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ADVISORY  
COUNCIL

# Statutory Sentencing Discounts for Pleas of Guilty: Consultation Paper

March 2018

## **About this Consultation Paper**

This reference to the Sentencing Advisory Council was made by the then Acting Attorney-General and Acting for and on behalf of the Minister for Justice, the Hon Matthew Groom MP in August 2017.

This paper provides an overview of the current approach taken to reduction of sentence for a guilty plea in Tasmania and examines legislative approaches to sentencing discounts for pleas of guilty in other Australian jurisdictions and comparable international jurisdictions.

The paper asks for feedback in relation to the appropriate parameters for the introduction of a statutory framework to reduce sentences for pleas of guilty in Tasmania. The questions are set out at the beginning of the paper and are also contained in the relevant parts of the paper so that the options can be understood in context.

You may choose to address some or all of the questions and your answers may be referred to or quoted in a final report. If you do not wish your response to be published or if you wish to remain anonymous please indicate this in your response. After considering all responses, it is intended that a final report containing recommendations and advice to the Attorney-General will be published.

This Consultation Paper is available on the Sentencing Advisory Council's website at <[www.sentencingcouncil.tas.gov.au](http://www.sentencingcouncil.tas.gov.au)> or can be sent to you by email if you contact the Council at [sac@justice.tas.gov.au](mailto:sac@justice.tas.gov.au).

Responses should be made in writing by close of business **18 May 2018**.

If possible, they should be sent by email to [sac@justice.tas.gov.au](mailto:sac@justice.tas.gov.au), otherwise they can be mailed to the Sentencing Advisory Council: GPO Box 825 Hobart 7001.

## **Information on the Sentencing Advisory Council**

The Sentencing Advisory Council was established in June 2010 by the Attorney-General and Minister for Justice, the Hon Lara Giddings MP. The Council was established, in part, as an advisory body to the Attorney-General. Its other functions are to bridge the gap between the community, the courts and the Government by informing, educating and advising on sentencing issues in Tasmania. At the time that this paper was concluded, the Council members were Emeritus Professor Arie Freiberg AM (Chair), Dr Jeremy Prichard, Mr Scott Tilyard, Mr Peter Dixon, Ms Kim Baumeler, Mr Graham Hill, Professor Rob White, Associate Professor Terese Henning, Ms Kate Cuthbertson and Ms Linda Mason.

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## List of questions

### Questions (see p 22)

1. To what extent do systemic factors contribute to delay in Tasmania?
2. What are the features of the pre-trial process in Tasmania that may create obstacles to early guilty pleas?
3. In your view, what factors influence plea decisions of offenders in Tasmania?
4. In your experience, how many guilty pleas are to different charges than original charges or occur as a result of plea negotiations?

### Question 5 (see p 39)

In Tasmania, do you consider that there is a sentencing benefit to an offender from entering a plea of guilty and/or from entering an early plea of guilty compared to a late plea of guilty?

### Question 6 (see p 60)

Should the *Sentencing Act 1997* (Tas) be amended to provide that a guilty plea is a mitigating factor relevant to the sentence imposed?

### Questions (see p 68)

7. Should the statutory scheme set out the extent of the discount as a percentage reduction in sentence?
- 8(a) Should the court be required to state how much weight has been given to the guilty plea and its effect on the sentence imposed?
  - (b) Or should the court be permitted (but not obligated) to state how much weight has been given to the guilty plea and its effect on the sentence imposed?
  - (c) Or should there be a different position that applies to different sentence types to only impose the obligation on the court to state how much weight has been given to the guilty plea and its effect on the sentence imposed for more serious offences? If so, how should this be defined?
- 9(a) Should there be a cap on the amount by which a sentence can be reduced by a guilty plea specified in legislation? If so, what should that cap be? When should it apply?
  - (b) Or should a range be included in the legislation that sets out the minimum and maximum reduction for a guilty plea? If so, what should the range be? When should it apply?
  - (c) Or should a sliding scale be introduced relating to particular reductions? If so, should this be tied to specific pre-trial stages or should it relate to a plea entered at the 'first reasonable opportunity'? If it is tied to specific time frames/stages, what should these be and what exceptions should apply? What should the reductions be? What information should be made available to a defendant to allow an informed decision to enter a guilty plea and obtain the maximum discount?

**Questions** (see p 72)

10. Should all offenders who plead guilty be given a reduction in sentence for their guilty plea or should the court have the discretion to decide whether or not a guilty plea merits a reduction in sentence?
11. Should any category of offender or offence be automatically ineligible for a sentencing reduction for a guilty plea? If so, what nature or type of offences or offenders should be excluded?
12. Should there be a different sentencing discount scheme applicable to summary and indictable offences? If so, what should be the elements of the different schemes?

**Question 13** (see p 73)

Should the seriousness of the offence be a matter relevant to the sentencing discount for a guilty plea?

**Question 14** (see p 75)

Should the strength of the prosecution case be a matter relevant to the sentencing discount for a guilty plea?

**Question 15** (see p 76)

Should the actual benefit derived from a guilty plea in terms of time saving and the sparing of witnesses be a matter relevant to the sentencing discount for a guilty plea? Or should the narrow view be adopted, where the discount reflects the notional benefit to the system?

**Questions** (see p 77)

16. Should the circumstances of the plea be included as a matter relevant to the sentencing discount for a guilty plea?
17. Should the existence of a plea bargain be recognised as a matter relevant to the sentencing discount for a guilty plea? What should be the effect of a plea bargain?

**Question 18** (see p 78)

Should these factors be defined in statute (English approach), left to the discretion of the court with legislative clarification (as in NSW, South Australia and the ACT) or left completely to the court's discretion other than the timing of the plea (as in Victoria, Queensland, NT, Western Australia)? If some factors are set out in legislation, which ones should be included?

**Questions** (see p 81)

19. Should there be a statutory provision that allows the court to impose a sentence that is less than a mandatory minimum sentence in cases where an offender enters a plea of guilty?
20. If so, should it apply to all mandatory minimum sentences or should it only apply to mandatory minimum sentences that apply to indictable offences or some other category of offences or specific offence?
21. Should there be any additional conditions that restrict the availability of the sentencing discount?

22. If the court is able to provide a sentencing discount if an offender enters a plea of guilty to an offence attracting a mandatory minimum penalty with the result that the sentence would be below the mandatory minimum penalty, should an offender be entitled to the same discount as if the mandatory minimum penalty did not exist (that is, the usual discount scheme) or should it be a reduced discount?

**Question 23** (see p 86)

What issues do you see in relation to the imposition of a global sentence arising from the introduction of a statutory discount for a guilty plea?

**Question 24** (see p 87)

Are there any provisions that provide specific challenges to the operation of a statutory sentencing discount scheme?



# **1 Introduction**

## **1.1 Background to this paper**

In August 2017, the Acting Attorney-General and Acting for and on behalf of the Minister for Justice, the Hon Matthew Groom MP, requested that the Sentencing Advisory Council (the ‘Council’) examine and report on a statutory sentencing discount for pleas of guilty in Tasmania. This was a response to concerns in relation to delay in criminal proceedings and late-resolving guilty pleas, in particular the significant impact on the efficiency of the administration of justice and the court system and the unnecessary additional stress and trauma for victims, victims’ families and other vulnerable participants in the criminal trial process. The Government considered that the introduction of a statutory sentencing discount for pleas of guilty may have the potential to encourage appropriate pleas of guilty thereby reducing unnecessary delays and demands on the court system. However, the government noted that the introduction of a statutory discount for pleas of guilty required careful consideration so that unintended consequences that derogate from a defendant’s right to plead not guilty and receive proper advice of the case against him or her are not affected.

## **1.2 Terms of reference**

I request that the Sentencing Advisory Council examine a statutory sentencing discount for pleas of guilty in Tasmania. The Terms of Reference are as follows:

1. Examine the current approach of Tasmanian courts to the reduction of sentence where a defendant enters a plea of guilty.
2. Research legislative approaches in other jurisdictions of Australia and overseas, including any analysis of any impact of a statutory reduction in sentence on the court system.
3. Examine whether existing sentencing and penalties legislation in Tasmania provide specific challenges to the introduction of a statutory framework for the reduction in sentence for a plea of guilty, including whether there should be any exemptions (for example, drink driving and traffic offences).
4. Examine any challenges to the application of a statutory framework for reduction in sentences for pleas of guilty that may arise from global sentencing practices, with particular regard to related charges and mixed pleas.
5. Provide advice as to the appropriate parameters for the introduction of a statutory framework for the reduction in sentence for pleas of guilty, including —
  - a. the amount of a statutory reduction in sentence that should be applied where a defendant enters a plea of guilty to offences and how that reduction should be framed;
  - b. the amount of statutory reduction that should be applied where a defendant enters a plea of guilty to offences attracting a mandatory minimum sentence and how that reduction should be framed;
  - c. whether any additional factors (such as, but not limited to, the strength of the prosecution case, whether a victim has given evidence and the stage of the plea in the criminal process) ought to be considered and if so, how;

- d. whether characteristics of a defendant should be relevant to eligibility for statutory reduction of sentence including, but not limited to, previous convictions and juvenile offenders;
- e. the nature and type of offences that should be excluded from a statutory reduction of sentence for a plea of guilty; and
- f. any other matters considered relevant to the scope of a statutory reduction in sentence scheme.

### 1.3 Sentencing discount for a guilty plea

All Australian jurisdictions recognise a plea of guilty as a mitigating factor in sentencing, either in statute or through the common law.<sup>1</sup>

#### 1.3.1 Basis for a sentencing reduction for a plea of guilty

There are various reasons for a reduction in sentence for a plea of guilty. These include that it:

- (1) demonstrates remorse, and ‘by extension cast[s] light on the offender’s prospect of rehabilitation’;<sup>2</sup>
- (2) has a pragmatic, utilitarian value to the criminal justice system and the community. As Freiberg has observed, this includes ‘the cost saving to the prosecution, legal aid and the court system generally of trial, as well as the avoidance of trauma for victims and witnesses, and the desire to encourage other defendants who are similarly situated’.<sup>3</sup>

The public interest in a plea of guilty was summarised in *Cameron v The Queen*<sup>4</sup> by Kirby J to include:

the fact that a plea of guilty saves the community the cost and inconvenience of the trial ... which must otherwise be undertaken. It also involves a saving in costs that must otherwise be expended upon the provision of judicial and court facilities; prosecutorial operations; the supply of legal aid to accused persons; witness fees; and the fees paid, and inconvenience caused, to any jurors summoned to perform jury service. Even a plea at a late stage, even one offered on the day of the trial or during a trial, may, to some extent, involve savings of all these kinds.

Given that under our criminal justice system it is the right of the accused to put the State to the proof of the crime charged; given that by pleading guilty the accused surrenders any chance of being acquitted, even undeservedly; and given some empirical evidence that sentences following contested trials are not always substantially different from sentences upon a plea, it is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt. Doing this helps ease the congestion in the courts that delay the hearing of such trials as must be held. It also encourages the clear-up rate for crime and so vindicates public confidence in the processes established to protect the community and uphold its laws. A plea of guilty may also help the victims of crime to put their experience behind them; to

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<sup>1</sup> See further Chapter 3 and [4.1].

<sup>2</sup> Sentencing Advisory Council, Victoria (VSAC), *Guilty Pleas in the Higher Courts: Rates, Timing and Discounts* (2015) 2.

<sup>3</sup> Arie Freiberg, *Fox and Freiberg’s Sentencing: State and Federal Law in Victoria* (Thomson, 3<sup>rd</sup> ed, 2014) 378.

<sup>4</sup> (2002) 209 CLR 339, [66]–[67] (footnotes omitted).

receive vindication and support from their families and friends and possibly assistance from the community for injuries they have suffered.<sup>5</sup>

Over time, there has been a paradigm shift from earlier cases where there was no clear agreement that a plea of guilty alone could mitigate sentence.<sup>6</sup> Instead, it only provided a basis for mitigation of sentence where it was the result of ‘genuine remorse or where it resulted from a willingness to cooperate in the administration of justice, by saving the expense and inconvenience of a trial or the necessity of witnesses to give evidence’.<sup>7</sup> More recently, case law and statute have recognised that an offender is entitled to a discount as a result of pleading guilty, regardless of motivation.<sup>8</sup> In jurisdictions that have created statutory provisions providing a discount for a guilty plea, it is this utilitarian purpose that is typically recognised. In other words, the discount is usually granted ‘for the administrative benefits that flow to the system’,<sup>9</sup> and, so, the timing of the plea is important. This is because ‘the earlier the plea, the greater the saving to the State and the greater the potential discount for its utilitarian benefit’.<sup>10</sup>

### 1.3.2 Reasons for introducing a statutory sentencing discount for a plea of guilty

A statutory sentencing discount for pleas of guilty can be supported on the basis that it provides greater certainty for offenders. From an offender’s point of view, the creation of a statutory sentencing discount may produce a belief that a guilty plea will have a worthwhile outcome, in terms of a quantifiable discount.<sup>11</sup> In the Director of Public Prosecutions’ 2012–13 Annual Report, it was observed that there had been a drop in the number of matters finalised by pleas of guilty. He stated that it ‘may be that there is a perception among defendants that there is insufficient incentive to plead guilty as there is little clear difference between a sentence imposed on a plea of guilty and a sentence imposed following a finding of guilt by trial for an otherwise comparable crime’.<sup>12</sup> This has been recognised by the High Court in *Cameron’s* case, where Kirby J stated:

If the prisoner and the prisoner’s legal advisers do not know the measure of the discount, it cannot be expected that pleas of guilty will be encouraged in proper cases. ... Knowing that such a discount will be made represents one purpose of such discounts.<sup>13</sup>

This is also supported by research conducted by the Australian Institute of Criminology (AIC), which identified scepticism by defendants and defence counsel about the discounts awarded for an early plea, in circumstances where the discounting system is not transparent.<sup>14</sup> Accordingly, a statutory scheme may encourage offenders to enter a plea of guilty, or to enter an early plea of guilty, by

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<sup>5</sup> Ibid 360–361, [66]–[67].

<sup>6</sup> Geraldine MacKenzie, ‘The Guilty Plea Discount: Does Pragmatism Win Over Proportionality and Principle?’ (2007) 11 *Southern Cross University Law Review* 205, 208.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid 210.

<sup>9</sup> John Willis, ‘New Wine in Old Bottles: The Sentencing Discount for Pleading Guilty’ (1995) 13 *Law in Context* 39, 40.

<sup>10</sup> Freiberg, above n 3, 380.

<sup>11</sup> Willis, above n 9, 67; See discussion in New South Wales Law Reform Commission (NSWLRC), *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2014) 5; NSWLRC, *Encouraging Appropriate Early Guilty Pleas*, Final Report 141 (2014) 9.

<sup>12</sup> Director of Public Prosecutions, Tasmania, *Annual Report 2012–13* (2013) 2. Subsequent annual reports do not mention this issue.

<sup>13</sup> (2002) 209 CLR 339, 362.

<sup>14</sup> Jason Payne, *Criminal Trial Delays in Australia: Trial Listing Outcomes* (AIC, Research and Public Policy Series no 74, 2007) 48–49.

clearly establishing that there is an appreciable difference in the sentence imposed following a plea (compared to where a defendant unsuccessfully contests guilt).<sup>15</sup>

A statutory sentencing discount may also provide greater certainty for victims. If an offender enters an early plea, this may reduce the stress for victims by avoiding ‘many months, if not years, of prolonged distress and uncertainty awaiting the commencement of the trial’.<sup>16</sup> However, there are also concerns that, from the ‘victims’ perspective, sentence discounts for [the utilitarian benefit that a guilty plea gives to the criminal justice system] can appear to be unjust’.<sup>17</sup> The reduction in sentence may mean that the sentence does not, from a victim’s point of view, reflect the criminality of the offence. There has also been a perception that the ‘concept of “discount” [was] perceived as somehow “discounting” what [had] occurred to them’.<sup>18</sup>

In addition, it can be argued that a statutory sentencing discount for a guilty plea may have a positive effect on the court system in terms of facilitating earlier guilty pleas. It has been asserted that the ‘late identification of guilty pleas is a major source of inefficiency in the criminal justice system’.<sup>19</sup> As discussed, prosecution, police and defence resources have been wasted preparing for a trial that does not eventuate, if an offender enters a late guilty plea. This also contributes to an increase in court delay.<sup>20</sup> However, there is very little research that has examined the effect of legislation aimed at encouraging a guilty plea on the defendant’s decision to enter a plea or the consequences for the criminal justice system. As VSAC has observed, ‘[t]here does not seem to be a clear correlation between the provision of a specified reduction in sentence for a guilty plea and timeliness: some of the Australian jurisdictions that have provided more explicit guidance on the reduction in sentence ... nevertheless continue to face challenges posed by delay’.<sup>21</sup> While some emerging research does suggest that statutory sentencing discounts for a guilty plea can influence offender plea behaviour, it remains less clear that changing defendant plea behaviour can make any meaningful reduction in court delay. This is discussed further at [4.2].

### 1.3.3 Concerns raised about the sentencing discount for a guilty plea

There are criticisms of sentencing discount for guilty pleas. It has been argued that ‘[t]here is no clear *principled* criminological basis for punishing offenders who plead guilty less severely than those who elect to proceed to trial’.<sup>22</sup> Further, it can be seen to be contrary to the presumption of innocence by, in effect, penalising offenders who elect to proceed with a trial.<sup>23</sup> In *Cameron v The Queen*,<sup>24</sup> the High Court sought to explain the distinction between the sentencing discount for a guilty plea and the rule that an offender cannot be punished more severely for having elected for a trial in the following way:

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<sup>15</sup> It is noted that Leverick suggests that the role of sentencing discount could be constructed cynically so that the benefit is not so much in encouraging defendants to enter a guilty plea but as a ‘device that defence solicitors can draw on to justify their actions when advising clients that a guilty plea is in their best interests’: Fiona Leverick, ‘Tensions and Balances, Costs and Rewards: The Sentence Discount in Scotland’ (2004) 8 *Edinburgh Law Review* 360, 378.

<sup>16</sup> NSWLRC, Final Report, above n 11, 9.

<sup>17</sup> *Ibid* 224.

<sup>18</sup> *Ibid*.

<sup>19</sup> Willis, above n 9, 67. This is discussed further at [2.3.3].

<sup>20</sup> Don Weatherburn and Jacqueline Fitzgerald, *Trial Court Delay and the NSW District Criminal Court* (BOCSAR, Crime and Justice Bulletin Contemporary Issues in Crime and Justice 184, 2015) 7 - 8.

<sup>21</sup> VSAC, *Sentence Indication and Specified Sentence Discounts*, Final Report (2007) 27.

<sup>22</sup> Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 3<sup>rd</sup> ed, 2016) 313.

<sup>23</sup> *Ibid* 323.

<sup>24</sup> (2002) 209 CLR 339.

Although a plea of guilty may be taken into account in mitigation, a convicted person may not be penalised for having insisted on his or her right to trial. The distinction between allowing a reduction for a plea of guilty and not penalising a convicted person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction.<sup>25</sup>

However, the subtlety of the distinction can be difficult to grasp, especially from the point of view of an offender who has exercised his or right to plead not guilty.<sup>26</sup>

The potential for disparity in the sentence received if an offender enters a plea of guilty compared to an offender who elects to go to trial may result in injustice and unfairness. As MacKenzie has pointed out, there may be ‘a number of compelling and entirely justifiable reasons why [an offender may wish to exercise their right to a trial], in addition to the basic right of the accused to put the Crown to proof’.<sup>27</sup> These might include a case where the accused elects to put the Crown to proof because they have no memory of the events (such as resulting from drugs or intoxication or temporary amnesia following a car crash).<sup>28</sup> Another situation where a person elects to go to trial may be where there is the arguable defence to the charge. In these circumstances, MacKenzie argues that the offender ‘is placed in an unfair and disadvantageous position simply because they exercised their right to trial, despite the fact that they may have done so for legitimate, valid and entirely justifiable reasons, both on legal and ethical grounds’.<sup>29</sup> Accordingly, ‘[i]t is difficult to see how this situation is anything but discriminatory against the accused who exercises their right to trial’.<sup>30</sup>

Concerns have also been expressed about the pressure that may be placed on an innocent offender to enter a plea of guilty.<sup>31</sup> In their opposition to discounts for guilty pleas, Mack and Roach Anleu wrote that:

it puts an inappropriate burden on the accused’s choice to plead guilty, undermines proper sentencing principles, risks inducing a guilty plea from the innocent, undermines judicial neutrality and independence, and does not directly address the problems of time and delay which motivated its introduction by the courts.<sup>32</sup>

Ashworth has also observed that there is pressure placed on offenders, particularly when a custodial sentence would follow a guilty finding at trial but a guilty plea would result in a non-custodial sentence, and that evidence exists ‘that some innocent defendants may succumb to this pressure and decide to “cut their losses” by pleading guilty’.<sup>33</sup> Others have also expressed concern that the recognition of a guilty plea as a mitigating factor amounts to an inducement. Findlay et al, have observed that, ‘[i]t is a paradox [that] courts are diligent to prevent ... pressure or inducement ... to bring about an admission ... and yet with ... the plea of guilty such inducements have become

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<sup>25</sup> (2002) 209 CLR 339 [12] (Gaudron, Gummow and Callinan JJ).

<sup>26</sup> In his dissent in *R v Shannon* (1979) 21 SASR 442, Cox J stated that ‘he is convicted by the jury, and in accordance with the submission he will get a longer sentence than his colleague for no other reason than that his colleague pleaded guilty. He will need a very subtle mind, unusually sympathetic to the ways of the law, if he is to understand that he is going to prison for a longer term, not because he pleaded not guilty, but because he failed to plead guilty’: at 458–459.

<sup>27</sup> MacKenzie, above n 6, 215.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid 216.

<sup>30</sup> Ibid 217. See also Mike McConville and Luke Marsh, ‘Factory Farming and State-Induced Pleas’ in Jill Hunter, Paul Roberts, Simon Young and David Dixon (eds), *The Integrity of Criminal Process: From Theory into Practice* (Hart Publishing, 2016) 99.

<sup>31</sup> Julian Roberts and Ben Bradford, ‘Sentence Reductions for a Guilty Plea in England and Wales: Exploring New Empirical Trends’ (2015) 12 *Journal of Empirical Legal Studies* 187, 187.

<sup>32</sup> Kathy Mack and Sharyn Roach Anleu cited in Australian Law Reform Commission (ALRC), *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) 311.

<sup>33</sup> Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6<sup>th</sup> ed, 2015) 179.

institutionalised'.<sup>34</sup> Although it is not possible to determine the number of innocent offenders who have pleaded guilty, it has been argued that 'the discount coerces at least some innocent offenders to plead guilty'.<sup>35</sup> Research conducted in England that examined offenders' decisions to plead guilty found that, based on conversations with defence counsel, considerations of sentence predominated over the issue of guilt or innocence.<sup>36</sup>

#### 1.3.4 Systemic obstacles to early guilty pleas

In addition, commentators have highlighted that the creation of a statutory discount for a guilty plea as a means to encourage early pleas needs to be viewed in the context of other systemic features of the criminal justice system that may be obstacles to early guilty pleas. VSAC research has surveyed offender attitudes to entering a guilty plea and reported that 'finalising the case was an important consideration: [offenders] were not motivated to prolong the proceedings, and stressed the importance of avoiding a long court case'.<sup>37</sup> However, as Willis has observed, there may be good reasons why an offender may enter a late plea of guilty as there may be inadequate early disclosure as well as substantial benefits that may be gained by not pleading guilty until late in the proceedings in terms of plea bargaining.<sup>38</sup> These factors are discussed further at [2.3].

### 1.4 The Council's approach

In examining the issues associated with the introduction of a statutory reduction in sentence for a guilty plea, the Council is mindful of the caution of VSAC 'about the use of incentives to influence decisions made by participants in criminal proceedings' and the need to be cautious about 'placing undue emphasis on efficiency at the expense of justice'.<sup>39</sup> Nevertheless, the Council notes that a clear majority of offenders enter a plea of guilty and that 'securing appropriate guilty pleas early in a criminal matter is desirable and indeed necessary for the effective and efficient operation of the criminal justice system'.<sup>40</sup> Accordingly, in examining the issues associated with introducing a statutory sentencing discount for pleas of guilty in Tasmania, the Council's approach is to focus on encouraging those offenders who wish to enter a guilty plea to do so earlier in the process rather than attempting to encourage more offenders to enter guilty pleas. This balance may be difficult to realise.

The Council is also aware that a range of considerations may affect an offender's decision in relation to the timing of a plea of guilty and so it is necessary to consider the sentencing discount in the context of other obstacles that may exist within the criminal justice system to the timely entering of a plea of guilty. It is the Council's view that any sentencing discount scheme for a guilty plea will need to be accompanied by reforms to pre-trial criminal procedure which will ensure that there is early disclosure of the case against the defendant and that there is certainty in relation to the charges that an offender will face if the matter proceeds to trial. Measures must also be taken to address other systemic factors in the criminal justice process that lead to unnecessary delay and expense. In this

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<sup>34</sup> Bagaric and Edney, above n 22, 326 citing Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (1994) 114–115.

<sup>35</sup> Bagaric and Edney, above n 22, 326. See Juliet Horne, *A Plea of Convenience: An Examination of the Guilty Plea in England and Wales* (PhD Thesis, University of Warwick, School of Law, 2016) 50–55.

<sup>36</sup> Ibid 179–180.

<sup>37</sup> VSAC, above n 21, 24.

<sup>38</sup> Willis, above n 9, 67–68.

<sup>39</sup> VSAC, above n 21, 16.

<sup>40</sup> NSWLRC, Final Report, above n 11, 7.

context, the Council cautions against viewing the introduction of a sentencing discount scheme as the ‘solution’ to court delay and backlogs.

## 1.5 Scope of this paper

This paper examines the approach taken to the provision of a sentencing discount for pleas of guilty, including the structure and effect of statutory sentencing discount schemes that exist in other jurisdictions.

Chapter 2 presents statistics in relation to the current status of guilty pleas in Tasmania. It provides an overview of the procedure for the disposition of criminal offences in Tasmania and considers the extent of trial delay in Tasmania. It also considers research that examines the reasons for delay and consequences of delay.

Chapter 3 examines the current approach of Tasmanian courts to reduction of sentence where a defendant enters a plea of guilty.

Chapter 4 examines legislative approaches to sentencing discounts for pleas of guilty in other Australian jurisdictions and comparable international jurisdictions. It also considers any analyses of the impact of a statutory reduction for a guilty plea on the court system.

Chapter 5 provides an overview of the possible models that may be used for the introduction of a statutory framework to reduce sentences for pleas of guilty in Tasmania. It also considers challenges that may arise in the Tasmanian context from existing sentencing and penalties legislation and sentencing principles from the introduction of a statutory framework for the reduction in sentence for pleas of guilty.

It is noted that the Council has only examined the introduction of a statutory sentencing discount scheme in the context of the *Sentencing Act 1997* (Tas) and has not considered this issue in the context of the *Youth Justice Act 1997* (Tas). This means that this report only addresses adult offenders and young offenders sentenced under the *Sentencing Act 1997* (Tas). The Terms of Reference ask the Council to provide advice on whether the characteristics of a defendant should be relevant to eligibility for the statutory reduction of sentence for juvenile offenders. In Tasmania, a youth is defined as person who is 10 or more but less than 18 at the time the offence was committed.<sup>41</sup> Depending on the offence, a youth may be sentenced under the *Youth Justice Act 1997* (Tas) or as an adult under the *Sentencing Act 1997* (Tas). If a youth is sentenced under the *Sentencing Act 1997* (Tas), the Council’s view is that the same principles that apply to adult offenders should apply. The Council has not considered the issue of a statutory recognition of a guilty plea discount under the *Youth Justice Act 1997* (Tas) given the different theoretical principles and practical context that exists in relation to the operation of this Act.

Further, this paper does not consider the possibility of the introduction of a sentence indication scheme in the Supreme Court (as currently exists in the Magistrates Court with the contest mention process). This is beyond the scope of this reference but this may be an initiative that could be considered as part of a broader systemic response to address delay.

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<sup>41</sup> *Youth Justice Act 1997* (Tas) s 3.

## 2 Criminal procedure and the current status of guilty pleas in Tasmania

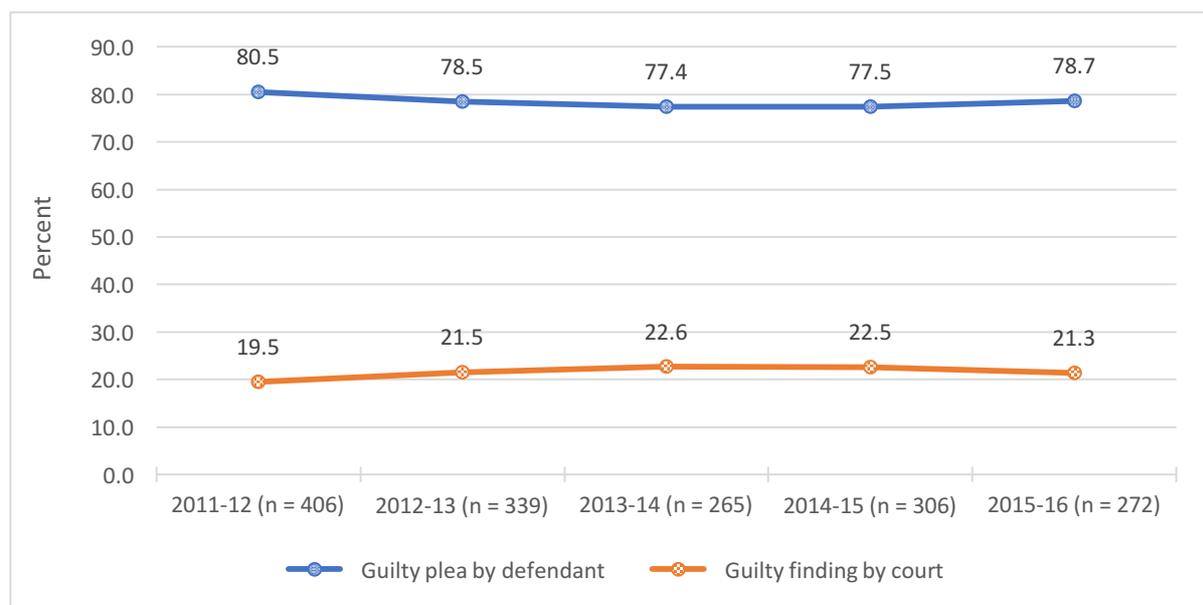
This chapter presents statistics in relation to the current status of guilty pleas in Tasmania. It also provides an overview of the procedures for the disposition of criminal offences in Tasmania and considers the extent of trial delay in Tasmania. This will provide a framework to consider the appropriate parameters for the introduction of a statutory framework for the reduction in sentence for pleas of guilty, including an understanding of the timing of pleas. It also considers research that examines the reasons for delay and consequences of delay.

### 2.1 Pleas of guilty

#### 2.1.1 Rates of guilty pleas

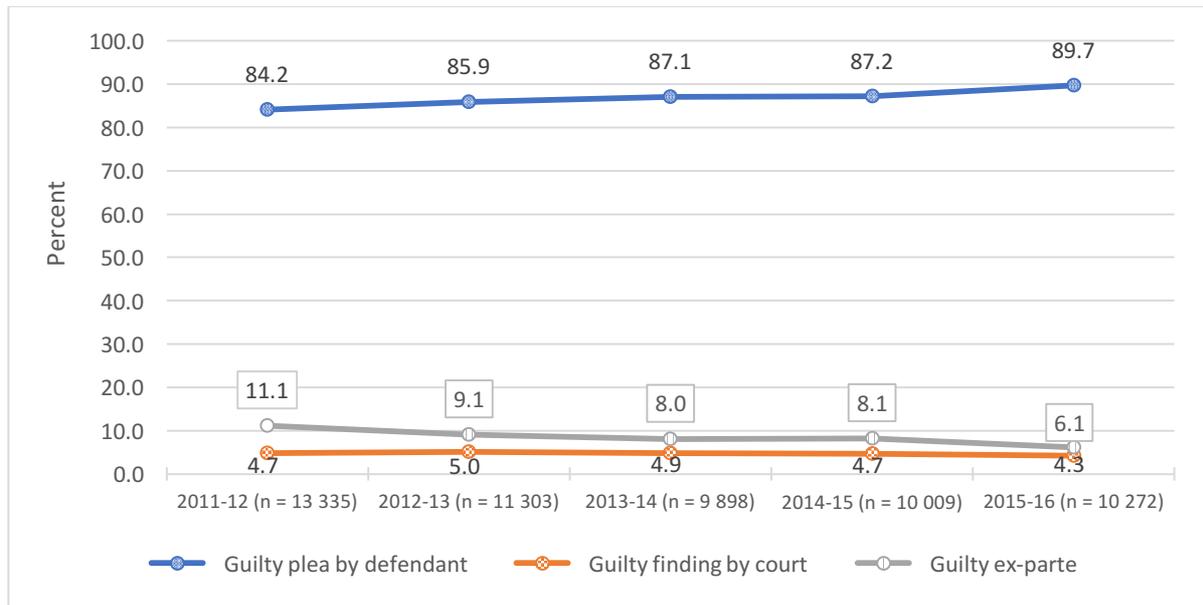
Most offenders sentenced in the Tasmanian courts plead guilty. In the Supreme Court, over the period 2011–12 to 2015–16, 78.6% of defendants in cases where the defendant was proven guilty were finalised by a guilty plea. This accounts for 1249 out of 1588 defendants. Figure 2.1 shows the percentage for each financial year in the period, which ranged from 80.5% in 2011–12 to 77.4% in 2013–14. In the Magistrates Court, 86.3% of defendants in cases where the defendant was proven guilty were finalised by a guilty plea. Figure 2.2 shows the percentage for each financial year in the period, which ranged from 84.2% in 2011–12 to 89.7% in 2015–16. In the Children’s Court, 93.6% of defendants in cases where the defendant was proven guilty were finalised by a guilty plea. Figure 2.3 shows the percentage for each financial year in the period, which ranged from 95.1% in 2011–12 to 92.9% in 2015–16.

