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ADVISORY
COUNCIL

STATUTORY SENTENCING REDUCTIONS FOR PLEAS OF GUILTY

FINAL REPORT No.10

October 2018



Tasmanian
Government

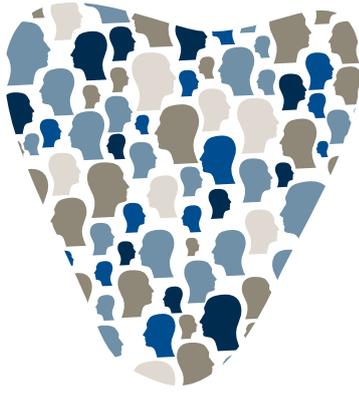


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About this Report

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.

In April 2018, the Council released a Consultation Paper which provided an overview of the current approach taken to reduction of sentence for a guilty plea in Tasmania and examined legislative approaches to sentencing reductions for pleas of guilty in other Australian jurisdictions and comparable international jurisdictions. The Consultation Paper asked for feedback in relation to the appropriate parameters for the introduction of a statutory framework to reduce sentences for pleas of guilty in Tasmania.

This Final Report makes recommendations to the Attorney-General in relation to the introduction of a statutory sentencing reduction scheme in Tasmania.

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 report was concluded, the Council members were Emeritus Professor Arie Freiberg AM (Chair), Dr Jeremy Prichard, Mr Scott Tilyard, Mr Peter Dixon, Ms Kim Baumeler,

Ms Rochelle Mainwaring, Ms Jill Maxwell, Professor Rob White, Associate Professor Terese Henning, Ms Kate Cuthbertson and Ms Linda Mason SC.

Consultation

Responses to the Consultation Paper were received from:

Daryl G Coates SC, Director of Public Prosecutions (DPP) (Submission 1)

Benedict Bartl, Community Legal Centres Tasmania (CLC Tas) (Submission 2)

Justice Gregory Geason, Supreme Court Judge (Submission 3)

Luke Rheinberger, The Law Society of Tasmania (Submission 4)

In addition, as part of the consultation, the Council conducted forums with representatives of the legal community (the Law Society, Community Legal Centres Tasmania and Tasmania Aboriginal Community Legal Service) and Tasmania Police (DPFEM Legal Services). The Council also met with the Director of Public Prosecutions, Daryl Coates SC, the Chief Magistrate, Ms Catherine Geason, the Chief Justice of the Supreme Court, the Hon Alan Blow OAM and Mr Brian Martin. Meetings were also held in New South Wales with representatives of the Public Defenders' Office, the Legal Aid Commission, the Office of the Director of Public Prosecutions and the Department of Justice. Meetings in South Australia were held with the Office of the Director of Public Prosecutions as well as a representative of the Legal Aid Commission and the Criminal Law Committee of the Law Society.

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Executive Summary

TERMS OF REFERENCE

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 do not occur.

The following Terms of Reference were given to the Council:

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.

A SENTENCING REDUCTION 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. Originally, the plea of guilty only provided a basis for mitigation of sentence where it reflected a particular subjective state of mind of the offender — either as a result of remorse or 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. More recently, however, case law and statute have recognised that an offender may be entitled to a reduction as a result of pleading guilty, regardless of the motivation of the offender. In providing a reduction in sentence for a guilty plea on an objective basis, courts and statute have recognised the utilitarian value of the guilty plea.

As indicated, the sentencing reduction for a guilty plea recognises the pragmatic value in terms of the financial savings from the early resolution of a matter and the public interest in conserving the trial process for cases where there is a genuine dispute in relation to the guilt. The guilty plea reduction is also supported on the basis that it avoids trauma for victims and witnesses of giving evidence at a trial. A statutory sentencing reduction scheme can be supported on the basis that it provides transparency and consistency in relation to the sentencing reduction provided by courts for an early guilty plea. This, in turn, may encourage more offenders to enter an early plea which, in addition to the benefits to the criminal justice system, has the advantage of providing greater certainty for victims.

Despite these advantages, there are criticisms of sentencing reductions for guilty pleas. It has been argued that such reductions are contrary to the presumption of innocence by penalising offenders who proceed to trial. Concerns have also been expressed that it may place undue pressure on an innocent offender to enter a plea of guilty, particularly when a custodial sentence would follow a guilty finding at trial, but a guilty plea would result in a non-custodial sentence. Further, commentators have argued that the creation of a statutory reduction for a guilty plea as a means to encourage early pleas must be viewed in the context of other systemic features of the criminal justice system that may be obstacles to early guilty pleas.

THE COUNCIL'S APPROACH

In examining the issues associated with the introduction of a statutory reduction in sentence for a guilty plea, the Council notes that a majority of offenders enter a plea of guilty and that the effective and efficient operation of the criminal justice system depends on most offenders pleading guilty. In 2016–17, 75% of offenders in the Supreme Court and 90.7% of offenders in the Magistrates Court entered a plea of guilty. In this context, 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'.¹

This was also a concern of the government as its reference to the Council indicated that any reforms in relation to a statutory sentencing discount for a guilty plea should not derogate from a defendant's right to plead not guilty and receive proper advice of the case against him or her. Accordingly, in examining the issues associated with introducing a statutory sentencing reduction 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. In the Council's view, a statutory sentencing scheme for guilty pleas should be an incentive or encouragement for appropriate early pleas of guilty and not as an incentive to enter a guilty plea where an offender would not have otherwise done so.

The Council is also aware of the importance of context and the need to ensure that any proposals for reform take into account the broader issues of delay within the pre-trial process in Tasmania. The Council is 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 reduction in the context of other obstacles that may exist within the criminal justice system to the timely entering of a plea of guilty. The Council notes that the lack of clarity in relation to the sentencing benefit of an early plea of guilty is only one factor that may influence defendants' plea behaviour. Other factors include issues relating to disclosure and certainty about the charges that an offender will face if the matter proceeds to trial. In this context, the Council cautions against viewing the introduction of a sentencing reduction scheme as the 'solution' to court delay and backlogs. The Council's view is that it is important to understand systemic features of the Tasmanian criminal justice system that lead to

¹ Sentencing Advisory Council, Victoria (VSAC), *Sentence Indication and Specified Sentence Discounts*, Final Report (2007) 16.

delay (separate from the timing of guilty pleas) as well as structural impediments to early pleas that exist within the system, and to address these factors as a means to reduce delay.

Based on an understanding of the broader system features leading to delay in Tasmania and research conducted elsewhere, it is the Council's view that the introduction of a statutory sentencing reduction for a guilty plea will not be effective on its own to reduce court delay. There is also a need to address these broader issues that cause delay and contribute to late guilty pleas. In this regard, the Council notes that the introduction of the utilitarian statutory reduction scheme in New South Wales has been introduced as part of significant reforms to pre-trial process to address delay (and not as a stand-alone reform) and has been accompanied by significant extra funding to support the reforms. Additional funding for Tasmania Police, Legal Aid and the Office of the Director of Public Prosecutions will be necessary to support changing practices in relation to disclosure and the early attention to matters by prosecution and defence. Appropriate additional resources will also need to be provided to the courts.

The Council also notes the development of a Magistrates Court (Criminal and General Division) Bill 2017 (Tas) as a response to delay within the Magistrates Court and considers that it is desirable for the government to continue to prioritise the enactment of this reform. The Council notes that appropriate funding will need to accompany the reforms to allow Tasmania Police to comply with the disclosure requirements under the legislation.

THE REVIEW PROCESS

In April 2018, the Council released a consultation paper, *Statutory Sentencing Discounts for Pleas of Guilty: Consultation Paper*.

In response, the Council received four written submissions from the following:

Daryl G Coates SC, Director of Public Prosecutions (DPP)

Benedict Bartl, Community Legal Centres Tasmania (CLC Tas)

Justice Gregory Geason, Supreme Court Judge

Luke Rheinberger, The Law Society of Tasmania

In addition, as part of the consultation, the Council conducted forums with representatives of the legal community (the Law Society, Community Legal Centres Tasmania and Tasmania Aboriginal Community Legal Service) and Tasmania Police (DPFEM Legal Services). The Council also met with the Director of Public Prosecutions, Daryl Coates SC, the Chief Magistrate, Ms Catherine Geason, the Chief Justice of the Supreme Court, the Hon Alan Blow OAM and Mr Brian Martin. Meetings were also held in New South Wales with representatives of the Public Defenders' Office, the Legal Aid Commission, the Office of the Director of Public Prosecutions and the Department of Justice. Meetings in South Australia were held with the Office of the Director of Public Prosecutions, as well as a representative of the Legal Aid Commission and the Criminal Law Committee of the Law Society.

THE CURRENT APPROACH OF TASMANIAN COURTS TO THE REDUCTION OF SENTENCE WHERE A DEFENDANT ENTERS A PLEA OF GUILTY

As indicated, most offenders sentenced in Tasmanian courts plead guilty. In the Supreme Court, over the period 2011–12 to 2016–17, 78.1% of defendants in cases where the defendant was proven guilty were finalised by a guilty plea. In the Magistrates Court, in the same period, 87.3% of defendants in cases where the defendant was proven guilty were finalised by a guilty plea.

There is data provided by the Office of the DPP that suggests that late pleas are a significant issue in the Supreme Court in Tasmania given the number of pleas entered after a matter is listed for trial. However, only limited information about the timing of pleas is available in Tasmania which makes it difficult to gauge the extent of late pleas in Tasmania and to evaluate whether any sentencing reform will be effective in changing the plea behaviour of offenders. Accordingly, the Council's view is that the data systems of both the Supreme Court and the Magistrates Court need to be reviewed and updated to ensure that information about the timing of pleas of guilty is recorded.

As required by Term of Reference 1, Chapter 4 examines the current approach of Tasmanian courts to reduction of sentence where a defendant enters a plea of guilty.

Unlike other Australian jurisdictions, in Tasmania there is no legislative provision that recognises a reduction of sentence for a guilty plea. However, 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. Factors relevant to the sentencing reduction evident from case law are the timing of the plea (and whether the plea can be described as an early plea) and the strength of the Crown case (that is, whether the offender is giving up a chance of an acquittal). In other jurisdictions, the strength of the Crown case is not usually a matter regarded as relevant to the utilitarian value of the plea.

Traditionally, there has been uncertainty in relation to the length of time that a sentence is reduced or whether the nature of the sentence is changed (such as a change from a sentence of immediate imprisonment to a suspended sentence or a non-custodial sentence) to give effect to the reduction for the utilitarian benefit. It has not consistently been the practice of the Supreme Court to specify the reduction and different views have been expressed about the appropriateness of quantifying the reduction.

The survey of Tasmanian sentencing comments conducted by the Council indicates that a guilty plea (and the timing of the plea) is identified as a relevant sentencing factor in many cases but in terms of identifying an actual benefit to reflect the utilitarian value of the plea, the traditional approach of the Supreme Court has been not to state the value of the reduction in sentencing attributable to the utilitarian value of the plea. This has meant that a defendant was not able to access (and defence counsel has not been able to give clear advice on) the likely reduction arising from an early (or late) plea of guilty. More recently, there has been a shift in judicial approach in the Supreme Court in relation to the practice of stating the reduction to reflect the principles set out by the Court of Criminal Appeal in *DPP v Broad*.² However, this has been done in less than 25% of cases to date.

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

As required by Term of Reference 2, Chapter 5 examines legislative approaches to sentencing reductions 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.

As indicated, all Australian jurisdictions (other than Tasmania) have legislation that makes provision for a sentencing reduction to be given for guilty pleas. This is also the position in England and Wales, and in New Zealand. 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 that the timing of the plea is relevant to the reduction received, with earlier pleas attracting a greater reduction than later pleas. The general approach is that the court should quantify the reduction, however, this is not legislatively prescribed in all jurisdictions. An offender may receive a reduction 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.

There are important differences, however, in approaches to how the reduction 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 reduction to a particular time identified in the pre-trial process. This is also the model recommended by the New South Wales Law Reform Commission (NSWLRC) and which was introduced in New South Wales on 30 April 2018. 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 reduction, 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 sentence that would otherwise have been imposed so the reduction received is clearly stated and transparent. Similarly, in New South Wales, (until the commencement of recent legislative changes which introduced a statutory sliding scale for many indictable offences), the emphasis on the utilitarian

2 [2018] TASCRA 5. See discussion at [4.1.1].

value of the plea has meant that the timing of the plea has been a key factor relevant to the reduction received, with the result that 'the earlier the guilty plea, the greater the utilitarian value and the greater the reduction that will be given by the sentencing court'.³ These principles still apply in New South Wales in relation to summary offences and certain indictable offences that are not dealt with by the new statutory reduction scheme. This is also the approach in Queensland, the Northern Territory, the Australian Capital Territory and New Zealand.

There are two key issues highlighted in the analysis of statutory sentencing reduction 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. Further, it is noted that a statutory sentencing reduction scheme for a guilty plea may not of itself provide sufficient incentive for an offender to enter an early plea. Any such a reform needs to be viewed in the context of systemic factors that might restrict an offender's ability to enter an early guilty plea. However, research suggests that it is possible that an incentive to enter a guilty plea can be effective in persuading some offenders to enter a plea earlier in the process. Research also suggests that a reform requiring a judge to specify the reduction can be effective in changing judicial behaviour, thus allowing offenders and their legal representatives to have a clearer understanding of the benefit of an early guilty plea.

(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 (in their own right) do not support the conclusion that such reforms have had any significant effect in reducing court delay. This reflects the fact that there are broader systemic factors that contribute to delay. In contrast, research in New South Wales has demonstrated that a case management approach where matters 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, had a significant effect on the early resolution of matters.

Advice as to the appropriate parameters for the introduction of a statutory framework for the reduction in sentence for pleas of guilty

The Terms of Reference require the Council to examine and report on a statutory sentencing discount for pleas of guilty in Tasmania and to provide advice as to the appropriate parameters for the introduction of such a scheme. This is addressed in Chapter 6.

The Council was asked 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 reduction of a guilty plea. A separate but related question is whether the court should be directed to state the reduction given in a particular case. Both setting out the value of the reduction in legislation and requiring the court to state the value of the reduction in a particular case are a means of creating certainty, transparency and consistency in terms of the reduction to be received for a guilty plea.

To enable the Council to address Term of Reference 5, the Consultation Paper sought 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.

3 New South Wales Law Reform Commission (NSWLRC), *Sentencing*, Report 139 (2013) 119 citing *R v Borkowski* [2009] NSWCCA 102; *R v Thomson and Houlton* 48 NSWLR 283, [154], [160].

There is considerable diversity in the approach to statutory provisions relating to the relevance of a guilty plea in sentencing in other comparable jurisdictions. However, it is possible to identify four models that could inform reforms in Tasmania:

Model (1): A statutory requirement to take into account a guilty plea (and its timing) in sentencing, with the court left with discretion in relation to the extent of the reduction provided. There is no legislative requirement for the court to state the discount provided.

There is no legislative statement of the amount of discount provided but case law provides guidance as to the appropriate discount for an early plea.

