessary as a basis for the leading of evidence relevant to proof of the remaining charge or charges.

- (ii) The Nature and Gravity of the Offences Libelled

In considering whether to accept pleas which the accused is prepared to offer Procurators Fiscal must have regard to the

nature and gravity not only of the offences in respect of which pleas of guilty are offered but also to the nature and gravity of the offences in respect of which the accused wishes the Crown to accept pleas of not guilty. As a general rule the more serious an offence is in terms of its intrinsic nature or in terms of any consequences for victims or the wider community, the less likely it is that the public interest will be served by the acceptance of a plea of not guilty, subject of course to paragraph 22.03 (i) above.

In this context Procurators Fiscal should have regard, inter alia, to the factors identified in paragraph 22.3.3 in relation to the potential significance of plea adjustment for the protection of victims and the supervision of convicted persons.

(iii) The Likely Sentence

Where the Procurator Fiscal is offered pleas of guilty to one or more of the charges libelled on a complaint or indictment on condition that pleas of not guilty to the remaining charge or charges are accepted, consideration should be given by the Procurator Fiscal to the sentence likely, in the judgement of the Procurator Fiscal, to be imposed in respect of the charge or charges to which the accused is prepared to offer pleas of guilty.

(iv) Any Relevant Departmental Guidance

Procurators Fiscal must always have in mind any relevant departmental guidance

such as is given in paragraphs 23.13(i) to 23.13(x) below.

(v) The Views of the Victim

The views of the victim, the next of kin of a deceased victim or the parents or legal guardian of a child victim may, where known, be taken into account at the discretion of the Procurator Fiscal as one factor in the process of considering whether to accept any pleas which the accused is prepared to offer. Such persons can only ever be advised of the possibility of an adjusted plea in the terms which the accused is prepared to offer and asked whether they wish to make any comment or express any view concerning the acceptance of the plea.

It must be made clear to such persons that the final decision will be a matter for the Procurator Fiscal or, where appropriate, Crown Counsel.

In this context see **paragraph 23.11** below.

(vi) The effect of adjusted pleas in avoiding the attendance and testimony of witnesses

As previously noted, one of the merits of justifiable plea adjustment is its effect in avoiding the necessity for victims and witnesses to attend court and give evidence.

Different considerations will apply where the accused has, prior to the date of trial, offered to plead guilty in terms which are not accepted by the Crown until the day of trial. In such circumstances the lateness of the Crown's agreement should not be held against the accused, and the Procurator Fiscal should be prepared to provide an explanation to the court, if requested, for any delay in the acceptance of the offer

made by the accused. In this context see **paragraph 23.05** below.

(vii) The age of the case

### 23.04 THE NARRATION

In addition to considering the pleas which would be acceptable to the Crown in the circumstances of any particular case, Procurators Fiscal must also consider the facts which are to be narrated both by the Crown and by the defence in the event of the acceptance of the pleas offered.

In the event of an adjusted plea, the only means by which the court can learn the facts of the case are generally the narration of facts by the Crown and the plea in mitigation on behalf of the accused. Therefore it is essential that the Procurator Fiscal considers the implications for the facts to be presented to the court both by the Crown and defence of acceptance of any pleas offered. In general the facts underlying a charge to which a plea of not guilty is accepted cannot form part of the Crown's narration unless they are also relevant to a charge to which a plea of guilty is tendered.

Ideally the Crown and defence should each be aware of the facts which the other intends to narrate before any final agreement is reached regarding adjustment of pleas. In the event of narration of conflicting versions of the facts in relation to a matter which the court considers is material to its understanding of the facts of the case or to the assessment of the appropriate disposal, the court may disregard the disputed matter where no evidence has been led (see **Galloway v Adair 1947 JC 7**; **Barn v Smith 1978 JC 17**).

Alternatively, the court may order a proof in relation to the disputed facts where the absence of agreement results in the court being unable to fully understand the material circumstances of the case or to decide on the appropriate disposal. It must be remembered that in such a situation the Crown will be deprived of the opportunity to lead evidence relevant to the charge or charges to which pleas of not guilty have been accepted as a means of contradicting the accused's version of the disputed facts.

Procurators Fiscal must exercise care in relation to the narration of facts by both the Crown and defence.

In addition, Procurators Fiscal should, so far as possible, satisfy themselves that the defence narration is consistent with the Crown's narration before deciding whether to accept the pleas offered and the defence narration of the material facts. If necessary Procurators Fiscal should check disputed facts with Crown witnesses or instruct the police to do so before coming to a decision whether or not to accept the defence narration of the material facts.