**Figure 2.1: Percentage of finalised defendants proven guilty by a guilty plea in the Supreme Court, 2011–12 to 2015–16<sup>42</sup>**

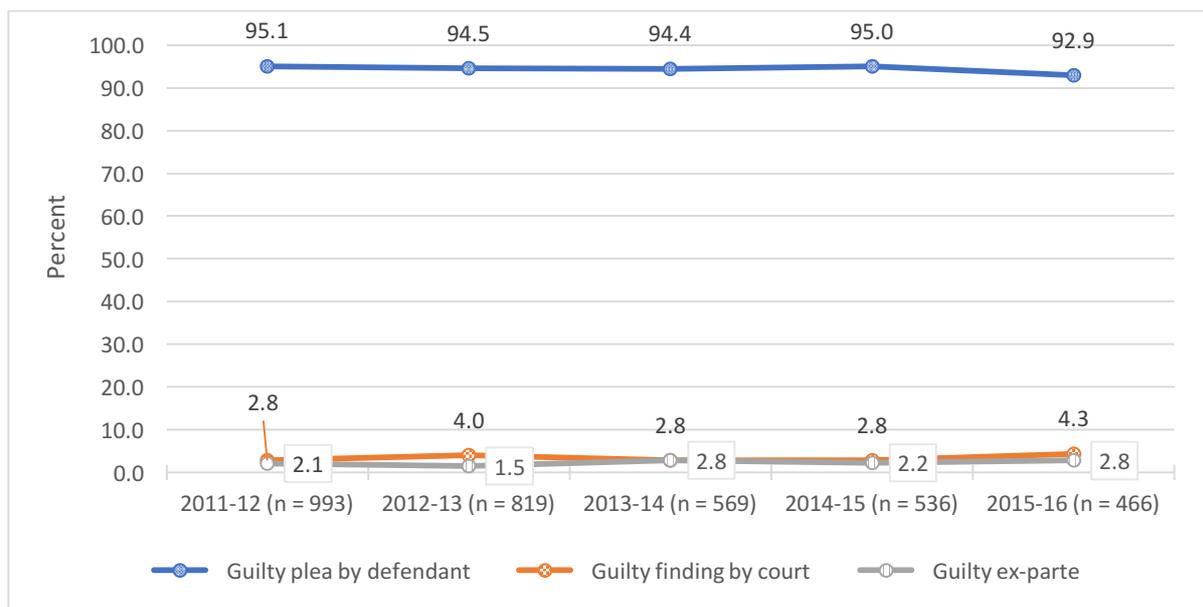


<sup>42</sup> Australian Bureau of Statistics (ABS), *Criminal Courts, Australia, 2015–16*, Cat 4513.0 (2017).

**Figure 2.2: Percentage of finalised defendants proven guilty by a guilty plea in the Magistrates Court, 2011–12 to 2015–16<sup>43</sup>**



**Figure 2.3: Percentage of finalised defendants proven guilty by a guilty plea in the Children’s Court, 2011–12 to 2015–16**

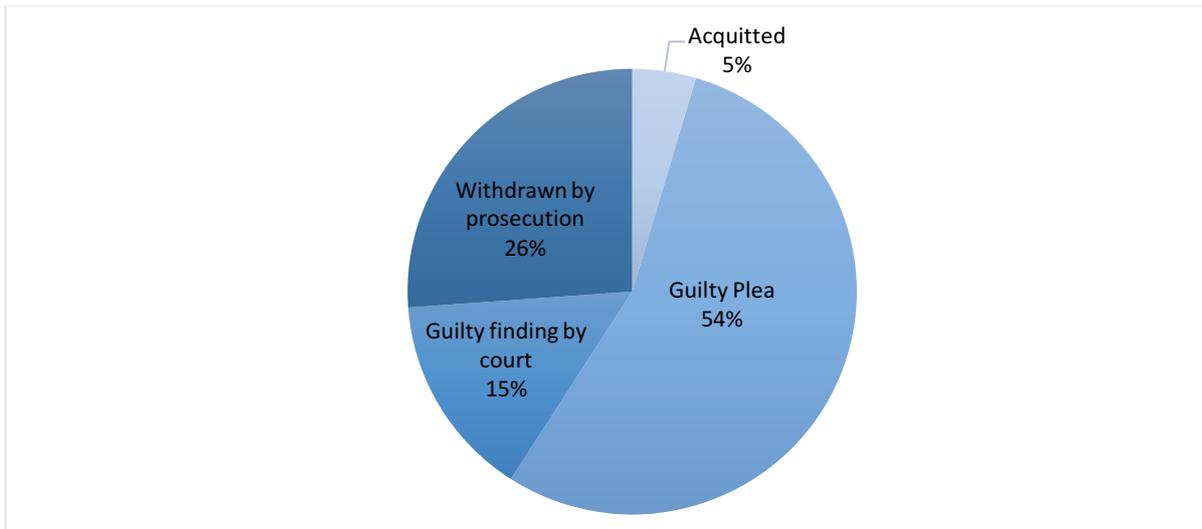


In the Supreme Court, for defendants finalised in 2015–16, there were 295 adjudicated outcomes, 25 matters transferred to another court and 103 matters withdrawn by the prosecution.<sup>44</sup> As shown in Figure 2.4, 54% of defendants were finalised by a plea of guilty (n = 214), 15% were finalised by a guilty finding (n = 58) and 5% were acquitted (n = 18).

<sup>43</sup> Ibid.

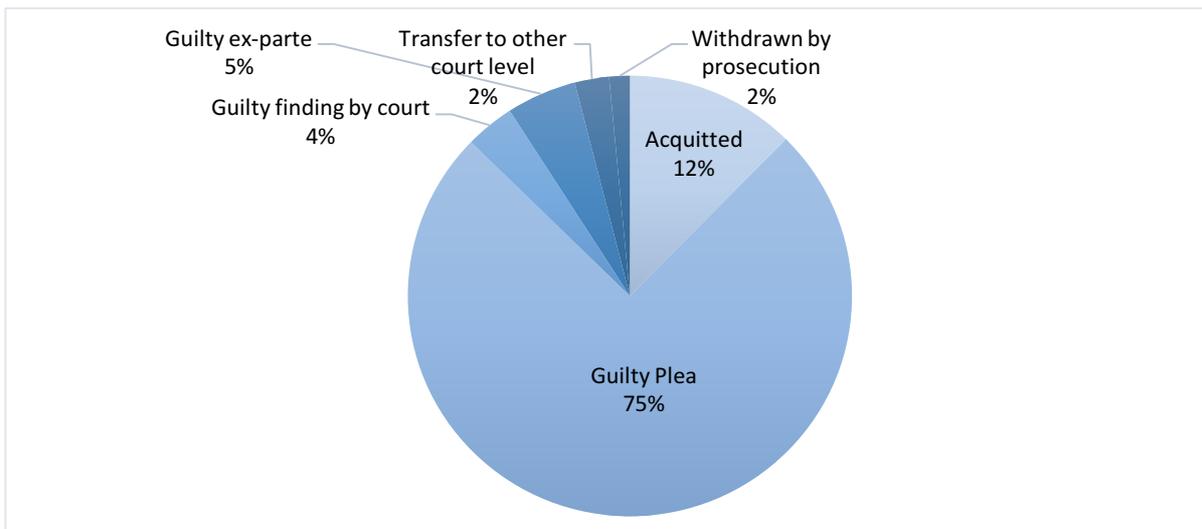
<sup>44</sup> Ibid.

**Figure 2.4: Defendants finalised: Method of finalisation, Supreme Court, 2015–16<sup>45</sup>**



In the Magistrates Court, for defendants finalised in 2015–16, there were 11 796 adjudicated outcomes, 187 matters withdrawn by the prosecution and 312 defendants that were transferred to another court. As shown in Figure 2.5, 75% of defendants were finalised by a plea of guilty (n = 9 210), 4% were finalised by a guilty finding (n = 437), 5% were finalised by an ex-parte guilty finding (n = 625) and 12% were acquitted (n = 1 524).

**Figure 2.5: Defendants finalised: Method of finalisation, Magistrates Court, 2015–16<sup>46</sup>**



### 2.1.2 Timing of guilty pleas

Limited information is currently readily available about the timing of pleas in Tasmania. This makes it difficult to gauge the extent of late pleas in Tasmania, and also makes it difficult to evaluate whether any sentencing reform is effective in changing the plea behaviour of offenders. Since the beginning of 2017, the Office of the Director of Public Prosecutions has kept records that identify

<sup>45</sup> Ibid. This relates to 398 defendants. This excludes defendants who were deceased, unfit to stand trial, transferred to non-court agencies, other non-adjudicated outcomes and cases where the method of finalisation could not be determined (n = 25).

<sup>46</sup> Ibid. This relates to 12 295 defendants. This excludes defendants who were deceased, unfit to stand trial, transferred to non-court agencies, other non-adjudicated outcomes and cases where the method of finalisation could not be determined (n = 3).

cases that were listed for trial in the next court sitting period that were resolved by a plea of guilty. This provides some indication of the extent of late pleas of guilty.

**Table 2.1: Pleas entered after set down for trial in the Supreme Court, 2017<sup>47</sup>**

	<b>Completed trials</b>	<b>Pleas of guilty after listed in trial grid</b>
February 2017	11	7
March/April 2017	12	7
May 2017	14	5
June 2017	13	7
July/August 2017	10	2
September 2017	12	4
October/ November 2017	11	4
November/December 2017	7	3

As indicated at [3.2], there is some information about the timing of pleas in the comments on passing sentence in 240 cases decided in the Supreme Court between 2015 and 30 June 2017, and in 51 of these cases the plea could be described as a late plea. However, this is reliant on comment being made by the sentencing judge and, accordingly, only presents an incomplete picture.

In the Magistrates Court, there is information about matters that resolved by a late plea for a six-month period in 2006. It has not been possible to obtain more recent information.

**Table 2.2: Summary of Outcomes for Listed Trials, Magistrates Court, January – May 2006**

	<b>Number</b>	<b>%</b>
<b>Total</b>	2272	
<b>Proceeded to trial/hearing</b>		
Full or part heard	638	28.1
<b>Did not proceed</b>		
Adjourned	943	41.5
Guilty Plea	288	12.7
Withdrawn	403	17.7
Not reached by court	0	0
Other	0	0

Data from the Magistrates Court in 2006 indicated that only 28% of matters proceeded on the day that the matter was listed for trial with a guilty plea being entered accounting for 17.6% of cases (288 out of 1634). A larger proportion of cases did not proceed because the matter was withdrawn (24.7%) or the matter was adjourned (57.7%). In relation to the 943 cases where the matter was adjourned, the defendant did not appear in 296 cases and various other reasons were identified in relation to the remaining 647 cases.<sup>48</sup> AIC research found that of those matters that did not proceed when listed

<sup>47</sup> Information provided by Linda Mason, DPP. Note that the Burnie information was provided to October 2017 and Launceston to October/November. The Hobart information includes pleas entered by 28 November 2017.

<sup>48</sup> Payne, above n 14, 22. Other categories (which did not have any cases) were that witnesses were not available/did not appear, or that the defence or prosecution were not ready: at 22. It is unclear what reasons fell into the other category.

(71.9%), 41.5% were adjourned and re-listed and 30.4% were finalised without a trial.<sup>49</sup> This may either have been because the matter was withdrawn or a plea of guilty was entered.

## 2.2 Criminal procedure

### 2.2.1 Indictable offences

The *Justices Act 1959* (Tas), the *Criminal Code*, the *Criminal Rules 2006* (Tas) and *Practice Direction 2* of 2017 govern pre-trial criminal procedure in the Supreme Court. Over time, changes have been made to the procedures applying to indictable offences with a view to reducing delay and inefficiencies, including the:

- Reduction of time elapsed between first appearance in a court of petty sessions and final disposition in the Supreme Court.
- Elimination of unnecessary committal hearings.
- Early indication of crime and crimes to be charged by indictment.
- Early identification and disposition of pleas of guilty.
- Elimination of unnecessary remand appearances.
- Certainty of trial date and elimination of adjournments.
- Reduction of costs.<sup>50</sup>

In 2017, the Supreme Court made changes to the arrangements that related to remand days and to directions hearings in criminal prosecutions to reduce the number of times that an accused person is required to attend court (which previously had resulted in matters being listed for mention unnecessarily), and to facilitate case management by judges.<sup>51</sup> It was indicated that the Supreme Court wished ‘to reduce the number of times that pending matters are listed before trial or plea. Ideally, matters should be listed only when that is desirable for cases management purposes’.<sup>52</sup> For this reason, directions hearings will be listed as required and the practice of listing most pending matters on the first day of each sitting will be discontinued.<sup>53</sup>

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<sup>49</sup> Payne, above n 14, 21.

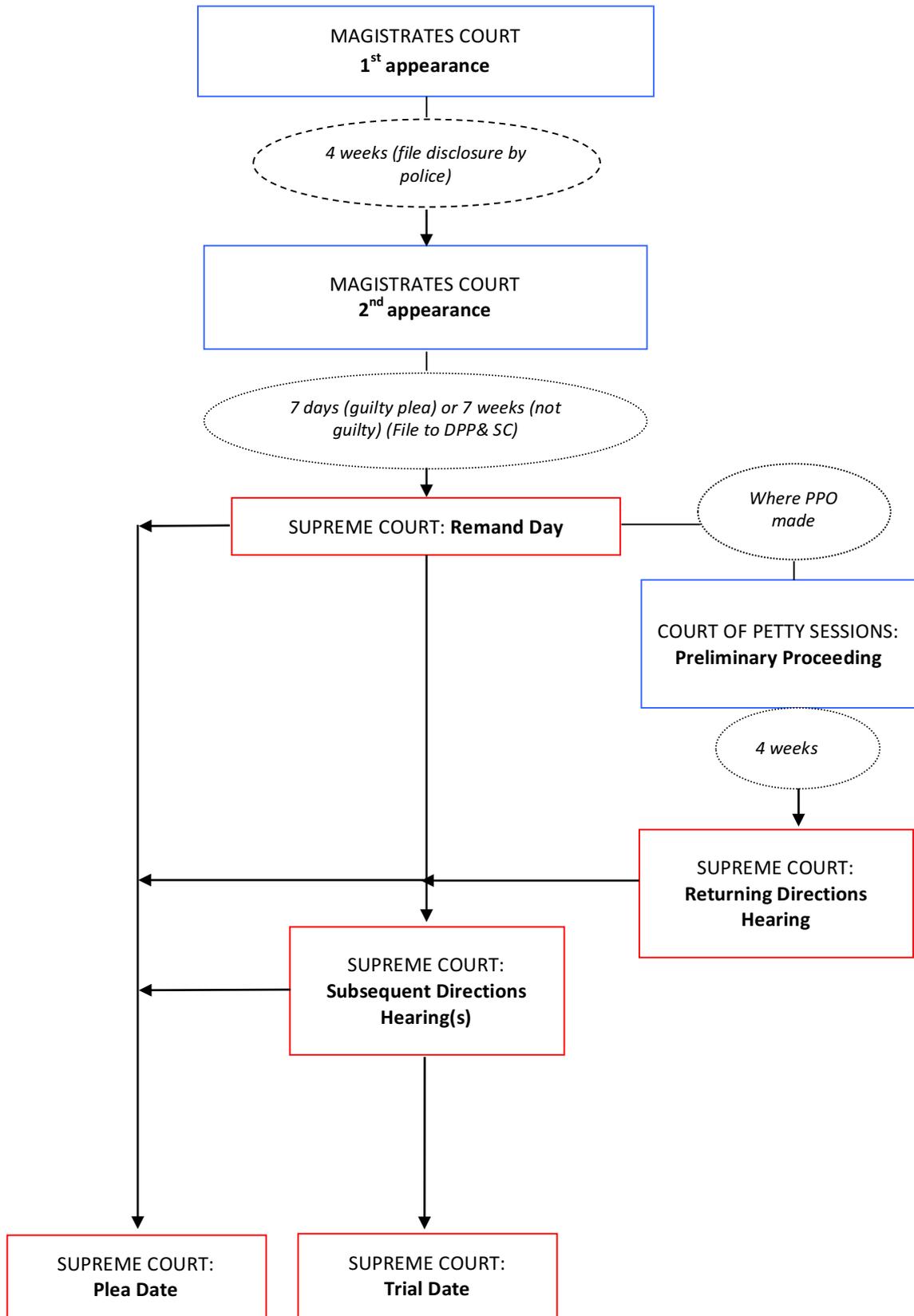
<sup>50</sup> Emily Warner, *A Guide to New Proceedings for the Disposition of Indictable Offences* (Supreme Court of Tasmania, 2010) 3.

<sup>51</sup> Supreme Court of Tasmania, ‘Directions Hearings in Criminal Cases’ (Practice Direction, no 2, 2017) 1.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

Figure 2.6: Pre-trial criminal procedure, Supreme Court Tasmania



In a summary of the process prepared by the Supreme Court (and adapted to take account of subsequent practice directions), the following stages (as set out in Figure 2.6) have been identified:

**(1) Stage 1. File Disclosure by Police Prior to Committal (Magistrates Court)**

Section 55 of the *Justices Act 1959* provides for an adjournment of 4 weeks between the defendant's first and second appearance in the Court of Petty Sessions. In this adjournment period section 56 provides that:

- any legal practitioner representing the defendant is to notify police of that fact and;
- police must provide the defendant or his [or her] legal counsel with the complaint; a copy of the transcript of any police interview (or an audiovisual copy, or viewing access to the same); copies of all witness statements; and a summary of the material facts relevant to the charge.
- There is also an ongoing duty on police to disclose any further witness statements or revised summaries of facts to the defendant if and when they come to light.

**(2) Stage 2: Plead/Elect and Committal Order on 2<sup>nd</sup> Appearance (Magistrates Court)**

Unless there is a further adjournment for some exceptional reason, section 59 of the *Justices Act 1959* provides that defendants will be called upon to plead to the complaint and make an election, if relevant, on their second appearance in the Court of Petty Sessions. If the crime is one that gives a defendant a right to elect a summary trial and an election for that mode of trial is made, the proceeding will be managed in the same way as all summary proceedings are managed in a court of petty sessions. If a defendant refuses to make an election he or she will be deemed to have elected a summary trial. If there is no election the defendant will be committed to the Supreme Court for sentence, or for trial according to the plea that has been entered. The office of the DPP will receive copies of the police file for review at this point (though police will retain the original file for any necessary further investigation) and will take over the conduct of the matter thereafter.

As a matter of practice, the minimum period of time between the committal order and the date of first appearance for the defendant in the Supreme Court will be:

- 7 days for a committal for sentence; and
- 7 weeks for a committal for trial.

The Court of Petty Sessions will therefore remand the defendant to appear in the Supreme Court on the next Remand Day, being the first day of the next Criminal Sittings that next occurs after 7 days, or 7 weeks, have elapsed, depending on the plea.

In cases of a committal for sentence the 7-day minimum period allows for a number of things to occur including:

- Receipt and review of the file by the office of the DPP;
- Filing of notice of legal representation with the Crown and the Supreme Court by the defendant's legal representative as required by the *Criminal Rules 2008*; and,
- Any necessary discussions between the Crown and the defendant's legal representative.

In cases of a committal for trial the 7-week minimum period allows for a number of things to occur including:

- Receipt and review of the file by the office of the DPP;

- Filing of notice of legal representation with the Crown and the Supreme Court by the defendant's legal representative as required by the *Criminal Rules 2008*;
- Complying with the practices outlined in Practice Direction 2 of 2016 with respect to giving notice of an intention to make an application for a preliminary proceedings order.

### **(3) Stage 3: Remand Day (1<sup>st</sup> Day of the Criminal Sittings)**

The *Criminal Rules 2008* provide that the first appearance of the accused after the committal order will be for a directions hearing. Practice Direction 2 of 2017 states that the warnings required under the *Criminal Code* s 331B(2)(c) and (d) in relation to alibi evidence and expert evidence will ordinarily be given.

After the first appearance, directions hearings will be listed as required. The practice of listing most pending matters on the first day of each sitting has been discontinued and directions hearings are listed at suitable times as considered necessary.

Section 331B of the *Criminal Code 1924* provides that if an accused, or a Crown law officer, requests that a preliminary proceedings order be made they must:

- identify the matter in respect of which the witness is to be questioned;
- specify why the evidence of the witness is relevant to that matter; and
- state why examination or cross-examination is justified.

Such examination of a witness will only be justified if there are "exceptional circumstances" in the case of witnesses in sexual offence cases and if it is "necessary in the interests of justice" in other cases.

Counsel are encouraged to arrange the order of directions hearings on Remand Day, and collaborate with the Supreme Court with respect to those arrangements, as occurs with respect to the arrangement of matters on a busy plea day.

### **(4) Stage 4: Preliminary Proceedings (Court of Petty Sessions)**

Preliminary proceedings take place in the Court of Petty Sessions before a Magistrate or a Justice of the Peace. The office of the Director of Public Prosecutions conducts preliminary proceedings before the Magistrate or Justice of the Peace.

Witnesses named in the preliminary proceedings order may be examined, cross-examined and re-examined in accordance with the order. The limits upon questioning are particularly strict where the proceedings involve a sexual offence. Justices can request that the Supreme Court give directions with respect to preliminary proceedings.

### **(5) Stage 5: Returning Directions Hearings (Supreme Court)**

At the conclusion of preliminary proceedings the accused is remanded to appear in the Supreme Court on the next occurring first day of a Criminal Sittings (Remand Day) not less than four weeks distant. It is anticipated that a record of the proceedings in the Court of Petty Sessions and transcript of the preliminary proceedings will have been filed with the Supreme Court and made available to the parties by this date.

### **(6) Stage 6: Subsequent Directions Hearings (Supreme Court)**

Subsequent directions hearings are listed at suitable times as considered necessary and in accordance with the requirements of the relevant matter. When an accused person appears before a judge before plea or trial, counsel will ordinarily be asked to inform the judge as to the following matters:

- Steps taken in relation to the case since the matter was last before a judge.

- Any further steps in relation to the case that have been agreed upon or proposed and when those steps will be taken.

The judge will then give any appropriate direction and adjourn the matters to an appropriate date for either a further directions hearing, a plea or trial.

There is also provision for the procedure that applies when an accused has a bail consent letter.

#### **(7) Stage 7: Supreme Court Mention (First Day of the Criminal Sittings)**

The general practice of listing most pending matters on the first day of each sitting has been discontinued.

#### **(8) Stage 8: Plea Date or Trial Date (Supreme Court)**

Pleas of guilty are listed for the third Wednesday of each criminal sitting. Counsel organise between themselves convenient times throughout the plea day in order to minimise expense and inconvenience of waiting for each matter to be called on.

The order of listings for trial is now determined by the judges in consultation with the Crown and collaboration with defence counsel.

Trial matters are listed to each week of the criminal sittings to commence during the relevant week. Adjournments are only to be granted in exceptional circumstances, or where there is insufficient court-time in that week for the matter to proceed to trial. The practice of listing matters for trial will be monitored and adjusted if necessary.

### **2.2.2 Summary offences**

In the Magistrates Court, each magistrate is responsible for the management of his or her own list. As with the Supreme Court procedure, the offender is able to obtain an adjournment of one month from their first appearance. At the offender's next appearance in court, there is an expectation that the offender will enter a plea. However, different magistrates may take different approaches to the requirement to enter a plea or to allow a further adjournment without a plea. This requirement is reflected in the Magistrates Court (Criminal and General Division) Bill 2017 (Tas), s 68 which provides that the defendant is to plead when he or she next attends court unless, in the interests of justice, the Court determines otherwise and further adjourns the proceedings.

#### ***Contest mention system***

Initially established as a pilot in 1996, the Magistrates Court has adopted a contest mention system as a means to facilitate the early resolution of matters where an offender intends to plead guilty. In its 2016–17 Annual Report, the Magistrates Court noted that 'the contest mention mechanism puts in place a process which enables a defendant, if they are going to plead guilty to an offence heard in the Magistrates Court, to do so at the earliest possible stage of the pre-trial proceedings'.<sup>54</sup> The contest mention system incorporates a sentence indication component that aims to identify cases that are 'defended solely as a result of an unjustified fear of the consequences of conviction'.<sup>55</sup> The contest mention system is also intended to address the problem of hearings being abandoned or guilty pleas entered at times when it was too late to enable other matters to be listed to use the hearing time that had become available.<sup>56</sup> An objective of the contest mention scheme is to facilitate early guilty pleas

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<sup>54</sup> Magistrates Court of Tasmania, *Annual Report 2016–17* (2017) <[http://www.magistratescourt.tas.gov.au/about\\_us/publications/annual-report-2016-2017](http://www.magistratescourt.tas.gov.au/about_us/publications/annual-report-2016-2017)>.

<sup>55</sup> Kate Warner, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002) 24.

<sup>56</sup> Magistrates Court of Tasmania, *Contest Mention* <[http://www.magistratescourt.tas.gov.au/OLD/nested\\_content/contest\\_mention](http://www.magistratescourt.tas.gov.au/OLD/nested_content/contest_mention)>.

by allowing an offender to be aware of the strength of the prosecution case and to address unrealistic fears of conviction that may be held by an offender by providing a sentence indication.<sup>57</sup> In addition, it aims to promote good case management by encouraging early communication between parties to narrow the issues in dispute and to concede facts and agree on common ground.<sup>58</sup> The guidelines set out the circumstances in which a sentence indication would be appropriate in a contest mention and the procedure that should apply:

**5.5. Sentence indication.**

- a. A sentence indication is appropriate where the general procedure has been followed and the magistrate is aware of all relevant factors and the matter is still to be contested.
- b. The indication should not be specific in terms of, for instance, length of imprisonment or amount of fine, only as to the type of sentence, for example, custodial/non-custodial, conviction/non conviction, licence retained/cancelled, community service order.
- c. If a sentence indication is given but the matter is still listed in for a contested hearing, the following procedure may still result in resolution:
  - (1) Ask the prosecutor if any proposals for withdrawals, amending of charges etc. put to the defence would still stand if the matter proceeded at a later date as a plea of guilty
  - (2) If so, indicate to the defence that the sentence indication would still stand if
    - (i) sufficient notice is given to enable the prosecutor to notify witnesses not to attend, and
    - (ii) sufficient notice is given to the magistrate's clerk to enable the contest date to be allocated to another contested matter.

The magistrate giving the indication would regard himself or herself part heard in these circumstances. A duly completed Sentence Indication Form should be placed on the court file. If the matter proceeds to contested hearing, the appropriate court clerk should at a time subsequent to that specified in paragraph 5.5(c)(2), but prior to the day of the contested hearing, place the Sentence Indication Form in a sealed envelope on the court file.

- a. It may not be appropriate in more complex cases to give an indication of sentence.
- b. The contest mention magistrate may take the view that a plea of guilty at contest hearing ought to attract the same sentencing 'discount' as may have been applicable if that plea had been entered at an earlier time.
- c. When providing a defendant with a sentence indication the magistrate should give the same effect to victim impact matters as would have been given in other circumstances.<sup>59</sup>

However, these are guidelines only, and some magistrates provide a more specific indication of the precise sentence contemplated following a guilty plea with the evaluation of the scheme stating that, 'in practice the Tasmanian approach is to provide sentence indications in specific terms (ie the length of any term of imprisonment or any amount of any fine)'.<sup>60</sup> Further, the evaluation also found that there is 'inconsistency amongst magistrates about the role and best use of contest mention hearings'.<sup>61</sup>

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<sup>57</sup> Katie McConnon and Victor Stojcevski, *Contest Mention Hearings Evaluation Report* (2012) 12.

<sup>58</sup> Ibid.

<sup>59</sup> Magistrates Court of Tasmania, above n 56; Ibid.

<sup>60</sup> McConnon and Stojcevski, above n 57, 22.

<sup>61</sup> Ibid 48.

While the scheme currently does not have a statutory basis, this will occur once the Magistrates Court (Criminal and General Division) Bill 2017 (Tas) is passed as the Bill contains provisions that formally recognise case management hearings. The aims of the case management hearing include to ‘explore the possibility of disposing of any such charge other than by way of the hearing of the charge’.<sup>62</sup> It will be possible for the court to indicate the sentence that it would impose on entering a plea of guilty.<sup>63</sup> The proposed legislation also ‘includes provisions for early prosecution disclosure, earlier entry of pleas, fewer adjournments, facilitating the summoning of police officers as witnesses, shorter preliminary proceedings on serious indictable charges, and straightforward methods of evidence presentation’.<sup>64</sup> The legislative package contains a number of initiatives, including:

- new case management procedures, standards, and sentence indication powers designed to promote the just and efficient determination of matters;
- a new prosecution and defence disclosure framework for disclosure of prosecution evidence and some defences;
- a new way of commencing criminal proceedings via a ‘court attendance notice’ instead of a ‘charge sheet’ or Complaint;
- new contempt of court powers and increased powers for the Court to control its own process;
- increased property value thresholds for matters that may be dealt with summarily in the Magistrates Court;
- a clear and contemporary scale of legal costs.<sup>65</sup>

**Table 2.3: Caseload and case outcome in the Contest Mention Court, Magistrates Court of Tasmania 2001–2012<sup>66</sup>**

Financial Year	Defendant’s referred to Contest Mention	Defendant’s sent to trial after Contest Mention		Defendant’s Plea of Guilty		Prosecution Matters Withdrawn (no evidence tendered)		Witnesses excused	Sitting Time saved
	No.	No.	%	No.	%	No.	%	No.	Hours
2001–02	1104	398	36	677	61	29	3	1632	1116
2002–03	1343	278	21	963	71	102	8	740	541
2003–04	1330	374	28	869	65	87	7	1220	706
2004–05	953	285	30	564	59	104	11	571	460
2005–06	1222	247	20	833	68	142	12	831	457
2006–07	1065	222	21	737	69	106	10	1414	897
2007–08	1337	189	14	1064	80	84	6	1138	657
2008–09	983	135	14	779	79	69	7	779	420
2009–10	1069	149	14	845	79	75	7	824	519
2010–11	1490	276	19	1093	73	121	8	1475	941
2011–12	2424	316	13	1878	77	230	10	1981	1293

<sup>62</sup> Magistrates Court (Criminal and General Division) Bill 2017 (Tas) cl 71(4)(b).

<sup>63</sup> Ibid cl 75(1).

<sup>64</sup> Magistrates Court of Tasmania, above n 54.

<sup>65</sup> Ibid.

<sup>66</sup> VSAC, above n 21, 64 citing Magistrates Court of Tasmania, *Annual Report 2004–05*, 79; McConnon and Stojcevski, above n 57, 28. Note that contest mentions were introduced in 2010–11 in Devonport and Burnie and 2011–12 in Launceston. It is also noted that the time saved is an estimate and difficult to verify: at 20.

## **2.3 Delay**

### **2.3.1 Measuring delay**

Research examining delay in the criminal justice system has acknowledged the extreme difficulty in quantifying delay.<sup>67</sup> It notes that there are two aggregate measures that are used to indicate the extent of delay in Australian criminal courts: (1) data on court duration produced by the Australian Bureau of Statistics (ABS) (the length of time taken from initiation to finalisation);<sup>68</sup> and (2) the backlog indicator that measures a court's pending backlog. This was developed and used as a benchmark in the Report on Government Services.<sup>69</sup> However, in viewing this statistical information, it is important to note that not all delay is detrimental given that legal proceedings take time and that therapeutic responses take longer to finalise with more appearances required for the judicial monitoring of orders.