As a matter of practice, the court may also state the discount provided.

This is the approach in Queensland, the Northern Territory, New Zealand, and in New South Wales in relation to summary offences and indictable offences involving offenders who were under the age of 18 years when the offence was committed and under the age of 21 years when charged before the court with the offence and commonwealth offences. It is also the approach in Western Australia in matters where a fixed term of imprisonment is not imposed.⁴

Model (2): A statutory requirement to take into account a guilty plea (and its timing) in sentencing with the court left with broad discretion in relation to the extent of the reduction provided. There is a legislative requirement for the court to state the discount provided.

There is no legislative statement of the amount of discount provided but case law provides guidance as to the appropriate discount for an early plea. This is the approach in Victoria.

Model (3): In cases where a term of imprisonment is imposed, there is a statutory requirement that provides that the maximum discount is 25% and the legislation provides that the sentence reduction must be stated.

This is the model in Western Australia.

Model (4): Legislation sets out a sliding scale of discounts based on fixed points within the pre-trial process.

This is the approach in South Australia and New South Wales. It is also the position in England and Wales, but the scale is contained in a sentencing guideline rather than legislation. In New South Wales, legislation requires that the reduction that is provided be stated by the court in imposing sentence. This is not set out in legislation in South Australia but is the practice of the court. There are some other key differences in the operation of the sliding scale approach in terms of whether the reductions provided are fixed (that is mandatory) or 'up to', the level of disclosure required to be provided by the prosecution to the defence, and the exceptions to the scheme.

After considering the various options the Council recommends a package for reform that reflects model 2 (above) as follows:

- Amend the *Sentencing Act 1997* (Tas) to recognise a guilty plea as a mitigating factor (Recommendation 2). This relates to the utilitarian value of the guilty plea — namely the benefit which accrues to the administration of justice from a plea of guilty such as the costs saving to the prosecution, legal aid and the court system generally, as well as the avoidance of trauma for victims and witnesses. It should be made clear in the legislation that the identification of the guilty plea as a factor relevant to the mitigation of sentence does not affect the application of other sentencing factors, which will continue to have effect. The purpose of the amendment should be to clarify the scope of the sentencing reduction to reflect the utilitarian value of the plea and not to alter the exercise of the sentencing discretion.
- Amend the *Sentencing Act 1997* (Tas) to set out three factors that are relevant to the reduction provided for a guilty plea: (1) the fact of the guilty plea; (2) the timing of the plea or the indication of the intention to plead guilty assessed in the circumstances of the case; and (3) the lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence (Recommendation 3).

⁴ However, in Western Australia, legislation provides that the sentence reduction must be stated, see [5.1], [6.3.1].

- Amend the *Sentencing Act 1997* (Tas) to require that the court is to state the effect of the guilty plea on the sentence. This is to apply in cases where a sentence of imprisonment is the appropriate sentence (without the reduction for a guilty plea). The court *must* state the discount in these cases and this may involve a reduction in the length of the sentence of imprisonment, the imposition of a partly suspended or fully suspended sentence or a probation or community service order (or a community corrections order) on the basis of the plea of guilty. In other cases, the court retains a discretion whether or not to state the discount (Recommendations 5 and 6).

The Council notes that these recommendations form a package of recommendations and does not support any legislative reform that would adopt only some aspects of the recommendations.

The Council's intention is that the legislative reform would provide a statutory basis for a sentencing reduction for a guilty plea *and* provide for a statement of that discount by the court — either as a mandatory or discretionary requirement depending on the sentence contemplated. The aim of these reforms is to provide clarity, transparency and greater certainty in relation to the sentencing reduction attributable to an early guilty plea and provide a signal to participants in the criminal justice system of the need to give early attention to the determination of charges and the appropriateness of a guilty plea. This reflects the Council's conclusions that delay in Tasmania is supported by a legal culture and funding model that does not encourage the early resolution of matters and the need to provide a signal to defence practitioners about the need to be in a position to provide timely advice to their clients about the benefit of a guilty plea rather than to focus on matters close in time to the trial date. In this regard, the Council notes the ethical obligations on barristers to provide advice about the consequences of entering a plea of guilty. It is also stressed that the inclusion of a guilty plea as a discrete factor in legislation does not mean that this is the only or the most significant sentencing factor. Further, the provision of a reduction in sentence to reflect the utilitarian value of the plea remains in the judge's discretion, and it may be that little or no discount is appropriate in the circumstances of a particular case.

Advice as to 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

In response to Term of Reference 5a, the Council *does not* consider that the value of the plea should be set out in legislation, either as a legislative cap or a sliding scale. The Council's view is that a sliding scale is context dependent relating to the need for early disclosure to allow the office of the DPP to determine the most appropriate charge(s) and for defence counsel to give proper advice. It will also be necessary to provide appropriate legal aid funding to allow for early attention to matters by defence counsel. Delay is endemic in the pre-trial process in Tasmania and many systemic factors (other than the timing of defendant pleas) contribute to this. These factors will not be resolved by the introduction of a prescriptive sentencing discount scheme in isolation from broader reforms. Accordingly, it is the Council's view that Tasmania does not have the appropriate institutional or legal infrastructure that would support the adoption of a sliding scale.

Further, there are difficulties in applying a percentage reduction to cases where the sentencing reduction would have the effect of changing the sentence type. It is not clear how a percentage reduction would operate in this situation. For example, it is not clear how a legislative requirement to reduce a sentence by a particular amount would translate to the decision to change sentence type from a term of imprisonment to a suspended sentence, or to impose another sentencing order on an offender. In addition, a statement of the value of the plea can be said to fetter judicial discretion and not allow the circumstances of the particular case to be taken into account in determining the value of the guilty plea.

The Council accepts that a statutory statement of the value of a plea can be supported on the basis of transparency, clarity and consistency, and that it makes clear to the sentencer, defence and prosecution the value of a guilty plea and removes uncertainty in relation to whether a discount is provided for a guilty plea. However, the Council considers that these benefits can also be achieved by requiring the court to state the discount provided. The Council's view is that the value of the discount should remain a matter that is for the exercise of the court's discretion, in the circumstances of the case.

Advice as to 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

The Council's view is that it is not appropriate to indicate in legislation the amount of the statutory reduction that should apply where an offender enters a plea of guilty. However, the Council observes that 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 direct conflict between 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 sentencing reduction for a guilty plea in circumstances where the effect of applying a sentencing reduction for a guilty plea would result in a sentence below the mandatory minimum sentence.

At present, there are very few mandatory minimum sentences to which the sentencing reduction scheme proposed by the Council would apply. However, if the government introduces mandatory minimum sentences for sexual offences against children, it will need to be aware that this will potentially affect pleas of guilty for sexual offences and sentencing practices for these offences. It is likely that mandatory minimum sentences will discourage guilty pleas if there is no sentencing incentive to enter an early plea of guilty. However, providing a sentence discount for a guilty plea would undermine the purpose of having a mandatory minimum sentence. The two policies appear to be inherently contradictory.

A significant 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, court delays and increased costs.

In this context, the Council reiterates its opposition to mandatory minimum sentences.

However, if the government continues to expand the range of offences for which mandatory minimum sentences apply, there are three options that it might consider to resolve the issue:

- (1) make no provision for a discount for a guilty plea in these circumstances (with the attendant risk in relation to reduced guilty pleas).
- (2) Allow for a discount for a guilty plea for all offences with mandatory minimum penalties.
- (3) Allow for a discount in 'special circumstances', for example child sexual offences if the legislation is adopted. A possible model in this regard is the approach to mandatory minimum non-parole periods in South Australia.

The Council provides these views only as an observation, and not as a recommendation as to the most appropriate model to adopt.

Advice as to 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

In response to Term of Reference 5c, as indicated, the Council's view is that three factors should be relevant to the sentencing reduction provided for a guilty plea: (1) the fact of the guilty plea; (2) the timing of the plea or the indication of the intention to plead guilty assessed in the circumstances of the case; and (3) that the lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence.

The stage of plea is central to the sentencing reduction provided to reflect the utilitarian value of the guilty plea in view of the greater benefits that accrue to the criminal justice system and to the victims and witnesses from an early plea. However, the Council's view is that, in the Tasmanian context, the timing of the plea should not be assessed solely on a temporal basis (that is, the stage of the proceedings at which the plea was made). While the stage of the plea will generally be highly persuasive in the determination of whether or not a plea is timely, the Council's view is that there needs to be scope for the court to exercise its discretion to make a determination that a plea was early (even if it was made at a later stage in the proceedings) based on whether it was made at the first reasonable opportunity in the circumstances of the particular case. This is the approach in jurisdictions other than New South Wales (indictable offences) and South Australia where a sliding scale is provided based on particular time periods. The reduction provided

should be in the discretion of the court, and it may be that in some cases, the circumstances of the case mean that a plea of guilty should result in very little or no reduction in sentence.

The Council acknowledges that the advantage of a prescriptive approach (in terms of the identified time periods relevant to the reduction attributable to the entry of the plea) has the advantage of a greater degree of clarity and consistency. It provides the clearest signal to defendants and the prosecution of the sentencing benefit of an early plea. It also overcomes uncertainty and inconsistency in determining when a plea is 'entered at the earliest reasonable opportunity'. However, the Council's view is that such a prescriptive sentencing reduction scheme is not appropriate in Tasmania at this time due to systemic factors such as problems relating to disclosure that would allow for the early identification of appropriate charges and early robust advice to be given by defence counsel. In addition, there is the lack of an appropriate funding model to allow legal representatives to give proper early attention to matters.

Further, the Council's view is that a prescriptive scheme may 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. Providing the courts with a degree of flexibility will prevent injustice arising where an offender is unable to comply with prescriptive time frames through no fault of their own. It will also address concerns about potential difficulties created by a prescriptive scheme for vulnerable and/or unrepresented defendants.

Accordingly, the Council's view is that it is more appropriate to adopt a flexible guilty plea scheme to provide the court with greater discretion to accommodate the realities of the pre-trial process.

The Council has considered whether the fact that a guilty plea was the result of a plea negotiation process should be relevant to the discount provided. The Court of Criminal Appeal has held that a discount may not be appropriate in circumstances where the offender's plea of guilty is entered as a result of the plea negotiation process. It can be argued that to receive a reduction in sentence in these circumstances is to obtain a 'double discount' — a lower sentence imposed given that the offender has entered a plea of guilty to a less serious offence and then a discount for entering a plea of guilty. However, the Council's view is that it is not appropriate to include a provision that would require the court to have regard to plea negotiation in determining the appropriate reduction for a guilty plea. The Council's

view is that the settled charges are the appropriate charges that reflect the criminality of the offender's conduct.

In addition, the Council has considered whether the strength of the prosecution case should be a factor considered in determining the sentencing reduction attributable to the utilitarian value of the plea. This is not a matter that has been generally considered to relate to the utilitarian value of the plea given that the basis for the reduction is the benefit to the administration of justice which is separate from issues of remorse or the strength of the prosecution case. The Council does not consider that the strength of the prosecution case should be a matter relevant to the sentencing reduction for a guilty plea.

Advice as to 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

Term of Reference 5d asks the Council to consider whether characteristics of a defendant should be relevant to eligibility for statutory reductions in sentence. The Council's view is that there does not appear to be any principled basis for excluding any particular class of offender automatically from a discount that is provided to recognise the utilitarian value of the plea.

Advice as to the nature and type of offences that should be excluded from a statutory reduction of sentence for a plea of guilty

Term of Reference 5e asks the Council to provide advice as to the nature and type of offences that should be excluded from a statutory reduction of sentence for a plea of guilty. The Council's view is that there does not appear to be any principled basis for excluding any particular class of offence automatically from a discount that is provided to recognise the utilitarian value of the plea.

However, the Council's view is that the requirement for the court to state the sentencing reduction provided for the guilty plea should apply in cases where a sentence of imprisonment is the appropriate sentence (without the reduction for a guilty plea). In such cases, the Council's view is that the court *must* state the discount. This may

involve a reduction in the length of the sentence of imprisonment, the imposition of a partly suspended or fully suspended sentence or a probation or community service order (or a community correction order) on the basis of the plea of guilty. In other cases, the court *may* [not must] state the discount. This distinction is intended to address concerns about the problems of delay due to the increasing complexity of sentencing in the Magistrates Court and the high volume of cases in which noncustodial sentences are imposed. The Council's view is that there should be consistency in the operation of the scheme for all sentences of imprisonment and so the scheme should operate in the Supreme Court and the Magistrates Court. It also reflects the fact that the vast majority of criminal offences are dealt with in the Magistrates Court.

Advice as to any other matters considered relevant to the scope of a statutory reduction in sentence scheme

Although a review of pre-trial processes in Tasmania is beyond the scope of this reference, the Council stresses that defendants' plea behaviour needs to be viewed in the context of systemic factors that contribute to late pleas as well factors that contribute to delay in the criminal justice system more broadly.

Based on the submissions received and the views expressed in the consultation process, as well as research undertaken in other jurisdictions, the Council makes the following observations in relation to systemic delay factors and the timing of pleas:

- Delay is endemic in the pre-trial process in Tasmania (as with other jurisdictions);
- Delay is sustained by a legal culture and funding model that do not encourage the early resolution of matters;
- There is a need to provide a signal to defence practitioners about the need to be in a position to provide timely advice to their clients about the benefit of a guilty plea rather than focusing on matters close in time to the trial;
- In indictable matters, the lack of early involvement of senior counsel for prosecution and defence who have the ability to assess the case and enter into negotiations about the appropriate charges is a factor that contributes to late pleas. Experience in other jurisdictions is that early resolution requires the involvement of people with the authority to make decisions. Charge certainty is also a factor identified as being relevant to the timing of a guilty plea;

- Appropriate information is required to allow defence counsel to give their clients realistic and persuasive advice about the likelihood of conviction and for the DPP and police prosecutions to take a relatively firm view on the appropriateness of the charges to be laid. In Tasmania, there is an issue in relation to timely disclosure;
- There is a perception that there is an advantage in waiting to enter a guilty plea given the delay inherent in the system and the lack of a clear sentencing benefit to an offender from an early guilty plea.

If changes are to be made to address delay along the lines suggested, they would need to be accompanied by the necessary funding to Tasmania Police, Legal Aid, the Magistrates Court and Supreme Court and the Office of the DPP to allow any reforms to be effectively implemented.

Advice as to whether existing sentencing and penalties legislation in Tasmania may provide specific challenges to the introduction of a statutory framework for the reduction in sentence for a plea of guilty

In making its recommendations, the Council has considered challenges to the introduction of a statutory framework for the reduction in sentence for pleas of guilty that may arise 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.

The Council notes that it does not consider that the requirement to state the discount should apply to all cases. It is the Council's view that the requirement that the court must state the discount should be reserved for more serious matters and so recommends that the requirement should only apply where a sentence of imprisonment is the appropriate sentence (without the reduction for the guilty plea). This approach is aimed at preventing difficulties that may arise due to the volume of cases in the Magistrates Court in relation to lower scale penalties such as fines and good behaviour bonds.