Where the defence narrate facts which the Crown positively dispute, the Procurator Fiscal should ensure, after the defence narration has concluded, that the Court is advised of the Crown's position (otherwise the court may accept what is said in mitigation and proceed to dispose of the case on that basis - see **McCartney v HMA 1997 SCCR 644**). The Court will then call upon the defence to make any further relevant comments and may order a proof in mitigation before disposing of the case.

In the case of **HMA v Bennett aka Reekie 1996 SCCR 331**, the failure of the Crown to challenge, before the sentencing judge, matters put forward by the defence

in mitigation following a plea of guilty proved fatal to the prospects of a Crown appeal against sentence on the ground of undue leniency.

### 23.05 STAGE AT WHICH PLEAS ARE TENDERED

Section 196(1) of the Criminal Procedure (Scotland) Act 1995 provides as follows:

“In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court may take into account –

- (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
- (b) the circumstances in which that indication was given.”

However, as illustrated by the cases of **HMA v Forrest 1998 SCCR 153** and **Tennie v Munro 1999 SCCR 70**, the court is not bound to give any ‘discount’ on sentence as a result of an early plea of guilty.

The judicial attitude prior to the enactment of Section 196 of the 1995 Act towards the notion of any concession being extended to an accused person in relation to the sentence imposed following a plea of guilty is illustrated by the case of **Strawhorn v McLeod 1987 SCCR 413**.

### 23.06 NOTING OF REASONS

Procurators Fiscal should keep in mind that they might at any time be called upon to justify their decisions in relation to particular cases. Accordingly in all but the most straightforward cases reasons for accepting adjusted pleas or for agreeing a particular narration of the facts should be clearly minuted on the case papers.

### 23.07 S. 76 INDICTMENTS

The procedure under Section 76 of the Criminal Procedure (Scotland) Act 1995 ultimately represents a mode of plea adjustment in solemn cases. Detailed guidance in relation to this procedure is given in **Chapter 6**.

The procedure to be followed where the accused appears in answer to a S. 76 indictment but either pleads not guilty or pleads guilty only in part and the prosecutor does not accept the plea is set out in **paragraph 6.11**.

Regard must be always be had to the 12 month, 110-day and 80-day periods in terms of Section 65 of the Criminal Procedure (Scotland) Act 1995 in such cases and to the effect on those periods of the failure on the part of the accused to plead guilty as libelled to the S. 76 indictment.

Where an extension to the 12 month period is necessary as a result of the failure of the accused to plead guilty as libelled to a S.76 indictment which has called in court the Procurator Fiscal should make a motion at the diet for an extension in terms of Section 65(3) of the 1995 Act.

In terms of Section 65(5) and (7) of the 1995 Act applications for extension of the 80-day and 110-day periods must be submitted to a judge of the High Court. Accordingly difficulties such as those identified above which result in a S. 76

indictment being deserted pro loco et tempore and in a consequent requirement for extension to the 80-day or 110-day period should be brought immediately to the attention of the appropriate Principal Depute, Procurator Fiscal or Assistant Procurator Fiscal in order that steps may be taken to initiate an application for the required extension.

Where the accused fails to appear in answer to a S. 76 indictment which has been duly served on him a warrant for his apprehension should be sought.

### **23.08 WITHDRAWAL OF GUILTY PLEAS**

A plea of guilty may be withdrawn where it was tendered as a result of a genuine misunderstanding as to the circumstances or as to the implications of the plea tendered (see **Frost v McGlennan 1998 SCCR 573**). A plea of guilty tendered after the accused has had the benefit of legal advice is unlikely to be allowed to be withdrawn (see **Mathieson v MacLeod 1996 SLT 660**).

A plea of guilty tendered simply for convenience will likewise not be permitted to be withdrawn (see **Kerr v Friel 1997 SCCR 317**).

Where permitted, a plea of guilty may be withdrawn at any time prior to the recording of both conviction **and** sentence (see **Tudhope v Campbell 1979 JC 24**). Thereafter the only recourse for the accused is to appeal (see **MacNeill v MacGregor 1975 JC 55**; **MacGregor v MacNeill 1975 JC 57**).

### **23.09 ADJUSTMENT OF PLEAS IN RELATION TO MORE THAN ONE CASE**

The defence may approach the Procurator Fiscal with an offer of pleas relating to more than one complaint or indictment relating to the same accused person.

In this context the guidance given in **paragraphs 23.02 and 23.03** above applies.

Where pleas are adjusted in relation to more than one complaint or indictment in this way, Procurators Fiscal should ensure where possible that arrangements are made for the various complaints and indictments in respect of which pleas of guilty are to be tendered to call on the same day before the same sheriff or magistrate in order that the agreed pleas can be tendered together.

The defence will not be bound by any agreement regarding pleas to be tendered until such time as the pleas are in fact tendered in open court.