### **2.3.2 Consequences of delay**

The negative consequences of delay in the criminal justice system have been long recognised. These include problems with the reliability of evidence after long periods of time, prolonged stress and anxiety for victims, and that the offender may be held on remand or bail for significant periods of time. As VSAC has observed:

Delay puts all the participants in the proceedings 'on hold': it defers the moment when the victim can achieve closure, forces witnesses to keep their recollections and evidence of the alleged offence fresh, and defers defendants' rehabilitation and reform.<sup>70</sup>

Delay in hearing matters also contributes to more delay. If an offender, or their legal representative, and the prosecution view delay as a normal part of the criminal justice process, then there is little motivation to seek an early resolution of the matter. As recognised by VSAC, this may undermine any attempt to facilitate early pleas: 'If the parties are aware that there will be a long period between the commencement and the conclusion of the proceedings ... the incentives that would otherwise encourage defendants to "get it over and done with" ... will be ineffectual'.<sup>71</sup>

### **2.3.3 Reasons for delay and responding to delay**

Understanding the reasons for delay and the appropriate response for delay involves understanding the pressures that operate within a particular court system. Research that examined reasons for trial delay in the District Court of New South Wales found that there were three factors that appeared to contribute to the growth in the backlog of cases: (1) a growth in trial registrations; (2) a growth in trial duration; and (3) a growth in the number (and percentage) of cases proceeding to trial.<sup>72</sup> Possible responses were to: (1) increase the capacity of the District Court; (2) increase the efficiency with which existing capacity is utilised; or (3) reduce the demand for trial court time.<sup>73</sup> It was also noted that demand for court time could be substantially reduced through earlier guilty pleas, in particular reducing the proportion of guilty pleas that are entered on the day of the trial.

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<sup>67</sup> Payne, above n 14, 8.

<sup>68</sup> Ibid 8–9.

<sup>69</sup> Ibid 10.

<sup>70</sup> VSAC, above n 21, 16. See also Richard Fox, 'Criminal Delay as Abuse of Process' (1990) 16 *Monash University Law Review* 64, 64.

<sup>71</sup> VSAC, above n 21, 16.

<sup>72</sup> Weatherburn and Fitzgerald, above n 20, 7. See also Payne, above n 14, 11.

<sup>73</sup> Weatherburn and Fitzgerald, above n 20, 7.

Australian research conducted by the AIC examined criminal trial delay caused when criminal trials fail to proceed on the day listed and the reasons why this occurs.<sup>74</sup> In this study, it was noted that there were three possible outcomes for criminal trials: (1) the trial proceeds as scheduled; (2) the trial is finalised on the day either by way of prosecution withdrawal or by a late guilty plea; or (3) the trial is adjourned and re-listed.<sup>75</sup> Matters that are adjourned result in the number of hearings required for that particular matter to be increased which uses valuable resources of the court and can lead to systemic delay.<sup>76</sup> The late resolution of matters by a guilty plea was also a matter that contributes to delay.<sup>77</sup>

More specifically, in relation to the reasons for the entry of late guilty pleas, the NSWLRC identified 10 overlapping and reinforcing factors that obstruct early appropriate pleas:

- (1) The prosecution serves parts of the brief of evidence late.
- (2) The defence expects further evidence will be disclosed closer to trial.
- (3) The defence believes that it is common practice for the prosecution to overcharge early, and that the charges will be reduced as the proceedings advance.
- (4) The prosecution accepts a plea to a lesser charge later in the proceedings.
- (5) Crown prosecutors with the authority to negotiate are not briefed until later in the proceedings.
- (6) The defence perceives that the court will be flexible in the way that it applies a sentence discount for the utilitarian benefit of an early plea that occurred later in the proceedings.
- (7) The defence is sceptical that sentencing discounts will be conferred to their client.
- (8) The defence believes that they will obtain better results in negotiations that occur just prior to trial.
- (9) There is discontinuity of legal representation.
- (10) The defendant holds back a plea because he or she wants to postpone the inevitable penalty; denies the seriousness of his or her predicament until the first day of trial; and/or is hopeful that the case will fall over due to lack of witnesses or evidence.<sup>78</sup> VSAC has observed that delay in itself may cause a defendant to defer a plea as the 'prospect of a long delay before the case goes to trial will reinforce the defendant's tendency to avoid the issue'.<sup>79</sup> An offender may defer entering a plea to postpone going to prison or to defer another consequence arising from a finding of guilt such as a loss of a drivers licence.

Accordingly, it was the view of the NSWLRC that a multifaceted solution was required given that 'any system (or combination of systems) that seeks to encourage guilty pleas will simply fail at the outset if it is superimposed on a system that effectively promotes late guilty pleas'.<sup>80</sup>

In October 2017, a number of legislative changes were introduced in the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) to reflect this multifaceted approach.

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<sup>74</sup> Payne, above n 14, 7.

<sup>75</sup> Ibid ix.

<sup>76</sup> Ibid 13.

<sup>77</sup> Ibid 14.

<sup>78</sup> NSWLRC, Final Report, above n 11, 9–10; NSWLRC, Consultation Paper, above n 11, 5. These factors reflect the findings of an Australian wide study undertaken by the AIC: see Payne, above n 14.

<sup>79</sup> VSAC, above n 21, 51.

<sup>80</sup> NSWLRC, Final Report, above n 11, 11.

One such change was a statutory sentencing discount based on a sliding scale for indictable offences. There were also four other elements aimed at reducing delay and facilitating early pleas of guilty:

- (1) The investigating agency provides a simplified brief of evidence to the DPP;
- (2) A senior prosecutor is to review the evidence and file a charge certificate with the Local Court that confirms the charges that will proceed to trial and identify any charges that should be withdrawn.
- (3) The prosecutor and the defence lawyer will then be required to have a case conference to discuss the case and to determine whether there are any offences to which the accused person is willing to plead guilty.
- (4) A change to the committal process so that the magistrates will need to be satisfied that the new steps certifying the charges and holding a case conference have been completed before committing the matter to a higher court.<sup>81</sup>

Moreover, additional funding has been provided to the DPP and Legal Aid to ‘ensure the continuity of senior lawyers ... from start to finish’. This is intended to ‘increase certainty about the charges, avoid last-minute changes in charges and pleas at trial and improve communications with victims about the process’.<sup>82</sup> VSAC has also identified structural impediments to an early guilty plea, including the fee structure that applies for legal aid that affects when counsel is engaged and ready to provide advice on plea.<sup>83</sup>

In England and Wales, significant changes have been made to the provisions relating to guilty pleas based on a view that defendants were responsible for delay by entering guilty pleas at the court door (a ‘cracked’ trial) resulting in substantial wasted resources as well as inconvenience and stress to witnesses.<sup>84</sup> However, McConville and March have argued that:

In fact, the evidence (including empirical research of the Royal Commission on Criminal Justice (1993)) demonstrated that “waste” was exaggerated to the point of being fictitious; that a substantial proportion of trials “cracked” because of decision-making by the prosecution; and that in only 6 per cent of cases did the trial “crack” because the defendant changed his mind.<sup>85</sup>

In the context of this paper, it is important to understand systemic features of the Tasmanian criminal justice system that lead to delay (separate from the timing of guilty pleas) as well as structural impediments to early pleas that exist within the system.

In addition to systemic factors affecting the timing of plea decisions, research has also examined factors that influence the plea behaviour of offenders. This has shown that criminal history and offence type are factors that influenced the decision to enter an early plea.<sup>86</sup> In addition, VSAC conducted focus groups with past and present offenders (24 current and 6 former offenders) in relation to the factors that had the greatest importance to them in deciding when and how to plea. This revealed that ‘the three most common factors in their plea decision were having the chance of a

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<sup>81</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017 (Mark Speakman).

<sup>82</sup> *Ibid.*

<sup>83</sup> It was reported that in indictable proceedings, assistance for contested matters will only be granted if the defence has merit and the case is certified as ready for a committal hearing. In practice, this is not possible before the committal mention, VSAC, above n 21, 22–23.

<sup>84</sup> See [4.2.5].

<sup>85</sup> McConville and Marsh, above n 30, 112.

<sup>86</sup> VSAC, above n 21, 23.

shorter sentence, wanting to get it over and done with and wanting to do the best for their families'.<sup>87</sup> Similarly, research conducted in New South Wales found that offenders with a prior conviction or being charged with more than one offence were factors associated with an increased likelihood of a late guilty plea and a decreased likelihood of a not guilty plea.<sup>88</sup>

### Questions

1. To what extent do systemic factors contribute to delay in Tasmania?
2. What are the features of the pre-trial process in Tasmania that may create obstacles to early guilty pleas?
3. In your view, what factors influence plea decisions of offenders in Tasmania?
4. In your experience, how many guilty pleas are to different charges than original charges or occur as a result of plea negotiations?

### 2.3.4 Supreme Court

In the Tasmanian Supreme Court, data suggest that there is an increasing problem of delay. Table 2.4 sets out the backlog indicator, which measures of the courts' pending caseload and is a measure of timeliness and delay.<sup>89</sup> In the Supreme Court Annual Report for 2015–16, the Chief Justice commented on the increases in the number of pending criminal cases. Similarly, the Director of Public Prosecutions has commented on the substantial increase in the pending list.<sup>90</sup>

**Table 2.4: Backlog indicator – Supreme Court (Criminal) – First instance, 2013–14 to 2015–16<sup>91</sup>**

	2013–14	%	2014–15	%	2015–16	%
Total Pending Caseload	348	100	388	100	381	100
Pending >12 months	92	26	107	28	110	29
Pending > 24 months	21	6	34	9	28	7

In discussing the backlog indicator, the Chief Justice observed that 'the percentages of pending criminal cases more than 12 months old and more than 24 months old were worse than any other jurisdiction'. However, it was noted that this was (in part) a feature of the pre-trial process where offenders are committed for trial to the Supreme Court before any preliminary proceedings.<sup>92</sup>

The clearance rate indicator shows whether the court is keeping up with its workload and denotes the number of finalisations as a percentage of the number of lodgements in the period.<sup>93</sup> Data set out in Table 2.5 also shows that although the court has improved its clearance rates since 2012–14, it is not reducing its pending caseload.

<sup>87</sup> VSAC, above n 21, 24.

<sup>88</sup> Clare Ringland and Lucy Snowball, *Predictors of Guilty Pleas in the NSW District Court* (NSW Bureau of Crime Statistics and Research, Bureau Brief 96, 2014) 1.

<sup>89</sup> Chief Justice of Tasmania, *Supreme Court of Tasmania Annual Report 2015–2016* (2016) 29.

<sup>90</sup> Director of Public Prosecutions, *Annual Report 2015–16* (2016) 4.

<sup>91</sup> Chief Justice of Tasmania, above n 89, 29.

<sup>92</sup> *Ibid* 7. See also Director of Public Prosecutions, above n 90, 4 for a discussion of the differences in pre-trial procedures that make comparisons of the pending list with other jurisdictions not relevant.

<sup>93</sup> Chief Justice of Tasmania, above n 89, 31.

**Table 2.5: Supreme Court clearance rate, criminal jurisdiction (first instance), 2013–14 to 2015–16<sup>94</sup>**

2013–14	2014–15	2015–16
88.8%	90.0%	97.1%

The backlog does not appear to be attributable to the number of criminal lodgements given that this has fallen from 564 in 2011–12 to 449 in 2015–16.<sup>95</sup> However, there are several factors identified in the annual report relevant to the increase in delay, including that:<sup>96</sup>

- Tasmania has fewer judges per 100 000 people and per 100 finalised cases than other Australian jurisdictions.
- The average number of attendances per finalisation in the Court’s criminal jurisdiction was the worst it has ever been, and the worst in the country.

Other factors that were identified as contributing to the backlog of criminal cases included the complexity and length of trials resulting from the greater use of complex scientific evidence, more applications made during the course of trials, the introduction of special hearings, pre-recorded evidence of ‘special witnesses’, more disputes about the cross-admissibility of tendency and coincidence evidence in cases involving multiple charges, and long drug cases involving evidence of financial records and surveillance device evidence.<sup>97</sup> The increasing complexity of criminal trials was also identified by the Director of Public Prosecutions as a matter relevant to the increase in the backlog, particularly in relation to sexual offence and drug offence trials.<sup>98</sup> In addition, the Chief Justice has observed that there had been a significant increase in relation to appeals where the magistrate has refused to grant bail in the Magistrates Court, which has contributed to the workload of the Supreme Court.<sup>99</sup> These appeals increased from 64 in 2011–12 to 110 in 2014–15 and then to 244 in 2015–16.<sup>100</sup>

In the Tasmanian context, it is noted that one or two lengthy trials can result in a flow-on effect in the court workload statistics. For example, in 2014–15, there was a murder trial that ran over five months. It was noted that ‘in the time taken to conduct that trial, almost 60 ordinary cases (trials and pleas of guilty) would usually have been finalised.’<sup>101</sup> Figure 2.7 shows that there has been an increase in the time taken to finalise criminal trials over the period 2011–12 to 2015–16.

<sup>94</sup> Chief Justice of Tasmania, above n 89, 31.

<sup>95</sup> Ibid 32.

<sup>96</sup> Ibid 7.

<sup>97</sup> Ibid 9.

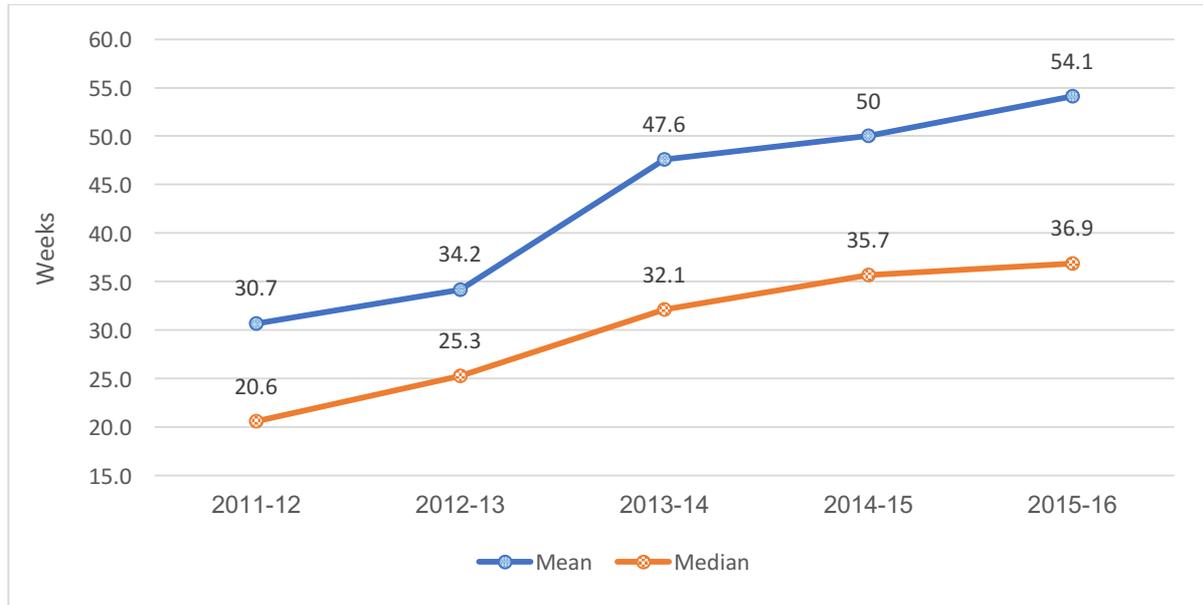
<sup>98</sup> Director of Public Prosecutions, above n 90, 4–5.

<sup>99</sup> Chief Justice of Tasmania, above n 89, 6.

<sup>100</sup> Ibid 33.

<sup>101</sup> Chief Justice of Tasmania, *Supreme Court of Tasmania Annual Report 2014–2015* (2015) 7.

**Figure 2.7: Duration from initiation to finalisation, Supreme Court (mean and median), 2011–12 to 2015–16<sup>102</sup>**



In the Annual Report, the Chief Justice also identified some of the steps that had been taken to attempt to reduce the backlog. These included legislative changes to permit the appointment of part-time acting judges and greater use of the *Criminal Code* s 308, that allows matters to be remitted to the Magistrates Court when a judge is satisfied that imprisonment for a term not exceeding one year will be adequate punishment in the circumstances of the case.<sup>103</sup> In addition, there have been listing changes so that criminal trials have been conducted in both courts in Launceston, and in Hobart a different courtroom has been used for Commonwealth criminal trials to increase the number of cases that can be heard simultaneously.<sup>104</sup> Other initiatives adopted in 2017 to attempt to reduce the backlog in criminal cases include the use of extended and additional criminal sittings and directions hearings to be convened, where appropriate, in cases that have been pending for a long time to attempt to conclude those cases as soon as possible.<sup>105</sup> As discussed at [2.2.1], there have also been changes to direction hearings in criminal cases.

### 2.3.5 Magistrates Court

In the Magistrates Court, there were 22 527 adult criminal matters lodged in the period 2016–17.<sup>106</sup> This was a 5.2% increase from the number of criminal matters lodged in 2015–16 (n = 21 912). In the period between 2014–15 and 2015–16 there was a 5.2% increase in the number of criminal matters lodged.<sup>107</sup>

The backlog indicator for the Magistrates Court shows that for criminal matters for adult offenders there has been an increase in the pending caseload over the period 2013–14 to 2016–17. In a 2016 review of the Magistrates Court prepared by KPMG, it was noted that data released in 2015 by the

<sup>102</sup> ABS, *Criminal Courts*, above n 42.

<sup>103</sup> Chief Justice of Tasmania, above n 89, 6.

<sup>104</sup> *Ibid* 9.

<sup>105</sup> Supreme Court of Tasmania, ‘Reduction of Backlog in Criminal Cases’ (*Circular to Practitioners*, no 4, 2017); Supreme Court of Tasmania, ‘Extended and Additional Criminal Sittings’ (*Circular to Practitioners*, no 7, 2017).

<sup>106</sup> *Magistrates Court Annual Report 2016–17* (2017).

<sup>107</sup> *Ibid*.

Productivity Commission show that Tasmania had the second highest case backlog for criminal matters greater than 12 months, at 11.8% and the lowest clearance rate for criminal matters at 94%.<sup>108</sup> In 2016–17, the case backlog for matters greater than 12 months had risen to 12.6%, which was the second highest, and the clearance rate was 92.2%.<sup>109</sup>

**Table 2.6: Backlog indicator – Magistrates Court (Criminal), 2013–14 to 2016–17<sup>110</sup>**

	<b>2013–14</b>	<b>%</b>	<b>2014–15</b>	<b>%</b>	<b>2015–16</b>	<b>%</b>	<b>2016–17</b>	<b>%</b>
Total Pending Caseload	5938	100	7312	100	7426	100	7952	100
Pending < 6 months	4340	73.1	4952	67.7	5165	69.6	5204	65.4
Pending > 6 months	897	15.1	1353	18.5	1294	17.4	1748	22
Pending > 12 months	694	11.8	1007	13.8	967	13	1000	12.6

**Table 2.7: Magistrates Court clearance rate, criminal jurisdiction (adult), 2013–14 to 2015–16<sup>111</sup>**

<b>2013–14</b>	<b>2014–15</b>	<b>2015–16</b>	<b>2016–17</b>
94.3%	90.4%	95.7%	92.2%

In its report, KPMG made the following observations in relation to the case backlog:

- (1) There are challenges prior to first appearance arising from offenders appearing on the first appearance without legal representation, delays caused by waiting for disclosure as police investigations are incomplete and the duplication of work in the listing process. It was noted that it is common for police investigations not to have been completed at the time the defendant first appears in court.<sup>112</sup> Charges may also differ at first appearance from those originally notified to the defendant, leading to an adjournment for the defendant to consider their plea and seek further information and advice.<sup>113</sup>
- (2) Some matters are dealt with by magistrates that could be more efficiently dealt with by police through an extension in the provision of infringement notices or the granting of orders.<sup>114</sup>
- (3) There are multiple appearances without progress that create a burden on the court. It was noted that ‘managing the day’s listing is a challenge, given the difficulties in managing non-appearances, failure of disclosure and adjournments’.<sup>115</sup> It was stated that ‘one of the main issues driving the recurrent case backlog and the number of court appearances is the fact that

<sup>108</sup> KMPG, *Review of the Magistrates Court of Tasmania* (2017) 17.

<sup>109</sup> Productivity Commission, *Report on Government Services 2018* (2018) Tables 7A.17, 7A.22 <<http://www.pc.gov.au/research/ongoing/report-on-government-services/2018/justice/courts>>. This excludes children’s court matters.

<sup>110</sup> *Magistrates Court Annual Report 2016–17* (2017); *Magistrates Court Annual Report 2015–16* (2016) 34; *Magistrates Court Annual Report 2014–15* (2015) 49.

<sup>111</sup> *Magistrates Court Annual Report 2016–17* (2017); *Magistrates Court Annual Report 2015–16* (2016) 35.

<sup>112</sup> KMPG, above n 108, 20, 22.

<sup>113</sup> *Ibid* 22.

<sup>114</sup> *Ibid* 21.

<sup>115</sup> *Ibid* 22.

many offenders as well as witnesses and other parties, do not have adequate information before coming into court'.<sup>116</sup>

- (4) There were inefficiencies arising from manually intensive processes, outdated technology, multiple operating structures duplicating roles and resources, and a lack of transparency on court process and information for stakeholders.<sup>117</sup>

In response to these observations, KMPG made several recommendations to improve the court process including:

- (1) Streamlining processes within the courts and administration by encouraging and facilitating 'pre-trial' meetings so that parties were ready to have the matter heard before a magistrate prior to listing<sup>118</sup> and increasing the use of contest mentions for criminal matters. It was also suggested that defendants should have a process where they can contact the courts prior to the date, if they know that they will not be able to appear (in exceptional circumstances only) and suggested that there could be incentives (such as a lower fine) offered to appear in court to reduce wasted time, as well as the length of finalisations.<sup>119</sup>
- (2) Taking simple matters out of the court such as allowing adjournments to be heard in front of a registrar rather than a magistrate, where these are more administrative in nature and having legislation for minor matters to be dealt with by fine or infringement notice by the police.<sup>120</sup>
- (3) Providing stakeholders with timely access to information on court operations and processes. This would include the development of easy-read documents or a smart phone application that provided users with accessible and understandable information about court processes. It was suggested that this information be provided by the police when the person was first charged, so they had adequate time to read and understand the material before coming to court.<sup>121</sup>

It is noted that the KMPG report did not identify late guilty pleas as a factor in the backlog in the Magistrates Court. Its focus, in terms of defendant behaviour, was non-appearance on the first appearance or not being ready to proceed due to lack of disclosure by the police or being presented with amended charges, or not understanding what was required at the first appearance.

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<sup>116</sup> Ibid 31.

<sup>117</sup> Ibid 23–26, 28.

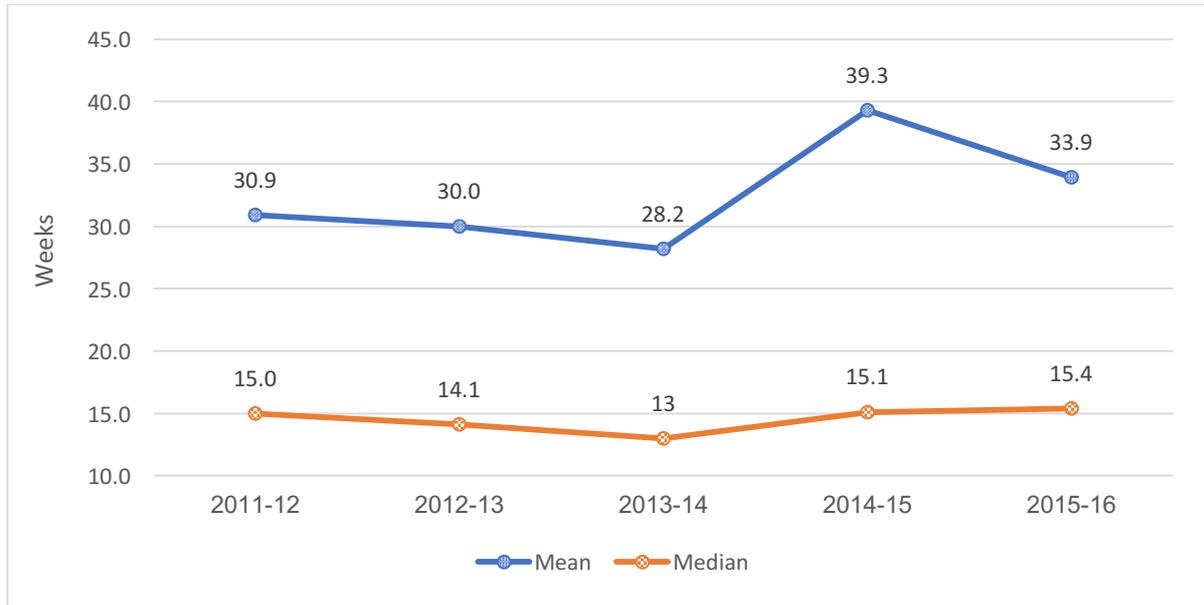
<sup>118</sup> Ibid 32. This was a suggestion based on a Victorian model. It is also noted that early pre-hearing disclosure of the prosecution case and pre-trial case management is provided for in the Magistrates Court (Criminal and General Division) Bill 2017 (Tas).

<sup>119</sup> KMPG, above n 108, 32.

<sup>120</sup> Ibid 33.

<sup>121</sup> Ibid 39.

**Figure 2.8: Duration from initiation to finalisation, Magistrates Court (mean and median), 2011–12 to 2015–16<sup>122</sup>**



It is noted that the average number of attendances required to resolve a matter in the Magistrates Court for adult offenders was 4.2 attendances.<sup>123</sup>

<sup>122</sup> ABS, above n 42. It is noted that during 2014–15 and 2015–16, a number of archival cases were officially closed off in the Tasmanian Magistrates Court system. The closure of these cases has also resulted in an increase in the mean and median duration from initiation to finalisation. Caution should therefore be used when making historical comparisons.

<sup>123</sup> *Magistrates Court Annual Report 2016–17* (2017).

### 3 Current approach to reduction of sentence for a guilty plea in Tasmania

As required by Term of Reference 1, this chapter examines the current approach of Tasmanian courts to reduction of sentence where a defendant enters a plea of guilty.

#### 3.1 Current law in Tasmania

##### 3.1.1 The scope of the sentencing discount – Court of Criminal Appeal authority

Unlike other Australian jurisdictions, in Tasmania there is no legislative provision that recognises a reduction of sentence for a guilty plea.<sup>124</sup>

Tasmanian case law has recognised that the utilitarian value of a plea of guilty may be taken into account as a mitigatory factor separate from any subjective consideration of remorse. As Tennent J stated in *Ilic v Tasmania*, '[t]here is no dispute that courts routinely allow discounts in respect of offender's sentences for pleas of guilty. ... The circumstances of each case will generally determine the extent of any discount allowed'.<sup>125</sup> However, there remains some inconsistency in the comments of the Court of Criminal Appeal in relation to the scope of the sentencing discount that is given in return for the utilitarian benefit of a plea of guilty. These inconsistencies revolve around whether there must be some altruistic motivation or whether a bare plea of guilty is sufficient to mitigate sentence. In *Inkson*,<sup>126</sup> Underwood J endorsed the principles set out by the Full Court of South Australia in *R v Shannon*,<sup>127</sup> indicating that they accurately represented the law in Tasmania.<sup>128</sup> These principles were that:

- (1) A plea of guilty may be taken into account in mitigation of sentence where—
  - (a) it results from genuine remorse, repentance or contrition, or
  - (b) it results from a willingness to co-operate in the administration of justice by saving the expense and inconvenience of a trial, or the necessity of witnesses giving evidence, or results from some other consideration which is in the public interest; notwithstanding that the motive, or one of the motives, for such co-operation may be a desire to earn leniency, and where to allow the plea a mitigatory effect would be conducive to the public purposes which the sentencing judge is seeking to achieve.
- (2) A plea of guilty is not of itself a matter of mitigation where it does not result from any of the above motives, but only from a recognition of the inevitable, or is entered as the means of inducing the prosecution not to proceed with a more serious charge.
- (3) In cases falling within (1), the judge is not bound to make a reduction, but should consider the plea with all the other relevant factors in arriving at a proper sentence.
- (4) In assessing the weight to be attached to a plea of guilty as a factor making for leniency, it is proper for the judge to bear in mind that it is important to the

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<sup>124</sup> See Chapter 4.

<sup>125</sup> (2009) 19 Tas R 201, [17] (Tennent J).

<sup>126</sup> (1996) 6 Tas R 1. See also *Hyland v R* [1996] TASSC 144, [9] (Cox CJ) applying *R v Shannon* (1979) 21 SASR 442.

<sup>127</sup> (1979) 21 SASR 442.

<sup>128</sup> (1996) 6 Tas R 1, 6–7. This has been accepted as correct: *Hyland v The Queen* [1996] TASCCA 14 (Cox CJ); *Tasmania v Baldock* [2015] TASCCA 3 (Pearce J).

administration of justice that guilty persons should not cause expense to the public and delay to other cases by putting forward false stories and on the basis of such false stories contesting the charges against them.

- (5) The above propositions are not to be taken as weakening in any way the principle that there must be no increase in the sentence which is appropriate to the crime because the offender has contested the charge.

This statement suggests that there must be some altruistic motivation (such as the desire to save the expense of a trial) even if coupled with the desire to obtain leniency in order for a plea of guilty to be mitigatory.<sup>129</sup> However, other Tasmanian decisions have accepted that a plea of guilty *per se* (without assessing the motive of the offender) justifies some reduction in an otherwise appropriate sentence.<sup>130</sup>

Factors relevant to the amount of the discount include the strength of the prosecution case (that is, was the plea a recognition of the ‘inevitable’) and the length and complexity of the trial avoided.<sup>131</sup> In *Dennison v State of Tasmania*,<sup>132</sup> the offender entered a plea of guilty to intentionally causing grievous bodily harm contrary to the *Criminal Code* s 170. This related to a stabbing that occurred in prison. Initially, the offender and two other assailants had been charged with the less serious offence of wounding contained in s 172. Following the offender’s plea, the co-offenders were eventually discharged on the basis that there was little prospect of conviction on the available evidence. In applying the principles that related to the plea of guilty, it was accepted that there was social utility derived from the plea:

It is unlikely, given the plea and circumstances of the attack, that there would have been co-operative and corroborative witnesses and the complainant may have been reluctant to give evidence for fear of repercussions. None of the attackers had admitted responsibility and it appears that the videotape was less than determinative. Whilst the statement attributed to the appellant on recovery of the knife was cogent, it did not transform the case against him into one of inevitability. His plea was utilitarian and, in the circumstances here, of significant importance.<sup>133</sup>

In *Ilic v Tasmania*,<sup>134</sup> the offender entered a plea of guilty to 42 charges relating to fraud and also gave undertakings to give evidence against two co-accused.<sup>135</sup> The Court of Criminal Appeal indicated that the offender was entitled to a significant discount to reflect the plea of guilty and the cooperation with authorities. In the circumstances of the case, the offender’s plea saved a considerable amount of time in the investigation by police and also led to savings by avoiding a lengthy and complex trial.<sup>136</sup> Accordingly, Tennent J stated that the ‘plea of guilty contributed to the administration of justice. It was more than bowing to the inevitable’.<sup>137</sup>

In contrast, there are cases that demonstrate that the Court of Criminal Appeal has applied King CJ’s second proposition in *Shannon* and declined to make a discount for a guilty plea in cases where the offender’s plea of guilty is entered as ‘a recognition of the inevitable’ or as a ‘means of inducing the

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<sup>129</sup> Warner, above n 55, 107.

<sup>130</sup> See *Pavlic v The Queen* (1995) 5 Tas R 186; *Tasmania v Baldock* [2015] TASCRA 3 [29] (Pearce J).

<sup>131</sup> *Pavlic v The Queen* (1995) 5 Tas R 186, 201 (Slicer J).

<sup>132</sup> (2005) 15 Tas R 50.

<sup>133</sup> *Ibid* [14] (Slicer J) applying *Pavlic v The Queen* (1995) 5 Tas R 186.

<sup>134</sup> (2009) 19 Tas R 201.

<sup>135</sup> It is noted that cooperation with authorities is a separate ground of mitigation, see Warner, above n 55, 110–111. This is beyond the scope of this paper.

<sup>136</sup> *Ilic v Tasmania* (2009) 19 Tas R 201, [23], [27] (Tennent J).