In relation to traffic offences, it should be made clear 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 that may be imposed (such as driving disqualification or forfeiture).

Further, the requirement for the court to state the sentencing reduction only applies where a sentence of imprisonment is the appropriate sentence (without the discount for a plea of guilty). In other cases, such as where the appropriate sentence is a fine or a community-based order, the court may state the discount but is not obligated to do so.

In relation to mandatory minimum penalties under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 17, the Council notes that the sentencing reduction scheme would not apply to the mandatory minimum fines and would only apply if the court had determined that a sentence of imprisonment was appropriate (before the reduction for the guilty plea is taken into account). Under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 17, the terms of imprisonment for different blood alcohol readings and the number of prior offences are set out as a maximum penalty (rather than a mandatory minimum term).

In relation to the vast majority of minor traffic offences contained in the *Road Rules 2009* (Tas), these are dealt with by the issue of infringement notices. 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.

Advice in relation to 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

The Council has also addressed 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.

The Council's view is that the scheme it has recommended is more compatible with global sentencing than a prescriptive sliding scale scheme. 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 (if a prescriptive scheme were adopted) arises if an offender enters guilty pleas for all charges but does so at different times giving rise to different discounts. 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).

The model recommended by the Council allows the court to determine the appropriate global sentence, and then make a reduction for the guilty plea based on the matters to which pleas of guilty are entered and taking into account the timing of those pleas.

Recommendations

Recommendation 1 (see [3.1.2])

Timing of guilty pleas

1. The data systems of both the Supreme Court and the Magistrates Court need to be reviewed and updated to ensure that information about the timing of pleas of guilty is recorded.

- (2) the timing of the plea or the indication of the intention to plead guilty assessed in the circumstances of the case; and
- (3) the lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence.

Recommendations 2–4 (see [6.1])

Legislative recognition of a guilty plea as a mitigating factor

2. The *Sentencing Act 1997* (Tas) should be amended to recognise the utilitarian value of a guilty plea as a mitigating factor.
3. Recommendation 2 should only be implemented if Recommendations 5, 6 and 7 are also implemented.
4. The legislation should make it clear that the identification of the guilty plea as a factor relevant to the mitigation of sentence does not affect the application of other sentencing factors, which will continue to have effect.

Recommendations 6–8 (see [6.3])

Disclosure of the value of the plea

6. The *Sentencing Act 1997* (Tas) should be amended to require that a judge or magistrate *must* set out the reduction in sentence that is attributable to a plea of guilty in cases where a sentence of imprisonment is the appropriate sentence (without the reduction for the guilty plea).
7. The *Sentencing Act 1997* (Tas) should be amended to provide that a judge or magistrate *may* set out the reduction in sentence that is attributable to a plea of guilty in cases other than where a sentence of imprisonment is the appropriate sentence (without the reduction for the guilty plea).
8. The legislative provision should make it clear that the sentencing reduction should be stated where the utilitarian value of the plea results in a reduction in the length of the sentence or where the nature of the sentence has changed due to the plea.

Recommendation 5 (see [6.2])

Factors relevant to the exercise of the court's discretion

5. The *Sentencing Act 1997* (Tas) be amended to set out the following factors as relevant to the exercise of the court's discretion to give a discount to reflect the utilitarian value of the plea:
 - (1) the fact of the guilty plea;

Recommendation 9 (see [6.4])

Quantifying the value of the plea in legislation

9. A statutory statement of the utilitarian value of the plea should not be introduced in Tasmania.

1.

Introduction

1.1 BACKGROUND TO THIS REPORT

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 do not occur.

In April 2018, the Council released a Consultation Paper which provided an overview of the current approach taken to reduction of sentence for a guilty plea in Tasmania and examined legislative approaches to sentencing reductions for pleas of guilty in other Australian jurisdictions and comparable international jurisdictions.

1.2 TERMS OF REFERENCE

The following Terms of Reference were given to the Council:

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 THE CONSULTATION PROCESS

In April 2018, the Council released a consultation paper, *Statutory Sentencing Discounts for Pleas of Guilty: Consultation Paper*.

In response, the Council received four written submissions from the following:

Daryl G Coates SC, Director of Public Prosecutions (DPP)

Benedict Bartl, Community Legal Centres Tasmania (CLC Tas)

Justice Gregory Geason, Supreme Court Judge

Luke Rheinberger, The Law Society of Tasmania.

In addition, as part of the consultation, the Council conducted forums with representatives of the legal community (the Law Society, Community Legal Centres Tasmania and Tasmania Aboriginal Community Legal Service) and Tasmania Police (DPFEM Legal Services). The Council also met with the Director of Public Prosecutions, Daryl Coates SC, the Chief Magistrate, Ms Catherine Geason, the Chief Justice of the Supreme Court, the Hon Alan Blow OAM and Mr Brian Martin. Meetings were also held in New South Wales with representatives of the Public Defenders' Office, the Legal Aid Commission, the Office of the Director of Public Prosecutions and the Department of Justice. Meetings in South Australia were held with the Office of the Director of Public Prosecutions, as well as a representative of the Legal Aid Commission and the Criminal Law Committee of the Law Society.

1.4 SENTENCING REDUCTION 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.⁵

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';⁶
- (2) has a pragmatic, utilitarian value to the criminal justice system and the community. 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'.⁷

The public interest in a plea of guilty was summarised in *Cameron v The Queen*⁸ 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

5 See further Chapter 5 and [4.1.1].

6 VSAC, *Guilty Pleas in the Higher Courts: Rates, Timing and Discounts* (2015) 2.

7 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson, 3rd ed, 2014) 378.

8 (2002) 209 CLR 339, [66]–[67] (footnotes omitted).

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 receive vindication and support from their families and friends and possibly assistance from the community for injuries they have suffered.⁹

Originally, the plea of guilty 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'.¹⁰ More recently, however, it has been accepted that an offender is entitled to a reduction in sentence for pleading guilty, regardless of motivation.¹¹ In jurisdictions that have created statutory provisions providing a reduction for a guilty plea, this utilitarian purpose is typically recognised and a reduction usually granted 'for the administrative benefits that flow to the system'.¹² The timing of the plea is another important factor because 'the earlier the plea, the greater the saving to the State and the greater the potential discount for its utilitarian benefit'.¹³

In a submission to the Council by Justice Geason of the Tasmanian Supreme Court, his Honour explained the basis of the reduction provided in sentence for pleas of guilty. His Honour referred to his judgment in *DPP v Broad*¹⁴ and outlined the distinction between sentencing purposes and non-sentencing purposes when considering the sentencing reduction for a plea of guilty. His Honour stated that:

3. A *non-sentencing purpose* includes the benefit which accrues to the administration of justice from a plea of guilty. The "utilitarian benefit" of a plea is a *non-sentencing purpose* because it is not a matter relating to the offender or the offending behaviour, (which are sentencing purposes).

4. That is why it is acknowledged that the utilitarian benefit of a plea of guilty ignores any consideration of whether the plea is evidence of remorse, or vindication of the victim; *R v Sutton* [2004] NSWCCA 225; *R v Mak*; *R v MSK* [2006] NSWCCA 381. I refer to these cases in *DPP v Karklins* (above) at [30]. It is a benefit which accrues irrespective of those matters; and it accrues for the benefit of the "system" generally. One such benefit, self-evidently, is the avoidance of unnecessary trials.

5. A sentencing purpose on the other hand is a matter for the sentencing judge to weigh in the exercise of his or her discretion in order to arrive at a sentence. This involves the judge arriving at a "single result"; *Wong v R* [2001] HCA 64, 207 CLR 584 at 611 [75]. I refer generally to my comments in *DPP v Broad* (above) at [31]–[33] which refers to the relevant authorities about this aspect.

In this report, it is this utilitarian value of the plea that is specifically addressed.

1.4.1 REASONS FOR INTRODUCING A STATUTORY SENTENCING REDUCTION FOR A PLEA OF GUILTY

Offenders typically receive a sentencing reduction in recognition for the utilitarian value of the plea. This reduction recognises the pragmatic value in terms of the financial savings from the early resolution of a matter and the public interest in conserving the trial process for cases where there is a genuine dispute in relation to the guilt. The guilty plea reduction is also supported on the basis that it avoids trauma for victims and witnesses of giving evidence at a trial.¹⁵ In the development of recent reforms in New South Wales, victims groups were supportive of a sentencing discount scheme that encouraged the early resolution of matters (rather than an offender entering a plea of guilty close in time to the trial). In sexual assault matters, in particular, the view was expressed that if a matter is 'ready' for trial and the complainant has been briefed, then a guilty plea to a lesser charge was more difficult to accept and of little benefit to complainant, so an early plea is preferable. There is also the benefit for victims in 'seeing a more consistent approach to determining sentencing reductions'.¹⁶

9 Ibid 360–361, [66]–[67].

10 Geraldine MacKenzie, 'The Guilty Plea Discount: Does Pragmatism Win Over Proportionality and Principle?' (2007) 11 *Southern Cross University Law Review* 205.

11 Ibid 210.

12 John Willis, 'New Wine in Old Bottles: The Sentencing Discount for Pleading Guilty' (1995) 13 *Law in Context* 39, 40.

13 Freiberg, above n 7, 380.

14 [2018] TASCRA 5. This is discussed further at [4.1.1].

15 *R v Thomson* (2000) 49 NSWLR 383 [120]–[121].

16 NSWLRC, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion*, Consultation Paper 15 (2014) 7.

In Tasmania, the value of the sentence reduction for a guilty plea has traditionally been unclear as it was not the usual practice of courts to state the reduction provided.¹⁷ A statutory sentencing reduction 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 reduction may create a belief that a guilty plea will have a worthwhile outcome, in terms of a quantifiable reduction.¹⁸ 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'.¹⁹ 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.²⁰

This is also supported by research conducted by the Australian Institute of Criminology (AIC), which identified scepticism by defendants and defence counsel about the reductions awarded for an early plea, in circumstances where the discounting system is not transparent.²¹ Accordingly, a statutory scheme may encourage offenders to enter a plea of guilty, or to enter an early plea of guilty, by clearly establishing that there is an appreciable difference in the sentence imposed following a plea (compared to where a defendant unsuccessfully contests guilt).²² This has the advantage of creating a more transparent sentencing system. This will mean that defence counsel 'will have a clearer idea of the likely outcome for the defendant if he or she enters a plea at different stages of the criminal process and they will be better able to advise clients'.²³

A statutory sentencing reduction 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'.²⁴ 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.²⁵ 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'.²⁶ Victims also do not support sentence discount for late pleas of guilty as the victims have already had to prepare themselves for trial and 'perceived late guilty pleas as being of little value'.²⁷

It can be argued that a statutory sentencing reduction 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'.²⁸ 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.²⁹ 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

17 However, it is noted that there appears to be a shift in judicial approach in the Supreme Court as discussed at [4.1.2].

18 Willis, above n 12, 67; See discussion in NSWLRC, above n 16, 5; NSWLRC, *Encouraging Appropriate Early Guilty Pleas*, Final Report 141 (2014) 9.

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

20 (2002) 209 CLR 339, 362.

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

22 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.

23 NSWLRC, above n 16, 7.

24 NSWLRC, above n 18, 9.

25 *Ibid* 224.

26 *Ibid*.

27 *Ibid* 264.

28 Willis, above n 12, 67. This is discussed further at [2.3].

29 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.

posed by delay'.³⁰ While some emerging research does suggest that statutory sentencing reductions for a guilty plea can influence offender plea behaviour, it remains less clear that changing their plea behaviour can produce any meaningful reduction in court delay. This is discussed further at [5.2]–[5.3].

1.4.2 CONCERNS RAISED ABOUT THE SENTENCING REDUCTION FOR A GUILTY PLEA

Sentencing reductions for guilty pleas have been criticised. 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'.³¹ 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.³² In *Cameron v The Queen*,³³ the High Court sought to explain the distinction between the sentencing reduction 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:

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.³⁴

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 her right to plead not guilty.³⁵

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'.³⁶ 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).³⁷ Another situation where a person may elect to go to trial is where there is an 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'.³⁸ Accordingly, '[i]t is difficult to see how this situation is anything but discriminatory against the accused who exercises their right to trial'.³⁹

Concerns have also been expressed about the pressure that may be placed on an innocent accused to enter a plea of guilty.⁴⁰ In their opposition to reductions 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.⁴¹

Ashworth has also observed that there is pressure placed on the accused, 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

30 VSAC, above n 1, 27.

31 Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 3rd ed, 2016) 313.

32 Ibid 323.

33 (2002) 209 CLR 339.

34 (2002) 209 CLR 339 [12] (Gaudron, Gummow and Callinan JJ).

35 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 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.

36 MacKenzie, above n 10, 215.

37 Ibid.

38 Ibid 216.

39 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.

40 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.

41 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.

guilty.⁴² 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 institutionalised'.⁴³ Although it is not possible to determine the number of innocent accused who have pleaded guilty, it has been argued that 'the discount coerces at least some innocent offenders to plead guilty'.⁴⁴ 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.⁴⁵

1.4.3 SYSTEMIC OBSTACLES TO EARLY GUILTY PLEAS

In addition, commentators have argued that the creation of a statutory reduction for a guilty plea as a means of encouraging early pleas must 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'.⁴⁶ 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.⁴⁷ These factors are discussed further at [2.3].

1.5 THE COUNCIL'S APPROACH

In examining the issues associated with the introduction of a statutory reduction in sentence for a guilty plea, the Council notes that a 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'.⁴⁸ In 2016–17, 75% of offenders in the Supreme Court and 90.7% of offenders in the Magistrates Court entered a plea of guilty. In this context, 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'.⁴⁹ This was also a concern of the government as its reference to the Council indicated that any reforms in relation to a statutory sentencing discount for a guilty plea should not derogate from a defendant's right to plead not guilty and receive proper advice of the case against him or her. Accordingly, in examining the issues associated with introducing a statutory sentencing reduction 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. In the Council's view, a statutory sentencing scheme for guilty pleas should be an incentive or encouragement for appropriate early pleas of guilty and not as an incentive to enter a guilty plea where an offender would not have otherwise done so.

The Council is also aware of the importance of context and the need to ensure that any proposals for reform take into account the broader issues of delay within the pre-trial process in Tasmania. The Council is aware that a range of considerations may affect an offender's decision in relation to the timing of a plea of guilty. It is necessary to consider the sentencing reduction in the context of other obstacles in the criminal justice system to the timely entering of a plea of guilty. The Council notes that the lack of clarity in relation to the sentencing benefit of an early plea of guilty is only one factor that may influence defendants' plea behaviour. Other factors include disclosure of information and certainty about the charges that an offender will face if the matter proceeds to trial. In this context, the Council cautions against viewing the introduction of a sentencing reduction scheme as a major contributor to a reduction in court delay and backlogs. The Council's view is that measures must also be taken to address other systemic factors that lead to unnecessary delay and expense.

42 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 6th ed, 2015) 179.