However it is thought that, on the basis of **Thom v HMA 1976 SLT 232**, the Crown will be bound by the terms of an unequivocal agreement from the time when it is made, assuming fulfilment by the defence of the Crown's conditions (see **paragraph 23.20**).

### **23.10 GIVING OF REASONS**

Where the Crown accepts pleas of not guilty in relation to the only charge or all charges against the accused on a particular complaint or indictment, the case should be marked "no further proceedings" under one of the headings identified in **paragraph 3.30 and Annex G to chapter 3** above.

Where an opportunity arises in relation to victims, next of kin or witnesses in serious cases in which adjusted pleas have been accepted, the general reason for the acceptance by the Crown of the adjusted

pleas (for example, evidential difficulties) may be given at the discretion of the Procurator Fiscal.

However, Procurators Fiscal should generally not disclose the detailed reasons for their acceptance of adjusted pleas. The only explanation which should generally be given for the acceptance by the Crown of adjusted pleas is that this was regarded as being, in all the circumstances of the case, in the public interest.

The reasons for this are that, quite apart from the fact that the prosecutor's decision to accept adjusted pleas may well have been influenced by information of a confidential nature relating to matters such as the credibility, reliability or state of health of essential witnesses or as to the details of police operations, it is also the case that plea adjustment necessarily involves (barring some supervening evidential difficulty) the acceptance by the Crown, in the public interest, of pleas of not guilty in relation to charges for which sufficient evidence of the guilt of the accused was available. It would be wrong for the Crown, in response to a request from a member of the public for a detailed explanation of the basis for the acceptance of adjusted pleas, to comment on the evidence which existed in support of those charges in respect of which pleas of not guilty were accepted as part of the plea adjustment process.

### **23.11 CONTACT WITH VICTIMS AND NEXT OF KIN**

During precognition the possibility of the resolution of the case by the adjustment of pleas should be explained to victims and witnesses, the next of kin of deceased victims and the parent or other person supporting a child victim or witness as part

of the precognoscer's general explanation of the procedures which may apply to the case.

In all cases in which pleas are adjusted at court on the day of trial in relation to serious cases victims, the next of kin of deceased victims and the parent or other person supporting a child victim should, if in attendance and if circumstances permit, be advised of any pleas agreed between the Crown and defence.

In accordance with **paragraph 23.03 (v)** above, Procurators Fiscal may wish to seek the views of the victim, next of kin, parent or support person before accepting pleas which the defence may be prepared to offer in those cases in which the Procurator Fiscal considers that the views of such persons might have a bearing on the decision whether to accept the pleas offered.

It is emphasised that it should be explained that any views expressed will be taken into account but that the ultimate decision will rest with the Procurator Fiscal who will also take account of other considerations.

### **23.12 REVIEW OF DISCLOSURE POLICY**

While paragraphs 23.10 and 23.11 above reflect current policy on the provision of reasons to victims and next of kin, this policy is under review. Further guidance will be issued in due course.

Steps should also be taken where possible to provide the sheriff clerk with advance notice of any adjusted pleas in solemn cases as a result of which the cases concerned will no longer proceed to trial. Such advance notice is important since the plea to be tendered by the accused will have to be recorded in writing by the sheriff clerk before being signed by the accused in court and delay and inconvenience may result if the sheriff clerk requires to prepare the written record of the plea at short notice prior to the calling of the indictment in court.

Although it is desirable to provide similar advance notice to sheriff clerks and district court clerks in relation to summary cases in which pleas are adjusted in advance of the trial diet, the feasibility of giving such notice will depend on the time available and on local conditions and arrangements.

Finally, where the adjustment of pleas means that interpreters will no longer be required to assist witnesses in the absence of the need for the case to proceed to trial or that equipment such as screens or a TV link which would have been used for the benefit of a vulnerable witness in the event of a trial are no longer necessary, steps should be taken as soon as possible after agreement is reached with the defence to excuse such interpreters or advise those whose responsibility it is locally to provide and set up such equipment that it is no longer required.

### **23.15 NOTING OF AGREEMENTS**

Where a Procurator Fiscal reaches agreement with the defence in advance of trial, the terms of the agreement (i.e. the pleas agreed in relation to each charge, any agreed narration of facts and any disclaimer which the defence have agreed to give in fulfilment of a condition imposed by the Crown) must be clearly noted on the case papers for the benefit of the Procurator Fiscal who will take the case at the diet when the pleas are to be tendered.

The same principle applies where pleas are tendered at one diet and the facts are to be narrated at a subsequent diet.

### **23.16 PRACTICAL STEPS**

The citations of any witnesses whose attendance at court is, in light of any plea adjusted with the defence, no longer necessary must be countermanded as soon as possible after the agreement is reached, assuming that the Procurator Fiscal has no reason to doubt that the accused will plead in the agreed terms.