<sup>137</sup> *Ibid* [27]. See also *Tasmania v Burns* (2012) TASCRA 11 [52].

prosecution not to proceed with a more serious charge'.<sup>138</sup> For example, in cases of where the offender has entered a plea of guilty to manslaughter (where there is a prospect of being convicted of murder), the Court of Criminal Appeal has indicated that little or no discount is appropriate given the unlikelihood of an outright acquittal and the risk of a conviction for murder.<sup>139</sup> In *Hyland v R*,<sup>140</sup> the court considered that no discount was appropriate where the offender only entered a plea of guilty to manslaughter after he had failed (after a lengthy voir dire) to exclude DNA evidence. In rejecting the offender's appeal against sentence, Cox CJ stated that 'he is not entitled, in the circumstances, to any discount for adopting the expedient which he did' and that no discount for a guilty plea was warranted.<sup>141</sup> Crawford J also agreed that the offender had no entitlement to a reduction in sentence for his pleas given that the plea was entered due to a perception that it was in 'his best interests to do so, thereby making sure that he avoided a sentence of life imprisonment'.<sup>142</sup> Zeeman J considered that there was no basis to allow a discount for the guilty plea given that the offender had already obtained 'a sufficient benefit by the removal of the risk of conviction of the more serious crime' and that at best he 'was only entitled to a minimal discount'.<sup>143</sup> In first instance sentencing comments, the strength of the prosecution case has been mentioned as a factor to provide the offender with a reduced discount, particularly when combined with a late plea.<sup>144</sup>

Yet, even in cases where the Crown has a strong case, there has been a willingness by the Court of Criminal Appeal to recognise the public interest in allowing some discount in sentence in the case of a timely plea. In *Crosswell*,<sup>145</sup> Evans J stated that:

I recognise that there was considerable evidence against the appellant in relation to his crimes. ... Whilst this reduces the mitigatory impact of his pleas of guilty, in a case such as this it does not totally negate it. He pleaded guilty as soon as the charges against him reflected those that are now under consideration. By doing so he facilitated the course of justice to a significant degree and obviated the need for the complainants and others to give evidence upon his trial. It is well recognised that it is in the public's interest to encourage pleas of guilty by giving an offender who pleads guilty a lesser sentence than one who pleads not guilty and is convicted; *Cameron v R* (2002) 209 CLR 339.<sup>146</sup>

Other cases have recognised the relevance of the effect of the plea for victims and the timing of the plea as relevant to the sentencing discount. In *Tasmania v Baldock*,<sup>147</sup> Pearce J stated that:

the result of the appellant's plea and his cooperation with the police was that it was clear from an early stage that the victim would not need to give evidence. That was of importance in this case. Although the case against the appellant was supported by forensic evidence and seemed strong, particular weight should be ascribed to admissions and a plea of guilty in cases of sexual offences like this one because it avoids distress to victim.<sup>148</sup>

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<sup>138</sup> Kate Warner, above n 55, 108.

<sup>139</sup> *Lyons* (1993) 69 A Crim R 307, 310 (Cox J), 314 (Wright J).

<sup>140</sup> [1995] TASSC 144.

<sup>141</sup> *Ibid* [10], [11].

<sup>142</sup> *Ibid* [42]. It is noted that the penalty for murder is no longer a mandatory life sentence.

<sup>143</sup> *Ibid* [56], [64]. See discussion of *Tasmania v Cernigoi*, 12 February 2015 (Pearce J) below, where the sentencing judge indicated caution in relation to the Crown's submission that pleading guilty to manslaughter amounted to a windfall for the offender that should not be a basis to reduce the otherwise appropriate sentence for the plea.

<sup>144</sup> See [3.2].

<sup>145</sup> [2012] TASSCA 1.

<sup>146</sup> *Ibid* [50] (Evans J).

<sup>147</sup> [2015] TASSCA 3.

<sup>148</sup> *Ibid* [29].

The value of a guilty plea (even a late plea) in cases of sexual offending was recognised in *DPP (Tas) v Farmer*.<sup>149</sup> In this case, the Crown successfully appealed against a sentence of eight years imprisonment, with a non-parole period of five years, imposed following the offender's plea of guilty to 14 sexual offences and in resentencing, the Court of Criminal Appeal gave consideration to the effect of the offender's plea of guilty. Evan J stated:

Whilst this is ordinarily a significant mitigatory matter in relation to a sexual offence, its force in this case was considerably reduced as the respondent only confirmed that he would plead guilty shortly prior to his trial. By that time, all of the victims had been required to give evidence and been cross-examined in the course of preliminary hearings. Nevertheless, the respondent's late pleas of guilty did avoid the need for his victims to again give evidence and it provided them with the satisfaction of knowing that he had publicly acknowledged his criminal conduct.<sup>150</sup>

Similarly, Blow J recognised the benefit of the plea of guilty for the complainants in sexual offence cases in not having to give evidence before a jury. His Honour also recognised that the pleas:

saved the Crown and its other witnesses the cost and inconvenience of completing a long trial. It is in the interests of the administration of justice that a substantial sentencing discount be provided to any offender who pleads guilty, even at such a later stage. Otherwise offenders will have little incentive to plead guilty.<sup>151</sup>

Although there is a focus on early pleas of guilty, the Court of Criminal Appeal in *Howlett v Tasmania* accepted that even a late plea of guilty (on the eve of the trial) can entitle an offender to a discount given that it avoids the cost and expense of the trial and also that the offender has '[given] up a chance of acquittal'.<sup>152</sup> In this case, there was a dispute about the admissibility of Crown evidence that was due to be decided on a voir dire and the offender elected to enter a plea of guilty. However, the value of a discount is considerably reduced for a plea entered when the trial is about to commence, especially in the face of a very strong Crown case.<sup>153</sup>

### 3.1.2 Quantifying the discount

There is also uncertainty in relation to the amount that a sentence is reduced to give effect to the discount for the utilitarian benefit. It has not consistently been the practice of the Supreme Court to specify the discount and different views have been expressed about the appropriateness of quantifying the discount.<sup>154</sup> In *Pavlic v The Queen*,<sup>155</sup> Green CJ and Wright J expressed the view that it was not appropriate to set out the discount for a guilty plea on the basis that it was no different from any other aggravating or mitigating factor.<sup>156</sup> In contrast, in *Dennison v State of Tasmania*,<sup>157</sup> Slicer J considered that 'whilst the High Court has rejected a sequential or two tiered approach to sentencing ... it has not suggested that significant components to the assessment of such sentence [cannot] be identified and their weight stated'.<sup>158</sup>

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<sup>149</sup> (2005) 157 A Crim R 150.

<sup>150</sup> Ibid [39].

<sup>151</sup> Ibid [50].

<sup>152</sup> *Howlett v Tasmania* [2010] TASCRA 15, [25] (Blow J).

<sup>153</sup> *Director of Public Prosecutions v Blyth* [2010] TASCRA 10, [5] (Blow J).

<sup>154</sup> *Ilic v Tasmania* (2009) 19 Tas R 201, [17] (Tennent J).

<sup>155</sup> (1995) 5 Tas R 186.

<sup>156</sup> Ibid 191 (Green CJ), 193 (Wright J).

<sup>157</sup> (2005) 15 Tas R 50.

<sup>158</sup> Ibid [55].

In some of the appeals that the Court of Criminal Appeal has allowed on the basis that the sentence was either manifestly excessive or inadequate, it is possible to determine the degree to which a sentence was reduced to take account of a guilty plea. In some cases, the amount has been expressly stated, eg in *DPP (Tas) v Farmer*,<sup>159</sup> Evans J would have allowed a reduction of 20% in circumstances where the offender entered a plea of guilty to sexual offences after the committal proceedings and before the trial.<sup>160</sup> In the same case, Blow J thought a substantial discount was appropriate but indicated that he would be ‘a little less generous’ than 20%.<sup>161</sup> In other cases, it is possible to calculate the reduction in sentence where a plea of guilty was the primary factor argued on appeal. For example, in determining that the original sentence was excessive in *Ilic v Tasmania*, Crawford CJ stated that taking into account the value of the plea and cooperation with authorities, the ‘sentence of imprisonment of four years and six months was equivalent to one of imprisonment for at least five years six months and, very possibly, six years, if no such pleas, information and undertaking had been provided’.<sup>162</sup> This was a reduction of 17% – 25%.<sup>163</sup>

### 3.2 Analysis of Supreme Court comments on passing sentence

The Council has undertaken an analysis for Supreme Court sentences for the period 1 January 2015 to 30 June 2017 to attempt to identify the approach taken in the sentencing process to pleas of guilty, including the timing of pleas. In this period, the Council has identified 713 cases where a matter was finalised and resulted in a sentence being imposed with plea information disclosed in 705 sentencing comments.<sup>164</sup> As shown in Table 3.1, in the cases where plea information was available, 535 of these cases (75.9%) were resolved by a guilty plea to all charges, 150 cases (21.3%) were resolved by a finding of guilt following a trial in relation to all charges, and there were 19 cases (2.7%) where the offender entered a plea of guilty to some charges and was found guilty in relation to other charges. Table 3.1 also shows that there are variations in the plea rates for different offence categories with offenders more likely to enter a guilty plea for property damage and burglary than for drug offences, non-sexual offences against the person and homicide.<sup>165</sup>

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<sup>159</sup> (2005) 157 A Crim R 150.

<sup>160</sup> *Ibid* [39].

<sup>161</sup> *Ibid* [50].

<sup>162</sup> (2009) 19 Tas R 201, [2].

<sup>163</sup> It is noted that in *R v Stanley*, 4 March 1998 CCA 53/1997, a case involving an appeal against sentence on the basis that the offender was given a sentencing discount on the basis of a promise to give evidence against co-offenders, and the offender subsequently refused to give evidence. In allowing the appeal against a sentence of five years imprisonment, Slicer and Wright JJ indicated that without the cooperation the sentence should be increased to six years imprisonment. Further, it is noted that in Victoria the discount provided by the court ranged from 25–33%. In addition, the discount is not only in quantum but in about one-third of cases, it changed the nature of the sentence, see [4.2.1].

<sup>164</sup> The Council identified an additional case where the sentencing comments were suppressed. This excludes commonwealth offences.

<sup>165</sup> This accords with research conducted by VSAC that found that there was a significant difference in the guilty plea rate depending on the type of offence: see VSAC, above n 2, 25–34.

**Table 3.1: Finding of guilt and guilty plea by offence type, Supreme Court of Tasmania 2015 – 30 June 2017<sup>166</sup>**

Offence type	Guilty plea		Finding of guilt		Mixed guilty plea/finding of guilt	
	n	%	n	%	n	%
Burglary	39	84.8	7	15.2	0	0.0
Drug offences	97	71.9	31	23.0	7	5.2
Homicide	18	69.2	8	30.8	0	0.0
Non-sexual offences against the person	114	64.4	56	31.6	7	4.0
Sexual offences	81	82.7	14	14.3	3	3.1
Offences involving fraud or dishonesty	54	79.4	14	20.6	0	0.0
Property damage	43	86.0	6	12.0	1	2.0
Robbery	54	81.8	11	16.7	1	1.5
Offences against good order	22	91.7	2	8.3	0	0.0
Other	13	92.9	1	7.1	0	0.0
<b>All offences</b>	<b>536</b>	<b>76%</b>	<b>150</b>	<b>21.3%</b>	<b>19</b>	<b>2.7%</b>

It was also possible to determine the timing of the plea from the comments on passing sentence in 240 of the 535 cases. In relation to these cases, there were 178 cases where the plea was identified as early, relatively early or at the earliest opportunity (or similar phrasing), 51 cases where the plea was described as not particularly early, not early, late, very late or reference was made to the stage of the proceedings where the plea was entered (which can be regarded as indicating a late plea)<sup>167</sup> and 11 cases where the court noted that the plea was entered following negotiations between the defence and the prosecution in relation to the facts or the appropriate charges. There were 13 cases (of the 51 late pleas) where it was noted that the plea was entered immediately before the day of the trial, on the day of the trial or during the trial.

### 3.2.1 The scope of the sentencing discount

In many cases, beyond the bare reference to the guilty plea, there was no mention of the manner in which the guilty plea was relevant to sentence. However, it was clear from the sentencing comments in other cases that the Supreme Court allows a sentencing discount to recognise the utilitarian value of the plea (separate from considerations of remorse).

In referring to the mitigatory effect of a guilty plea, the most commonly mentioned factor was the timing of the plea; there were 240 cases where the court made reference to the timing of the offender's plea. For example, the court observed that the offender's early plea and cooperation with police entitled the offender 'to a real and significant discount on what would otherwise be an appropriate sentence'.<sup>168</sup> In contrast, in relation to late pleas, the court has stated that the offender 'has pleaded guilty but the plea of guilty could hardly be said to have come at a stage where she is entitled

<sup>166</sup> This is classified by the offence category of the most serious offence, in cases involving multiple offences.

<sup>167</sup> In three of these cases, the court noted that the offender was waiting for legal aid funding (two cases) or legal advice (one case) before entering the plea.

<sup>168</sup> *Tasmania v Kernan*, 20 October 2015 (Estcourt J).

to any great credit for it.<sup>169</sup> Other factors mentioned were the value in sparing witnesses the trauma of giving evidence (and the value of an early plea in relieving victims of the anxiety arising from concerns about being required to give evidence) (58 cases), the saving of time and resources by avoiding the trial (39 cases) and the strength of the prosecution case (36 cases).

In the context of drug trials, reference was made in several cases to the utilitarian value arising from the saving of resources by the avoidance of the trial despite the strength of the prosecution case. In addition, some benefit was still recognised by the sentencing judge even if the plea of guilty was made at a late stage:

Some reduction in sentence should be made for it, but it was very late, and occurred only after much work by the police and the prosecuting authority, and in the face of an imminent trial and strong evidence. In this case the collateral benefits to the criminal justice system by the plea are relatively small.<sup>170</sup>

You pleaded guilty, but you only did that at a very late stage — years after you were charged — and only after the Crown were ready for trial, with 17 witnesses ready to give evidence and hundreds of photos prepared and copied and ready to hand out to a jury. However your plea of guilty counts in your favour to some extent because you have saved the State the cost and expense of a trial lasting a few days.<sup>171</sup>

Your counsel has submitted that you should receive credit for your plea of guilty, because of its utilitarian benefit. The plea came at an extremely late stage and, accordingly, it seems to me that utilitarian benefit can be the only reason why you should receive credit for it and, further, that any such benefit arising from the plea is limited. By the time that the plea was communicated to the prosecution, the case had been fully prepared, and time had been allocated for the trial. The fact that the trial was not actually required is, of course, of some benefit to the justice system. In my view, the plea can be attributed to your acknowledgement of the strength of the prosecution case, and this is confirmed by the submission that it was only after the late delivery of important evidence that you decided to plead guilty. Of course, your guilt was known to you throughout and there was nothing to prevent you from pleading guilty at a much earlier time. Notwithstanding this, you are entitled to such credit for the utilitarian benefit of the plea as is appropriate in the circumstances.<sup>172</sup>

In other drug cases where the offender was found guilty following trial, reference was made in passing sentence that the offender was ‘not entitled to the mitigation an early plea of guilty would have attracted, especially in a case which required as much preparation and prosecution as this one did.’<sup>173</sup> Similarly, in a case of dishonestly acquiring a financial advantage, it was stated that:

Some substantial mitigating factors that are commonly found are absent in this case. Mr Dimech did not plead guilty, but instead put the Crown to the trouble and expense of a very complicated trial, involving the obtaining of evidence from overseas, and the calling of witnesses from gambling companies, banks, and even a witness from the company that runs PayPal, who gave evidence by video link from Shanghai. So, the co-operation in the administration of justice that is reflected in a plea of guilty was not present in this case.<sup>174</sup>

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<sup>169</sup> *Tasmania v Stephenson*, 24 June 2016 (Estcourt J).

<sup>170</sup> *Tasmania v Bechara*, 2 June 2017 (Pearce J).

<sup>171</sup> *Tasmania v Hay*, 16 May 2017 (Blow CJ).

<sup>172</sup> *Tasmania v Delphine*, 14 April 2017 (Brett J).

<sup>173</sup> *Tasmania v Farhat*, 2 June 2017 (Pearce J).

<sup>174</sup> *Tasmania v Dimech*, 19 May 2015 (Blow CJ).

In relation to homicide offences, there was greater focus in sentencing comments on the benefit to witnesses, the victim (attempted murder) or their family arising from a guilty plea. However, the court (in several cases extracted below) also recognised the relevance of saving time and resources as well as taking into account the strength of the Crown case:

There was a debate about the mitigatory weight to be attributed to his plea of guilty. The defendant submitted that the plea was reflective of remorse and, perhaps more particularly, provided utilitarian benefits to the Court and the community. Witnesses were spared the stress and inconvenience of giving evidence. The Crown submits that the plea carries little weight in light of the facts that the plea was very late with witnesses being briefed for the trial, and the fact that the defendant was at risk of being convicted of murder. That suggests that the acceptance of the plea was a windfall, but caution needs to be exercised about taking such a view, and of course, the murder charge could have been pursued. In my view remorse is demonstrated by the other material, and there is little point in scrutinising the plea in that context. I acknowledge some utilitarian benefit in the plea and take the view that in all of the circumstances it is a mitigatory factor of some weight, but one to be put alongside all of the factors to be taken into account, but of itself it does not amount to a compelling call for leniency.<sup>175</sup>

There is little for me to take into account in his favour. However it is significant that he has pleaded guilty to the two charges, and that he is sorry for what he did. His pleas of guilty have resulted in Ms Xuereb being spared the ordeal of giving evidence, and have saved the State the cost and inconvenience of a long trial. However the case against him was very strong, and therefore pleading guilty should be regarded as accepting the inevitable.<sup>176</sup>

While some credit should flow from your plea of guilty, it should not be significant given the inevitability of conviction.<sup>177</sup>

You pleaded guilty and it was submitted by your counsel that plea had very real value. There was, she said, an arguable case about whether what occurred, in the surrounding circumstances in which it occurred, could amount to gross negligence. A conviction was not an inevitable outcome. I accept that submission.<sup>178</sup>

The value of the plea in sparing the witnesses from giving evidence and the saving of resources were also factors mentioned in relation to non-sexual offences against the person:

He pleaded guilty at an early stage. His sentence will be reduced as a result because Mr Sain will not be subject to the anxiety and distress of having to relive these events and give evidence and be subject to cross examination about them. It also means that the resources of the State needed to prepare for and conduct a trial are saved.<sup>179</sup>

The court has indicated that this had a diminished effect if the plea was a late plea:

Your plea did avoid the need for the complainant to give evidence but, because it came so late in the day, she has had to live with the expectation that she would need to give evidence about this matter since the crime occurred and up to a point when the trial was scheduled to begin the following day.<sup>180</sup>

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<sup>175</sup> *Tasmania v Cernigoi*, 12 February 2015 (Pearce J).

<sup>176</sup> *Tasmania v Mason*, 28 May 2015 (Blow CJ).

<sup>177</sup> *Tasmania v Bowden*, 29 April 2015 (Tennent J).

<sup>178</sup> *Tasmania v Anglin*, 14 April 2015 (Tennent J).

<sup>179</sup> *Tasmania v Morrison*, 15 May 2017 (Pearce J).

<sup>180</sup> *Tasmania v Shaw*, 13 April 2017 (Brett J).

The defendant is to be given some credit for his pleas of guilty. They were very late in the scheme of things but the presence of an additional charge of aggravated burglary complicated resolution. Ms Davies had to give evidence in preliminary proceedings, but was spared the ordeal of doing it again this time in front of a jury, and the pleas have utilitarian value.<sup>181</sup>

The benefit to victims was a significant factor mentioned in relation to sexual offences, where it was noted that it is the ‘policy of the criminal law to encourage a plea of guilty, even if the case against an accused is strong, where the effect is to save victims, especially children who are the victims of crimes of a sexual nature, from the distress of giving evidence and the anticipation that a trial may be necessary’.<sup>182</sup> This discount was particularly reflected in cases where an offender has fully cooperated with police and has entered an early plea of guilt, so relieving the anxiety for the victim of the anticipation of giving evidence:

That he has accepted what is said against him and acknowledged his guilt at an early stage, obviating the need for the children to give evidence, are things which significantly weigh in his favour.<sup>183</sup>

The one thing that can be said in the defendant’s favour is that he pleaded guilty at early time. This serves to vindicate the complainant, and to relieve the stress of anticipation of a trial, and the rigours of the trial process itself. Established principle in this State suggests a significant discount for a plea of guilty in sexual cases, but what is significant will vary from case to case.<sup>184</sup> His early plea of guilty is given full mitigatory effect. The plea of guilty has vindicated the complainant and avoided the need for her to experience the stress of giving evidence. In this regard alone, I have allowed a significant reduction to the sentence which would otherwise have been imposed.<sup>185</sup>

Once charged, the defendant pleaded guilty at the earliest opportunity. He is entitled to mitigation from that plea. As a result of it the complainant was aware that she would be spared the trauma and embarrassment of having to give evidence.<sup>186</sup>

His plea of guilty vindicates the complainant and saves the complainant the stress of giving evidence. The defendant should be given the full mitigatory value of his plea and his sentence is reduced because of this fact.<sup>187</sup>

In cases of sexual offending, some discount has also been recognised when a guilty plea is entered late in the process given that it spares the complainant the stress of giving evidence at trial (if not the stress leading up to the trial):

You pleaded guilty to this charge on the day set for the commencement of the trial. Your counsel claims that the plea is evidence of remorse and, further, that you should receive credit because the plea means that the complainant will not have to give evidence. I accept that you probably are remorseful but I do not think that such remorse is evidenced by your late plea. I think it is almost certainly a result of the late realisation by you, probably arising from accurate legal advice, that the case against you is overwhelming. You should receive credit for the fact that the complainant has not had to give evidence, but she has had to live with the prospect of the upcoming trial until the fact of the plea was

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<sup>181</sup> *Tasmania v French*, 22 June 2017 (Porter AJ).

<sup>182</sup> *Tasmania v MCW*, 13 March 2015 (Pearce J).

<sup>183</sup> *Tasmania v RJM*, 10 March 2016 (Porter J).

<sup>184</sup> *Tasmania v KR*, 7 October 2015 (Porter J).

<sup>185</sup> *Tasmania v RSJ*, 15 May 2015 (Wood J).

<sup>186</sup> *Tasmania v JKK*, 18 February 2016 (Pearce J).

<sup>187</sup> *Tasmania v SGH*, 9 June 2016 (Wood J).

communicated to the State on the night before the scheduled commencement of the trial. She has been required to travel from interstate expecting to give evidence. This moderates the beneficial effect of the plea of guilty.<sup>188</sup>

There is little that mitigates the defendant's crimes, save that he has pleaded guilty thus sparing the complainant the ordeal of a trial. For that he is entitled to some discount on what would otherwise be an appropriate sentence of imprisonment, although I note that it cannot be said that it was an early plea, and was in reality an acceptance of the inevitable.<sup>189</sup>

### 3.2.2 Quantifying the discount

In the period from 2015 to the time of writing, the Council has only identified one case where the sentencing judge (at first instance) specified the extent of the discount arising from the utilitarian value of the plea. In *Tasmania v Matthews*,<sup>190</sup> the offender entered a plea of guilty to one charge of accessing child exploitation material, one charge of possession of child exploitation material and one charge of possessing a bestiality product. In sentencing, Estcourt J noted that the offender had cooperated with the police and entered a plea of guilty at the earliest practicable opportunity and so was entitled to a genuine discount on an otherwise appropriate sentence. His Honour considered the Court of Criminal Appeal decision in *Pavlic v The Queen*,<sup>191</sup> which indicated that 'a plea of guilty is a mitigating factor like any other and should not be assessed as a separate secondary process, or as justifying a specific quantified discount'.<sup>192</sup> However, His Honour stated that:

twenty-two years on from Pavlic and with fixed discounts for pleas of guilty utilised in other Australian States, I see nothing in Pavlic that prevents me from recording that, although not as a secondary separate process, but as part of a process of synthesis nonetheless divisible in my own mind, I have allowed in this case a discount in the order of appropriately one-fifth on an otherwise appropriate head sentence.<sup>193</sup>

In contrast, as indicated, in many cases there was no specific reference to the value of the plea beyond mentioning it as a factor in sentencing. In other cases, the sentencing judge made it clear that the offender received 'a discount', 'a genuine discount' or a 'real and significant discount' on the sentence that would otherwise have been imposed. This made it clear that a discount was provided but it was not possible to determine the actual extent. In other cases, relative terms such as 'some mitigation' or 'some weigh' or 'some credit' were used to indicate the sentencing weight attributed to the guilty plea, often balanced against the overwhelming prosecution case and/or the lateness of the plea. For example, in an armed robbery case, it was stated that '[a]s to those admissions, and your plea, while they carry some weight, it must be accepted they were a bowing to the inevitable'.<sup>194</sup> In an aggravated armed robbery case, the sentencing judge stated that '[s]ome mitigation arises from the pleas of guilty. The pleas are not particularly early, but avoid the cost and delay of trials and, more importantly, save the witnesses the trauma of having to give evidence'.<sup>195</sup>

In attributing a value to the guilty plea, in several cases, it was listed with other mitigating factors to justify the imposition of a suspended sentence, or the minimum non-parole period or to reduce the

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<sup>188</sup> *Tasmania v G*, 12 April 2017 (Brett J).

<sup>189</sup> *Tasmania v KRR*, 6 August 2015 (Estcourt J).

<sup>190</sup> 28 September 2017 (Estcourt J).

<sup>191</sup> (1995) 5 Tas R 186.

<sup>192</sup> *Tasmania v Matthews*, 28 September 2017 (Estcourt J).

<sup>193</sup> *Ibid.*

<sup>194</sup> *Tasmania v Robinson-Stacey*, 27 April 2015 (Tennent J).

<sup>195</sup> *Tasmania v Shaw*, 9 August 2016 (Pearce J).

term of imprisonment or to justify the imposition of a non-custodial sentence.<sup>196</sup> This meant that it was not possible to isolate the effect of the guilty plea from these other factors. As a result, it is difficult for offenders and their legal advisers to determine the actual extent of the discount that is attributable to a guilty plea, and, in particular, the benefit to an offender that would arise from entering an early plea as compared to a late plea. Accordingly, the analysis of the Council reflected the observations of VSAC that, currently:

It is difficult to identify the actual impact of the current guilty plea provisions on sentencing in Victoria and elsewhere. As a guilty plea is only one of many factors taken into account at sentence, judicial officers' sentencing remarks do not always reveal whether the guilty plea was taken into account and, if so, the effect on the sentence. Even where the effect of the guilty plea has been identified at sentencing, it may not be possible to isolate this as the sole or even main cause of any differences in sentencing practices between cases resolved by a plea and those where the offender was convicted and sentenced after a trial.<sup>197</sup>

One method to determine the benefit of a guilty plea is to examine the severity of penalty imposed in cases where offenders plead guilty compared to cases where there is a guilty verdict following a trial. In the Tasmanian context, Table 3.2 sets out severity of the penalty for selected offence categories by identifying the imprisonment rate and the median term of imprisonment in cases where the offender has entered a plea of guilty and in cases where the offender was found guilty at trial. It also shows the percentage differences (or the discounts) between the two groups of offenders with a negative sign indicating the penalty for offenders convicted by guilty plea is lower while a positive sign indicating the penalty is higher.<sup>198</sup> This allows a tentative assessment to be made in relation to the discount given to an offender who enters a plea of guilty compared to an offender who is found guilty at trial. It shows that for sex offences and drug offences, there is a considerable difference in the imprisonment rate when an offender enters a plea of guilty compared to a finding of guilt following a trial. In relation to fraud offences, there does not appear to be a benefit for a guilty plea in terms of imprisonment rate but there is a considerable reduction in the median term of imprisonment.

**Table 3.2: Severity of penalty by method of conviction<sup>199</sup>**

	Convicted by plea		Convicted by verdict		Difference (%)	
	Imprisonment rate %	Median prison term (months)	Imprisonment rate %	Median prison term (months)	Imprisonment rate	Median prison term
Sex offences (n=95)	43.8	36	80	39	-45.3	-7.7
Drug offences (n=129)	17.3	17	38.7	16	-55.3	6.3
Fraud (n=70)	25.5	18	20	36	27.5	-50
Non-sexual offences against person (exclude homicide) (n=170)	45.6	18.5	60.7	24	-24.9	-22.9

<sup>196</sup> This accords with Victorian research that shows that guilty pleas operate to change the nature of the sentence imposed as well as to reduce the length of a sentence, see discussion at [4.2.1].

<sup>197</sup> VSAC, *Sentence Indication and Specified Sentence Discounts*, Discussion Paper (2007) 25. It is noted that there was a later change in the law in Victoria that requires a statement in relation to the effect of the pleas, *Sentencing Act 1991* (Vic) s 6AAA.

<sup>198</sup> The difference is calculated by subtracting the verdict value from the plea value and dividing by the verdict value. This is based on the approach of BOCSAR, see Don Weatherburn and Joanne Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Court* (BOCSAR, 2000) 36–37.

<sup>199</sup> This table is based on the approach of *ibid* 37. It excludes cases where there was a mixture of guilty pleas and findings of guilty at trial.

However, these data need to be approached with considerable caution given that the cases will differ in many respects other than a guilty plea and so it not possible to isolate the effect of the plea on the penalty imposed.<sup>200</sup> In addition, these data do not disclose the difference in penalty for a plea of guilty that is entered early compared to a late plea.

**Question 5**

In Tasmania, do you consider that there is a sentencing benefit to an offender from entering a plea of guilty and/or from entering an early plea of guilty compared to a late plea of guilty?

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<sup>200</sup> Roberts and Bradford, above n 31, 190.

## 4 Approaches to statutory sentencing discount schemes in other comparable jurisdictions

As required by Term of Reference 2, this chapter examines legislative approaches to sentencing discounts for pleas of guilty in other Australian jurisdictions and comparable international jurisdictions. It also considers any analyses of the impact of a statutory reduction for a guilty plea on the court system.

### 4.1 Overview of statutory sentencing discount schemes in other comparable jurisdictions

As indicated at [3.1.1], all Australian jurisdictions (other than Tasmania) have legislation that makes provision for a sentencing discount to be given for guilty pleas. This is also the position in England and Wales, and in New Zealand. An overview of the various approaches is set out in Table 4.1.

A key feature that is common to all these jurisdictions is that the utilitarian value of a guilty plea (separate from remorse) is a matter taken into account and the timing of the plea is relevant to the discount received, with earlier pleas attracting a greater discount than later pleas. In addition, in all jurisdictions the court has a discretion as to whether to actually impose a lesser sentence. The general approach is that the court should quantify the discount, however, this is not legislatively prescribed in all jurisdictions. An offender may receive a discount for an offer to plead guilty to a lesser offence, even if the plea is not accepted, if the offender is subsequently found guilty of the lesser crime.<sup>201</sup>

There are important differences, however, in approaches to how the discount is calculated in the various jurisdictions. In South Australia, Western Australia and England and Wales, a sliding scale model has been adopted that clearly connects a specified discount to a particular time identified in the pre-trial process. This is also the model recommended by the NSWLRC<sup>202</sup> and set out in legislation passed by New South Wales in October 2017.<sup>203</sup> This model has the greatest degree of certainty but has less flexibility and less scope for judicial discretion.

In comparison, other models do not have a legislatively prescribed discount, but the utilitarian value of the plea reflects whether the offender entered a plea of guilty at earliest or first possible opportunity. For example, in Victoria the court is directed to take account of the guilty plea, including the timing of the plea, and (in some cases) is required to set out the sentencing that would otherwise have been imposed and so the discount received can be calculated. In New South Wales, similarly (until the commencement of recent legislative changes to introduce a statutory sliding scale), the emphasis on the utilitarian value of the plea has meant that the timing of the plea has been a key factor relevant to the discount received, with ‘the earlier the guilty plea, the greater the utilitarian value and the greater the discount that will be given by the sentencing court’.<sup>204</sup> There is guidance from the judgment in *Thomson and Houlton* in relation to the likely amount of the discount and the desirability of the court stating the discount given. This approach also exists in Queensland, the Northern

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<sup>201</sup> Freiberg, above n 3, 379. This is a recognised exception in England and Wales, see Sentencing Council (UK), *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2017) 7.

<sup>202</sup> See NSWLRC, Final Report, above n 11.

<sup>203</sup> See *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (yet to commence).

<sup>204</sup> NSWLRC, *Sentencing*, Report 139 (2013) 119 citing *R v Borkowski* [2009] NSWCCA 102; *R v Thomson and Houlton* 48 NSWLR 283, [154], [160].