43 Bagaric and Edney, above n 31, 326 citing Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (1994) 114–115.

44 Bagaric and Edney, above n 31, 326. See Juliet Home, *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.

45 Home, above n 44, 179–180. However, Flynn and Freiberg have argued that there is little evidence that offenders were being pressured to plead guilty irrespective of guilt or innocence in Victoria, see Asher Flynn and Arie Freiberg, *Plea Negotiations: Pragmatic Justice in an Imperfect World* (Palgrave, 2018) Chapter 8.

46 VSAC, above n 1, 24.

47 Willis, above n 12, 67–68.

48 NSWLRC, Final Report, above n 18, 7.

49 VSAC, above n 1, 16.

Based on an understanding of the broader system features leading to delay in Tasmania and research conducted elsewhere, it is the Council's view that the introduction of a statutory sentencing reduction for a guilty plea will not be effective on its own to reduce court delay. There is also a need to address these broader issues that cause delay and contribute to late guilty pleas. In this regard, the Council notes that the introduction of the utilitarian statutory reduction scheme in New South Wales has been introduced as part of a larger package of significant reforms to pre-trial process to address delay and has been accompanied by significant extra funding to support the reforms.⁵⁰

Additional funding for Tasmania Police, Legal Aid and the Office of the Director of Public Prosecutions will be necessary to support changing practices in relation to disclosure and the early attention to matters by prosecution and defence. Appropriate additional resources also need to be provided to the courts.

1.6 SCOPE OF THIS REPORT

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

Chapter 2 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 presents statistics in relation to the current status of guilty pleas in Tasmania and the timing of pleas.

Chapter 4 examines the current approach of Tasmanian courts to reduction of sentence where a defendant enters a plea of guilty.

Chapter 5 outlines the reasons for introducing a statutory sentencing reduction for a plea of guilt and examines legislative approaches to sentencing reductions 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 6 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 reduction 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.⁵¹ 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 reduction 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 report 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) which is beyond the scope of this reference.

50 See further at [2.3.1], [5.2.3] for discussion of NSW reforms.

51 *Youth Justice Act 1997* (Tas) s 3.

2. Overview of Criminal Procedure in Tasmania and Delay in the Pre-trial Process

This chapter provides an overview of the procedures for the disposition of criminal offences in Tasmania and the extent of delay in the Tasmanian criminal justice system. It also considers the reasons for delay in the pre-trial process and measures already taken in Tasmania that attempt to address delay. As indicated at [1.1], the government has expressed interest in a statutory sentencing discount for pleas of guilty to encourage appropriate pleas of guilty thereby reducing unnecessary delays and demands on the court system. Accordingly, it is necessary to understand the current pre-trial process in Tasmania and the extent and causes of delay in the system.

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 the fact that an 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.⁵²

Accordingly, delay imposes a considerable burden on all participants in the criminal justice system. This was highlighted in consultations with stakeholders indicating that while some offenders may delay entering a plea to avoid the inevitable or in the hope that the complainant will not appear at trial, for many offenders, delay increases stress while waiting for the resolution of matters. Delay may mean that an offender is held in custody on remand or under the restrictions of bail conditions. Further, delay that affects memory and evidence of the offence affects both witnesses that may give unfavourable and favourable evidence for the accused.

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'.⁵³

2.1 CRIMINAL PROCEDURE

2.1.1 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.

An overview of the pre-trial steps is set out in Figure 2.1.

52 VSAC, above n 1, 16. See also Richard Fox, 'Criminal Delay as Abuse of Process' (1990) 16 *Monash University Law Review* 64, 64.

53 VSAC, above n 1, 16.

Figure 2.1: Pre-trial criminal procedure, Supreme Court Tasmania

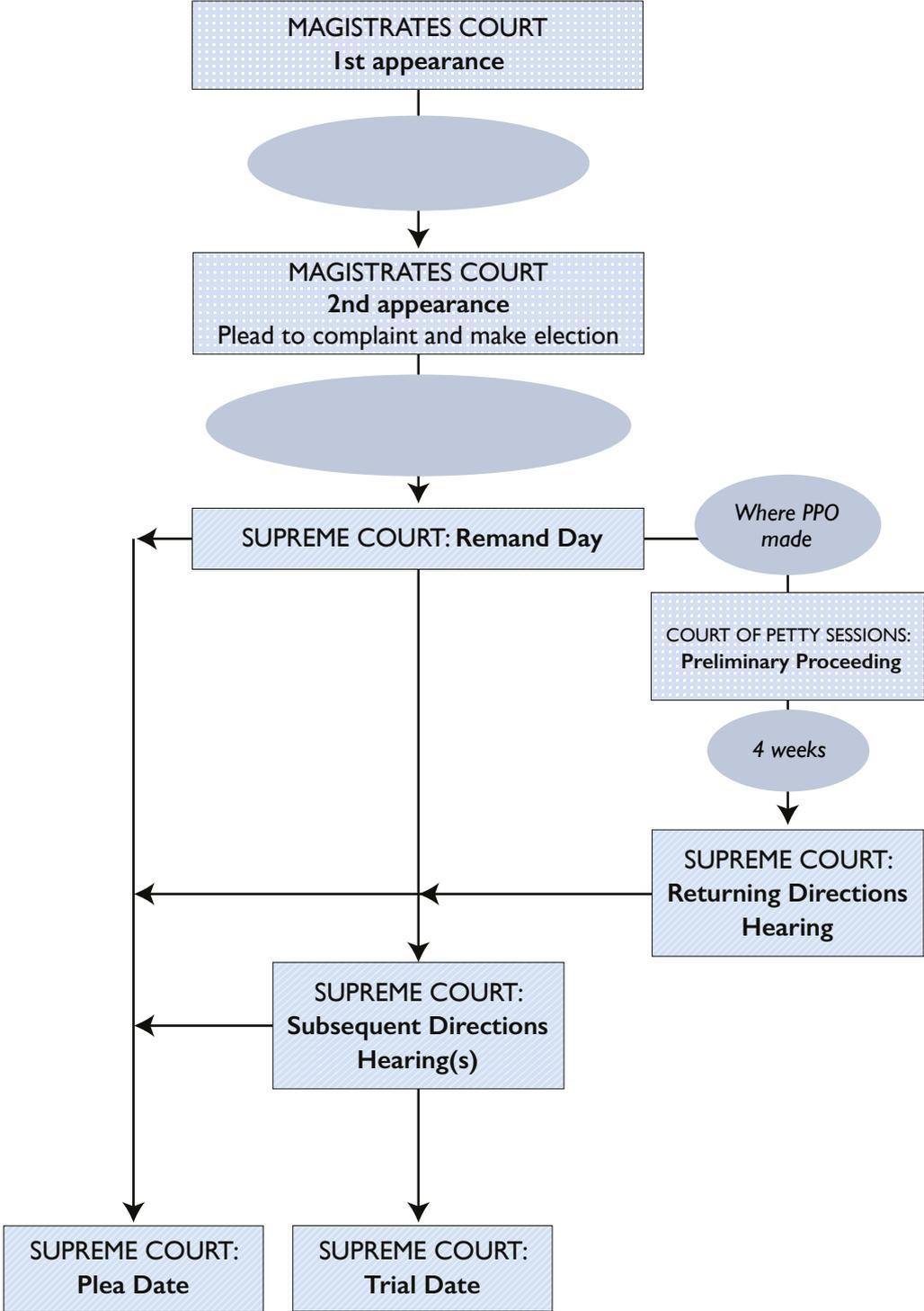


Figure 2.1 shows that indictable matters commence in the Magistrates Court and are transferred to the Supreme Court after the offender has entered a plea (guilty or not guilty). Under the legislative structure, this will occur on the offender’s second appearance in the Magistrates Court, unless the matter is further adjourned if this is in the interests of justice in the particular circumstances of the case.⁵⁴ If an offender is committed for sentence, the minimum time period until the offender’s first court appearance in the Supreme Court is seven days. If the offender is committed for trial, the minimum time period is seven weeks. Once committed to the Supreme Court, the file is provided to

54 Justices Act 1959 (Tas) s 58.

the Office of the Director of Public Prosecutions for review. This will involve settling the appropriate charges and determining whether to proceed with the matter by filing an indictment.⁵⁵ Once in the Supreme Court, directions hearings are held as required and the trial date is determined by judges in consultation with the Crown and in collaboration with defence counsel.

2.1.2 SUMMARY OFFENCES

In the Magistrates Court, each magistrate is responsible for the management of their own list. Currently, 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 draft 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.

A significant feature of the Magistrates Court's pre-trial process is the contest mention system. This was initially established as a pilot in 1996 and has since been adopted 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'.⁵⁶ 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'.⁵⁷ 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.⁵⁸

An objective of the contest mention scheme is to facilitate early guilty pleas 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.⁵⁹ 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.⁶⁰ 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

55 It is noted that the DPP provides charging advice to Tasmania Police in relation to sexual assault crimes in circumstances where there may be a question as to appropriateness of the charges or the sufficiency of the evidence, Director of Public Prosecutions (DPP), *Prosecution Police and Guidelines* (DPP Guidelines) 23. The DPP must also authorise charges for maintaining a sexual relationship with a young person: at 25. The DPP must also be notified as soon as a person is charged with an indictable family violence crime: at 31. Tasmania Police can also seek advice for the Office of the DPP if it is unsure whether a matter ought to be charged on indictment or summarily: at 53. Tasmania Police also should obtain advice from the Office of the DPP prior to any charges being laid for death or serious injury arising out of driving (at 60) and conspiracy (at 79). It is desirable for Tasmania Police to consult the Office of the DPP before charging for indictable sea fisheries offences: at 81. The DPP must consent to prosecutions for criminal defamation: at 86.

56 Magistrates Court of Tasmania, *Annual Report 2016–17* (2017) <http://www.magistratescourt.tas.gov.au/about_us/publications/annual-report-2016-2017>.

57 Kate Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) 24.

58 Magistrates Court of Tasmania, *Contest Mention* (2012) <http://www.magistratescourt.tas.gov.au/OLD/nested_content/contest_mention>.

59 Katie McConnon and Victor Stojcevski, *Contest Mention Hearings Evaluation Report* (2012) 12.

60 Ibid.

- (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.⁶¹

However, these are guidelines only, and some magistrates provide a more specific indication of the precise sentence contemplated following a guilty plea with an 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)'.⁶² Further, the evaluation conducted by McConnon and Stojcevski found that there is 'inconsistency amongst magistrates about the role and best use of contest mention hearings'.⁶³ Nevertheless, as indicated in Table 2.1, the contest mention scheme appears to have been successful in facilitating guilty pleas and saving court time and expense.

Table 2.1: Caseload and case outcome in the Contest Mention Court, Magistrates Court of Tasmania 2001–2012⁶⁴

	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

61 Magistrates Court of Tasmania, above n 58; Ibid.

62 McConnon and Stojcevski, above n 59, 22.

63 Ibid 48.

64 VSAC, above n 1, 64 citing Magistrates Court of Tasmania, *Annual Report 2004–05*, 79; McConnon and Stojcevski, above n 59, 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.

Contest mentions are not available for all offences (for example they are not used in family violence offences) and are generally used for matters that have an anticipated hearing time of longer than two hours. Nevertheless, feedback received by the Council to the Consultation Paper indicates that the contest mention scheme has created transparency in relation to likely outcome and has assisted in the resolution of matters by plea.⁶⁵

While the scheme currently does not have a statutory basis, this will occur if the draft Magistrates Court (Criminal and General Division) Bill 2017 (Tas) is passed as the Bill contains provisions that formally recognise case management hearings.⁶⁶ 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'.⁶⁷ It will be possible for the court to indicate the sentence that it would impose on entering a plea of guilty.⁶⁸

2.2 DELAY

2.2.1 EXTENT OF DELAY

Supreme Court

In the Tasmanian Supreme Court, data suggest that there is an increasing problem of delay. This is reflected in the two aggregate measures that have been 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);⁶⁹ 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.⁷⁰ However, it needs to be understood that research examining delay in the criminal justice system has acknowledged the extreme difficulty in quantifying delay.⁷¹ Further, in viewing this statistical information, it is important to note that not all delay is detrimental given that legal proceedings take time and it is important that justice is not compromised by administrative expediency. It is also noted that therapeutic responses take longer to finalise with more appearances required for the judicial monitoring of orders.

In the Supreme Court, there were 512 non-appeal criminal matters lodged in the period 2016–17.⁷² This was a 14% increase from the number of criminal matters lodged in 2015–16 (n = 449). However, since 2010–11 to 2016–17, there has been a 16.5% decrease in the number of non-appeal criminal matters lodged.⁷³ There has also been a decrease in the number of appeals over this period from 33 appeals lodged in 2010–11 to 23 in 2016–17.⁷⁴

Table 2.2 sets out the backlog indicator, which measures of the courts' pending caseload and is a measure of timeliness and delay.

Table 2.2: Backlog indicator – Supreme Court (Criminal) – First instance, 2013–14 to 2016–17⁷⁵

	2013–14	%	2014–15	%	2015–16	%	2016–17	%
Total Pending Caseload	348		388		381		448	
Pending > 12 months	92	26	107	28	110	28.9	130	29
Pending > 24 months	21	6	34	9	28	7	40	8.9

65 The Law Society and Tasmania Police were supportive of the contest mention scheme.

66 However, it is noted that the Bill was a consultation draft and it is not clear how or if it will be amended following feedback received in the consultation process.

67 Magistrates Court (Criminal and General Division) Bill 2017 (Tas) cl 71(4)(b).

68 Ibid cl 75(1).

69 Payne, above n 21, 8–9.

70 Ibid 10.

71 Ibid 8.

72 Productivity Commission, *Report on Government Services 2018* (2018) <<http://www.pc.gov.au/research/ongoing/report-on-government-services/2018/justice/courts>> Table 7A.1.