### **23.17 MULTIPLE ACCUSED**

Where there is more than one accused in relation to any given case the Procurator Fiscal has a duty to consider the pleas, in relation to each, which would be acceptable to the Crown as a means of resolving the case in the public interest.

The position regarding each accused must accordingly be considered separately.

However, in addition the Procurator Fiscal must consider the overall circumstances of the case and the parts played by each accused in the offending behaviour which gave rise to the prosecution in deciding whether the public interest would be served by the acceptance of the pleas which the accused may be prepared to offer.

Procurators Fiscal must endeavour to be consistent in dealing with similarly situated accused in relation to the same complaint or indictment or in relation to the same charges or conduct where co-participants are prosecuted separately (see **Thom v Smith 1979 SLT (Notes) 25**).

### **23.18 UNREPRESENTED ACCUSED**

The guidance given above applies whether or not an accused person is legally represented. Where the accused is represented by counsel or a solicitor any discussions regarding the adjustment of pleas must be with the relevant representative and not with the accused direct.

Where the accused is unrepresented it remains proper for the Procurator Fiscal to consider any offer of pleas by the accused or to advise the accused of the pleas which would be acceptable to the Crown and of any conditions to which such acceptance would be subject. However, care must be taken to ensure that the unrepresented accused is not given the impression that he is being put under pressure by the Procurator Fiscal to plead guilty to any charge. It must always be stressed that a plea of guilty will not be acceptable in relation to a charge in respect of which the

accused maintains his innocence. To counter any suggestion of unfairness or impropriety any discussion of pleas with an unrepresented accused should, where possible, be conducted in the presence of a witness e.g. another member of the Procurator Fiscal's staff or the clerk of court.

Procurators Fiscal should not engage in any discussion with unrepresented accused persons as to the likely disposal in the event of a plea of guilty. However, it is proper for the Procurator Fiscal to draw the attention of the accused to the terms of Section 196(1) of the Criminal Procedure (Scotland) Act 1995 and to advise the accused, if asked, of the statutory limits on the sentencing powers of the court in relation to the charge or charges against him. In this regard see the guidance on sentencing powers in the precognoscers' handbook.

### **23.19 PLEAS AFTER EVIDENCE**

Where a Procurator Fiscal is offered pleas in advance of trial which appear at that stage not to be acceptable and so rejects the offer and proceeds to trial, it remains proper to review the situation in the light of any evidence led at trial. If, in the light of any evidence led, the Procurator Fiscal takes the view that any pleas which the defence are prepared to offer, whether or not in the same terms as those originally offered, ought to be accepted he or she should advise the defence accordingly, in order that those pleas can be tendered and accepted.

Alternatively, the defence may approach the Procurator Fiscal during the course of a trial with an offer of pleas, even where no offer was made or where a suggestion by the Procurator Fiscal was rejected by the defence in advance of trial. In such cases the Procurator Fiscal should apply the

relevant general and specific guidance given above in deciding whether to accept the pleas offered during the trial.

### **23.20 FAILURE BY DEFENCE TO FULFIL CROWN CONDITIONS**

In the English cases of **R v Richards; R v Stober (1993) 96 Cr. App. R. 258**, in which three defendants were charged with murder, counsel for the prosecution indicated in advance of trial that pleas of guilty to manslaughter would be acceptable from two of the defendants on condition that the third pled guilty to murder. The third refused to plead guilty and the case proceeded to trial, after which all three were convicted of murder. The two appealed on the ground, *inter alia*, that if the prosecution had been prepared to accept pleas of guilty to manslaughter from them earlier it was unjust to then proceed against them in relation to the murder charge. The appeals were dismissed, the court holding that counsel for the prosecution had a discretion to indicate on what basis the case would be capable of resolution by pleas of guilty and that he was not bound by any conditional indication given where the conditions attached were not fulfilled.

The same principle appears to apply to prosecutors in Scotland. A similar point was taken, and rejected by the High Court, in the appeal case of **Latto & Others v Vannet 1997 SCCR 721**.

These cases do however highlight the need for Procurators Fiscal to make clear any conditions attached by them to the acceptance of pleas from accused persons in resolution of proceedings.

### **23.21 CONSULTATION**

Particularly serious, sensitive or complex cases should not be the subject of resolution by means of adjusted pleas

without the approval of the relevant Principal Depute, Procurator Fiscal or Assistant Procurator Fiscal.

Similarly, pleas previously rejected in a particular case should not subsequently be accepted without consultation with a senior colleague unless the circumstances in which the pleas were previously rejected have altered materially due to factors such as the failure of an essential witness to attend court, the perceived significance of additional information or evidence (for the Crown or defence) or the trial prosecutor's assessment of the quality of evidence led at trial.