Territory, the Australian Capital Territory and New Zealand. This model has the advantage of flexibility and transparency, but there is less certainty as it is not always clear when the ‘first opportunity’ can be said to have occurred as this is left to the discretion of the sentencing judge. As Wren and Bartels have stated,

The timing is more complicated than simply considering a chronology of when the offender entered a guilty plea. The intricacies of the criminal justice system mean there are often lengthy periods of communication and procedural matters to be addressed before an offender can reasonably be expected to plead guilty. The High Court in *Cameron* acknowledged that the question is not one that can be answered “simply by looking at the charge sheet”. Rather, the question to be asked is when would it be reasonably practicable to expect the offender to have entered a plea.<sup>205</sup>

There are also differences between jurisdictions (either in case law interpretation or in legislation) in relation to the additional factors that are taken into account in determining the utilitarian value of the plea. For example, Freiberg has indicated that the presumption is that the discount should be available irrespective of the seriousness of the offence and ‘the more serious the crimes, the greater the weight to be given to a guilty plea’.<sup>206</sup> However, in New South Wales, in *R v Borkowski*<sup>207</sup> it was stated that there ‘may be offences that are so serious that no discount should be given’. This is reflected in the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) where the general position is that the sentencing discounts are fixed, meaning that the full discount must be given.<sup>208</sup> However, there are two exceptions where the court may decide that no discount or a reduced discount should be applied. These are where: (1) the level of culpability of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence would not be satisfied by the imposition of the discount; and (2) the utilitarian value of the offender’s guilty plea has been eroded by a dispute as to the facts on sentence. In addition, no discount will apply where the court imposes a life sentence.<sup>209</sup>

In Victoria, Lasry J imposed a life sentence without a non-parole period in circumstances where the offender had entered a guilty plea to a charge of murder and incitement to murder on the basis that ‘when that value [of the plea] is weighed with all the other relevant and countervailing considerations [it] was insufficient to result in a lesser sentence’.<sup>210</sup> This is incorporated in legislation South Australia and the Australian Capital Territory. Another factor that is relevant in some jurisdictions is the strength of the prosecution case. For example, this is expressly recognised in legislation in South Australia as a relevant factor in calculating the discount. In contrast, in New South Wales, Victoria, Queensland, and in England and Wales, the strength of the prosecution case is not relevant to the level of reduction.<sup>211</sup> As a general rule, the offender’s motivation for entering a guilty plea, including remorse, is not relevant to the discount for a guilty plea (but may provide a separate ground of

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<sup>205</sup> Elizabeth Wren and Lorana Bartels, “‘Guilty, Your Honour’: Recent Legislative Developments on the Guilty Plea Discount and an Australian Capital Territory Case Study on its Operation” (2014) 35 *Adelaide Law Review* 361, 366.

<sup>206</sup> Freiberg, above n 3, 379.

<sup>207</sup> (2009) 195 A Crim R 1 [32].

<sup>208</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017 (Mark Speakman); *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) s 25D(1).

<sup>209</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017 (Mark Speakman); *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) s 25F.

<sup>210</sup> [2017] VSC 493 [98].

<sup>211</sup> Freiberg, above n 3, 380; Sentencing Council (UK), above n 201, 4; Bagaric and Edney, above n 22, 318; *Phillips v The Queen* (2012) 222 A Crim R 149 [36]. Although note *R v Mahony* [2012] QCA 366, where the Court of Appeal in Queensland held that the strength of the prosecution case was relevant to gauging the extent of the savings of court and judicial time, and in a case where the prosecution case was very strong, the savings were expected to be less than they might reasonably be in a different case, for example, a complicated circumstantial one: at [55]–[56].

mitigation).<sup>212</sup> However, in the Northern Territory case law has treated remorse as relevant to the provision of the maximum discount for the guilty plea.<sup>213</sup>

There are also differences in relation to the approach taken to the relevance of saving witnesses from giving evidence in calculating the value of the guilty plea. In New South Wales, this is not taken into account in relation to the utilitarian value of the plea but is relevant to remorse.<sup>214</sup> In contrast, in other jurisdictions, this is generally taken to be a factor to be considered under the utilitarian justification for the sentencing discount.<sup>215</sup>

Table 4.1 shows the nature of the discount given (in terms of the reduction provided in the quantum of the sentence) but these figures do not take into account a change in the nature of the sentence, for example from imprisonment to a suspended sentence or a community correction order.

**Table 4.1: Overview of how a court takes a guilty plea into account**<sup>216</sup>

	<b>Court must take into account</b>	<b>Discretionary impact of plea on sentence</b>	<b>Specifying the discount</b>	<b>Other</b>
NSW (current) <sup>217</sup>	Fact of plea. Timing of plea or indication of intention to plead guilty. Circumstances in which indicated intention to plead guilty.	May impose a lesser penalty (but must not impose a lesser penalty that is unreasonably disproportionate to the nature and circumstances of offence).	Court must record reasons if no discount is given. Encouraged to quantify discount. <sup>218</sup>	No legislatively stated discount but between 10% and 25% depending on timeliness of plea. <sup>219</sup>
NSW (proposed to apply to indictable offences) <sup>220</sup>	Fact of plea. Timing of plea.	Must impose the discount unless exception applies (level of culpability, disputed facts and life sentences).	Court must record how the sentence was calculated if the sentencing discount is applied and must record reasons for determination if determines not to apply or to reduce the discount.	Sliding scale from 5% up to 25% depending on timing of the plea (specific periods and percentages outlined in legislation).
Victoria <sup>221</sup>	Fact of plea. Timing of plea or indication of intention to plead guilty.	May impose a less severe sentence.	Court must or may (depending on sentence imposed) state the sentence it would have imposed but for the guilty plea.	No legislatively stated discount but statistical evidence is that the average is around 25–33%.
SA <sup>222</sup>	Whether reduction would be so disproportionate to the seriousness	May reduce sentence but courts	Practice to specify discount. <sup>224</sup>	Sliding scale from 10% up to 40%

<sup>212</sup> See *R v Borkowski* (2009) 195 A Crim R 1 [32]; *Phillips v The Queen* (2012) 222 A Crim R 149 [36]; VSAC, above n 197, 37.

<sup>213</sup> *JKL v The Queen* [2011] NTCCA 7.

<sup>214</sup> *Morton v The Queen* [2014] NSWCCA 8 referring to *R v Thomson and Houlton* 48 NSWLR 283.

<sup>215</sup> See [1.3.1].

<sup>216</sup> This table is adapted from NSWLRC, Consultation Paper, above n 11, Table 9.2.

<sup>217</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(3)(k), 22.

<sup>218</sup> *R v Thomson & Houlton* (2000) 49 NSWLR 383.

<sup>219</sup> *Ibid*; *R v Borkowski* [2009] NSWCCA 102.

<sup>220</sup> *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW).

<sup>221</sup> *Sentencing Act 1991* (Vic) ss 5(2)(e), 6AAA.

<sup>222</sup> *Criminal Law (Sentencing) Act 1988* (SA) ss 10B and 10C.

	<b>Court must take into account</b>	<b>Discretionary impact of plea on sentence</b>	<b>Specifying the discount</b>	<b>Other</b>
	<p>of the offence or so inappropriate in the case of that particular defendant, that it would shock the public conscience.</p> <p>Timing of indication of plea of guilty (including whether it would in the opinion of the court have been reasonable to expect the defendant to have done so at an earlier stage).</p> <p>Circumstances of the plea.</p> <p>Whether the defendant has pleaded guilty to all offences where has been charged with more than one offence.</p> <p>If the defendant satisfies the court that he or she could not reasonably have been expected to plead guilty at earlier stage in the proceedings because of circumstances outside of his or her control – that fact (not for Magistrates Court).</p> <p>Whether the defendant was made aware of any matter that would have enabled the defendant to plead guilty earlier.</p> <p>Any other factor or principle that the court thinks relevant.</p>	<p>ordinarily provide a reduction close to the maximum, in the absence of a good reason.<sup>223</sup></p>		<p>based on timing of plea (specific periods and percentages outlined in legislation).</p>
Queensland <sup>225</sup>	<p>Fact of plea.</p> <p>Timing of plea or indication of intention to plead guilty.</p>	<p>May reduce sentence.</p>	<p>Court must state that took into account guilty plea and must state the reasons if it did not reduce the sentence.</p>	<p>No legislatively stated discount but discount of 30% ordinarily granted where plea is entered or indicated at an early stage.<sup>226</sup></p>
WA <sup>227</sup>	<p>Fact of plea.</p> <p>Timing of plea (the earlier in proceedings, the greater the reduction in sentence).</p>	<p>May reduce the head sentence to recognise the benefits to the State and to any victims or witness to the offence.</p>	<p>Court must state reduction in sentence and extent of reduction.</p>	<p>Discount of up to 25% (set out in legislation).</p>
ACT <sup>228</sup>	<p>Fact of plea.</p> <p>Timing of plea or indication of intention to plead guilty.</p> <p>Whether the plea was related to negotiations between the prosecution and defence about the</p>	<p>May impose a lesser sentence (but must not impose a lesser penalty that is unreasonably disproportionate to the nature and</p>	<p>Must state penalty it would have otherwise imposed.</p>	<p>No legislatively stated discount but generally applies NSW guideline judgment re quantum of discount.<sup>229</sup></p>

<sup>224</sup> *R v Harris* (1992) 59 SASR 300.

<sup>223</sup> Brian Martin, *Review of the Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012 and Criminal Law (Sentencing) (Supergrass) Amendment Act 2012* (Report, 2015) 33.

<sup>225</sup> *Penalties and Sentences Act 1992* (Qld) s 13.

<sup>226</sup> Mackenzie, above n 6, 211. It was noted that there was less benefit closer to the trial date but no sliding scale existed and the ‘practice is that a substantial discount will still be available even if the plea is entered at a later stage’: at 211.

<sup>227</sup> *Sentencing Act 1995* (WA) s 9AA.

<sup>228</sup> *Crimes (Sentence Administration) Act 2005* ss 35(3), 37(2)(b).

<sup>229</sup> Wren and Bartels, above n 205.

	<b>Court must take into account</b>	<b>Discretionary impact of plea on sentence</b>	<b>Specifying the discount</b>	<b>Other</b>
	charge to which the offender pleaded guilty. The seriousness of the offence. The effect of offence on anyone who can make a victim impact statement (including the victim or victims' family). Must not make any significant reduction if the court considers that the prosecution's case was overwhelmingly strong.	circumstances of offence).		Applies if there is a real likelihood that the court will sentence the offender to imprisonment.
NT <sup>230</sup>	Fact of plea. Timing of plea or indication of intention to plead guilty.	May reduce sentence.	Desirable for the court to indicate the extent to which a plea of guilty has been given weight as a mitigating factor. <sup>231</sup>	A reduction of 25% will normally be given in circumstances where there has been an early guilty plea which is indicative of true remorse and resipiscence. <sup>232</sup> However, there is no set range or tariff and needs to be determined in the circumstances of the case. <sup>233</sup>
England/Wales <sup>234</sup>	Timing of indication of intention to plead guilty. Circumstances of indication to plead guilty.	Limited exceptions set out in guideline.	Court must state that imposed lesser penalty. Court should state the amount of the reduction. <sup>235</sup>	Sliding scale from 1/10 <sup>th</sup> to 1/3 <sup>rd</sup> based on timing of the plea (details set out in Guideline judgment). <sup>236</sup>
NZ <sup>237</sup>	Fact of plea. Timing of plea.	May reduce sentence.	Should set out discount. <sup>238</sup>	Should not exceed 25%. <sup>239</sup>

## 4.2 Research examining impact of statutory reduction on the court system

### 4.2.1 Victoria

In Victoria, following recommendations from VSAC, the *Sentencing Act 1991* (Vic) was amended in March 2008 to include s 6AAA which requires (in certain cases), if the court imposes a less severe sentence than it would otherwise have imposed because the offender pleaded guilty to the offence, the court to state the sentence and non-parole period that it would have imposed. This provision was

<sup>230</sup> *Sentencing Act* (NT) s 5(2)(j).

<sup>231</sup> *JKL v The Queen* [2011] NTCCA 7, [24].

<sup>232</sup> *Ibid* [28].

<sup>233</sup> *Ibid* [31].

<sup>234</sup> *Criminal Justice Act 2003* (UK) ss 144, 174(7).

<sup>235</sup> Sentencing Council (UK), above n 201, 5.

<sup>236</sup> *Ibid* 5.

<sup>237</sup> *Sentencing Act 2002* (NZ) s 9(2)(b).

<sup>238</sup> *Hessell v R* [2009] NZCA 450.

<sup>239</sup> *Hessell v R* [2010] NZSC 135.

‘intended to make the sentence discounts for guilty pleas more transparent and consistent, thereby encouraging defendants who intended to plead guilty to do so as early as possible’.<sup>240</sup> Additionally, the provision aimed to encourage people who ‘intended to plead guilty to do so as early as possible, without encouraging inappropriate guilty pleas’.<sup>241</sup>

In view of its aims, in analysing the effect of the reforms in 2015, VSAC considered that ideally ‘post-reform analysis would show that the plea rate had remained stable and had not increased, but that those who were pleading guilty were doing so early’.<sup>242</sup> This appears to have been the case, with VSAC’s 2015 analysis showing that rates of guilty pleas had not increased but that there had been a significant increase in the rate of early guilty pleas. However, while this was the intended effect of *Sentencing Act 1991* (Vic) s 6AAA, it was not possible to identify the extent that this reform had contributed, if at all, to this outcome.<sup>243</sup> This was because there had also been ‘a concerted effort by the courts, prosecution, and defence to ensure that cases that [were] likely to be resolved by a guilty plea’ were identified at an early stage.<sup>244</sup> Moreover, in addition to the introduction of s 6AAA, other reforms to improve efficiency were also adopted. These included:

- The commencement of the *Criminal Procedure Act 2009* (Vic), which was intended to “clarify, simplify and consolidate the laws relating to criminal procedure” in the Magistrates’ Court, County Court, and Supreme Court.
- A change in policy at the Office of Public Prosecutions that opened the way to more meaningful discussion between parties, including requiring the solicitor with conduct of the prosecution to “consider whether the prosecution may be resolved by a plea of guilty to appropriate charges” at every stage of the prosecution.
- Initiatives introduced by Victoria Legal Aid, such as a post-committal negotiation fee for private practitioners and barristers “aimed at encouraging early resolution and narrowing of disputed issues” and the creation of specialist criminal law teams in Victoria Legal Aid’s in-house practice.
- Increased case management by the courts and earlier resolution discussions to identify early guilty pleas. ...
- The introduction of a “24 hour initial directions hearing” program in the County Court. This shortened the gap between a committal with a not guilty plea (in the Magistrates’ Court) and the initial directions hearing in the County Court from 10 to 12 weeks to “24 hours” (the following sitting day).
- At the initial directions hearing, the list judge “after hearing from the parties [assesses] whether to fix a trial date or to adjourn the matter for a further [initial directions hearing] in order to explore the possibility of resolution”.<sup>245</sup>

Despite the uncertainty in relation to the role played by the introduction of a specified sentencing discount on the timing of plea, VSAC’s analysis demonstrates that it is possible to introduce measures to facilitate earlier guilty pleas.

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<sup>240</sup> VSAC, above n 2, 12.

<sup>241</sup> Ibid 22.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid 12.

<sup>245</sup> Ibid 12–13, citations omitted.

In addition, VSAC's analysis of the *Sentencing Act 1991* (Vic), s 6AAA indicates that the provision has resulted in greater certainty and transparency in relation to the relevance of guilty pleas to sentencing. It was found that there was a very high compliance rate with the requirement to state the sentence that would otherwise have been imposed.<sup>246</sup> This meant that it was now possible to ascertain the precise discount that had been obtained in a particular case and also to determine the relationship between plea timing (late or early) and the discount received. VSAC found that in one-third of cases with a s 6AAA statement, the sentence type changed as a result of the guilty plea.<sup>247</sup> It reported that 'a large proportion of offenders sentenced to a suspended sentence, an intensive corrections order, a community based order, or a community correction order would have faced a sentence of immediate imprisonment if they had not pleaded guilty'.<sup>248</sup> In the remaining two-thirds of cases, the guilty plea reduced the sentence length<sup>249</sup> with VSAC reporting that 'the most common discount was 20–30% of the total effective sentence (in 44.9% of cases), and there was a 30–40% discount in a further 26.8% of cases'.<sup>250</sup>

In relation to the timing of the plea, VSAC compared sentence discounts at four key plea timing stages: (1) during the committal stage (in the Magistrates Court) and (2) entered during the pre-trial hearing stage in the higher courts (both classified as early pleas); and (3) entered at door of court and (4) entered during the trial (both classified as late pleas).<sup>251</sup> It found 'a small but statistically significant difference between the average sentence discounts at each stage'<sup>252</sup> and concluded that the research suggested 'that plea timing, independent of sentence length, is an important factor in determining the level of the discount'.<sup>253</sup> It also indicated that the degree of difference found between 'early' and 'late' pleas needed to be understood in light of law that provides a greater discount to pleas given at the first practicable opportunity, and this may mean that a plea that was classified as a 'late' plea according to a chronological assessment was nonetheless a plea entered at the first opportunity.<sup>254</sup> In addition, VSAC also found that the sentence discount was related to sentence length with offenders sentenced to shorter periods of imprisonment receiving a larger discount (as a proportion of their sentence) than offenders who were sentenced to a longer sentence.<sup>255</sup>

#### 4.2.2 South Australia

In 2012, changes were made to South Australian sentencing law by the *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (SA), which introduced a sliding scale that was 'expressly intended to codify the proposition "the earlier the plea, the greater the discount"'.<sup>256</sup> The hierarchy of discounts for matters dealt with in Magistrates Court or for matters dealt with as summary offences are set out in Table 4.2.<sup>257</sup>

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<sup>246</sup> Ibid 47.

<sup>247</sup> Ibid 59.

<sup>248</sup> Ibid 75.

<sup>249</sup> Ibid 59.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid 69.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid 76.

<sup>254</sup> Ibid 69.

<sup>255</sup> Ibid 76.

<sup>256</sup> NSWLRC, Final Report, above n 11, 133 quoting SA, *Parliamentary Debate*, Legislative Council, 4 September 2012, 2001.

<sup>257</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 10B.

**Table 4.2: South Australia statutory sentencing discount for guilty pleas: Magistrates Court and matters dealt with as summary offences**

Time frame	Discount
Not more than 4 weeks after first appearance in court.	Up to 40%
More than 4 weeks after first court appearance but if a date has been set for a trial – not less than 4 weeks before that day and in any other case before the trial.	Up to 30%
Less than 4 weeks before the day set for trial if the defendant satisfies the court that he or she could not reasonably have pleaded guilty at an earlier stage because of circumstances outside or his or her control.	Up to 30%
In any other circumstances, if there are good reasons to do so.	Up to 10%

Table 4.3 sets out the hierarchy of discounts for all other cases that are currently contained in the *Criminal Law (Sentencing) Act 1988* (SA) s 10C and the proposed time frames that will be introduced following the commencement of the amendments contained in the *Summary Procedure (Indictable Offences) Amendment Act 2017* (SA).

**Table 4.3: South Australia statutory sentencing discount for guilty pleas: Indictable offences**

Current time frame	Proposed time frame <sup>258</sup>	Discount
Not more than 4 weeks after first appearance in court.	Not more than 4 weeks after first appearance in court.	Up to 40%
More than 4 weeks after first court appearance but before the defendant is committed for trial.	More than 4 weeks after first court appearance but on or before the defendant’s committal appearance.	Up to 30%
From committal until 12 weeks after the first date fixed for the arraignment of the defendant.	From the day after the committal appearance and ending immediately before the defendant is committed for trial.	Up to 20%
If the defendant satisfies the court that he or she could not reasonably have pleaded guilty at an earlier stage because of circumstances outside of his or her control, if plea entered from committal but before commencement of a trial.	During the period commencing immediately after the defendant is committed for trial and ending immediately after the arraignment appearance in a superior court.	Up to 15%
Within 7 days immediately following an unsuccessful application to quash or stay the proceeding or a ruling adverse to the interests of the defendant in the course of a hearing of the proceedings determined in the period between committal and 5 weeks before the commencement of the trial.	During the period commencing immediately after the defendant’s arraignment appears in a superior court and ending at the commencement of the trial, if there is good reason to do so.	Up to 10%
In any other circumstances, if there are good reasons to do so.	n/a	Up to 10%

This approach was intended to ‘improve the operation and effectiveness of the criminal justice system by reducing current delays and backlogs in cases coming trial; by encouraging offenders who [were] minded to plead guilty, to do so in a timely way’.<sup>259</sup> In South Australia, as elsewhere, there were concerns raised about the number of offenders who entered a late plea of guilty, and the flow on effect for the criminal justice system. It was reported that for all major indictable matters finalised between

<sup>258</sup> These time frames are contained in the *Summary Procedure (Indictable Offences) Amendment Act 2017* (SA) (yet to commence).

<sup>259</sup> Attorney-General’s Department, Government of South Australia, *Transforming Criminal Justice: Consultation Paper* (2015) 2–3.

1 January 2011 and 30 September 2012, of matters which resolved by a guilty plea, only 35.7% of the pleas occurred at the committal stage with 59.5% of guilty pleas resolved after the committal but prior to a trial commencing.<sup>260</sup>

In 2015, a review of the operation of the provisions was undertaken by Mr Martin QC and an evaluation report was also prepared by the Office of Crime Statistics and Research. The findings in relation to the timing of pleas are set out in Table 4.4 and show that there had been ‘a substantial increase in the percentage of major indictable offences finalised by guilty pleas in the Magistrates Court’.<sup>261</sup> There had also been an increase in the percentage of matters finalised within the first four weeks of the first appearance.<sup>262</sup> Despite this change in plea behaviour, it was found that there had been no change in the court backlogs in the District Court, measured as the percentage of matters unfinished after 12 and 24 months.<sup>263</sup> However, it was concluded that ‘[s]peaking generally ... the increase in the number of guilty pleas is improving the operation and effectiveness of the criminal justice system simply because more pleas of guilty have been entered or indicated at the earlier stages of the system’.<sup>264</sup> Martin expressed the view that more time may be required to see the increased number of early pleas translated into an improvement in the time taken to dispose of matters in the District Court and to reduce backlog.<sup>265</sup> It was acknowledged that ‘other factors [were] likely to be impinging upon the effects of the sentence reduction scheme in these areas and it is not appropriate ... to comment on these matters’.<sup>266</sup> Martin also considered that the sentencing discount scheme provided transparency in relation to the reduction allowed in sentences in recognition of guilty pleas.<sup>267</sup>

**Table 4.4: Evaluation of *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012 (SA), Timing of guilty pleas***<sup>268</sup>

	<b>Within four weeks of first appearance</b>	<b>Prior to committal</b>	<b>More than 12 weeks post arraignment</b>
Three years prior to commencement (March 2013)	4% to 6%	38% to 52%	25% to 32.5%
12 months post commencement	8%	62%	16%

In Martin’s review, it was noted that several difficulties were identified with the scheme including:

- The four-week period of qualification poses difficulties given the ‘practical consideration of busy practitioners, coupled with problems of access to defendants’.<sup>269</sup> This period created a particular disadvantage for indigenous offenders.<sup>270</sup>

<sup>260</sup> Ibid 3.

<sup>261</sup> Office of Crime Statistics and Research (SA), *Evaluation Report Executive Summary* (2015) annexed in Brian Martin, *Review of the Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012 and Criminal Law (Sentencing) (Supergrass) Amendment Act 2012* (Report 2015).

<sup>262</sup> Office of Crime Statistics and Research, above n 261.

<sup>263</sup> Ibid.

<sup>264</sup> Martin, above n 223, 28.

<sup>265</sup> Ibid 34.

<sup>266</sup> Ibid.

<sup>267</sup> Ibid 28.

<sup>268</sup> Parliament of South Australia, House of Assembly, 16 November 2016, (Rau) referring to Brian Martin, *Review of the Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012 and Criminal Law (Sentencing) (Supergrass) Amendment Act 2012* (Report 2015).

<sup>269</sup> Martin, above n 223, 30.

<sup>270</sup> Ibid 23.

- Difficulties created for unrepresented defendants understanding the operation of the scheme at the time of the first appearance in court.<sup>271</sup>
- The Law Society of South Australia expressed concern (based on anecdotal information) that the ‘scheme has the potential to elevate the risk of inappropriate pressure being placed upon persons accused of crime to plead guilty’.<sup>272</sup>
- Absence of information required by the defence before advising their clients was consistently identified as a major impediment to the entry of a plea within the first four weeks. It was noted that the police and the Office of the Director of Public Prosecution (ODPP) believed ‘that a change of culture and attitude [was] required in this area because ... many of the requests for information are unnecessary and contrary to the spirit of the scheme which [was] intended to encourage offenders to admit their guilt at an early stage thereby avoiding unnecessary investigative and other work associated with the prosecution’.<sup>273</sup> In respect of this concern, Martin suggested that:

[p]art of the solution rests with changing the attitudes of those in the legal profession who cling to the belief that defendant is always entitled to know the strength of the prosecution case before deciding whether to plead guilty and should be entitled to a full discount notwithstanding that they kept their options open while waiting to see the strength of the prosecution case.<sup>274</sup>

Martin’s view was that ‘in the vast majority of cases the defendant is aware of the conduct and whether the conduct amounted to a crime’.<sup>275</sup> However, he acknowledged that ‘the defendant is entitled to information as to the essential allegations which form the basis of the charge and will inform the court of the factual basis upon which the sentence is to be imposed’ to allow an informed decision to be made in relation to entering a plea.<sup>276</sup> The difference of views presented here highlights the potential for dispute to exist in relation to the nature of the information that should be provided to an offender to allow an informed decision to be made. Martin also recognised that there was a need for the ODPP to be involved at the earliest possible opportunity and to ensure that those responsible for the conduct of the case are able to negotiate appropriate settlement of charges or have access to immediate instructions.<sup>277</sup>

- The ODPP noted that in cases where the prosecution accepted a plea to an offence at a later stage that was different from the offence originally charged, a practical issue has arisen when the courts have interpreted the provisions as allowing the defendant to be entitled to a full 40% reduction (by applying the time periods to the new offence). This was also said to provide an incentive for the prosecution to charge more than one offence arising out a single set of circumstances. Accordingly, Martin recommended that the legislation be amended to remove this anomaly.<sup>278</sup>

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<sup>271</sup> Ibid 29.

<sup>272</sup> Ibid 23.

<sup>273</sup> Ibid 30.

<sup>274</sup> Ibid 3

<sup>275</sup> Ibid 31.

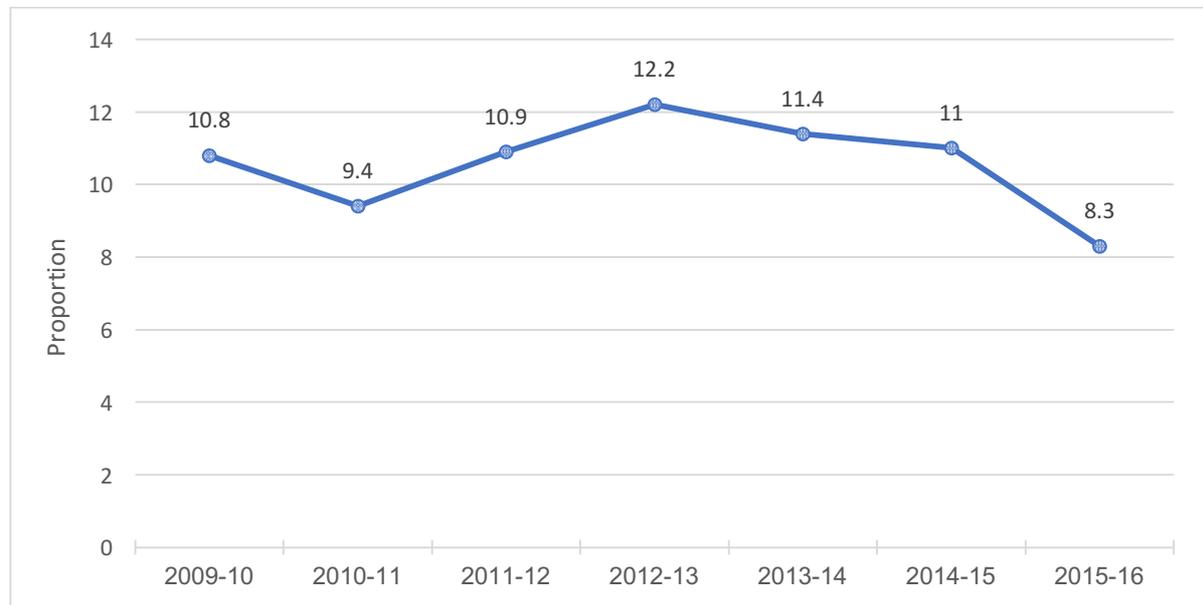
<sup>276</sup> Ibid 31.

<sup>277</sup> Ibid.

<sup>278</sup> Martin, above n 223, 32–33.

Figure 4.1 shows the proportion of trials that proceeded in the District and Supreme Courts that were resolved by a guilty plea at or during the trial in the period 2009–10 to 2015–16.<sup>279</sup> This appears to show that there has been an overall decline in the number of matters resolved by plea at trial since the introduction of the sentencing discount scheme in 2013.

**Figure 4.1: Proportion of trials in District and Supreme Court, South Australia resolved by guilty plea at or during the trial**



In 2015, the Attorney-General’s Department released a consultation paper seeking feedback on a number of significant reforms to the way major indictable offences were dealt with<sup>280</sup> and this indicated that late guilty pleas and delay were still of concern.<sup>281</sup> It was reported that in 2015–16, 36% of major indictable criminal trials that were vacated were due to late guilty pleas.<sup>282</sup>

Following these reviews, significant changes have been made to criminal procedure in the *Summary Procedure (Indictable Offences) Amendment Act 2017 (SA)*. These include:

- Requiring major indictable matters to be the subject of a ‘charge determination’ by the DPP prior to the commencement of the committal proceedings.
- Giving courts discretion to set out realistic adjournment timeframes that reflect the needs of individual cases, and reduce unnecessary court appearances when the matter is in the Magistrates Court. On the first hearing, the police will inform the Magistrates Court of the time required to provide a preliminary brief and then the matter will be adjourned for that time to enable this brief to be prepared plus four weeks to allow the DPP to consider the brief and make a charge determination.
- Introducing a tiered disclosure system that will allow earlier disclosure of primary evidence to the defence. If the defendant still wants to plead not guilty after provision of the preliminary brief, the Magistrates Court will adjourn the matter to enable provision of a committal brief,

<sup>279</sup> This information is obtained from the Office of the Director of Public Prosecution, Annual Reports for the period 2010–11 to 2015–16.

<sup>280</sup> Attorney-General’s Department, Government of South Australia, above n 259.

<sup>281</sup> Ibid 1.

<sup>282</sup> Attorney-General’s Department, Government of South Australia, *Transforming Criminal Justice – Major Indictable Reform: Factsheet* (2017) 1.

that contains further evidence not included in the preliminary brief. If the defendant still wants to plead not guilty, they will be committed to a higher court for trial.

- Requiring ‘case statements’ to be filed by the prosecution and defence prior to a matter being arraigned in the higher court to identify the matters that are genuinely in dispute.<sup>283</sup>

There are also changes to the sentencing discount scheme including:

- Changing the timing and amount of sentencing reductions available (as set out in Table 4.3).
- Providing a specific reduction as an incentive for complying with pre-trial disclosure. A deduction for up to 10% is allowed if the defendant did not plead guilty but the sentencing court is satisfied that the defendant complied with all statutory or court order requirements relating to pre-trial disclosure and procedures and has otherwise conducted their case in a cooperative and expeditious manner.
- Ensuring that the court has regard to the timing of negotiations where those negotiations result in a different charge being laid to replace an earlier charge in respect of the same conduct.<sup>284</sup>

These reforms were designed to build upon the earlier sentencing reforms with a view to increasing the ‘efficiency of the progression of major indictable matters by reducing the number of guilty pleas occurring after the committal stage, instead encouraging an appropriate guilty plea at an earlier stage’.<sup>285</sup>

### **4.2.3 New South Wales**

In its reference examining mechanisms to encourage appropriate early guilty pleas, the NSWLRC set out developments to criminal law and procedure introduced between 1990 to 2013 with a view to encouraging appropriate pleas.<sup>286</sup> These included the enactment of a statutory provision directing the sentencing court to take a guilty plea and the timing of the plea into account. There has also been the guideline judgment delivered in 2000 by the Court of Criminal Appeal in *R v Thomson; R v Houlton*,<sup>287</sup> that indicated that the utilitarian value of an early plea can result in a sentencing discount of 10–25%, depending on the timing of the plea. The guideline judgment also directed that sentencing judges should explicitly quantify the discount afforded by the guilty plea. Other reforms included pilot plea indication schemes and criminal case conferencing.<sup>288</sup> Despite these initiatives, the assessment of the NSWLRC was that ‘the statistics in NSW show that past attempts to encourage early guilty pleas have not been particularly successful’.<sup>289</sup> However, in its blueprint for reform, the NSWLRC did not address matters resolved in the summary jurisdiction given that evidence and consultations indicated that ‘late entry of guilty pleas in summary proceedings [was] not an issue that caused[d] delay or consume[d] resources as it [did] in the District Court’.<sup>290</sup>

In New South Wales, for indictable matters finalised in 2013, 50.17% (1756) were committed for sentence and 49.82% (1744) were originally committed for trial, of which 52.76% (915) eventually

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<sup>283</sup> Ibid.

<sup>284</sup> Ibid 2.

<sup>285</sup> Attorney-General’s Department, Government of South Australia, above n 259, 3.

<sup>286</sup> NSWLRC, Consultation Paper, above n 11, 3–4.

<sup>287</sup> (2000) 49 NSWLR 383.

<sup>288</sup> See NSWLRC, Consultation Paper, above n 11, 3–4.