73 Ibid.

74 Ibid.

75 Ibid Table 7A.17.

In the Supreme Court Annual Report for 2016–17, the Chief Justice commented on the increases in the number of pending criminal cases. His Honour wrote that, '[t]he number of first instance criminal cases awaiting finalisation has grown to an unacceptable level' from 316 pending cases as at June 30 2013 to 448 as at June 30 2017.⁷⁶ Pending cases reached a high of 457 as at December 31 2017.⁷⁷ Similarly, the Director of Public Prosecutions has commented on the significant concern of the pending list.⁷⁸ In discussing the backlog indicator up to 2015–16, 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.⁷⁹ The DPP has also observed that the nature of the pre-trial process in Tasmania, with offenders generally committed to the Supreme Court within six weeks of being charged, means that comparisons with the back-logs in other jurisdictions are not relevant.⁸⁰

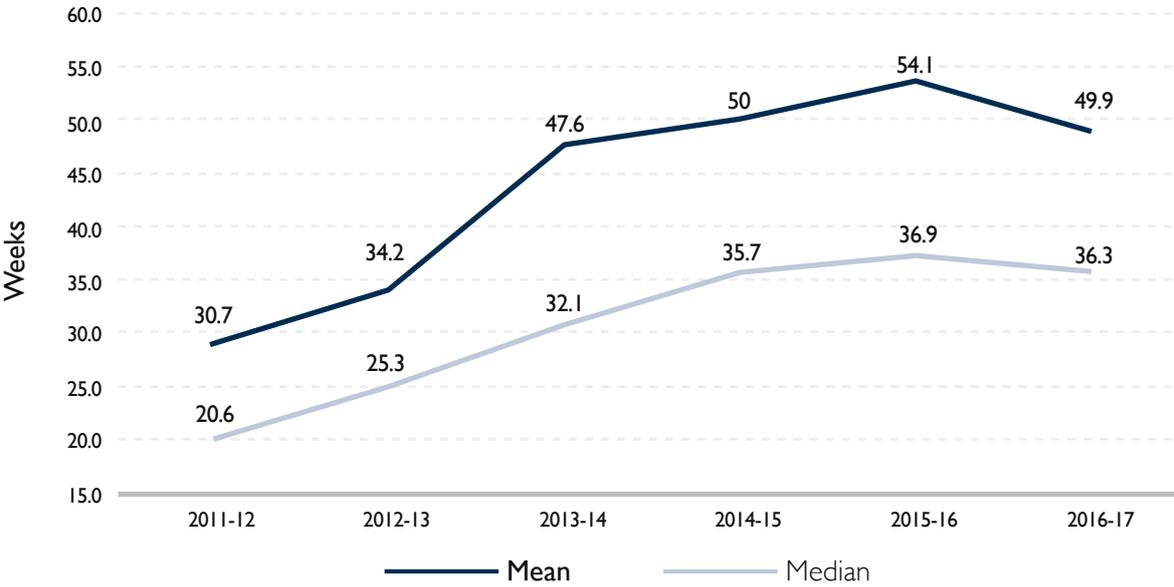
The clearance rate indicator (set out in Table 2.3) shows whether the court is keeping up with its workload and denotes the number of finalisations as a percentage of the number of lodgements in the period.⁸¹ Data set out in Table 2.3 also show that although the court has generally improved its clearance rates since 2012–14 (other than 2016–17), this has not had any effect in reducing its pending caseload.

Table 2.3: Supreme Court clearance rate, criminal jurisdiction (first instance), 2013–14 to 2016–17⁸²

2013–14	2014–15	2015–16	2016–17
88.8%	90.0%	97.1%	85.4%

Figure 2.2 shows that there has been an increase in the time taken to finalise criminal trials over the period 2011–12 to 2015–16. However, in 2016–17, there had been a reduction in the number of weeks to finalise matters.

Figure 2.2: Duration from initiation to finalisation, Supreme Court (mean and median), 2011–12 to 2016–17⁸³



76 Chief Justice of Tasmania, *Supreme Court of Tasmania Annual Report 2016–2017* (2017) 3.
 77 Ibid 3.
 78 Director of Public Prosecutions, Tasmania, *Annual Report 2016–17* (2017) 7.
 79 Ibid 7. See also Director of Public Prosecutions, Tasmania, *Annual Report 2015–16* (2016) 4 for a discussion of the differences in pre-trial procedures that make comparisons of the pending list with other jurisdictions not relevant.
 80 Director of Public Prosecutions, Tasmania, above n 78, 7.
 81 Chief Justice of Tasmania, *Supreme Court of Tasmania Annual Report 2015–2016* (2016) 31.
 82 Productivity Commission, above n 72, Table 7A.22.
 83 ABS, *Criminal Courts, Australia, 2016–17*, Cat 4513.0 (2018).

It is noted that the average number of attendances required to resolve a matter in the Supreme Court was 5.4 attendances.⁸⁴

Magistrates Court

In the Magistrates Court, there were 22 527 adult criminal matters lodged in the period 2016–17.⁸⁵ 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.⁸⁶

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 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%.⁸⁷ 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%.⁸⁸

Table 2.4: Backlog indicator – Magistrates Court (Criminal), 2013–14 to 2016–17⁸⁹

	2013–14	%	2014–15	%	2015–16	%	2016–17	%
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 2.5: Magistrates Court clearance rate, criminal jurisdiction (adult), 2013–14 to 2015–17⁹⁰

2013–14	2014–15	2015–16	2016–17
94.3%	90.4%	95.7%	92.2%

84 Productivity Commission, above n 72, Table 7A.21.

85 Magistrates Court of Tasmania, above n 56.

86 Ibid.

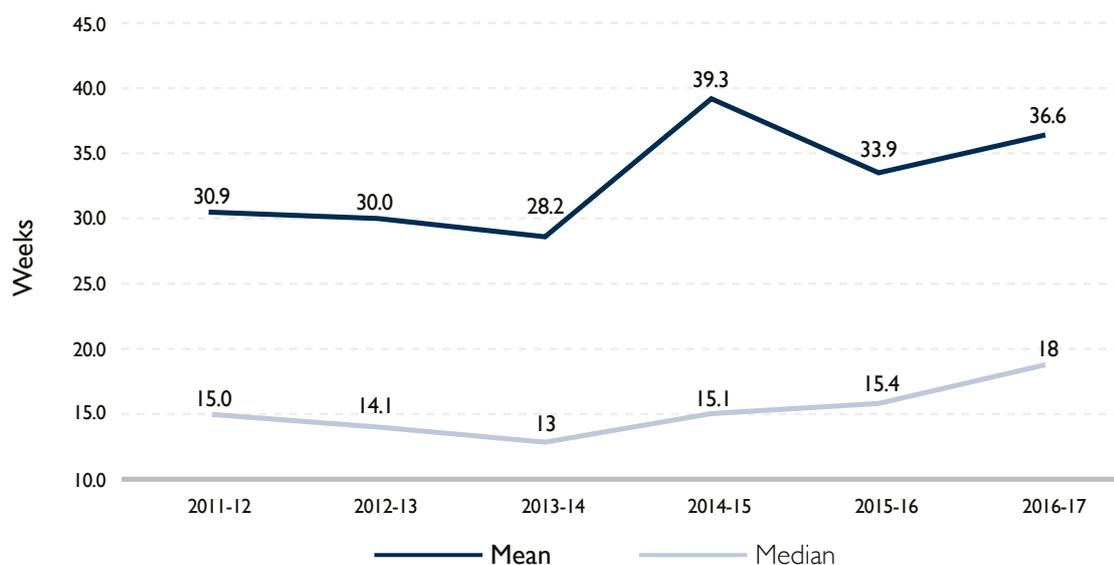
87 KPMG, *Review of the Magistrates Court of Tasmania* (2017) 17.

88 Productivity Commission, above n 72, Tables 7A.17, 7A.22. This excludes children's court matters.

89 Magistrates Court of Tasmania, above n 56; Magistrates Court of Tasmania, *Magistrates Court Annual Report 2015–16* (2016) 34; Magistrates Court of Tasmania, *Magistrates Court Annual Report 2014–15* (2015) 49.

90 Magistrates Court of Tasmania, above n 56; Magistrates Court of Tasmania, (2016), above n 89, 35.

Figure 2.3: Duration from initiation to finalisation, Magistrates Court (mean and median), 2011–12 to 2016–17⁹¹



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.⁹²

2.3 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.

2.3.1 OTHER JURISDICTIONS

Research has been conducted in other jurisdictions that has examined the reasons for delay in the criminal justice process. Research 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.⁹³ 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.⁹⁴ 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.

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.⁹⁵ 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.⁹⁶ 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.⁹⁷ The late resolution of matters by a guilty plea was also a matter that contributed to delay.⁹⁸

91 ABS, above n 83. 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.

92 Magistrates Court of Tasmania, above n 56.

93 Weatherburn and Fitzgerald, above n 29, 7. See also Payne, above n 21, 11.

94 Weatherburn and Fitzgerald, above n 29, 7.

95 Payne, above n 21, 7.

96 Ibid ix.

97 Ibid 13.

98 Ibid 14.

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.⁹⁹

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'.¹⁰⁰ 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 driver 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'.¹⁰¹ The recommendations of the NSWLRC were introduced in the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW), which commenced on 30 April 2018.

In New South Wales, one of the recent changes to address court delay was the introduction of a statutory utilitarian sentencing reduction based on a sliding scale for indictable offences. However, there were also four other key elements in the reform aimed at reducing delay and facilitating early pleas of guilty as set out in the Second Reading Speech:

- (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.¹⁰²

According to the Second Reading Speech, these reforms are 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'.¹⁰³

99 NSWLRC, Final Report, above n 18, 9–10; NSWLRC, above n 16, 5. These factors reflect the findings of an Australian wide study undertaken by the AIC: see Payne, above n 21.

100 VSAC above n 1, 51.

101 NSWLRC, Final Report, above n 18, 11.

102 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017 (Mark Speakman).

103 *Ibid.*

These reforms have been supported by a funding package of \$93 million over four years to allow senior lawyers to manage serious criminal cases from start to finish, prosecutors to certify the most appropriate charges based on earlier delivery of relevant evidence and mandatory criminal case conferencing between parties to resolve more matters before committal to a higher court.¹⁰⁴ This involved investments in Legal Aid and the Office of the DPP. There has also been extensive training on the application of the reforms provided to Legal Aid NSW, the Office of the DPP, the Commonwealth DPP and the NSW Police Force, as well as private legal practitioners and the Aboriginal Legal Service.¹⁰⁵ This has been to support an appreciation of the changes made by the reforms to pre-trial process, and to assist in the cultural change that will be required for the legislative intent to be successfully implemented. Judicial education about the aims of the scheme and its operation has also been provided.

In developing the reforms, the Department of Justice has had a project team that has worked on the implementation of the recommendations of the NSWLRC, supported by a Steering Committee involving the Director of Public Prosecutions, the Justice Department, the Public Defender's Office and Legal Aid.

There have also been changes made to data collection processes to gather metrics around the sentencing reduction to evaluate and monitor the operation of the statutory framework. This reflected the recommendation of the NSWLRC that the implementation team should:

- (a) establish a data set of performance indicators that, in particular, tracks the timing of guilty pleas, and
- (b) review the information technology systems used to support court case management to ensure they capture the data set of performance indicators.¹⁰⁶

In South Australia, following a series of reviews into the operation of the criminal process,¹⁰⁷ significant changes were made to criminal procedure contained in the *Summary Procedure (Indictable Offences) Amendment Act 2017 (SA)*. These reforms 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, 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.¹⁰⁸

It is noted that SA Police will have carriage of major indictable matters until a charge determination is made by the DPP.¹⁰⁹ If an offender makes an offer of resolution prior to charge determination, this is provided to SA Police. However, if the offer of resolution involves the amendment of charges, this is forwarded by SA Police to the DPP.¹¹⁰

There has been concern about this reform expressed by the Law Society of South Australia, which recognised the problems that arise from late pleas (in particular over-listing of the trial list). The Society has observed that late pleas occur for a variety of reasons including the later production of evidence which provides an overwhelming case. Late pleas may also occur where a prosecutor is appointed and there is a change of charges, a downgrading of charges

104 Mark Speakman (Attorney -General), 'Historical Criminal Justice Reforms Begins Today' (Media Release, 30 April 2018).

105 Ibid.

106 NSWLRC, Final Report, above n 18, Recommendation 12.1.

107 These are discussed at [5.2.2].

108 Attorney-General's Department, Government of South Australia, *Transforming Criminal Justice – Major Indictable Reform: Factsheet 1* (2017) 1.

109 Director of Public Prosecutions, South Australia, *Processes and Procedures: Major Indictable Reforms* (2018) <<https://www.dpp.sa.gov.au/publications/major-indictable-reform/>> 5.

110 Ibid.

or agreement is reached about the factual basis upon which the accused is to be sentenced.¹¹¹ The Law Society considered that these issues needed to be addressed to make a change in relation to the late guilty pleas being entered. It proposed not over-listing the trial list and having the prosecution receive adequate funding to enable prosecutors to be assigned earlier to the trials as steps to address the issue of late pleas.¹¹²

In England and Wales, prosecution behaviour as well as defendant behaviour has been identified as a factor relevant to the time of pleas. 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.¹¹³ 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.¹¹⁴

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.¹¹⁵ 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 plead. This revealed that 'the three most common factors in their plea decision were having the chance of a shorter sentence, wanting to get it over and done with and wanting to do the best for their families'.¹¹⁶ 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.¹¹⁷

2.3.2 THE TASMANIAN CONTEXT

Supreme Court

Many factors have been identified as providing an explanation of court delay in the Supreme Court. In explaining the case backlog, the Supreme Court's annual report 2015–16 identified several factors relevant to the increase in delay, including that:¹¹⁸

- 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 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, long drug cases involving evidence of financial records and surveillance device evidence, and the evidentiary rule in relation to consent in sexual offence matters with the requirement to seek leave to cross-examine on certain issues.¹¹⁹

The increasing complexity of criminal trials has also been 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.¹²⁰ In addition,

111 Law Society of South Australia, 'Transforming Criminal Justice – Major Indictable Reform' Submission to the Attorney-General, 31 October 2016, 6.

112 Ibid 7.

113 See [5.2.5].

114 McConville and Marsh, above n 39, 112.

115 VSAC, above n 1, 23.

116 Ibid 24.

117 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.

118 Chief Justice of Tasmania, above n 81, 7.

119 Chief Justice of Tasmania, above n 76, 12–13.

120 Director of Public Prosecutions, Tasmania, above n 79, 4–5.

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.¹²¹ These appeals increased from 64 in 2011–12 to 110 in 2014–15 to 244 in 2015–16 and then to 304 in 2016–17.¹²²

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 a murder trial 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.’¹²³

Additional pressure on the backlog in the Supreme Court is likely to occur given that backlogs had increased over the period 2013–14 to 2015–16 when lodgements had fallen from 564 in 2011–12 to 449 in 2015–16.¹²⁴ Lodgements have now risen to 512 in the 2016–17 period.¹²⁵

In Tasmania (as elsewhere) concerns about delay in the pre-trial criminal process are not new. Over time, changes were made to the procedures with a view to reducing delay and inefficiencies, including the early identification and disposition of pleas of guilty by reforms in the pre-trial process in the Supreme Court.¹²⁶ Key features of these reforms included:

- (1) **Disclosure.** Following an offender’s first appearance, the matter is adjourned for four weeks and the 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 audio-visual copy, or viewing access to the same), copies of all witness statements and a summary of the material facts relevant to the charge.¹²⁷ This was intended to provide for early disclosure for all indictable offences.¹²⁸
- (2) **Transfer of matter to the Director of Public Prosecutions.** As a general rule, police have responsibility for the matter until after the defendant’s second appearance in the Magistrates Court and then the file is provided to the office of Director of Public Prosecutions for review and the office of the DPP takes over the conduct of the matter. The early involvement of the Office of the DPP was to allow for charges can be settled without delay.¹²⁹
- (3) **Preliminary proceedings.** There are no longer committal proceedings in the Magistrates Court prior to an offender being committed to stand trial in the Supreme Court. This was to allow for the early involvement of the office of the DPP. Once a matter has been committed to the Supreme Court, the defendant can make a request for preliminary proceedings, which allow the defendant to question a particular witness.¹³⁰ This was intended to eliminate unnecessary committal hearings.¹³¹
- (4) **Remand days and directions hearings.** 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.¹³² 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’.¹³³ For this reason, directions hearings are now listed as required and the practice of listing most pending matters on the first day of each sitting was discontinued.¹³⁴

121 Chief Justice of Tasmania, above n 81, 6; Chief Justice of Tasmania, above n 76, 16.

122 Chief Justice of Tasmania, above n 76, 16.

123 Chief Justice of Tasmania, *Supreme Court of Tasmania Annual Report 2014–2015* (2015) 7.

124 Productivity Commission, above n 72, Table 7A.1. This relates to non-appeal criminal lodgments. Chief Justice of Tasmania, above n 76, 32.