<sup>289</sup> Ibid 4. See also Wai Yin Wan, Craig Jones, Steve Moffatt and Don Weatherburn, ‘The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court’ (BOCSAR, Crime and Justice Statistics Bureau Brief 44, 2010).

<sup>290</sup> NSWLRC, Final Report, above n 11, 4.

were finalised by the entry of a guilty plea.<sup>291</sup> In 2013, 83% of all matters proved in the District Court were resolved by a guilty plea with 65% of pleas entered at or before committal was finalised and 35% entered after the matter was committed for trial. Data provided by the Office of the Director of Public Prosecutions for 2011–12, show that for matters committed for trial in the District Court, 30% of matters were resolved in a defended trial, 29% of matters were resolved in plea on the first day of the trial, 23% resolved in plea between arraignment and first day of trial, and 12% of matters were discontinued by the prosecution.<sup>292</sup> In this period, there were 719 late guilty pleas with 62% received on day of trial, 22% at the arraignment and 16% entered between arraignment and the trial date.<sup>293</sup> In 2012–13, there had been a slight increase in day-of-trial pleas at 66% (516) of all later guilty pleas.<sup>294</sup> It was also noted that in the District Court in 2012, the majority of pleas received on the first day of trial were entered to an amended charge (63%).<sup>295</sup>

Research conducted by BOSCAR in 2010 also indicated that despite the guideline judgment, ‘the very high rate of late guilty pleas has persisted’.<sup>296</sup> This research examined the effectiveness of a Criminal Case Conferencing scheme that was introduced in New South Wales to bring about a reduction in the number of late guilty pleas.<sup>297</sup> A key component of this scheme was that a discount of 25% was available for all applicable guilty pleas entered before a matter was committed for trial, and if a guilty plea was entered after a matter was committed for trial, then the offender could only access a discount of up to 12.5%.<sup>298</sup> An evaluation of the effectiveness of the scheme concluded that it had not met its objective of increasing the rate of guilty pleas and one of the reasons identified for its ineffectiveness was the possibility that defendants and their legal representatives continued to view the promise of significant sentencing discounts with scepticism.<sup>299</sup>

This reflected the findings of earlier research conducted by Weatherburn and Baker, which surveyed defence representatives in relation to the reasons why offenders enter a later guilty plea. The two most common reasons were that there was a late decision by the Crown to accept a plea to a lesser charge, another charge or fewer charges and that there had not been an opportunity to discuss the matter with the Crown until late in the process.<sup>300</sup> Another reason identified was that there was no clear sentence benefit to offenders for earlier rather than later guilty pleas.<sup>301</sup> According to Weatherburn and Baker, this perception was ‘soundly based in fact’ given that sentencing discounts were not applied in a consistent manner.<sup>302</sup> It was reported that:

Accused who plead guilty enjoy considerable sentence benefits over accused who leave it to the court to decide their guilt. However, accused who plead guilty early receive very modest sentence benefits, and in many cases appear to be actually penalised, over accused

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<sup>291</sup> Ibid 18.

<sup>292</sup> Ibid 22.

<sup>293</sup> Ibid 23.

<sup>294</sup> Ibid 24.

<sup>295</sup> Ibid.

<sup>296</sup> Yin Wan, Jones, Moffatt and Weatherburn, above n 289, 2.

<sup>297</sup> It is noted that this scheme was set out in legislation (*Criminal Case Conferencing Trial Act 2008* (NSW)) which has now been repealed.

<sup>298</sup> Yin Wan, Jones, Moffatt and Weatherburn, above n 289, 2.

<sup>299</sup> Ibid 8. See discussion in NSWLRC, Final Report, above n 11, 223, and ff.

<sup>300</sup> Weatherburn and Baker, above n 198, 26.

<sup>301</sup> Ibid 27.

<sup>302</sup> Ibid 36.

who plead guilty at a later stage. Sentence benefits are also applied somewhat inconsistently across different types of offences.<sup>303</sup>

Decisions in relation to the timing of the plea were also influenced by perceptions in relation to the sentencing practices of particular judges and offenders were more likely to enter a plea if listed before a judge whose sentencing practices were viewed as ‘tough’ compared to their peers.<sup>304</sup> Accordingly, the authors concluded that to be effective, ‘there needs to be a significant discount for early guilty pleas and this needs to be applied consistently across different kinds of offences’.<sup>305</sup>

Despite this research demonstrating that reforms in relation to guilty plea discounts and associated criminal procedural changes have not been effective in reducing court delay or facilitating earlier pleas, offence specific research conducted by the New South Wales Judicial Commission in relation to robbery revealed that following the guideline judgment in *Thomson*, there had been an increase in pleas entered at the earliest opportunity (64% compared to 82%) and a reduction in late pleas (16.4% compared to 7.7%) in relation to matters sentenced before and after the guideline judgment.<sup>306</sup> The Judicial Commission also found changes in judicial behaviour with an increased percentage of judges quantifying the discount for the guilty plea following the guideline judgement (4.4% compared to 63.4%). It was noted that other judges (14.6%) did not quantify the discount but instead used words such as ‘maximum’, ‘full’, ‘substantial’ or ‘significant’ to describe the discount.<sup>307</sup> This suggests that greater guidance for offenders about the sentencing discount and the requirement for judicial officers to state the discount can result in a change in plea behaviour.

However, modelling would suggest that, in isolation, even a significant change in plea behaviour (a reduction by 75% of late pleas) will not necessarily be effective in reducing court backlogs. In 2017, BOCSAR released a paper that presented a simulation model that sought to determine the effect of various possible reforms on the pending case backlog in the Sydney Registry of the District Court, specifically to determine what (if any) intervention could reduce the case backlog from 702 cases to 430 cases by the end of 2019.<sup>308</sup> It considered the effect of the following scenarios: (1) an increase in the number of judges available to preside over trials; (2) a reduction in the number of late/trial-day guilty pleas by defendants; (3) a reduction in the number of adjournments occurring on the morning of a trial; (4) elimination the mid-year vacation period; and (5) a combination of scenarios (1) through (4).<sup>309</sup> It found that the only intervention that could reduce the backlog to 430 cases or less was the addition of five or more judges to the Sydney Registry.<sup>310</sup> In relation to guilty pleas, the modelling indicated that even a 75% reduction in later guilty pleas did not result in the backlog decreasing; rather, it indicated that the average backlog would rise to 725 cases in December 2019 despite the reduction.<sup>311</sup> Accordingly, it was observed that ‘the effects from reducing the late guilty pleas are much weaker than the effects from adding additional judges, and that the guilty plea reform would

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<sup>303</sup> Ibid 36.

<sup>304</sup> Ibid 38.

<sup>305</sup> Ibid.

<sup>306</sup> Lynne Barnes and Patrizia Poletti, *Sentencing Robbery Offenders since the Henry Guideline Judgment* (Judicial Commission of New South Wales Monograph 30, 2007) 75–76.

<sup>307</sup> Ibid 78.

<sup>308</sup> Hamish Thorburn, ‘A Simulation Model of the NSW District Criminal Court with Illustrative Applications’ (BOCSAR Crime and Justice Bulletin Contemporary Issues in Crime and Justice 204, 2017) 1.

<sup>309</sup> Ibid 3.

<sup>310</sup> Ibid 1.

<sup>311</sup> Ibid 7.

only slow the rate of increase in the size of the backlog, rather than cause a decline'.<sup>312</sup> In terms of a combination of scenarios, it was found that a combination of two additional judges, a 50% reduction in later guilty pleas, a 33% reduction in adjournments and the elimination of the mid-year vacation would achieve a smaller but still significant reduction in the backlog to 564 cases.<sup>313</sup>

Other research released by BOCSAR in 2018 suggests that changes in pre-trial procedure can be highly effective in altering a defendant's plea behaviour (separate from any reform to statutory discounts for guilty pleas).<sup>314</sup> This research evaluated a new case management approach trialled in the NSW District Criminal Courts, where cases allocated to a special 'rolling list court' (RCL) were dealt with from start to finish by the same judge and defence and prosecution lawyers instead of the usual arrangements where cases may be dealt with by different judges and lawyers at different points in the progress of a case. Significant findings were that the RCL resulted in more early guilty pleas. Specifically, the research found that:

- More than half (58%) of the matters resolved in a guilty plea before the trial date in the RCL compared to 22% of matters randomised to the general list of the NSW District Criminal Court.
- The average time from committal to finalisation for cases in the RLC was 262 days, compared with 364 days for cases randomly assigned to the general list, a reduction of 28%.
- The average time taken to enter a guilty plea in the RLC (151 days) was 31% lower than among cases balloted to the general list (220 days).<sup>315</sup>

In interviews with prosecution and defence, the greater number of early pleas was attributed to the involvement of senior prosecutors early in the process and the confidence that this gave to defence counsel that 'nothing would change closer to the trial date'<sup>316</sup> and that 'incentives to delay in pleading guilty were removed as no better deal could be obtained by holding out until the day of the trial'.<sup>317</sup>

#### 4.2.4 Australian Capital Territory

The *Crimes (Sentencing) Act 1995* (ACT) s 33 sets out a list of factors that court must take into account in sentencing an offender and this includes a guilty plea. Under the *Crimes (Sentencing) Act 1995* (ACT) s 35, there are further provisions relevant to the reduction in penalty for a guilty plea that apply where an offender has pleaded guilty and the court considers there is real likelihood that the offender will be sentenced to imprisonment.<sup>318</sup> As indicated in Table 4.1, the court must consider the fact of the plea, the timing of the plea, whether the plea was related to negotiations between the defence and the prosecution in relation to the charge to which the offender pleaded guilty, the seriousness of the offence and the effect of the offence on a victim and/or the victim's family. The court is also directed not to make any significant reduction if the court considers that the prosecution's case is overwhelmingly strong.

Research in the ACT has examined the approach of the Supreme Court to the sentencing discount for a guilty plea but has not considered the broader implications in terms of the effect of the timing of an

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<sup>312</sup> Ibid 9. It is noted that this is based on assumption that the early guilty plea reform would have no effect on trial duration: at 10.

<sup>313</sup> Ibid 1.

<sup>314</sup> Sara Rahman, Suzanne Poynton and Don Weatherburn, 'The NSW Rolling List Court Evaluation: Final Report' (BOCSAR Crime and Justice Bulletin Contemporary Issues in Crime and Justice 8, 2017).

<sup>315</sup> Ibid 8–9.

<sup>316</sup> Ibid 13.

<sup>317</sup> Ibid 10.

<sup>318</sup> *Crimes (Sentencing) Act 1995* (ACT) s 35(1).

offender's plea or court delay. Wren and Bartels analysed decisions handed down by the ACT Supreme Court over the 30-month period between January 2011 and June 2013 to identify how the sentencing discount for a guilty plea operates, and examined the relevance of the timing of the plea to the discount received. It was reported that 'the majority of sentences identified the timing of the plea as either a plea entered early or one entered late. However, there were a number of sentences where the timing of the plea was not given significant attention in the sentencing remarks'.<sup>319</sup> Based on an analysis of sentencing remarks, it was noted that early pleas of guilty attracted an average reduction of 24% and pleas entered at a later stage attracted an average discount of 18%.<sup>320</sup> Wren and Bartels referred to the case of *R v Howard*,<sup>321</sup> where the offender entered a plea on the morning of the trial and, in sentencing, Penfold J stated that:

It is undeniable that there is utilitarian value in a plea of guilty ... even if the only saving is in the court time actually set aside for the trial. It is accordingly undesirable to create a situation where there is so little benefit in a later plea that a person who has not pleaded before the trial is about to commence might as well try his or her luck at trial rather than make a late plea.<sup>322</sup>

In this case, the offender received a discount of 17% (compared to 28% if the plea had been entered at an early stage). In discussing the approach of the ACT Supreme Court, Wren and Bartels indicate that the court has given some significant discounts for pleas entered at a later stage.<sup>323</sup>

#### **4.2.5 England and Wales**

In England, legislation provides that a guilty plea and the timing of the plea is relevant to the imposition of sentence<sup>324</sup> and case law indicates that a guilty plea generally attracts a sentence reduction of 25–30%.<sup>325</sup> This was expanded upon in sentencing guidelines that were released in 2005 (revised in 2007), which recommended:

- one-third discount for a guilty plea at the first reasonable opportunity;
- one-quarter discount for a guilty plea after the trial date is set;
- one-tenth discount for a guilty plea at the door of court/after trial begun.<sup>326</sup>

Research conducted by the Sentencing Council reported that in the Crown Court, a vast majority of offenders plead guilty at or prior to the Plea and Case Management Hearing (PCMH) and that the proportion of offenders who pleaded guilty at this stage had been increasing from 74% in 2011 to 81% in 2013, and remained at 81% in 2014. It was reported that this increase was mainly drawn from a group of offenders that previously pleaded after the PCMH but before the day of the trial, which had decreased from 11% in 2011 to 6% in 2014.<sup>327</sup> It was noted that the proportion of offenders who pleaded on or after the day of the trial had remained stable within the range of 13 to 15%.<sup>328</sup> However, other research has commented on a reduction in the number of cases where the offender enters a plea

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<sup>319</sup> Wren and Bartels, above n 205, 378.

<sup>320</sup> Ibid.

<sup>321</sup> 22 November 201 (Penfold J).

<sup>322</sup> Ibid [25].

<sup>323</sup> Wren and Bartels, above n 205, 381.

<sup>324</sup> *Criminal Justice Act 2003* (UK) s 144.

<sup>325</sup> See Horne, above n 35, 34.

<sup>326</sup> Sentencing Guidelines Council (UK), *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) 6.

<sup>327</sup> Office of the Sentencing Council, *Crown Sentencing Survey Annual Publication 2014* (2015) 36.

<sup>328</sup> Ibid.

of guilty on the day of the trial. Cases that collapse on the day of the trial are referred to as ‘cracked’ trials and it was reported that the proportion of cases that ‘cracked’ had fallen from 30% in the year ending September 2011 to 24% in the year to September 2015. It was noted that the most common reason for a cracked trial was because the defendant pleads guilty (80% of cracked trials).<sup>329</sup>

This research suggests that there has been an increase in the number of cases where an offender enters an early plea. However, it appears that there will always be a proportion of offenders who wait until the last minute to enter a plea. This finding echoes the conclusion of VSAC (referring to New South Wales and Scottish research) that some people will always enter a late plea of guilty regardless of any incentives offered for early guilty pleas.<sup>330</sup>

The Sentencing Council’s research also examined the effect of the stage at which the plea was entered on the reduction applied to an offender’s sentence. It found that the highest reduction (one-third) was received by offenders who pleaded guilty at the first opportunity, while offenders who entered a plea at a late stage (on or after the day of trial) generally received a reduction of between 1 and 20%.<sup>331</sup> These data have been analysed by Roberts and Bradford, who reported that the following deductions based on a guilty plea were made:<sup>332</sup>

	Percentage of cases (n = 43 108)
No reduction	3
1 – 10%	8
11 – 20%	8
21 – 32%	11
One-third	63
Greater than one-third	7

This research confirmed that the greatest reductions accrued to offenders who entered a prompt plea and indicated that judicial practice was generally consistent with the guidelines.<sup>333</sup> However, it was noted that there was offence variation with smaller reductions for certain offence categories such as homicide.<sup>334</sup> In conclusion, Roberts and Bradford observed that these findings indicated that the sentencing discount was more modest than had been previously thought and that this might lead to calls, by those who were concerned with reducing the costs of criminal justice, to ‘argue that the incentive for defendants to plead guilty needs to be greater’.<sup>335</sup>

In 2017, the Sentencing Council issued a new guideline judgement which did not include greater discounts for a guilty plea to encourage guilty pleas, but did make changes to address concerns that had been raised that the guidelines were not being applied consistently and that in some cases, the levels of reductions were higher than those recommended in the previous guideline.<sup>336</sup> In response to these concerns, the new guideline contains clear time frames (rather than at the earliest opportunity) with the stated aim of improving clarity and consistency for sentencers, and also offenders, victims

<sup>329</sup> Ministry of Justice, National Audit Office, *Efficiency in the Criminal Justice System* (2016) 17.

<sup>330</sup> VSAC, above n 21, 29.

<sup>331</sup> Office of the Sentencing Council, above n 327, 36.

<sup>332</sup> Roberts and Bradford, above n 31, 197.

<sup>333</sup> *Ibid* 197–198.

<sup>334</sup> *Ibid* 208.

<sup>335</sup> *Ibid* 207.

<sup>336</sup> Sentencing Council (UK), *Reduction in Sentence for a Guilty Plea – Guideline Consultation* (2016) 5.

and the community.<sup>337</sup> However, it is noted that in its response to the consultation, the Law Society queried the need for new guidelines given that it was ‘unable to identify the evidence which demonstrate[d] a failure in the current system’.<sup>338</sup>

#### **4.2.6 Scotland**

Evidence about the likely effect of sentencing reforms in relation to a discount for a guilty plea can be found in a Scottish study conducted by Chalmers et al in 2007.<sup>339</sup> This study examined changes to the timing of guilty pleas following reforms to High Court procedure, which included a High Court judgment requiring judges to state in open court whether a sentence had been discounted for a plea of guilty, particularly early pleas, and if so, by how much.<sup>340</sup>

There was general agreement that, while the proportion of matters resolved by a guilty plea had not changed, there had been an increase in early guilty pleas. This change in the timing of pleas was attributed to the High Court decision, a change in the legal aid structure and new disclosure requirements.<sup>341</sup> However, the incentive for an early plea appeared to influence the behaviour of those who were already likely to be early pleaders (that is, they would have entered their plea at an early stage but the sentencing reform encouraged them to enter their plea earlier) and that there is a proportion of offenders ‘who will always wait until the last possible opportunity to plea, no matter what incentives are on offer for early pleas of guilty’.<sup>342</sup>

### **4.3 Conclusion**

There are two key issues highlighted in the analysis of statutory sentencing discount schemes operating elsewhere:

- (1) **Ability to influence a defendant’s plea behaviour.** It is recognised that the reasons why an offender may enter a plea at an early or late stage are complex and relate to the type of offence and the criminal history of the offender.<sup>343</sup> Further, it is noted that a statutory sentencing discount scheme for a guilty plea may not of itself provide sufficient incentive for an offender to enter an early plea and such a reform would need to be viewed in the context of systemic factors that might restrict an offender’s ability to enter an early guilty plea.<sup>344</sup> However, research suggests that it is possible that an incentive to enter a guilty plea could be effective in persuading some offenders to enter a plea earlier in the process. Research also suggests that a reform that would require a judge to specify the discount is effective to change judicial behaviour, and would allow offenders and their legal representatives to have a clearer understanding of the benefit of an early guilty plea.

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<sup>337</sup> Ibid.

<sup>338</sup> The Law Society, *Response of the Law Society of England and Wales to the Sentencing Council Consultation on the Reduction in Sentence for a Guilty Plea Guideline* (2016) 2.

<sup>339</sup> James Chalmers, Peter Duff, Fiona Leverick and Yvonne Melvin, *An Evaluation of the High Court Reforms arising from the Criminal Procedure (Amendment) (Scotland) Act 2004* (Scottish Executive Social Research, 2007) 2.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid 3.

<sup>342</sup> Ibid 25–26.

<sup>343</sup> VSAC, above n 21, 29.

<sup>344</sup> Ibid 16, 20.

- (2) **Extent to which an increase in early guilty pleas reduces delay.** Evaluations that have examined the impact (or likely impact) of sentencing reforms in relation to guilty pleas do not clearly indicate that such reforms have been effective in reducing delay.

## 5 Issues and options for reform

To enable the Council to address Term of Reference 5, this chapter seeks feedback in relation to the appropriate parameters for the introduction of a statutory framework to reduce sentences for pleas of guilty, including:

- the amount of a statutory reduction in sentence that should be applied where a defendant enters a plea of guilty to offences and how that reduction should be framed;
- the amount of statutory reduction that should be applied where a defendant enters a plea of guilty to offences attracting a mandatory minimum sentence and how that reduction should be framed;
- whether any additional factors (such as, but not limited to, the strength of the prosecution case, whether a victim has given evidence and the stage of the plea of guilty in the criminal process) ought to be considered and if so, how;
- whether characteristics of a defendant should be relevant to eligibility for statutory reduction of sentence including, but not limited to, previous convictions and juvenile offenders;
- the nature and type of offences that should be excluded from a statutory reduction of sentence for pleas of guilty.

This chapter also considers challenges to the introduction of a statutory framework for the reduction in sentence for pleas of guilty that may arise in the Tasmanian context from existing sentencing and penalties legislation, including whether there should be any exemptions (for example, drink driving and traffic offences), as required by Term of Reference 3. It also examines any challenges to the application of a statutory framework for reductions in sentences for pleas of guilty that may arise from global sentencing practices, with particular regard to related charges and mixed pleas as required by Term of Reference 4.

### 5.1 Legislative recognition of a guilty plea as a mitigating sentencing factor

As indicated, all Australian jurisdictions other than Tasmania have legislative recognition of the relevance of a guilty plea as a sentencing factor. This is based on the utilitarian benefit for the court system, the community and victims from an offender entering a plea of guilty and is separate from subjective considerations relating to the offender's motivation for entering a plea, such as remorse or a willingness to facilitate the course of justice. The application of these legislative provisions may result in the imposition of a different sentence type or a reduction in the length of a sentence or amount of a fine.

In Tasmania, as a means of clarifying the operation of the sentencing discount for a guilty plea as a mitigating factor in its own right, one option for reform would be to create a statutory provision in the *Sentencing Act 1997* (Tas). Adopting such an approach would be unique within Tasmania's legislative framework as Tasmania, unlike other jurisdictions, does not have a statutory regime that sets out relevant mitigating factors.<sup>345</sup> However, such a reform would have the advantage of creating certainty

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<sup>345</sup> *Crimes (Sentencing) Act 2005* (ACT) s 33; *Crimes Act 1014* (Cth) s 16A(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act* (NT) s 5(2); *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10(1); *Sentencing Act 1991* (Vic) s 5. It is noted that in Western Australia, the court is directed to have regard to mitigating factors but there is little detail in relation to the matters that may mitigate other than a plea of guilty: *Sentencing Act 1995* (WA) ss 6(2)(d), 8, 15. See further discussion in Bagaric and Edney, above n 22, 305–312.

for offenders and their advisers that the utilitarian value of a guilty plea is an independent matter that is taken into account in the sentencing process. Statutory recognition of guilty pleas as a mitigating factor would reflect the current Tasmanian position in that judges do take account of the utilitarian value of the plea.

As indicated at [1.3.3], there are competing views about the appropriateness of a sentencing discount for a guilty plea on the basis that it imposes a penalty on a defendant who does not plead guilty and that this is contrary to general sentencing principles. However, as Wren and Bartels have observed, despite this controversy, given ‘the benefits the system affords offenders and the state, it is likely to remain a crucial aspect of the criminal justice system’.<sup>346</sup>

#### **Question 6**

Should the *Sentencing Act 1997* (Tas) be amended to provide that a guilty plea is a mitigating factor relevant to the sentence imposed?

## **5.2 Disclosure of the value of the plea and quantifying the plea**

Currently, in Tasmania the general approach of the court is not to specify the sentencing discount given for a guilty plea in a particular case and, accordingly, there is no indication from the Court of Criminal Appeal of the range of the discount for guilty pleas that may be appropriate more generally.

The Terms of Reference ask the Council to provide advice in relation to the amount of a statutory reduction in sentence that should be applied where the defendant enters a plea of guilty and how that reduction should be framed. This suggests that it is intended that the statutory scheme should set out the value of the discount of a guilty plea. A separate but related question is whether the court should be directed to state the discount given in a particular case.

### **5.2.1 Disclosure of the value of the plea**

In Australia and other comparable jurisdictions, there are several approaches to stating the value of the plea by the court and in legislation:

- (1) The statute is silent about the requirement of the court to state the discount and the value of the discount. This is the approach in Queensland, New South Wales (current), the Northern Territory and New Zealand. In New South Wales, currently, the ‘gap’ is filled by a guideline judgment that specifies the range of the discount based on the timing of the plea and that the court is encouraged to state the discount in a particular case. However, in New South Wales, a prescribed discount based on the timing of the plea has been enacted.
- (2) The statute requires or allows the court to state the value of the guilty plea (that is the reduction given for the guilty plea) in a particular case with no specific range for the discount provided in the legislation. This is the approach in Victoria and the Australian Capital Territory.
- (3) The statute sets out a prescribed discount based on the timing of the plea but the court is not directed to state the reduction given in a particular case. This is approach in South Australia.
- (4) The statute sets out a prescribed discount based on the timing of the plea and the court is required to state the discount given in a particular case. This is the approach in Western Australia. It is also the position that applies in England and Wales by virtue of the sentencing

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<sup>346</sup> Wren and Bartels, above n 205, 363. See also Bagaric and Edney, above n 22, 331.

guideline. This was also the recommendation of the New South Wales Law Reform Commission and this has been adopted in the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW).

Accordingly, it can be seen that in terms of specifying the value of the discount, legislation may or may not set out the amount of the discount that is generally to be applied and may or may not require the court to state the amount of the discount. Both setting out the value of the discount in legislation and requiring the court to state the value of the discount in a particular case are a means of creating certainty, transparency and consistency in terms of the discount to be received for a guilty plea.

In Victoria, based on the recommendations of VSAC, the legislation provides that: ‘if in sentencing an offender, a court imposes a less severe sentence than it would otherwise have imposed because the offender pleaded guilty to the offence, the court must state the sentence and the non-parole period, if any, that it would have imposed but for the plea of guilty’.<sup>347</sup> This is intended to apply for more serious offending as it applies in relation to custodial orders, sentences of imprisonment, community corrections orders for a period of two years or more or fines exceeding 10 penalty units or aggregate fines exceeding 20 penalty units.<sup>348</sup> VSAC considered that this allowed for transparency, accountability and clarity.<sup>349</sup> It was also considered to be consistent with instinctive synthesis, which is a common law principle that describes the process where all considerations relevant to the case are simultaneously unified, balanced and weighed by the sentencing judge in determining the appropriate sentence.<sup>350</sup> However, the section has been criticised by judges on the basis that it introduces artificiality into the sentencing process.<sup>351</sup> Courts have also observed the complexity of the task of identifying a discount for a guilty plea where the plea is connected with other mitigating factors.<sup>352</sup>

In other cases, under the Victorian legislation the court may state the sentence that it would have imposed.<sup>353</sup> This approach has the advantage of allowing the offender and his or her legal representative in more serious cases to see that a discount has been provided and to allow for the discount to be calculated (to inform other offenders of the value of the plea). The legislation does not impose this obligation on courts that are dealing with less serious matters but allows the court to specify the discount if desired. Similarly, in the Australian Capital Territory, the obligation to state the value of the plea only applies if the court is considering imprisonment.<sup>354</sup> The NSWLRC has recommended that the court should be required to disclose the discount given for the utilitarian value of the plea.<sup>355</sup> This has been adopted in the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW), where the court will be required to state the discount for indictable offences and must apply the fixed discount (subject to limited exceptions) if an offender pleaded guilty within the specified time period. In other jurisdictions, the value of the discount is set in legislation, either as a cap (Western Australia) or as a sliding scale (South Australia).<sup>356</sup> In Western Australia, the

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<sup>347</sup> *Sentencing Act 1991* (Vic) s 6AAA(1).

<sup>348</sup> *Ibid* s 6AAA(1)(b).

<sup>349</sup> VSAC, above n 21, 54.

<sup>350</sup> *Ibid* 34, 41.

<sup>351</sup> See *R v Nguyen* [2011] VSC 73, [30] (Coughlan J); *The Queen v Prately* [2013] VSC 298, [38] (Priest JA); *DPP v Carleton* [2014] VSC 19, [38] (Kaye J); *The Queen v Deing* [2014] VSC 270, [47] (Croucher J); *The Queen v Bacak* [2015] VSC 474, [39] (Lasry J).

<sup>352</sup> *R v Trezise* [2009] VSC 520, [49] (Coughlan J); *R v Davis* [2010] VSC 274, [38] (Coughlan J); *R v Spark* [2009] VSC 374, [24] (King J); *R v Watson* [2009] VSC 403, [38] (Kaye J); *DPP v Meulenbrock* [2010] VSC 113, [22] (Kaye J).

<sup>353</sup> *Sentencing Act 1991* (Vic) s 6AAA(3).

<sup>354</sup> *Crimes (Sentence Administration) Act 2005* s 37.

<sup>355</sup> NSWLRC, Final Report, above n 11, 227. This reiterated its recommendation in NSWLRC, above n 204.

<sup>356</sup> See [4.1].

*Sentencing Act 1997* (WA) s 9AA(4) provides the court must not reduce the fixed term — (a) by more than 25%; or (b) by 25%, unless the offender pleaded guilty, or indicated that he or she would plead guilty, at the first reasonable opportunity. This specifies the maximum discount that can be given (25%) and the circumstances when it can be given (when the offender entered a plea of guilty at the first reasonable opportunity). This allows flexibility to take into account ‘many reasons that defendants, through no fault of their own, may not be in a position to make a decision whether or not to plead guilty’.<sup>357</sup>

In New South Wales, although not currently set out in legislation, another model is provided in the guideline judgment, which sets out a range of between 10% and 25% depending on the timeliness of the plea.<sup>358</sup> This involves an assessment of whether the plea was entered at the earliest opportunity. This will be changed to a sliding scale for indictable offences ranging from 25% if the plea was accepted by the magistrate in committal proceedings for the offence, to 10% if the offender was committed for trial and the offender pleaded guilty at least 14 days before the first day of the trial for the offence or complied with the pre-trial notice requirements and pleaded guilty at the first available opportunity able to be obtained by the offender, to 5% if entered at a later time. There are several exceptions that may allow the offender to receive a particular discount (even if the guilty plea is entered outside of the time frames). These are if:

- The offender offered to enter a plea of guilty to an offence or a reasonably equivalent offence which the prosecution refused but then later accepted, or the accused was later found guilty.
- An ex officio indictment was filed and there were no prior committal proceedings or the prosecution adds a new offence to the indictment, where the facts and evidence that establish the new offence are substantially different from those contained in the brief of evidence for the committal proceedings.
- The offender is found to be fit to be tried after the offender is committed for trial, and whose matter was not remitted to a magistrate for continued committal proceedings.<sup>359</sup>

This reflects the recommendations of the NSWLRC. The NSWLRC considered that a statutory sentence discount regime was required on the basis that it would provide a clear incentive for a defendant to plead guilty early by providing transparent discounts that are only available ‘in cases where the efficient operation of the criminal justice system is facilitated’.<sup>360</sup> Its view was that the discount should be prescribed by statute to ensure consistency and clarity. The scheme proposed in New South Wales only applied to indictable matters and had three tiers:

- Tier 1 – 25% discount on sentence for guilty pleas entered in the Local Court. It considered that this corresponded with the maximum discount available for summary matters (where the guideline judgment will continue to apply) and that the discount does not need to be overly generous on public policy grounds.<sup>361</sup> This would be referred to as the ‘Early Resolution with Discount’ Stream.<sup>362</sup>
- Tier 2 – 10% discount on sentence for guilty pleas entered after a matter exits the Local Court. This was to address the current perception that the District Court can be overly flexible in

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<sup>357</sup> VSAC, above n 21, 62.

<sup>358</sup> See [4.1].

<sup>359</sup> *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) ss 25D(3)–(5).

<sup>360</sup> NSWLRC, Final Report, above n 11, 225.

<sup>361</sup> Ibid 228.

<sup>362</sup> Ibid 230.

applying the discount for an early plea and that this dilutes any impact of a statutory scheme and undermines the utilitarian rationale.<sup>363</sup>

- Tier 3 – 5% discount on sentence for guilty pleas entered on the day of the trial. This was to provide some incentive to avoid unnecessary trials but to reflect the limited utilitarian value of guilty plea entered on the day of the trial.<sup>364</sup>

This was a significant move away from the current situation that applied for indictable offences in New South Wales, where the maximum sentencing discount is available when the offender has entered a guilty plea at the first available opportunity. This shift was made on the ground that the current position allowed ‘a significant or maximum discount [to] still be given to pleas entered “late” in the criminal justice process, meaning after a matter has entered a superior court’.<sup>365</sup> In setting out exceptions to the proposed scheme, the NSWLRC’s view was that these should be limited to the following situations:

- An early offer to plead to a lesser charge and this is later accepted by the prosecution or the defendant is found guilty of the lesser charge.<sup>366</sup>
- If an offender is unfit to stand trial and later becomes fit to stand trial.<sup>367</sup>

The legislation in South Australia also sets out a sliding scale of discounts ranging from 40% if the plea of guilty is entered not more than four weeks after first appearance in court down to 10%. There are several exceptions that may allow an offender to receive a particular discount (even if the guilty plea is entered outside of the time frame). These apply if:

- The court did not sit during the period;
- The court did not sit during that period at a place where the defendant could reasonably have been expected to attend;
- The court did not list the defendant’s matter for hearing during that period;<sup>368</sup> or
- the court was, for any other reason outside the control of the defendant, unable to hear the defendant’s matter during that period.<sup>369</sup>

Further exceptions are being made to allow the court to reduce the sentence that it would otherwise have imposed as if the defendant had pleaded guilty during the relevant period if the prosecution was, for any reason outside of the control of the defendant, unable to finalise negotiations with the defendant in relation to the plea during that period.<sup>370</sup>

In England and Wales, a similar approach is set out in the sentencing guideline. This provides for a sliding scale of discounts from one-third at the first stage of the proceedings (normally the first hearing at which a plea or indication of plea is sought) to one-tenth on the first day of the trial with no discount provided if the plea is entered in the course of the trial.<sup>371</sup> This differed from the model

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<sup>363</sup> Ibid 228.

<sup>364</sup> Ibid 229.

<sup>365</sup> Ibid 231.

<sup>366</sup> Ibid 232.

<sup>367</sup> Ibid 233.

<sup>368</sup> This only applies for cases not heard in the Magistrates Court.

<sup>369</sup> *Criminal Law (Sentencing) Act 1988* (SA) ss 10B(3), 10C(3).

<sup>370</sup> *Summary Procedure (Indictable Offences) Amendment Act 2017* ss 15, 16 (yet to commence).

<sup>371</sup> Sentencing Council, above n 201, 5.

contained in the earlier guideline, which provided for the maximum deduction applied when the plea was entered at the ‘first reasonable opportunity’. This change was made on the basis that ‘first stage of the proceedings’ was ‘defined more tightly than the “first reasonable opportunity”’.<sup>372</sup> In relation to the court’s discretion to provide a greater discount than the proportion relevant to the stage of the proceedings at which the plea is entered, there are two exceptions:

- Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the defendant’s ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done, a reduction of one-third should still be made. This applies where it was necessary to receive advice and/or have sight of evidence in order to understand whether the defendant was in fact and law guilty compared to cases where the defendant merely delays a plea of guilty to assess the strength of the prosecution evidence and the prospects of conviction or acquittal.<sup>373</sup>
- If the offender is convicted of a lesser or different offence from that originally charged, and had earlier made an unequivocal indication of a guilty plea to this charge.<sup>374</sup>

The prescriptive approach in South Australia, England and Wales, and which is proposed in New South Wales, has the advantage of greater clarity and consistency, but the discretion of the court is curtailed given that the extent of the discount is closely tied to the timing of the plea and the limited exceptions set out in the legislation. Additionally, concerns have been raised about its effect. VSAC did not support a model that set out in legislation the permissible reduction for a guilty plea or a sliding scale on the basis that this lacked flexibility and was an inappropriate curtailment of judicial discretion.<sup>375</sup> VSAC was also concerned that a specified reduction in sentence ‘might improperly induce guilty pleas and give rise to disproportionate and unduly lenient sentencing’.<sup>376</sup> This approach was also rejected by the ALRC which stated that:

The ALRC does not support legislative prescriptions of the quantum of a discount, whether in the form of a fixed percentage, a range of percentages, or a maximum percentage. Such an approach unduly fetters judicial discretion. Sliding scales of discounts based solely on the time of a guilty plea are also problematic because they do not recognise the particular circumstances in which a plea is made.<sup>377</sup>

Ashworth has also raised concerns about the operation of a statutory sliding scale in cases that are ‘on or around the cusp of custody’ where it is ‘a crucial and momentous decision ... capable of exerting considerable pressure to plead guilty’.<sup>378</sup>

In addition, there are concerns about the pressure that a sentencing discount scheme based on strict time limits places on an offender to plead guilty before the person knows the case against them. In the context of the reforms in England and Wales, concerns have been expressed that there are inadequacies in Crown disclosure before the first hearing and this means that an offender cannot be properly advised and poses a risk that an offender may enter a plea to obtain the sentence discount.<sup>379</sup> It has been suggested that the English reforms undermine the requirement to put the prosecution to

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<sup>372</sup> Sentencing Council (UK), above n 336, 17.

<sup>373</sup> Sentencing Council (UK), above n 201, 7.

<sup>374</sup> Ibid 7.

<sup>375</sup> VSAC, above n 21, 63.

<sup>376</sup> Ibid viii.

<sup>377</sup> ALRC, *Same Time, Same Crime: Sentencing of Federal Offenders*, Report 103 (2006) [11.40].

<sup>378</sup> Ashworth, above n 33, 175.

<sup>379</sup> Ed Johnston, ‘The Early Guilty Plea’ (2016) 180 *Criminal Law and Justice Weekly*.

proof as the tenor of the sentencing discount reforms are that ‘defendants know if they are guilty or not, should be clear about this at an early stage, and should be cooperative’.<sup>380</sup> This is explicit in respect of the approach taken in the South Australian reforms.<sup>381</sup>

There are also difficulties in applying a sliding scale discount to cases where the sentencing reduction would have the effect of changing the sentence type.<sup>382</sup> It is not clear how a percentage discount would operate in this situation. As noted at [4.2.1], VSAC found that in one-third of cases with a s 6AAA statement, the sentence type changed as a result of the guilty plea.<sup>383</sup> Similarly, it is not clear how a percentage discount would operate in relation to the exercise of the sentencing discretion to record (or not record) a conviction when imposing a probation order, a fine, a rehabilitation program order or a conditional undertaking under the *Sentencing Act 1997* (Tas) s 7.

Other concerns are that such an approach, in creating a highly prescriptive and complex set of time frames and exceptions, may be counter-productive as it may lead to longer sentencing hearings, where parties make submissions in relation to the factual and legal issues relating to the application of the sliding scale and its exceptions, as well as more appeals from the Supreme Court to the Court of Criminal Appeal and from the Magistrates Court to the Supreme Court in relation to interpretation and application of the provisions. As noted at [5.6.1], the South Australian Court of Appeal has commented on the complexity that was added to the sentencing process by the enactment of the *Criminal Law (Sentencing) Act 1988* (SA) s 10C. In the period 2015 to 2017, a search of the Westlaw First Point database revealed 15 appeals that involved the application of the *Criminal Law (Sentencing) Act 1988* (SA) s 10C.<sup>384</sup>

The prescriptive scheme may also potentially create injustice by limiting the benefit of a sentencing discount for a guilty plea only to cases that fit within the constraints of the time frames in the legislation rather than making an assessment based on the justice of the particular case. For example, in South Australia, concerns have been raised about the operation of the scheme where a plea is entered after the four week period through no fault of the offender, and the offender is not able to obtain the maximum discount.<sup>385</sup> This difficulty was noted in the context of indigenous defendants whose lifestyle or other circumstances, or the absence of interpreters, prevent practitioners from obtaining early instructions.<sup>386</sup> In addition, currently an offender may offer to plead guilty within the four week period, but there may be negotiations about the factual basis of the plea that mean that the plea is entered after the four week period has elapsed. As such, the offender would not be entitled to the maximum discount (even though the offer was made within the four week period).<sup>387</sup> Moreover, in South Australia it has been suggested by the Law Society that there is uncertainty in relation to the discount and that this has led to defendants not taking advantage of the legislative discount regime.<sup>388</sup> This uncertainty is, in part, attributed to a ‘major, and perhaps insurmountable, hurdle to the proper

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<sup>380</sup> Ibid.

<sup>381</sup> See [4.2.2].

<sup>382</sup> Ashworth, above n 33, 174.

<sup>383</sup> VSAC, above n 2, 59.

<sup>384</sup> *R v Brusnahan* [2017] SASCFC 117; *R v Corlett* [2017] SASCFC 112; *R v Harse* [2017] SASCFC 17; *R v Hallcroft* [2017] SASCFC 415; *R v Donald* [2017] SASCFC 117; *R v Ballam* [2016] SASCFC 110; *R v Alderson* [2016] SASCFC 85; *R v Dransfield* [2016] SASCFC 68; *R v Bridgeland* [2016] SASCFC 28; *R v Dwyer* [2015] SASCFC 12; *R v Wakefield* [2015] SASCFC 10; *R v Capaldo* [2015] SASCFC 56; *R v Stavreas* [2015] SASCFC 68; *R v Deng* [2015] SASCFC 176; *R v Muldoon* [2015] SASCFC 69.

<sup>385</sup> Martin, above n 223, 31.

<sup>386</sup> Ibid 32.

<sup>387</sup> Ibid 33.

<sup>388</sup> Ibid Appendix B.

efficacy of the scheme [which] is the fact that the pre-discount sentence starting point is, to a large extent, discretionary'.<sup>389</sup>

An additional objection to specifying a cap or a reduction range is that it would be premature given that it is not currently known the extent to which courts recognise the value of a guilty plea.<sup>390</sup> As a general rule, Tasmanian courts do not specify the weight attached to a guilty plea and, as recognised by VSAC, 'it may be that by setting a [statutory] reduction without reference to what is happening at the moment ... a situation [could arise] where sentences imposed in accordance with the reduction are markedly different from current sentencing practice'.<sup>391</sup>

A scheme that allows the court to set out the discount given for a guilty plea is more consistent with the current sentencing regime where the court decides the 'factors most relevant in determining whether a reduction should be given and its amount'.<sup>392</sup> A more explicit prescriptive regime using a sliding scale would require a single, measurable factor (such as the timing of plea) to be specified to enable the scheme to operate.<sup>393</sup> This would also create greater complexity in applying a global sentence.<sup>394</sup> However, as indicated, although this may lack flexibility, a prescriptive regime provides for maximum clarity.

### **5.2.2 Quantifying the value of the plea**

If it is decided to create a statutory sentencing discount scheme that sets out the value of the discount, either as a cap, a range or a sliding scale, it will be necessary to decide on the amount by which a sentence can be reduced.

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<sup>389</sup> Ibid.

<sup>390</sup> VSAC, above n 21, 63.

<sup>391</sup> Ibid.

<sup>392</sup> Ibid 55.

<sup>393</sup> Ibid 55.

<sup>394</sup> See [5.6].



- (2) If the statutory scheme sets out the discount, should this prescribe a specified discount relating to a particular time in the trial (South Australia, England and Wales and proposed New South Wales), or should it be an indicative cap of the maximum discount at the earliest possible or first reasonable opportunity (Western Australia) or should it provide an indicative range (the current New South Wales approach)?
- (3) If the statutory scheme sets the value of the discount in reference to specific time frames, what should those time frames be? What exceptions should apply?
- (4) If the statutory scheme sets out the discount, what should the value of the discount be?
- (5) Should the sentencing judge set out the discount given? (Victorian, proposed New South Wales (indictable offences) and ACT approach)? Should this apply in all cases or only in relation to more serious cases?

The resolution of these issues also requires consideration to be given to the consistency of a sentencing discount scheme with global sentencing and mandatory sentencing.

#### **Questions**

7. Should the statutory scheme set out the extent of the discount as percentage reduction in sentence?
- 8(a) Should the court be required to state how much weight has been given to the guilty plea and its effect on the sentence imposed?
- (b) Or should the court be permitted (but not obligated) to state how much weight has been given to the guilty plea and its effect on the sentence imposed?
- (c) Or should there be a different position that applies to different sentence types to only impose the obligation on the court to state how much weight has been given to the guilty plea and its effect on the sentence imposed for more serious offences? If so, how should this be defined?
- 9(a) Should there be a cap on the amount by which a sentence can be reduced by a guilty plea specified in legislation? If so, what should that cap be? When should it apply?
- (b) Or should a range be included in the legislation that sets out the minimum and maximum reduction for a guilty plea? If so, what should the range be? When should it apply?
- (c) Or should a sliding scale be introduced relating to particular reductions? If so, should this be tied to specific pre-trial stages or should it relate to a plea entered at the 'first reasonable opportunity'? If it is tied to specific time frames/stages, what should these be and what exceptions should apply? What should the reductions be? What information should be made available to a defendant to allow an informed decision to enter a guilty plea and obtain the maximum discount?

### **5.3 Factors relevant to the value of the sentencing discount for a guilty plea**

If a statutory sentencing discount is created to provide for a guilty plea, it is necessary to decide the scope of its operation.

Currently, the common law position that applies in Tasmania means that in assessing the utilitarian value of the plea, the sentencer takes into account the timing of the plea, the strength of the prosecution case, the type of offence, the benefit to witnesses and the saving of time and resources to

the state. This reflects the more traditional common law approach set out by the High Court in *Cameron's* case and differs from the approach in many other jurisdictions (as set out in Table 4.1) where the legislation specifies that the fact of the plea and the timing of the plea are the central factors in determining the sentencing reduction that should be received for a guilty plea. However, in these jurisdictions the court retains a discretion as to the actual discount given in the circumstances of a particular case.

Accordingly, it is necessary to consider the factors that the court may take into account in determining the amount of the sentencing discount. In addition, it is necessary to determine if all offenders are entitled to a discount or if the court should retain a discretion to reduce or deny a discount in some circumstances. It is also necessary to decide whether case law should be used to set out these factors or whether they should be set out in legislation.

### **5.3.1 Should all offenders who plead guilty get a reduction in sentence?**

In considering the scope of a sentencing discount scheme, it is necessary to decide whether all offenders who plead guilty should obtain a sentencing discount or if the court should have a discretion to give little or no discount in the circumstances of particular case, or if particular offenders or offences should be excluded from the scheme.

#### ***All offenders?***

Arguments in favour of allowing a discount for all offenders include that this would create the greatest possible certainty that the discount will be applied and also ensure consistency in the discount given (based on the timing of the plea).<sup>399</sup> No jurisdiction has gone as far as adopting this approach, but the position in England and Wales under the sentencing guideline comes close and is very prescriptive. The proposed model in New South Wales would also require the court to provide the fixed specified statutory discount subject to the limited exceptions.

The English model has the effect that, as a general rule, an offender who enters a guilty plea within the specified time frame is entitled to the discount subject only to the limited circumstances set out in the guidelines where the court can give a lesser discount for a guilty plea than the discount. These exceptions are where:

- (1) A hearing is held to determine the factual basis of sentencing where the offender disputes the case as put forward by the prosecution and the offender's version is rejected or witnesses are called during such a hearing.<sup>400</sup>
- (2) There is a minimum sentence under the *Firearms Act 1968* s 51A.<sup>401</sup>
- (3) An appropriate custodial sentence applies for offenders convicted of certain possession of knives or offensive weapons offences or a prescribed custodial offence applies in relation to drug trafficking offences and burglary offences.
- (4) Setting the minimum term (non-parole) for murder (which is a mandatory life sentence) to ensure that the minimum term properly reflects the seriousness of the offence.<sup>402</sup>

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<sup>399</sup> See VSAC, above n 197, 37.

<sup>400</sup> Sentencing Council (UK), above n 201, 7. This is called a Newton hearing. The discount may also be reduced if the offender's version of events is rejected at a special reason hearing: at 7.

<sup>401</sup> Minimum sentences are discussed further at [5.4].

<sup>402</sup> Sentencing Council (UK), above n 201, 8.

Accordingly, a reduced discount may only be given where appropriate or prescribed custodial sentence provisions apply or in relation to offences with mandatory minimum penalties, where the sentence given cannot be below the minimum term for specified firearm offences. In the case of murder, a reduced discount or no discount may be given. In England and Wales, there is a mandatory life sentence for murder and the court may specify a minimum term to be served or may make an order for a life minimum term. In applying the guidelines, the court may determine that it is appropriate to order a whole of life minimum term and, in that case, there will be no reduction for a guilty plea.<sup>403</sup> In other cases, the court must weigh the overall length of the minimum term to ensure that after taking account of other mitigating factors the sentence is not inappropriately short and there is a separate (reduced) discount provided for guilty pleas for murder. This is a sliding scale with a maximum discount of one-sixth or five years, whichever is less, based on the timing of the plea.

In New South Wales, the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) will require the court to make the statutory sentencing discount for indictable offences, subject to exceptions where:

- (1) No discount or a reduced discount may be applied because the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can be met only by imposition of a penalty with no allowance for a reduction of that discount.
- (2) The value of the plea has been eroded by a dispute as to facts at sentencing.
- (3) A sentence of life imprisonment is imposed.

In South Australia, since the introduction of the sliding scale, the courts have applied the sentencing reduction scheme to mean that, unless there is good reason, a reduction close to the maximum should ordinarily be given.<sup>404</sup>

In other Australian jurisdictions that have a statutory sentencing discount for a guilty plea, the provisions have wide application with no automatic entitlement to have a reduction. As indicated in Table 4.1, most Australian jurisdictions have retained discretion for the court to determine the weight to be given to a guilty plea, with the consequence that there is no automatic reduction for a guilty plea (and no automatic exclusions either). This reflects the current position in Tasmania, where the common law principles apply. This approach may reduce certainty but has the advantage that it still allows for the court to make a lesser discount or to make no discount if this is appropriate.<sup>405</sup> The relevant factors are considered below at [5.3.2].

### ***Excluding offenders or offences?***

A different approach would be to create a scheme where particular offences or offenders were not eligible for a statutory reduction in sentence for a guilty plea. This generally does not apply elsewhere in comparable jurisdictions, where decisions to reduce or exclude a sentencing discount for a guilty plea are based on the circumstances of the particular case (other than special rules in relation to mandatory minimum terms).<sup>406</sup> In the Australian Capital Territory, the specific rules in relation to guilty pleas only apply where the court considers that there is a real likelihood that the offender will

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<sup>403</sup> See also *The Queen v Cardamone* [2017] VSC 493, where the offender was sentenced to life imprisonment without parole following a guilty plea to a charge of murder and incitement to murder. This sentence will be appealed.

<sup>404</sup> Martin, above n 223, 33.

<sup>405</sup> VSAC, above n 21, 57.

<sup>406</sup> This is discussed at [4.1].

be sentenced to imprisonment but a guilty plea is a relevant consideration in all cases.<sup>407</sup> As with other Australian jurisdictions and in New Zealand, the court has a broad discretion to make no reduction or to make a smaller reduction in sentence if that is appropriate in the circumstances of the case. Even in England and Wales, where the specified discount is reduced or may be denied in certain cases in relation to murder, this decision depends on the circumstances of the case. There is no category of offence or offender that is automatically excluded from an entitlement to some reduction.

If this approach were adopted in Tasmania, it would be necessary to determine for which offences and/or for which offenders there would be no entitlement to a statutory sentencing discount for entering a guilty plea. There is no precedent for this elsewhere. There also does not appear to be any principled basis for excluding any particular class of offence or offender automatically from a discount that is provided to recognise the utilitarian value of the plea. Taking the example of offenders with prior convictions, which is raised in the Terms of Reference as a possible category of offender that may be excluded, the justification for the utilitarian benefit afforded for a guilty plea in terms of saving time and resources is equally applicable to these offenders as it is to first time offenders. Indeed, if the intention of the reform is to encourage earlier pleas of guilty from offenders who intend to plead guilty, research elsewhere would suggest that repeat offenders may be the most responsive to incentives to enter an earlier plea.<sup>408</sup> Accordingly, excluding these offenders from a sentencing discount may be counter-productive to the aims of the reform. It would also potentially exclude a large number of offenders, given research that indicates the extent of recidivism<sup>409</sup> and so would reduce the potential gains from a sentencing discount scheme on delay and demand on the court system. It would also be objectionable to ‘double count’ prior convictions in the sentencing process — both as an aggravating factor and then as a basis to deny an offender eligibility for a discount for a guilty plea.<sup>410</sup>

In relation to any proposal to identify and exclude any particular groups such as offenders who have committed designated serious offences, VSAC stated that this ‘would be unfair and counterproductive; it would discriminate against particular types of defendants or cases, and the types of offences excluded may be ones in which the timely plea provides greatest discount’.<sup>411</sup>

Another approach would be to adopt a similar scheme to that which has been proposed in New South Wales, where the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW) will create a separate statutory scheme that applies only to indictable offences. This will have a sliding scale based on the timing of the plea. In other cases, the current law in relation to the sentencing discount for guilty pleas will continue to apply. In Tasmania, it may be appropriate to introduce a statutory discount scheme that applies only to indictable offences, or a different scheme for indictable offences, given the use of contest mentions in the Magistrates Court. For example, in Tasmania in the Magistrates Court it may be possible to make amendments to the sentencing indication scheme that operates in contest mention hearings to facilitate earlier guilty pleas (rather than introducing a new guilty plea discount scheme).<sup>412</sup> An additional concern in relation to the creation of a statutory

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<sup>407</sup> *Crimes (Sentencing) Act 2005* (ACT) ss 33(1)(j), 35(1)(a), 35(1)(b).

<sup>408</sup> VSAC, above n 21, 23. The AIC research found that some offenders would not communicate or negotiate on plea until the last minute and that this was particularly prevalent amongst recidivists with significant experience in the criminal justice system: Payne, above n 14, ix.

<sup>409</sup> Ibid 60.

<sup>410</sup> Although prior criminality is a consideration that typically most aggravates a sentence, it is noted that some commentators have argued that ‘doctrinally it is not clear that this approach is sound’: Bagaric and Edney, above n 22, 247.

<sup>411</sup> VSAC, above n 21, 60.

<sup>412</sup> As noted at [1.5], possible reforms to the sentence indication scheme are beyond the scope of this reference.

discount scheme that would apply in the Magistrates Court is the number of unrepresented defendants who appear in this jurisdiction. This may create unfairness as an unrepresented defendant may not be aware of any sentencing discount scheme, and so may not be aware of the sentencing advantage that may be obtained from entering an early guilty plea. Conversely, an unrepresented offender may not be able to make an appropriate assessment of their guilt in relation to the offence(s) charged and may be inappropriately coerced or pressured into entering a guilty plea by the existence of the sentencing discount.

#### Questions

10. Should all offenders who plead guilty be given a reduction in sentence for their guilty plea or should the court have the discretion to decide whether or not a guilty plea merits a reduction in sentence?
11. Should any category of offender or offence be automatically ineligible for a sentencing reduction for a guilty plea? If so, what nature or type of offences or offenders should be excluded?
12. Should there be a different sentencing discount scheme applicable to summary and indictable offences? If so, what should be the elements of the different schemes?

### 5.3.2 Factors relevant to the exercise of the court's discretion

The Terms of Reference request the Council to consider if additional factors relevant to the amount of the statutory reduction ought to be considered and if so, how. If a statutory discount is to be provided, it is necessary to determine the factors that are (and those that are not) relevant to determining the weight of the plea.<sup>413</sup>

#### *Timing of the plea*

Central to the utilitarian value of a guilty plea is its timing. As discussed at [4.1], the earlier the plea the greater the benefit to the system in terms of saving time and resources and also in relation to reducing uncertainty for witnesses and victims. All jurisdictions have recognised the timing of the plea as a factor that the court must take into account. However, as discussed at [4.1], the significance of the timing of the guilty plea has a different role in jurisdictions that have adopted a sliding scale, those that have specified a range or cap and those that have retained a discretionary approach where the timing of the plea is a relevant factor with the value left to the sentencing judge in the circumstances of the particular case.<sup>414</sup> The approach to be taken in Tasmania in relation to the timing of the plea in a statutory sentencing discount scheme has been addressed in Chapter 3.

#### *Seriousness of the case*

As noted at [4.1], generally, in Australia the court has a broad discretion in relation to allowing a sentencing discount and this allows the court to impose a sentence that reflects the seriousness of the case. In Victoria, in *Phillips v The Queen*<sup>415</sup> the Court of Appeal held that a 'discount for the utilitarian benefit of the plea must always be allowed ... save for the exceptional category of case'.<sup>416</sup> The court considered that the 'exceptional case arises when the gravity of the offending conduct is of

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<sup>413</sup> VSAC, above n 21, 43.

<sup>414</sup> Ibid 63.

<sup>415</sup> (2012) 37 VR 594.

<sup>416</sup> Ibid [36].

such an order that no discount from the maximum sentence is appropriate'.<sup>417</sup> Similarly, in New South Wales in *R v Borkowski*<sup>418</sup> the Court of Criminal Appeal indicated that 'there may be offences that are so serious that no discount should be given; or where the protection of the public requires a longer sentence'. The relevance of the circumstances of the offence to the exercise of the discretion is also acknowledged in the current legislation in New South Wales (the lesser penalty must not be unreasonably disproportionate to the nature and circumstances of the offence), the ACT (the lesser penalty must not be unreasonably disproportionate to the nature and circumstances of the offence and takes into account the seriousness of the case and the effect of the offence on the victim), and South Australia (whether the reduction would be so disproportionate to the seriousness of the offence or so inappropriate in the case that it would shock the public conscience).<sup>419</sup> In New South Wales, for indictable offences, under changes made by the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW), the court will be able to reduce or deny a sentencing discount if the offender's level of culpability in the commission of the offence is so extreme.

Although the approach in Australia is, for particularly serious offences, to take the seriousness of the offence into account in calculating the discount, it has been argued that there are difficulties with treating offence seriousness as a relevant factor. Leverick has argued that the sentencing discount is not based on 'intrinsic moral grounds' but rather is 'most convincingly justified on the basis of instrumental benefits — the reduction of distress caused to those involved ... and the cost savings that guilty pleas almost universally bring — and these benefits stem from cases where the offence is morally reprehensible just as they do from others'.<sup>420</sup> As a result, Leverick argues that the 'seriousness of the offence is appropriately reflected in the headline figure, not the discount'.<sup>421</sup> It also allows greater uncertainty and subjectivity.

### Question 13

Should the seriousness of the offence be a matter relevant to the sentencing discount for a guilty plea?

### *Overwhelming prosecution case*

In applying a sentencing discount to recognise the utilitarian value of the plea, the approach of courts in most Australian jurisdictions with statutory schemes has been to accept that the strength of the prosecution case is not a relevant factor in calculating the discount from a utilitarian perspective. In *Phillips v The Queen*,<sup>422</sup> the court stated that 'the strength of the Crown case is irrelevant to the discount to be allowed for the utilitarian benefit of the plea as it does not bear upon the objective benefits of the plea'.<sup>423</sup> Similarly, in *Morton v The Queen*,<sup>424</sup> the court summarised the principles applying to the sentencing discount for the utilitarian value of the plea to include the principle that the

<sup>417</sup> Ibid.

<sup>418</sup> (2009) 195 A Crim R 1 [32].

<sup>419</sup> In the *Summary Procedure (Indicatable Offences) Amendment Act 2017* (yet to commence), this wording is changed to the reduction 'would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would, or may, affect public confidence in the administration of justice'.

<sup>420</sup> Fiona Leverick, 'Sentencing Discounting for Guilty Pleas: An Argument for Certainty over Discretion' [2014] *Criminal Law Review* 338, 348.

<sup>421</sup> Ibid.

<sup>422</sup> (2012) 37 VR 594.

<sup>423</sup> Ibid [36].

<sup>424</sup> [2014] NSWCCA 8.

‘utilitarian discount does not take into account the strength of the prosecution case’.<sup>425</sup> This is set out in the sentencing guideline in England and Wales. It is also the position in Scotland.<sup>426</sup>

In contrast, in the Australian Capital Territory the strength of the Crown case is set out in legislation as a relevant matter and the court is directed not to make any significant reduction if it considers that the prosecution’s case was overwhelmingly strong.<sup>427</sup> In Western Australia, the Court of Appeal interpreted the legislative provisions in the *Sentencing Act 1995* (WA) s 9AA to allow the court to have regard to the strength of the prosecution case by taking a broader view of the utilitarian benefits that accrued to the state following a guilty plea than that which has been applied in New South Wales and Victoria.<sup>428</sup> Section 9AA of the *Sentencing Act 1995* (WA) specifically refers to ‘the benefits to the State’ and this was interpreted to mean ‘the benefits which the State directly or indirectly receives or derives as a consequence of the offender entering a guilty plea’.<sup>429</sup> This included securing the conviction of a person, not having to use resources to prepare for or defend and conduct a trial, avoiding the time and expense involved in empanelling jurors and the more expeditious and efficient resolution of the proceedings.<sup>430</sup> In the court’s view, this meant that the strength of the prosecution case was a relevant factor as it was directly relevant to the prospect of securing a conviction:

In general, the stronger the prosecution case, the higher the prospect of a judgment of conviction absent a guilty plea. Conversely, in general, the weaker the prosecution case, the lower the prospect of a judgement of conviction absent a guilty plea. Ordinarily, as a matter of fact, the strength of the prosecution case will be directly relevant to the extent of the benefits received or derived by the State as a consequence of the offender entering a guilty plea.<sup>431</sup>

The strength of the prosecution case is relevant in Tasmania, reflecting the High Court’s approach to the utilitarian value of the plea based on the “willingness to facilitate the court of justice” given that ‘the extent to which a defendant will relinquish certain rights and interests will depend on his or her prospects, and this in turn depends on the strength of the prosecution case’.<sup>432</sup> Case law also suggests that no discount or a reduced benefit may be given in cases where the offender is ‘bowing to the inevitable’ or has obtained a benefit by negotiating a reduced charge.<sup>433</sup>

From a policy perspective, there would appear to be no basis to deny an offender a reduction in sentence for a guilty plea in the face of a strong prosecution case given that the purpose of the discount is to encourage an early plea. As Leverick has stated, it would be a ‘rather absurd result that those who are caught red-handed do not merit a sentence discount, when these are the very people who, on the grounds of efficiency, should be encouraged to plead guilty at the earliest possible stage’.<sup>434</sup> It is also difficult to make an assessment of the Crown case from the sentencing hearing, as Ashworth has noted that ‘the idea of being caught red-handed refers only to a factual situation, and there may be more to them than meets the eye — for example, a possible defence such as duress of

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<sup>425</sup> It is noted that the strength of the prosecution case may qualify the extent of genuine remorse or contrition: *R v Thomson; Houlton* (2000) 49 NSWLR 383, [137]; *Phillips v The Queen* (2012) 37 VR 594, [61].

<sup>426</sup> *Gemmell* [2011] HCJAC 129 referred to in Leverick, above n 420.

<sup>427</sup> See Table 4.1.

<sup>428</sup> *Abraham v Western Australia* (2014) 244 A Crim R 151.

<sup>429</sup> *Ibid* [56].

<sup>430</sup> *Ibid*.

<sup>431</sup> *Ibid* [58].

<sup>432</sup> VSAC, above n 21, 46.

<sup>433</sup> See [3.1.1].

<sup>434</sup> Leverick, above n 15, 386.

circumstances, automatism, or whatever'.<sup>435</sup> Similar statements were made by the Sentencing Council, in explaining its decision to remove the strength of the prosecution case as a relevant factor in the sentencing guidelines to apply to the reduction in sentencing for a guilty plea:

Such cases where the police and the [Crown Prosecution Service] CPS have identified that the evidence is strong and a guilty plea is likely are those in which the guideline aims to encourage a plea at the first stage of proceedings. An important factor in the incentive to plead at that early stage is the certainty of receiving the maximum reduction for a guilty plea. By removing the chance that the reduction might be withheld, the draft guideline will provide defendants and those advising them with certainty regarding the reduction and will provide the greatest possible incentive to plead early.<sup>436</sup>

The Sentencing Council also considered that the 'benefits that derive from a guilty plea still apply in cases where the prosecution evidence is overwhelming' namely, the 'witnesses and victims will still be spared the anxiety and uncertainty of being required to attend court and give evidence, and the resources of the justice system will still be saved the time and expense of a trial'.<sup>437</sup> The Sentencing Council recognised that there was a reluctance to provide those who have little or no prospect of being acquitted with a 'reward' for pleading guilty. However, the Sentencing Council argued that 'it is important to recognise that the guilty plea reduction is in place to provide an incentive ... and not a reward. For it to work effectively it is important that it is clear and unqualified incentive to the defendant'.<sup>438</sup>

Alternatively, it could be argued that 'those who plead guilty in the face of overwhelming evidence are less morally deserving' or that if an offender has only a minimal chance of escaping conviction at trial, they do not need the same discount to encourage a guilty plea.<sup>439</sup>

#### **Question 14**

Should the strength of the prosecution case be a matter relevant to the sentencing discount for a guilty plea?

#### ***Narrow or broad interpretation of utilitarian value***

In calculating the value of the plea, it is possible to adopt a narrow or broad interpretation of the utilitarian value. A narrow approach reflects the notional benefit to the court system of having a guilty plea and the value of the plea is calculated largely based on its timing — an early plea having a greater value given the greater saving to the court system.<sup>440</sup> If the statutory scheme adopted is one based solely on a sliding scale dependent on the timing of the plea (as exists in England and Wales and proposed in New South Wales), then this reflects this narrow approach given that the time of the plea determines the value of the discount. The timing and circumstances surrounding the plea are also the dominant considerations in South Australia. However, the court has a discretion and can depart from the maximum provided by the scheme if good reasons exist.<sup>441</sup>

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<sup>435</sup> Bagaric and Edney, above n 22, 318–319 quoting Andrew Ashworth, *Sentencing and Criminal Justice* (Butterworths, 3<sup>rd</sup> ed, 2000) 144.

<sup>436</sup> Sentencing Council (UK), above n 336, 15.

<sup>437</sup> *Ibid.*

<sup>438</sup> *Ibid.*

<sup>439</sup> Leverick, above n 420, 346.