125 Productivity Commission, above n 72, Table 7A.1. This relates to non-appeal criminal lodgments.

126 Emily Warner, *A Guide to New Proceedings for the Disposition of Indictable Offences* (Supreme Court of Tasmania, 2010) 3.

127 *Justices Act 1959* (Tas) ss 55, 56. This is replicated in the draft *Magistrates Court (Criminal and General) Bill 2017* (Tas), s 51(b), 92(5).

128 Warner, above n 126, 4.

129 *Ibid.*

130 For more detail in relation to preliminary procedure in Tasmania, see Sentencing Advisory Council, Tasmania (TSAC), *Statutory Sentencing Discounts for Pleas of Guilty: Consultation Paper* (2018) [2.2.1].

131 Emily Warner, *A Guide to New Proceedings for the Disposition of Indictable Offences* (Supreme Court of Tasmania, 2010) 3.

132 Supreme Court of Tasmania, ‘Directions Hearings in Criminal Cases’ (Practice Direction, no 2, 2017) 1.

133 *Ibid.*

134 *Ibid.*

Despite the intention of these procedural reforms, they did not have the intended effect of reducing delay in the Supreme Court precipitating changes to case management and trial arrangements in 2017 and additional changes in 2018.

In the 2017, steps taken to attempt to reduce the backlog included legislative changes to permit the appointment of part-time acting judges and greater use of the *Criminal Code* s 308, which 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.¹³⁵ In addition, there were listing changes so that criminal trials could be 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.¹³⁶ Other initiatives adopted in 2017 included 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.¹³⁷

In 2018, the Supreme Court introduced further changes including a concentrated criminal trial period in Hobart between 23 April 2018 to 6 July 2018 where more trials were run than usual.¹³⁸ There were also new criminal case management arrangements for indictable offences introduced in 2018.

In 2018, the Supreme Court determined that new arrangements would apply for the management of criminal cases that made provision for forward planning, the listing of trials and the adjournment of matters once listed, greater judicial oversight in case management, provision for monitoring of the progress of criminal cases within the Court Registry and the appointment of managing judges to oversee matters.¹³⁹

In the Magistrates Court, 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.¹⁴⁰ 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.¹⁴¹
- (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.¹⁴²
- (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'.¹⁴³ It was stated that 'one of the main issues driving the recurrent case backlog and the number of court appearances is the fact that many offenders as well as witnesses and other parties, do not have adequate information before coming into court'.¹⁴⁴
- (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.¹⁴⁵

135 Chief Justice of Tasmania (2016), above n 81, 6. See also Chief Justice of Tasmania (2017) above n 76, 3–4.

136 Chief Justice of Tasmania (2016) above n 81, 9. See also Chief Justice of Tasmania (2017), above n 76, 3–4.

137 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).

138 Supreme Court of Tasmania, 'Concentrated Criminal Trial Period Hobart, 23 April 2018 to 6 July 2018' (*Circular to Practitioners*, no 3, 2018).

139 Supreme Court of Tasmania, 'Criminal Case Management Arrangements' (*Circular to Practitioners*, no 4, 2018).

140 KPMG, above n 87, 20, 22.

141 *Ibid* 22.

142 *Ibid* 21.

143 *Ibid* 22.

144 *Ibid* 31.

145 *Ibid* 23–26, 28.

In response to these observations, KMPG made several recommendations to improve the court process including streamlining processes within the courts and their administration by encouraging and facilitating 'pre-trial' meetings and increasing the use of contest mentions for criminal matters.¹⁴⁶ Other recommendations included allowing some adjournments to be heard in front of a registrar rather than a magistrate, increasing the use of infringement notices¹⁴⁷ and providing offenders with timely access to information on court operations and processes.¹⁴⁸

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.

Reflecting the observations of the KPMG review of the Magistrates Court in relation to the issue of incomplete disclosure by police investigators at the first appearance by defendants, the draft Magistrates Court (Criminal and General Division) Bill 2017 (Tas) requires the provision of preliminary brief for summary offences (other than offences specified in the Schedule) at least 14 days before the return day specified in the court attendance notice.¹⁴⁹ The draft Bill also provides for a 'full brief' in relation to summary offences, which must be provided by the prosecutor to the defendant if the offence is not an offence in the Schedule, the defendant has pleaded not guilty and makes a request either not later than 21 days before the case management hearing or, if a case management hearing is not being held, the hearing of the charge.¹⁵⁰

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'.¹⁵¹ 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.¹⁵²

The development of a Magistrates Court (Criminal and General Division) Bill 2017 (Tas) has been a long running project in Tasmania, which has been pursued with the aim of providing a framework for criminal matters to 'help to expedite the criminal litigation process while protecting fundamental rights to access to justice and a fair trial'.¹⁵³ Accordingly, the Council notes that many aspects of these reforms are relevant to the issues of delay identified in the pre-trial criminal process in Tasmania and for this reason the draft Bill is relevant to this report. In 2017, the Department of Justice released a consultation draft of the legislation, with the comment period closing in March 2017. An updated draft has not been made publicly available at the time of writing, but the Council understands that it remains a government priority.

The Council's view is that it is desirable for the government to continue to prioritise the enactment of this reform. The Council also notes that appropriate funding will need to accompany the reforms to allow Tasmania Police to comply with the disclosure requirements under the legislation.

146 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 draft Magistrates Court (Criminal and General Division) Bill 2017 (Tas).

147 KMPG, above n 87, 33.

148 Ibid 39.

149 Clause 51(1)(a).

150 Clause 54(1).

151 Magistrates Court of Tasmania, above n 56.

152 Ibid.

153 Magistrates Court of Tasmania, above n above n 56, 11.

2.4 SUBMISSIONS RECEIVED AND VIEWS FROM CONSULTATIONS

In the Consultation Paper, the Council asked a series of questions that sought to elicit feedback in relation to the causes of delay in Tasmania and the barriers that exist to early guilty pleas including the factors that influence plea decisions. The Council also sought feedback whether guilty pleas are entered to different charges than original charges or occur as a result of plea negotiations.

2.4.1 QUESTION 1: TO WHAT EXTENT DO SYSTEMIC FACTORS CONTRIBUTE TO DELAY IN TASMANIA?

Consistent with research elsewhere, feedback indicated that offender behaviour in terms of timing of guilty pleas only represented one factor in delay and that there are broader systemic factors that contribute to court delay. CLC (Tas) indicated that in its view, 'there are a number of systemic factors that contribute to delay in Tasmania's justice system including, most significantly, a lack of free legal assistance'. Its view was that:

Other factors that contribute to delay include the State's failure to provide disclosure in a timely fashion, the lack of judicial officers and the setting of the criminal law lists by the Director of Public Prosecutions. Nevertheless, the lack of timely legal assistance is the most significant factor contributing to delay in Tasmania's justice system.¹⁵⁴

The Law Society identified disclosure, funding and having an appropriate decision-maker involved early in the process as key systemic factors that play a significant role in contributing to delay. From the perspective of the Law Society, central issues included:

Having an appropriate person with carriage of the matter, and having all relevant materials, in order that decisions can be made as to amendments to charges, pleas-bargain outcomes and the like;

As a corollary, information flow between police prosecution and the DPP allowing those things to occur; and

Administrative requirements for the granting of legal aid to defendants;

Failure to adhere to legislative or court ordered timetables.¹⁵⁵

The DPP raised the increasing complexity of criminal trials as a factor relevant to delay in the criminal justice process. For example, there is greater complexity in prosecuting drug cases involving surveillance and phone intercepts and bank records as well as an increase in sexual assault cases with many historical sexual cases. These prosecutions are resource intensive for prosecuting authorities. The nature of trials and their increasing complexity was also identified by other stakeholders as a factor in court delay. It was recognised that the court has taken steps to increase judicial time and court space available for criminal matters, but this needed to be matched by corresponding ability for prosecuting authorities to have matters ready for trial. Accordingly, it was necessary to address resourcing and process in all aspects of the criminal justice system — for the court, the defence and the prosecution.

In the Magistrates Court, Tasmania Police considered that court delay was attributable to an increase in the number of matters prosecuted in that court. In addition, the rise of family violence matters being prosecuted reflected improved police practice, but this increase contributed to delay given that family violence matters were generally complex matters. Another factor identified was the increase in police numbers, leading to the greater detection of crime. This would affect both matters in the Magistrates and Supreme Courts.

2.4.2 QUESTION 2: WHAT ARE THE FEATURES OF THE PRE-TRIAL PROCESS IN TASMANIA THAT MAY CREATE OBSTACLES TO EARLY GUILTY PLEAS?

In relation to delays in guilty pleas and factors affecting defendant's plea behaviour, CLC (Tas) indicated that in its view the lack of evidence made available to the accused, including sufficient details of the charges, was the most significant obstacle to early guilty pleas in the pre-trial process in Tasmania.¹⁵⁶ It wrote that:

Anecdotally, we are aware of a number of cases where the accused has had access to either no or insufficient evidence to confidently enter a plea, particular in circumstances in which elements of the crime include a mental element or a legal defence is available.

154 Submission 2.

155 Submission 4.

156 Submission 2.

The failure in both legislation and policy to prescribe timeframes for the provision of disclosure means that defence counsel is regularly unable to provide good advice in a timely manner. In some cases, counsel may only have the complaint and the 'Facts for the Prosecutors' for multiple court appearances.¹⁵⁷

Accordingly, it was the view of CLC (Tas) that it 'would be grossly unfair if legislative discounts were introduced for early pleas of guilty without also introducing reforms around the provision of disclosure'.¹⁵⁸ CLC (Tas) strongly supported statutory requirements on disclosure, which would 'in turn allow for appropriate consideration before a plea is entered and importantly [would] ensure that a plea [was] not entered before all relevant evidence [had] been received'.¹⁵⁹

Inadequate funding was another significant feature identified by CLC (Tas) that creates obstacles to early guilty pleas. CLC (Tas) wrote that 'inadequate funding — particularly in the early stages — ... means that underpaid and inexperienced lawyers are required to act in cases that require more experienced counsel. Defence counsel often work at pay rates that are not commensurate with the experience required'.¹⁶⁰ It was stated that there was little incentive for counsel 'to spend 10–12 hours taking instructions, trawling through materials and considering legal arguments all within the first hours or days of being charged, when at that point the standard "investigate and report" fee is a paltry \$240.00'.¹⁶¹ The significance of funding was identified by other stakeholders who indicated that the current legal aid funding model did not encourage counsel to focus on the matter until close in time to the trial.

The Law Society indicated that the factors that it had identified above (the need for appropriate person to be able to negotiate charges, disclosure, legal aid and adherence to time tables) created obstacles to the entry of early guilty pleas. In addition, it identified that 'court time for preliminary proceedings, the processes in which orders for preliminary proceedings need to be applied, delay in production of evidence, for example the waiting times on transcripts of preliminary proceedings, and more generally delayed disclosure, all play a role in creating obstacles to earlier pleas of guilty than might otherwise be the case'. The Law Society noted that 'those features do not delay a plea of guilty simpliciter — that is at the earliest opportunity on basic disclosure'.¹⁶²

Stakeholders identified the need for better disclosure by police and the Crown. For example, it was said that in complex cases there was a 'stand-off' described as a 'Catch 22' with prosecution not wanting to transcribe recordings until it is known that there will be a trial and defence counsel not being able to advise on likelihood of conviction until they know the strength of the Crown case. This reflects the prosecution's frustration that considerable time and resources are expended on matters where pleas of guilty are made shortly prior to trial. The DPP wrote:

At present we have a significant number of matters, particularly in the areas of fraud and drug prosecutions, where pleas of guilty are made shortly prior to trial. Often in these cases no indication is given by defence of any concessions, thus every matter has to be strictly proved. This takes considerable time and resources, not only for this Office but for Tasmania Police. In particular, a great deal of time is taken in the transcription of extensive listening device and telephone intercept material. While work is being done on a case that eventually results in a plea of guilty this means other cases which go to trial are delayed. In many matters where a case has been prepared and set down for trial these are overwhelming Crown cases. However, a number of defence counsel believe that if their clients plead earlier they will not receive any significantly greater discount.¹⁶³

Stakeholders also indicated that delays in pleas were, in part, attributable to cultural factors within legal profession. The traditional approach of the legal professional has been to only give detailed consideration to a matter when the trial is 'imminent'. In his submission, the DPP referred to a complex fraud case that had been listed for trial during a concentrated trial period (implemented by the Supreme Court to attempt to resolve court backlogs). It was indicated that despite two call over days during which counsel was requested to advise whether the case would proceed as a trial or whether the matter may be resolved in another way, defence counsel indicated that it would be a trial:

157 Submission 2.

158 Submission 2. CLC (Tas) supported a disclosure provision similar to s 123 of the *Criminal Procedure Act 1921* (SA).

159 Submission 2.

160 Submission 2.

161 Submission 2.

162 Submission 4.

163 Submission 1.

[In this case] defence counsel indicated the case was a definite trial and no concessions in respect of proof would be given to the Crown. Extensive work was conducted, a forensic accountant was engaged, jury books were prepared, witnesses were briefed, and an opening address was prepared, all at great time and expense to my Office and Tasmania Police. Yet defence counsel, despite his earlier comments at the directions hearing, on the afternoon before the trial was due to start indicated it would be a plea of guilty. I have grave doubts that the defence counsel had even looked at the case until a couple of days before trial was due to start.¹⁶⁴

Overall, the general view was expressed by stakeholders that the current system encourages an approach where the matter is only carefully considered before the trial.

2.4.3 QUESTION 3: IN YOUR VIEW, WHAT FACTORS INFLUENCE PLEA DECISIONS OF OFFENDERS IN TASMANIA?

In the Consultation Paper, TSAC asked about the factors that influence plea decisions of offenders in Tasmania. CLC (Tas) indicated that, broadly speaking, in descending order of importance were:

- Is the accused actually guilty of the charge?
- Can the State prove the accused is guilty of a charge?
- Legal advice provided to the accused;
- Is the accused likely to be imprisoned?
- The personality type of that client — some accused will not plead guilty regardless of the evidence or the advice.¹⁶⁵

The Law Society indicated that defendants are 'motivated by a variety of factors in their decisions to enter pleas'. The Law Society observed that there are 'a significant number of matters where defendants, facing a prima facie overwhelming case will seek to take their chances at trial in the hope that evidence falls over, or out of a human reaction to delay the inevitable consequences'. This 'human reaction, coupled with the hope that a prosecution case may become weakened over time, for example by a change of heart from a complainant, a complainant no longer being contactable, or witness recollections being affected by delay, all influence offenders and defendants'. As noted at [2.3.1], delays in the court process reinforce (or contribute to) this thought process given, as the Law Society noted, 'delay in trials proceeding in the Supreme Court is also a known factor'.¹⁶⁶

In the context of the Magistrates Court, Tasmania Police observed that the nature of family violence prosecutions was that defendants may be motivated by a desire to delay a plea of guilty until it is apparent that the complainant has arrived at court to give evidence (that is, 'I will plead if she shows up'). This mindset may also apply to offenders charged with other offences where the complainant is known to them, such as matters of sexual assault, where an accused may delay a plea to the last minute to see if the complainant attends court. However, as indicated at [2.4.1], feedback from the DPP is that concern about late pleas generally exists in relation to drug and fraud cases.

It was also noted delay in the provision of documents to the defence plays a role 'as it does not allow the strength of the case to be conclusively assessed often until the point of trial'. The Law Society wrote that '[o]ften, the case as it is known at an early stage, together with clients' instructions, is such that a plea of not guilty is meritorious — when in fact an assessment of the totality of evidence may not support such a justification'. Accordingly, the Law Society observed that the '[i]nability of defence counsel to have those informed discussions early with defendants plays a role'.¹⁶⁷

Funding was also identified by the Law Society as relevant to the timing of advice to defendants. It was noted the defence lawyers are predominately paid by the Legal Aid Commission of Tasmania, and '[i]n those circumstances defence counsel will be inclined to wait for full disclosure so that an appropriate assessment of all materials can be undertaken once and advice and recommendations given'. The Law Society wrote that this type of analysis will not occur when: 'a) You are not being paid for it; and b) A client is motivated by the hope or belief a defence may exist and/or charges may not proceed has not reason to change or advance their position'. In the Law Society's view this was related to 'the delay in provision of material [which] also delays the ability for a proper assessment from the

164 Submission 1.

165 Submission 2.

166 Submission 4.

167 Submission 4.

DPP or police prosecution as to the merits of amending a charge, discontinuing a particular charge or resolving a totality of matters which may delay an ultimate plea of guilty'.¹⁶⁸

Uncertainty of outcome was also identified by the Law Society as a factor relevant to the entry of guilty pleas. The Law Society noted that there is 'a public perception that sentences will be for longer periods of imprisonment' and this may motivate offenders to delay entering pleas of guilty. The Law Society noted that the contest mention scheme in the Magistrates Court has proceeded on the basis of certainty of outcome and sentence. It is noted that since 2011–12 to 2016–17, there has been a decline in the proportion of offenders who are entering a guilty plea (80.5% to 75%) in the Supreme Court. In contrast, in the Magistrates Court, the proportion of offenders entering guilty pleas has risen from 84.2% to 90.7% over the same period. While it is not possible to determine the factors relevant to these changes, it is possible that uncertainty of outcome in terms of sentence (with a concern that a longer sentence may be imposed) has contributed to this trend in the Supreme Court.

A factor raised in relation to the timing of pleas of guilty by defendants by the Law Society was the lack of a tangible benefit for an offender from entering an early guilty plea, where the observation was made that 'absent a benefit or requirement of the client to advance matters at earlier stages that a majority of defendants would see little benefit in so doing'.¹⁶⁹

2.4.4 QUESTION 4: IN YOUR EXPERIENCE, HOW MANY GUILTY PLEAS ARE TO DIFFERENT CHARGES THAN ORIGINAL CHARGES OR OCCUR BECAUSE OF PLEA NEGOTIATIONS?

In other jurisdictions, plea negotiation has been raised as a factor relevant to the timing of the plea, with a view expressed that the best deal to be obtained is that offered just prior to trial, and given the potential advantages of delaying a plea, there is no benefit to be derived from an early plea from the point of view of the defendant. As a result, TSAC asked for feedback on how many guilty pleas are to different charges than the original charges or occur because of plea negotiations.

The Law Society observed that the experience of defence counsel was that 'a large majority of charges in the Magistrates Court and in the Supreme Court result by way of guilty pleas to amended charges and/or as a result of plea negotiations'.¹⁷⁰

CLC (Tas) indicated that in its experience 'the "plea deal" operates in summary jurisdictions in circumstances where the State will not proceed with matters that are contestable in exchange for pleas to those charges where the evidence is strong. Generally, this is easier to achieve if the accused has been charged with a large number of offences'. CLC (Tas) considered that there was 'less negotiation in summary courts where the accused is charged with indictable offences. This is because the Director of Public Prosecutions is reluctant to negotiate'. CLC (Tas) reported that:

Anecdotally, we are aware of a large number of indictable matters that may be resolved through an "alternative verdict" with one senior criminal lawyer observing that 10 of his last 13 trials ended with an alternative verdict, two not guilty verdicts and one guilty verdict on the ordinary indictment charge.¹⁷¹

The DPP's policy on plea negotiations is set out at [6.2.2], and feedback from the DPP was that there were not many changes to the charges prior to the entry of guilty pleas.

Plea negotiation is discussed further at [6.2.2].¹⁷²

168 Submission 4.

169 Submission 4.

170 Submission 4.

171 Submission 2.

172 See also results of Flynn and Freiberg, above n 45.

2.5 THE COUNCIL'S VIEWS AND CONCLUSIONS

Based on the submissions received and the views expressed in the consultation process, as well as research undertaken in other jurisdictions, TSAC makes the following observations in relation to systemic delay factors and the timing of pleas:

- Delay is endemic in the pre-trial process in Tasmania (as with other jurisdictions), perpetuated by a legal culture and funding model that does not encourage the early resolution of matters.
- There is a need to provide a signal to defence practitioners about the need to be in a position to provide timely advice to their clients about the benefit of a guilty plea rather than focusing on matters close in time to the trial.
- In indictable matters, the lack of early involvement of senior counsel for the prosecution and defence who have the ability to assess the case and enter into negotiations about the appropriate charges is a factor that contributes to late pleas. Experience in other jurisdictions is that early resolution requires the involvement of people with the authority to make decisions. Charge certainty is also a factor identified as being relevant to the timing of a guilty plea.
- Appropriate information is required to allow defence counsel to give robust advice about the likelihood of conviction and for the DPP and police prosecutions to take a view on the appropriateness of the charges. In Tasmania, there is an issue in relation to timely disclosure.
- There is a perception that there is an advantage in waiting to enter a guilty plea given the delay inherent in the system and the lack of a clear sentencing benefit to an offender from an early guilty plea.

Although a review of pre-trial process in Tasmania is beyond the scope of this reference, the Council considers that it is important to be aware of the broader reforms to pre-trial criminal process that have taken place in New South Wales and South Australia to understand the context of the statutory reduction schemes. In particular, the structured statutory reduction scheme for the utilitarian benefit of the plea has been accompanied by other significant changes to pre-trial processes to address pre-trial delay.

The Council observes that common to the reforms in South Australia and New South Wales has been the recognition of the need for early involvement of sufficiently senior lawyers who can negotiate charges, give robust advice (from the defence point of view) and certify charges (from the prosecution point of view). The guilty plea reduction is one component of reforms that aims to create a process where there is an early understanding of the case by the prosecution and defence, rather than a focus on negotiations close in time to trial. Legal Aid funding changes have also supported these reforms, with the fee structure in New South Wales changed to facilitate greater involvement of counsel earlier in the process. Funding incentives have also been provided in South Australia for cases resolved by early guilty pleas.

VSAC has also identified structural impediments to an early guilty plea, including the timing of a defendant's access to legal advice including the fee structure that applies for legal aid that affects when counsel is engaged and ready to provide advice on plea.¹⁷³ Other Victorian research conducted by Flynn and Freiberg highlighted the timing of plea negotiations as a factor relevant to the timing of a guilty plea.¹⁷⁴

173 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 1, 22–23.

174 Flynn and Freiberg, above n 45, 89.

3. Guilty Pleas in Tasmania

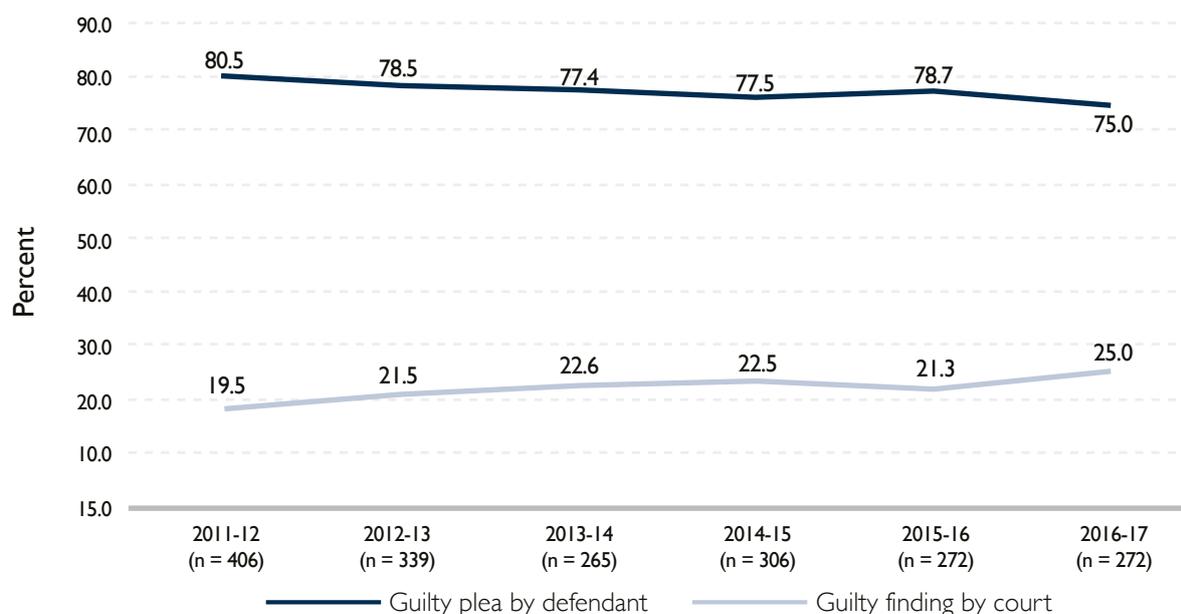
This chapter presents statistics in relation to the current status of guilty pleas in Tasmania. This will provide a framework for considering the appropriate parameters for the introduction of a statutory framework for the reduction in sentence for pleas of guilty, including an understanding of the timing of pleas.

3.1 PLEAS OF GUILTY

3.1.1 RATES OF GUILTY PLEAS

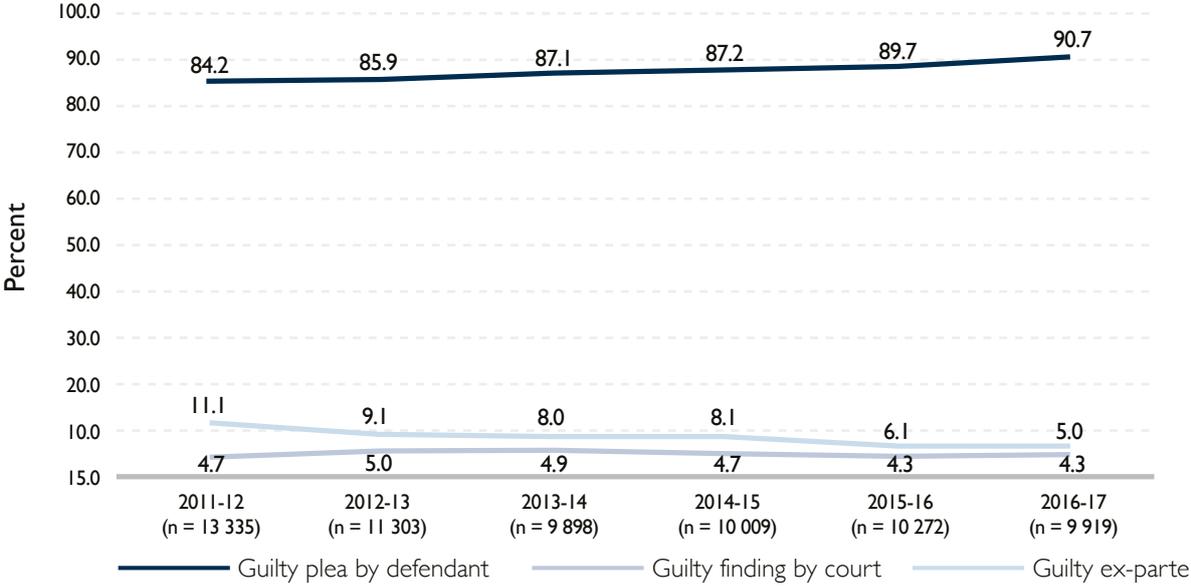
Most offenders sentenced in Tasmanian courts plead guilty. In the Supreme Court, over the period 2011–12 to 2016–17, 78.1% of defendants in cases where the defendant was proven guilty were finalised by a guilty plea. This accounts for 1453 out of 1860 defendants. Figure 3.1 shows the percentage for each financial year in the period, which ranged from 80.5% in 2011–12 to 75% in 2016–17. In the Magistrates Court, 87.3% of defendants in cases where the defendant was proven guilty were finalised by a guilty plea. Figure 3.2 shows the percentage for each financial year in the period, which ranged from 84.2% in 2011–12 to 90.7% in 2016–17.

Figure 3.1: Percentage of finalised defendants proven guilty by a guilty plea in the Supreme Court, 2011–12 to 2016–17¹⁷⁵



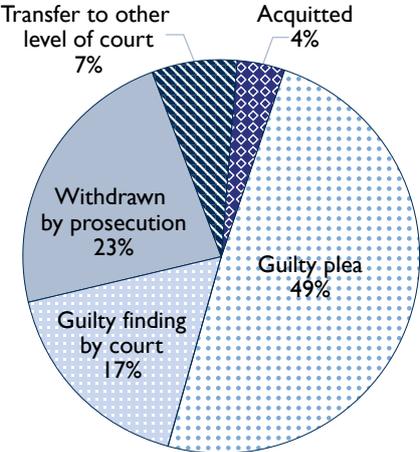
175 ABS, above n 83.

Figure 3.2: Percentage of finalised defendants proven guilty by a guilty plea in the Magistrates Court, 2011–12 to 2016–17¹⁷⁶



In the Supreme Court, for defendants finalised in 2016–17, there were 297 adjudicated outcomes, 28 matters transferred to another court and 94 matters withdrawn by the prosecution.¹⁷⁷ As shown in Figure 3.3, 49% of defendants were finalised by a plea of guilty (n = 204), 17% were finalised by a guilty finding (n = 68) and 4% were acquitted (n = 18). In 23% of matters all charges were withdrawn by the prosecution.¹⁷⁸

Figure 3.3: Defendants finalised: Method of finalisation, Supreme Court, 2016–17¹⁷⁹



176 Ibid. Guilty ex-parte is a method of finalisation in the Magistrates Courts. It is when the court adjudicates charge(s) and the charge(s) are proven either: (i) where the defendant pleaded guilty and the charges are proven in his/her absence, or (ii) the defendant failed to appear and the charge(s) were proven on the basis of the evidence presented.