<sup>440</sup> VSAC, above n 21, 45; VSAC, above n 197, 35.

<sup>441</sup> *R v Dwyer* [2015] SASCFC 12, [34]–[35]; *R v Stavreas* [2015] SASCFC 68, [20].

Alternatively, as is currently the practice in Tasmania, it is possible to adopt a broad approach to the utilitarian value of the plea that allows the court to make adjustments depending on the circumstances of the case, with the timing of plea being only one of the relevant factors.<sup>442</sup> In *Morton v The Queen*,<sup>443</sup> it was stated that ‘some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy’. Similarly, in *Phillips v The Queen*,<sup>444</sup> the court stated that ‘a greater discount ... may be justified where the plea involves very considerable savings of costs to the community or where some other very significant benefit can be seen to flow from the plea’.<sup>445</sup> This approach allows the court to take account of the actual benefit of the plea in the particular case and this will differ based on factors concerned with the particular case. For example, in more serious and complex cases (such as drug trafficking trials or cases where there are multiple charges or multiple complaints), there are greater benefits arising from a guilty plea.<sup>446</sup> In addition, regard can be had to the stress that the victims and witnesses are spared by the guilty plea, which may be greater in cases involving vulnerable victims such as sexual offences cases.<sup>447</sup> This might contrast with cases arising at a summary level, such as driving offences, drug possession offences, minor offences of dishonesty or a breach of the peace, where there is no identified victim and most of the witnesses will be police witnesses or expert witnesses<sup>448</sup> However, it can be argued that it is unfair to take into account matters such as the length or complexity of the trial given that these ‘are not matters within the control of the defendant and do not directly reflect either the seriousness of the offence of the offender’s culpability for his or her conduct’.<sup>449</sup>

#### Question 15

Should the actual benefit derived from a guilty plea in terms of time saving and the sparing of witnesses be a matter relevant to the sentencing discount for a guilty plea? Or should the narrow view be adopted, where the discount reflects the notional benefit to the system?

#### *Circumstances of the plea*

In New South Wales (current position), South Australia and the Australian Capital Territory, the circumstances in which the plea is entered is a relevant factor set out in the legislation. This allows the court to have regard to the timeliness of a plea based on factors such as negotiations with the prosecution, or whether the offender had to wait to receive information from the Crown to allow a decision to be made about the offender’s prospects. Plea bargaining typically results in a reduction of the number of charges, often with the offender pleading guilty to less serious charges.

In the Australian Capital Territory, the legislation also specifically refers to ‘whether the plea was related to negotiations between the prosecution and defence about the charge to which the offender pleaded guilty’. As Wren and Bartels note, this is unique given that in Australia, courts generally ‘do not recognise formal plea bargaining, even though guilty pleas are often the result of negotiations between the defence and prosecution as to which charges may attract a plea and therefore which

<sup>442</sup> VSAC, above n 21, 45; VSAC, above n 197, 36.

<sup>443</sup> [2014] NSWCCA 8.

<sup>444</sup> (2012) 222 A Crim R 149.

<sup>445</sup> Ibid [36].

<sup>446</sup> VSAC, above n 197, 36.

<sup>447</sup> VSAC, above n 21, 45. Note in New South Wales, the utilitarian discount does not reflect the saving of witnesses from giving evidence but this is relevant to remorse: *R v Thomson; Houlton* (2000) 49 NSWLR 383, [119]–[123].

<sup>448</sup> Leverick, above n 15, 373.

<sup>449</sup> VSAC, above n 197, 35.

charges the prosecution are more likely to proceed with'.<sup>450</sup> This provision directs the court to have regard to any plea bargain or negotiation in relation to the charges between the prosecution and the defence. This was included to reflect the case law that indicated that there should be 'diminishing credit for pleas that are the result of negotiations with the prosecution'.<sup>451</sup> However, the legislation was deliberately drafted to allow the court to take account of the particular circumstances of the case rather than state the effect of a negotiation on the value of the plea.<sup>452</sup>

In Tasmania, the Court of Criminal Appeal has accepted that a plea of guilty is not a matter of mitigation where it 'was entered as a means of inducing the prosecution not to proceed with a more serious charge'.<sup>453</sup> This approach prevents an offender from 'double-counting' as a result of negotiating with the prosecution to enter a plea of guilty to a lesser charge and then receiving an additional discount as a result of entering a guilty plea to that lesser charge. There are also criticisms that exist in relation to plea bargaining that would make the inclusion of a provision that recognised plea negotiations controversial. These relate to the secrecy and lack of transparency around plea negotiations and the possibility that the prosecution may "overcharge" an offender (by charging them with numerous or more serious offences) in order to an offender to induce a guilty plea to a lesser charge'.<sup>454</sup>

### Questions

16. Should the circumstances of the plea be included as a matter relevant to the sentencing discount for a guilty plea?
17. Should the existence of a plea bargain be recognised as a matter relevant to the sentencing discount for a guilty plea? What should be the effect of a plea bargain?

### ***What approach should be taken to the relevance of these factors?***

If a sentencing discount for a guilty plea is created, it will be necessary to decide if there are factors that should be included or excluded from consideration and if these factors should be set out in legislation or left to case law. It would be possible to set out in legislation all the relevant considerations that may or may not be taken into account in determining the weight of a guilty plea. This would potentially provide greater clarity to the operation of the sentencing discount. This reflects the approach in the Australian Capital Territory where the legislation sets out a list of factors to which the court must have regard when reducing the sentence for a guilty plea. However, in a majority of Australian jurisdictions and in New Zealand, the approach has been to provide for a sentencing discount for a guilty plea that is recognised in legislation but, other than recognising the relevance of the timing of the plea, the legislation does not set out 'the manner in which the sentencing discretion is to be exercised'.<sup>455</sup> For example, currently in New South Wales the timing and circumstance of the plea and the need for the discount not to operate to make the sentence disproportionate to the offence are recognised but other relevant factors are set out in common law principles. In Victoria, the

<sup>450</sup> Wren and Bartels, above n 205, 375.

<sup>451</sup> Ibid 375.

<sup>452</sup> Ibid.

<sup>453</sup> *Hyland*, Unreported 82/1996 relying on *Shannon* (1979) 21 SASR 442, 452. See discussion in Warner, above n 55, 108–109.

<sup>454</sup> Wren and Bartels, above n 205, 376. See also Asher Flynn and Kate Fitz-Gibbon, 'Bargaining with Defensive Homicide: Examining Victoria's Secretive Plea Bargaining System Post Law Reform' (2011) 35 *Melbourne University Law Review* 905; Ashworth, above n 33, 261; K Graham, 'Overcharging' (2014) 11 *Ohio State Journal of Criminal Law* 701, for a discussion of overcharging.

<sup>455</sup> Willis, above n 9, 54.

existence of the discount is set out in legislation but, other than the timing of the plea, other relevant factors are found in case law. This means that the court can ‘isolate the sentencing value of the plea without identifying particular factors that are relevant, and exclusively relevant’.<sup>456</sup> This is considered to be consistent with the doctrine of instinctive synthesis.<sup>457</sup>

**Question 18**

Should these factors be defined in statute (English approach), left to the discretion of the court with legislative clarification (as in NSW, South Australia and the ACT) or left completely to the court’s discretion other than the timing of the plea (as in Victoria, Queensland, NT, Western Australia)? If some factors are set out in legislation, which ones should be included?

## 5.4 Mandatory minimum sentencing

An issue that arises in relation to the discount for a guilty plea is how a sentencing discount scheme should operate in the context of provisions that contain a mandatory minimum sentence. There is a conflict between the requirements of a mandatory minimum sentencing scheme that requires the court to impose at least the minimum term and a statutory sentencing discount scheme that requires the court to make a discount for a guilty plea. As discussed below, there are only a limited number of offences in Tasmania that currently attract a mandatory minimum sentence.

### 5.4.1 Mandatory minimum sentences in Tasmania

In Tasmania, mandatory minimum sentencing exists for certain indictable and summary offences, which limits the power of the court to impose a sentence below the minimum term. Section 16A of the *Sentencing Act 1997* (Tas) provides that there is a mandatory minimum sentence of six months for the offence of causing serious bodily harm to a police officer. This does not contain any exceptions. There have been no offenders sentenced under this provision to date. The Tasmanian Government has also unsuccessfully attempted to introduced mandatory minimum sentences for serious sexual offences committed against children.<sup>458</sup> If such provisions were introduced, this would increase the number of offenders sentenced in the Supreme Court for offences subject to mandatory minimum sentencing provisions. There is also a mandatory minimum sentence of 12 months’ imprisonment for a second conviction for the summary offence of taking or using a vehicle or vessel contained in the *Police Offences Act 1935* (Tas) s 42. The court has a discretion to impose a sentence that is shorter than the minimum term if it thinks it is reasonable having regard to: (a) the time that has elapsed since the commission of a previous offence; (b) the character, antecedents, age, health, or mental condition of that person; and (3) any other special circumstances.<sup>459</sup> This provision is not frequently used. The Sentencing Advisory Council Statistics for the Magistrates Court (SAC Stats) show that in the period 2 July 2012 to 31 August 2017, there were four people sentenced in relation to use of a vehicle and four people sentenced in relation to use of a vessel and no offender received the mandatory minimum penalty. Section 17 of the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) provides for a minimum fine for drink driving offences, with a discretion to impose a lesser fine if special circumstances exist.<sup>460</sup> In contrast, these offences involved many offenders with SAC Stats showing that 10 363

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<sup>456</sup> VSAC, above n 21, 48.

<sup>457</sup> Ibid.

<sup>458</sup> Sentencing Amendment (Mandatory Sentencing for Serious Sexual Offences Against Children) Bill 2017 (Tas).

<sup>459</sup> *Police Offences Act 1935* (Tas) s 42(5).

<sup>460</sup> *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 17(5). See Warner, above n 55, 166–168 for a discussion of special circumstances.

offenders were sentenced for a drink or drug driving offence to which the minimum sentence (fine) applied. Anecdotally, the Council understands that a majority of offenders entered a plea of guilty to these offences given the difficulty of disputing a charge and pleas of not guilty only tend to be entered on technical grounds.

### 5.4.2 Approaches in other jurisdictions

In general, absent legislative provisions to the contrary, a sentencing discount cannot be given for a guilty plea that has the effect of reducing a sentence below a statutory minimum term.

In England and Wales, there are several statutory provisions that create prescribed minimum sentences and the usual guidelines that operate in relation to the discount for a guilty plea do not apply. There are different approaches taken to a sentencing discount for a guilty plea for these offences: either a discount limited to 20% is available for some offences to provide some encouragement for an offender to plead guilty or for other offences there is no discount available, which ‘renders the minimum sentence comparatively more severe, without any compelling justification’.<sup>461</sup>

**Table 5.2: Prescribed minimum sentence and discount for guilty plea, England and Wales**

Offence	Discount
<i>Power of Criminal Courts (Sentencing) Act 2005</i> (UK) s 110 (third offence class A drug trafficking)	A discount of up to 20% <sup>462</sup>
<i>Power of Criminal Courts (Sentencing) Act 2005</i> (UK) s 110 (third domestic burglary)	A discount of up to 20% <sup>463</sup>
<i>Firearms Act 1968</i> s 51A (possession of a prohibited weapon)	No discount
<i>Violent Crime Reduction Act 2006</i> ss 28–29 (using someone to mind a weapon)	No discount

In South Australia, the *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ab) specifies that the court is able to impose a shorter non-parole period (below the minimum non-parole period) if the court is satisfied that special reasons exist. Special reasons include taking into account, if the offender has pleaded guilty to the charge of the offence, the fact and circumstances surrounding the plea.<sup>464</sup> The Court of Criminal Appeal in South Australia has considered the relationship between the statutory sentencing discount in s 10C of the *Criminal Law (Sentencing) Act 1988* (SA) and reduction of minimum non-parole periods contained in s 32(5)(ab) and has held that s 32(5)(ab) does not preclude any reduction pursuant to s 10C.<sup>465</sup> This was said to reflect the intention of Parliament to maintain the utilitarian advantages of sentence reduction for a guilty plea and allow greater scope to fix a non-parole period which proportionally differentiates between offenders who have pleaded guilty and those who have not.<sup>466</sup> However, the operation of the *Criminal Law (Sentencing) Act 1988* (SA) s 10C is constrained by s 32, so that ‘the inability to give effect to that reduction [on account of a guilty plea] will only amount to a special reason to depart from the statutory minimum if the failure to do so would result in a sentence so manifestly disproportionate to all of the circumstances of the case that

<sup>461</sup> Ashworth, above n 33, 172.

<sup>462</sup> *Criminal Justice Act 2003* (UK) s 144(2).

<sup>463</sup> *Ibid* s 144(2).

<sup>464</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 32A(3).

<sup>465</sup> *R v Hallcroft* (2016) 126 SASR 415 [37] (Kourakis CJ).

<sup>466</sup> *Ibid* [69] (Kourakis CJ).

the case should be treated as an exception to the rule'.<sup>467</sup> The court has also indicated that the existence of special reasons would not generally support a reduction of a notional non-parole period to the full extent of the maximum possible discount in s 10C.<sup>468</sup>

In addition, the *Criminal Law (Sentencing) Act 1988* (SA) ss 10B(5) and 10C(5) provide that nothing in those sections affects the operation of s 17. Section 17 provides that the court may impose a sentence below the minimum penalty if there are good reasons 'having regard to – (a) the character, antecedents, age or physical or mental condition of the defendant; or (b) the fact that the offence was trifling; or (c) any other extenuating circumstances'. This allows the court to impose a sentence lower than the minimum penalty for good reasons including 'extenuating circumstances'. However, unlike the *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ab), there is no reference made to a plea of guilty and it is unclear that this would amount to an 'extenuating circumstance'.

In Victoria, a guilty plea is not expressly recognised as a special reason that would warrant an exception to the mandatory minimum non-parole sentencing provisions. In VSAC's consideration of the circumstances that should amount to specified 'special reasons' to justify departure from the scheme, it rejected the inclusion of a plea of guilty on the basis that there was ample scope for the court to impose a reduction of sentence to acknowledge the plea above the minimum sentence threshold.<sup>469</sup>

### 5.4.3 Discussion

One criticism of mandatory minimum sentences for offences is that they reduce the incentive to enter a plea of guilty, and so increase the number of trials and result in court delays and increased costs.<sup>470</sup> The resolution of the interrelationship of mandatory minimum sentencing provisions and a statutory sentencing discount for a guilty plea highlights the tensions that are created by competing political imperatives that have resulted in legislative changes that fetter judicial discretion (a law and order agenda relying on harsher sentences compared to the need for efficiency within the criminal justice system resulting in lighter sentences being received by offenders as an incentive to enter an early guilty plea). However, it is possible (as evidenced by the English and Wales provisions) to provide for the court to impose a sentence less than the mandatory minimum sentence when an offender enters a plea of guilty, in order to retain the incentive to enter an early guilty plea. It is also possible to have a different approach for different mandatory minimum provisions, to allow a guilty plea to reduce the sentence in respect of some mandatory minimum terms and not in respect of others.

Previously, the Council considered the interaction of a guilty plea with a mandatory minimum sentencing scheme in the context of its consideration of mandatory minimum sentences for serious child sex offences.<sup>471</sup> In relation to these offences the Council's preliminary advice was that, if an offender pleads guilty, a sentencing discount should be provided. This reflected stakeholder views in the consultation process that there should be some distinction made between offenders who plead guilty and those who are found guilty following trial for the purposes of the mandatory minimum sentencing scheme. This reflects current sentencing practice as well as concerns that a mandatory minimum sentencing scheme may discourage offenders from entering a guilty plea. In the context of sexual assault trials, the utilitarian benefit of a guilty plea extends beyond the saving of resources.

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<sup>467</sup> Ibid [70].

<sup>468</sup> Ibid [38].

<sup>469</sup> VSAC, *Statutory Minimum Sentences for Gross Violence Offences*, Report (2011) 93.

<sup>470</sup> See discussion in TSAC, *Mandatory Sentencing for Serious Sexual Offences Against Children*, Final Report No 7 (2016) 7.

<sup>471</sup> TSAC, *Sex Offence Sentencing*, Final Report No 4 (2015).

Importantly, it relieves the complainant of the need to give evidence at trial, and an early plea saves the complainant the stress and anxiety of anticipating and preparing for the trial. This benefit was stressed by the Victims Support Service, who observed that the life experience of a victim is improved if they do not go through the trial process.

In the context of sexual assault trials, a guilty plea is significant for several reasons. First, it relieves the complainant of the distress of giving evidence. The trauma of the trial process for complainants is a recurrent concern in the literature examining sexual assault and the criminal law.<sup>472</sup> However, it is acknowledged that some complainants may wish to go through the trial process if it results in the offender receiving a longer sentence (if convicted). Second, the introduction of a mandatory minimum sentencing scheme may result in fewer convictions for sexual offences. As the Council has previously observed, research shows that offenders charged with sexual assault are already less likely to plead guilty for all offences other than homicide and further, that it is relatively more difficult to obtain a conviction at trial for sexual offences than for offenders charged with other offences.<sup>473</sup> Guilty pleas also save the expense of a trial.<sup>474</sup>

In the context of mandatory minimum sentences for serious sex offences against children, the Council observed that the introduction of a sentencing discount to reduce the specified mandatory minimum sentence required decisions to be made about the most appropriate model to be used. In particular, it is necessary to decide the means by which the discount is determined.<sup>475</sup>

In the context of this paper, it is necessary to decide the approach to be adopted for mandatory minimum sentences beyond that contemplated for child sex offences. It is necessary to determine:

- (1) Whether there should be a statutory provision that allows the court to impose a lesser sentence than the mandatory minimum sentence in cases where an offender enters a plea of guilty? This could involve allowing an offender to have no discount for a guilty plea, a lesser discount than generally applicable or the same discount.
- (2) If so, should it apply to all mandatory minimum sentences or only mandatory minimum sentences that apply to indictable offences or some other category of offences or specific offence? Should there be any additional conditions that would restrict the availability of the sentencing discount?
- (3) If the court is able to provide a sentencing discount if an offender enters a plea of guilty to an offence attracting a mandatory minimum penalty with the result that the sentence would be below the mandatory minimum penalty, should an offender be entitled to the same discount as if the mandatory minimum penalty did not exist (that is, the usual discount scheme) or should it be a reduced discount?

#### **Questions**

19. Should there be a statutory provision that allows the court to impose a sentence that is less than a mandatory minimum sentence in cases where an offender enters a plea of guilty?
20. If so, should it apply to all mandatory minimum sentences or should it only apply to mandatory minimum sentences that apply to indictable offences or some other category of offences or specific offence?

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<sup>472</sup> Ibid 63.

<sup>473</sup> Ibid.

<sup>474</sup> It is noted that a guilty plea may also be a factor relevant to the sentencing process by demonstrating remorse or a willingness to accept responsibility for the offence: see Warner, above n 55, 105–106.

<sup>475</sup> TSAC, above n 470, 73.

21. Should there be any additional conditions that restrict the availability of the sentencing discount?
22. If the court is able to provide a sentencing discount if an offender enters a plea of guilty to an offence attracting a mandatory minimum penalty with the result that the sentence would be below the mandatory minimum penalty, should an offender be entitled to the same discount as if the mandatory minimum penalty did not exist (that is, the usual discount scheme) or should it be a reduced discount?

## 5.5 Mandatory sentencing

There are some provisions in Tasmania that involve the imposition of special penalties. These are mandatory fixed penalties with the court having no discretion in relation to whether or not to impose the penalty.

Special penalties are created in the *Living Marine Resources Management Act 1995* (Tas) ss 267 and 268 in relation to offences of illegally taking or possessing fish and the illegal use of apparatus. These provisions provide that ‘a court must not reduce or suspend a special penalty for any reason’.<sup>476</sup> SAC Stats reveal that these offences are relatively infrequently sentenced in the Magistrates Court. There were two cases sentenced involving the sale of fish taken in contravention of the Act (s 262(1)) and two cases sentenced involving trafficking in fish (s 264A(1)).<sup>477</sup> In the Supreme Court, the Council has identified five cases sentenced between 2008 and August 2017, and in all cases the offender entered a plea of guilty.

However, a statutory discount scheme for a guilty plea is unlikely to affect offender plea behaviour in relation to special penalty given that a court is currently unable to adjust these special penalty offences but the court has a discretion in relation to the sentence imposed on the offender and can take into account a guilty plea in imposing the sentence. Accordingly, if a statutory discount scheme is adopted, the special penalty would be imposed (without regard to the guilty plea) and the sentence that is imposed would be calculated according to the discount scheme.

## 5.6 Global sentencing

In Tasmania, where an offender is convicted of multiple offences, a judge has the power to impose one sentence for all offences (a global sentence).<sup>478</sup> Tasmanian courts also have the power to impose separate sentences for each offence but, in practice, where an offender is convicted of multiple offences, a global order is usually made. Consequently, in most cases it is not currently possible to determine the proportion of the total sentence that relates to each individual count.

In the Terms of Reference, the Council was asked to examine any challenges to the application of a statutory framework for the reduction in sentences for pleas of guilty that may arise from global sentencing practices, with particular regard to related charges and mixed pleas. Concern was raised that in many cases offenders come before the court for sentence with multiple and sometimes unrelated offences where the application of a statutory discount for plea of guilty has potential to involve significant complexity. For example, an offender may have entered pleas of guilty to a

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<sup>476</sup> *Living Marine Resources Management Act 1995* (Tas) ss 267(2), 268(2).

<sup>477</sup> It is noted that this is an indictable offence that can be heard in the Magistrates Court if the prosecution and defence agree.

<sup>478</sup> *Sentencing Act 1997* (Tas) s 11. See Warner, above n 55, 56–57.

number of charges on an indictment, but not guilty to others requiring those charges to proceed to trial. In the Council's analysis of sentences imposed in the Supreme Court in the period 2015 to 30 June 2017, there were 19 (out of 705) cases where the offender entered a plea of guilty to some counts and a plea of not guilty to other counts.

### 5.6.1 Approaches in other jurisdictions

Issues concerning the interaction between a statutory sentencing discount scheme and the imposition of a general sentence do not arise in all jurisdictions given that several jurisdictions do not have a provision that allows the court to impose a single sentence in respect of all counts. Other than Tasmania, statutory authority only exists in New South Wales, South Australia, Victoria and the Northern Territory.<sup>479</sup>

In Victoria, the *Sentencing Act 1991* (Vic) s 6AAA provides clear directions in relation to the approach to be taken in applying a discount for guilty pleas when a general sentence is imposed. Section 6AAA provides that that:

(2) If an offender is sentenced for more than one offence in the same proceeding and subsection (1)(a) and (b) apply, the court must state, in respect of any total effective period of imprisonment —

(a) the sentence; and

(b) the non-parole period, if any—

that it would have imposed but for the plea of guilty and need not state those matters in respect of each offence.

...

(5) For the purposes of this section, an aggregate sentence imposed in respect of two or more offences is to be treated as a sentence imposed in respect of one offence.

This means that:

the court only needs to indicate the sentence that it would have imposed (but for the guilty plea) in relation to the overall sentence and any non-parole period. If the offender is sentenced for more than one offence at the same time, the court does not need to indicate the sentence that it would have imposed for each individual charge.<sup>480</sup>

In South Australia, there is also provision to apply a single sentence for all or some offences where a person is found guilty of number of counts.<sup>481</sup> In relation to guilty pleas, the *Criminal Law (Sentencing) Act 1988* (SA) s 10C(4)(d) provides that:

In determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made within a particular period, a court must have regard to such of the following as may be relevant: ... in the case where the defendant has been charged with more than 1 offence — whether the defendant pleaded guilty to all of the offences.

This means that the court is able to have regard to whether an offender has entered a guilty plea to all charges in weighing the value of the guilty plea. However, the application of the sentencing discount to a general sentence is complicated by the need to apply different discounts to pleas of guilty made at different times in the pre-trial process. The operation of the sentencing discount for a guilty plea in the

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<sup>479</sup> Freiberg, above n 3, 805.

<sup>480</sup> VSAC, *Guilty Pleas and Sentencing – Specified Sentence Discount* (2017) <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/guilty-pleas-and-sentencing>>.

<sup>481</sup> *Criminal Law (Sentencing) Act 1988* (SA) s 18A.

context of a single sentence imposed for multiple offences, where the offender had entered pleas of guilty at different times (and so different maximum percentages apply) has been considered in several South Australian decisions.<sup>482</sup> In *R v Wakefield*,<sup>483</sup> the Court of Criminal Appeal discussed the issue of how the differing discounts should be applied where guilty pleas are entered at different stages in the context of an offender who was sentenced for two charges. The sentencing judge applied one penalty and allowed an overall reduction of 12.5% for the plea of guilty with no explanation as to how that figure was determined. This approach was held to be an error. The Court of Criminal Appeal said that there was ‘no reason why the sentencing court cannot impose a single penalty utilising s 18A, but it must do so by proceeding in the manner prescribed by s 10C’.<sup>484</sup> This meant that the court must ‘apply the prescribed criteria by reference to the respective maximum discounts and arrive at individual discounts for those individual offences’.<sup>485</sup> Accordingly, it was held that ‘the sentencing court is obliged to explain how it has arrived at the single sentence imposed after application of the differential discounts. This, in turn, requires identification of the notional starting head sentences for the individual offences and the notional discount applied’.<sup>486</sup> However, there was no need to determine or identify separate starting points and discounts for individual offences if the same discount applied to all offences.

Subsequently, in *R v Donald; R v Pitt; R v Whitaker*,<sup>487</sup> the Court of Criminal Appeal considered the interaction of s 18A and s 10C in the context of offenders sentenced for 57 offences committed during the course of a drug trafficking enterprise, with guilty pleas entered at different times (some attracting up to 10% and some up to 30% discounts). In imposing sentence, the sentencing judge specified separate starting points and discounts for each count and then accumulated the notional sentences identified for each offence and applied the principles of totality and concurrency. This was also held to be an error. Instead of determining the discount for each offence, the Court of Appeal held that the judge should have separately applied s 18A to all of the offending that attracted the lower discount and all of the offences that attracted the higher discount and then considered other sentencing principles, including whether to impose a single sentence. The relevant principles were said to be as follows:

1. It is always necessary to identify the applicable sentencing principles and standards for the particular offences charged.
2. In applying s 18A of the Act, the sentencing Judge should, as a general rule, first determine what sentence each separate offence would attract and then consider whether the sentences should be served concurrently or cumulatively. In considering the question of whether a sentence should be served concurrently or cumulatively the general criminal law sentencing principles apply. This approach has the benefit of transparency.
3. In some cases, the matter may be so straightforward that the separate consideration of the individual sentences is unnecessary.
4. In some cases, the approach in paragraph two may be unnecessary because the totality principle will so obviously operate that it becomes pointless to consider

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<sup>482</sup> See *R v Wakefield* (2015) 121 SASR 569; *R v Donald; R v Pitt; R v Whitaker* (2016) 126 SASR 276; *R v Dang* [2015] SASFCFC 154.

<sup>483</sup> (2015) 121 SASR 569.

<sup>484</sup> *Ibid* [38] (Blue J).

<sup>485</sup> *Ibid*.

<sup>486</sup> *Ibid* [39].

<sup>487</sup> (2016) 126 SASR 276.

and to assemble the individual sentences that would otherwise be imposed. In such cases to accumulate the sentences will lead to an “air of unreality” in the sentencing process.

5. If a sentencing court wishes only to use s 18A once for multiple offences, and differing statutory discounts apply, the Court must explain how it has arrived at the single sentence imposed after application of the differential discounts. This requires identification of the notional starting head sentences for the individual offences and the notional discounts applied. If the offending can be grouped, such that a common discount applies across particular offences, and s 18A applied to the various groupings independently, then notional sentences will not be necessary.
6. As to when such an “air of unreality” arises in any particular case will depend on the facts and circumstances of each case.
7. Failure to adopt any particular approach will of itself not amount to an error of law.
8. The sentencing Judge should provide sufficient reasons for the approach adopted.<sup>488</sup>

In imposing a general sentence, the correct process was for the sentencing court to group offences together according to the time at which the plea was entered and impose one penalty for each group of offences. Having arrived at those sentences, the court could again use s 18A to arrive at a final sentence that was appropriate to reflect the criminal conduct.<sup>489</sup> In delivering its judgment, the Court of Appeal commented on the additional layer of complexity that was added to the sentencing process by the enactment of the *Criminal Law (Sentencing) Act 1988* (SA) s 10C.<sup>490</sup>

In New South Wales, the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A allows the court to impose an aggregate sentence of imprisonment. Currently, the court has expressed the view that where there are multiple offences and pleas entered at different times, ‘a proper exercise of discretion requires the judge to discriminate between the offences if it is necessary to do so in order to properly reflect the value of the pleas by the discount given’.<sup>491</sup> The court has also stated that ‘the discount has to apply to the overall sentence imposed and not just the individual sentences. This of course may be difficult when there are different discounts applicable to different sentences’.<sup>492</sup> It is unclear how the sliding scale for guilty pleas proposed by the NSWLRC would apply to aggregate sentences, and this matter was not addressed in the report. It was also not addressed in the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW).

## 5.6.2 Discussion

As indicated in the Terms of Reference, a sentencing discount scheme may create greater complexity in cases where an offender enters a guilty plea to some offences and is found guilty at trial for other offences. An additional area of complexity (depending on the structure of the scheme) arises if an offender enters guilty pleas for all charges, but does so at different times giving rise to different discounts.

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<sup>488</sup> Ibid [31] (Lovell J).

<sup>489</sup> Ibid [35].

<sup>490</sup> Ibid [24].

<sup>491</sup> *R v SY* [2003] NSWCCA 291. This was approved as a correct statement of principle in *Morton v The Queen* [2014] NSWCCA 8, [33].

<sup>492</sup> *Felton v The Queen* [2010] NSWCCA 79, [45].

The Council's preliminary view is that a statutory discount for a guilty plea will complicate the process of imposing a global sentence but that it is not inherently incompatible. The approach taken in Victoria (with the greater judicial discretion in relation to the weighing of relevant factors) would allow for courts to sentence in much the same manner that they currently do with the exception of the requirement to state that the sentence that the offender would have received if he or she had not pleaded guilty to all or some of the charges (and so quantifying the value of the guilty pleas). This is much simpler than the approach adopted in South Australia, where the sentencing discount scheme has added considerable complexity to the sentencing process. This requires the court to group offences together according to the applicable discount and then impose a single penalty for each group taking into account the discount and then to consider the overall penalty that is appropriate based on the single penalties decided. This reasoning would need to be set out in the sentencing comments.

Accordingly, the nature of the effect on the operation of global sentencing resulting from the introduction of a statutory sentencing discount scheme will be depend on the structure of the scheme.

**Question 23**

What issues do you see in relation to the imposition of a global sentence arising from the introduction of a statutory discount for a guilty plea?

## **5.7 Any other sentencing and legislative provisions that provide specific challenges**

The Terms of Reference asked the Council to consider whether there are specific challenges to the introduction of a statutory framework for the reduction in sentence for pleas of guilty, including if there should be any offences excluded, such as traffic offences, from the scheme. In relation to minor traffic offences contained in the *Road Rules 2009* (Tas), these are dealt with by the issue of infringement notices. An infringement notice scheme provides 'a system for the expeditious collection of monetary penalties arising with respect of minor offences, such as routine traffic offences'.<sup>493</sup> Previously, the Council has identified 45 Acts (as well as other associated regulations) administered by various government department and agencies that provide for the issue of infringement notices.<sup>494</sup> In addition to the use of infringement notices for minor regulatory offences, there has been an expansion of the infringement notice system to allow the police to issue an infringement notice in relation to a number of summary offences contained in the *Police Offences Act 1935* (Tas), including prohibited language, public annoyance, trespass, dispersal of people, graffiti, street entertainment, entering the reserved area of a sports venue, drinking in public, supplying alcohol to youths, failing to provide details of driver of a vehicle, use of a spotlight on a vehicle on a public street, advertising reward for return of stolen property, holding a motor vehicle race without a permit, holding an activity on a public street without a permit and holding a public entertainment that has been prohibited by the Commissioner.<sup>495</sup>

The Council notes that a statutory sentencing discount provided for guilty pleas will not affect the operation of the infringement notice scheme because its operation will be limited to matters where an offender is sentenced by a court.

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<sup>493</sup> *McQuade v Marion City Council* (1998) 100 A Crim R 203, 206.

<sup>494</sup> See TSAC, *Non-conviction Sentences: 'Not recording a Conviction' as a Sentencing Option*, Final Report No 3 (2014) 84 for a discussion of infringement notices.

<sup>495</sup> *Police Offences Act 1935* (Tas) s 61.

In relation to traffic offences, it is also noted that the statutory discount for a guilty plea relates to the punitive element of the sentence imposed by the court and not to ancillary orders (such as driving disqualification) that may be imposed.

**Question 24**

Are there any provisions that provide specific challenges to the operation of a statutory sentencing discount scheme?