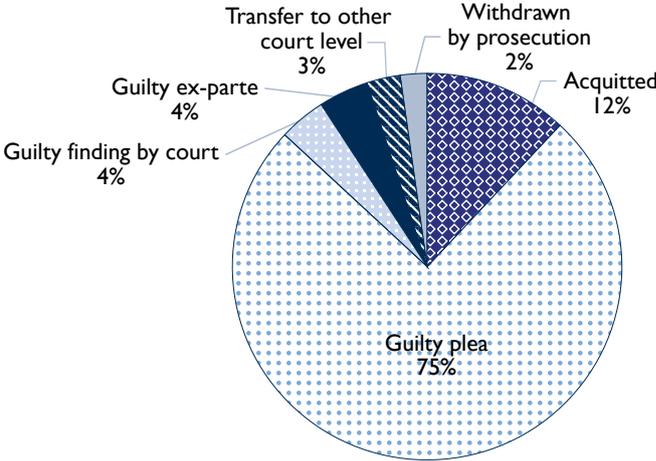
177 Ibid.

178 Once the Office of the DPP has responsibility for the file, it is reviewed to determine the appropriate charges and a decision may be made not to file an indictment for all or some of the charges. The factors relevant to the decision to prosecute an indictable matter are set out in the DPP Guidelines, above n 55 (5–10) and one of the reasons why a complaint may have been laid by police and then a decision made by the DPP to discharge the accused, is that different tests apply to these decision makers. Police prosecutions are commenced on obtaining a *prima facie* case, which is a lesser standard of proof than applies to the Office of the DPP. The test for the DPP on filing an indictment is that there is a reasonable prospect of conviction on the available and admissible evidence (*Criminal Code* (Tas) s 310(4); DPP Guidelines 5).

179 ABS, above n 83. This relates to 412 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.

In the Magistrates Court, for defendants finalised in 2016–17, there were 11 364 adjudicated outcomes, 276 matters withdrawn by the prosecution and 318 defendants that were transferred to another court. As shown in Figure 3.4, 75% of defendants were finalised by a plea of guilty (n = 9000), 4% were finalised by a guilty finding (n = 427), 4% were finalised by an ex-parte guilty finding (n = 492) and 12% were acquitted (n = 1 454). Only 2% of all charges were withdrawn by the prosecution.

Figure 3.4: Defendants finalised: Method of finalisation, Magistrates Court, 2016–17¹⁸⁰



3.1.2 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 to evaluate whether any sentencing reform has been effective in changing the plea behaviour of offenders. Accordingly, the Council’s view is that the data systems of both the Supreme Court and the Magistrates Court need to be reviewed and updated to ensure that information about the timing of pleas of guilty is recorded.

Recommendation 1

The data systems of both the Supreme Court and the Magistrates Court need to be reviewed and updated to ensure that information about the timing of pleas of guilty is recorded

Since the beginning of 2017, the Office of the Director of Public Prosecutions has kept records that identify cases that were listed for trial in the next court sitting period that were resolved by a plea of guilty. Table 3.1 provides an indication of the extent of late pleas of guilty in the Supreme Court with nearly 30% of matters being resolved by a guilty plea after the matter is listed for trial.

180 Ibid. This relates to 11 965 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.

Table 3.1: Pleas entered after set down for trial in the Supreme Court, February 2017–27 June 2018¹⁸¹

	Completed trials	Pleas of guilty after listed in trial grid	Proportion of matters listed that resulted in guilty plea (%)
Hobart	82	39	32.2
Launceston	47	18	27.7
Burnie	17	7	23.7
Total	158	66	29.5

During the concentrated trial period held in Hobart in 2018, there were 47 trials listed with 18 of those resolving by guilty plea after listing (38.3%) and one matter resulting in a discharge. During the case management leading up to the allocation of a trial date for these matters, there would have been at least two call-over days where counsel was asked identify issues that could be resolved by agreement and to indicate whether the matter was a definite trial. These data suggest that late pleas are a significant issue in Tasmania given the number of pleas entered after a matter is listed for trial.

As indicated at [4.2], there is also 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 3.2: Summary of Outcomes for Listed Trials, Magistrates Court, January–May 2006

	Number	%
Total	2272	
Proceeded to trial/hearing		
Full or part heard	638	28.1
Did not proceed		
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.¹⁸² AIC research found that of those matters that did not proceed when listed (71.9%), 41.5% were adjourned and re-listed and 30.4% were finalised without a trial.¹⁸³ This may either have been because the matter was withdrawn or a plea of guilty was entered.

181 Information provided by Linda Mason, SC, Deputy DPP.

182 Payne, above n 21, 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.

183 Payne, above n 21, 21.

4. *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.

4.1 CURRENT LAW IN TASMANIA

4.1.1 THE SCOPE OF THE SENTENCING REDUCTION – 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.¹⁸⁴ However, Tasmanian case law has recognised that a plea of guilty may be taken into account as a mitigatory factor apart from any subjective consideration of remorse.

Traditionally, there had been some uncertainty in relation to the scope of the sentencing reduction that is given in return for the utilitarian benefit of a plea of guilty. This uncertainty revolved around whether there must be some altruistic motivation accompanying the guilty plea to allow a guilty plea to mitigate or whether a bare plea of guilty was sufficient. The approach of Underwood J in *Inkson*¹⁸⁵ suggested 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.¹⁸⁶ This decision suggested that a reduction for the utilitarian value of the plea (saving time and cost to the community and sparing witnesses (including the victim) from having to give evidence was linked to the subjective motivation of the offender. However, other Tasmanian decisions had accepted that a plea of guilty *per se* (without assessing the motive of the offender) justified some reduction in an otherwise appropriate sentence.¹⁸⁷

More recent decisions of the Tasmanian Court of Criminal Appeal have indicated an acceptance of a sentencing reduction provided solely on utilitarian grounds. In *Director of Public Prosecutions v Broad*,¹⁸⁸ Geason J explicitly recognised that the reduction is provided for a plea of guilty in recognition of the advantages that accrue to the administration of justice separate from matters of remorse or the strength of the prosecution case.¹⁸⁹ His Honour stated that ‘the benefit to the administration of justice occurs by reason of the plea, simpliciter... Thus when it is said that a plea of guilty attracts a discount, it is in terms of the benefit to the administration of justice; the utilitarian benefit’.¹⁹⁰ The mitigation arising from the utilitarian benefit of the plea was also accepted by Pearce J in *Butt v Tasmania* (with whom Porter AJ) agreed¹⁹¹ and by Wood and Pearce JJ in *Director of Public Prosecutions v Harington*.¹⁹²

184 See Chapter 5 for a discussion of the operation of the sentencing reduction for a guilty plea in other Australian jurisdictions.

185 (1996) 6 Tas R 1. See also *Hyland v R* [1996] TASSC 144, [9] (Cox CJ) applying *R v Shannon* (1979) 21 SASR 442.

186 Warner, above n 57, 107.

187 See *Pavlic v The Queen* (1995) 5 Tas R 186; *Tasmania v Baldock* [2015] TASCRA 3, [29] (Pearce J).

188 [2018] TASCRA 5.

189 *Ibid* [27]–[30].

190 *Ibid* [30].

191 [2018] TASCRA 3, [57].

192 [2017] TASCRA 4, [36] (Wood J), [83] (Pearce J).

A key factor relevant to the sentencing reduction is whether the plea can be described as an early plea. This was articulated by Geason J in *Director of Public Prosecutions v Broad*: the discount 'is one intended to further an identified policy consideration. That policy consideration is the encouragement of early pleas of guilty'.¹⁹³ The value of the early plea was also recognised by Wood and Pearce JJ in *Director of Public Prosecutions v Harington*¹⁹⁴ and by Pearce J in *Tasmania v Baldock*.¹⁹⁵ However, while the courts have indicated that an early plea attracts a greater reduction than a later plea,¹⁹⁶ it has been recognised that a 'plea of guilty, even if delivered at a late state of proceedings, attracts a discount'.¹⁹⁷ The value of a guilty plea (even a late plea) has particularly been recognised in cases of sexual offending where the need to provide the offender with an incentive to enter a plea (even at a late stage) has been stressed.¹⁹⁸ For example, in *Director of Public Prosecutions v Harington*,¹⁹⁹ the defendant's sentence was reduced for a guilty plea entered on the morning of the trial. It was stated that 'the change of plea spared the complainants the ordeal of actually having to give evidence and represented some vindication. However, the complainants were still exposed to the trauma of having to relive and recall the criminal acts to which they were subjected, and the anxiety of the anticipated trial'.²⁰⁰

Factors that have traditionally been identified by the Tasmanian Court of Criminal Appeal as being relevant to the amount of the reduction 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.²⁰¹ More recently, the Court of Criminal Appeal has indicated that the strength of the prosecution case is not a matter that is relevant to the mitigation arising from a guilty plea. This was stated by Geason J in *Director of Public Prosecutions v Broad*²⁰² and *Butt v Tasmania*²⁰³ and by Estcourt J in *Director of Public Prosecutions v Harris*.²⁰⁴ However, despite these more recent statements from the Court of Criminal Appeal on the scope of the utilitarian value of the plea, it is unclear the extent to which the strength of the prosecution case (for example, whether the offender is giving up a chance of an acquittal) will remain relevant to the discount provided.²⁰⁵

4.1.2 QUANTIFYING THE REDUCTION

There has traditionally been uncertainty in relation to the extent to which a sentence is reduced, or the nature of the sentence is changed (such as a change from a sentence of immediate imprisonment to a suspended sentence or a non-custodial sentence) to give effect to the reduction for the utilitarian benefit. It has not consistently been the practice of the Supreme Court to specify the reduction and different views have been expressed about the appropriateness of quantifying the reduction.²⁰⁶ In *Pavlic v The Queen*,²⁰⁷ Green CJ and Wright J expressed the view that it was not appropriate to set out the reduction for a guilty plea on the basis that it was no different from any other aggravating or mitigating factor.²⁰⁸ In contrast, in *Dennison v State of Tasmania*,²⁰⁹ 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'.²¹⁰

193 [2018] TASCRA 5, [29].
 194 [2017] TASCRA 4, [36], [84].
 195 [2015] TASCRA 3, [29].
 196 *Director of Public Prosecutions v Harington* [2017] TASCRA 4, [36] (Wood J); *Butt v Director of Public Prosecutions* [2018] TASCRA 3, [26]–[27] (Estcourt J).
 197 *Director of Public Prosecutions v Karklins* [2018] TASCRA 6, [63] (Geason J). See also *DPP (Tas) v Farmer* (2005) 157 A Crim R 150, [39] (Evans J), [50] (Blow J); *Howlett v Tasmania* [2010] TASCRA 15, [25] (Blow J).
 198 *DPP (Tas) v Farmer* (2005) 157 A Crim R 150, [50] (Blow J).
 199 [2017] TASCRA 4.
 200 *Ibid* [84].
 201 *Pavlic v The Queen* (1995) 5 Tas R 186, 201 (Slicer J); *Dennison v State of Tasmania* (2005) 15 Tas R 50; *Ilic v Tasmania* (2009) 19 Tas R 201; *Lyons* (1993) 69 A Crim R 307, 310 (Cox J), 314 (Wright J); *Hyland v R* [1995] TASSC 144.
 202 [2018] TASCRA 5, [28], [30].
 203 [2018] TASCRA 3, [57].
 204 [2013] TASCRA 5, [41].
 205 For example, see *Tasmania v Frith*, 2 August 2018, where Pearce J observed that in assessing the value of the guilty plea '[i]n light of the objective circumstances and his admissions I do not see that he gave up much chance of acquittal for either count'.
 206 *Ilic v Tasmania* (2009) 19 Tas R 201, [17] (Tennent J).
 207 (1995) 5 Tas R 186.
 208 *Ibid* 191 (Green CJ), 193 (Wright J).
 209 (2005) 15 Tas R 50.
 210 *Ibid* [55].

Historically, the Supreme Court of Tasmania has not indicated, in the sentencing comments, the reduction that attached to a guilty plea in the particular case.

More recently, there has been a noticeable change in the approach of the court, with statements from the Court of Criminal Appeal recognising the permissibility of specifying the reduction allowed for the utilitarian value of the plea. In *Director of Public Prosecutions v Broad*,²¹¹ Geason and Estcourt JJ agreed that the articulation of the amount of reduction for pleas of guilty was not inconsistent with the instinctive synthesis approach to sentencing and was desirable in the interests of transparency.²¹² However, it was made clear that there was not an obligation on the sentencing judge to do so.²¹³ While Wood J agreed that it was permissible for the sentencing judge to specify a quantified reduction, her view was that it was a matter left to the discretion of the particular judge to 'assess the desirability of doing so with reference to the circumstances of the particular case'.²¹⁴ In *Director of Public Prosecutions v Karklins*,²¹⁵ Geason J stated that '[u]nless the discount which is applied is quantified, the force of the oft repeated proposition that a benefit accrues from entering an early plea is diminished. As such, in my view, the amount of any discount afforded a defendant should be disclosed'.²¹⁶ While accepting that it was permissible for the court to state the discount attributable to the guilty plea, Blow CJ indicated that this was not his usual practice.²¹⁷ However, his Honour indicated that, in some types cases, he considered it may be appropriate to provide specific information about the size of the discount, particularly in serious and complicated drug trafficking cases where offenders are often slow to enter pleas.²¹⁸ In contrast, Porter AJ indicated that he preferred 'not to offer any comment on whether or not it is desirable for a sentencer to state the quantum of a discount given'.²¹⁹

In appeals that have been allowed on the basis that the sentence was either manifestly excessive or inadequate, it is possible to determine the degree to which the otherwise appropriate 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*,²²⁰ 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.²²¹ In the same case, Blow J thought a substantial discount was appropriate but indicated that he would be 'a little less generous' than 20%.²²² This was a late plea to sexual offences that was entered just before the trial. More recently, in *Director of Public Prosecution v Broad*, an assault case involving an early plea, the Court of Criminal Appeal expressly stated that the reduction for the early guilty plea was 20%.²²³ In this case, Wood J indicated that she saw 'real benefit in quantifying the discount in a case such as this where the sentence to be imposed as a substituted sentence is a heavy sanction. If the effect of the plea of guilty is not articulated, it may be thought by the respondent that the Court is only paying lip-service to the mitigatory value of a plea of guilty'.²²⁴ In *Tasmania v Harington*, a sexual offence case, the defendant entered a guilty plea on the morning of the trial, and in quantifying the applicable discount Wood J allowed a discount of 20%. This approach was approved by Estcourt J in *Tasmania v Butt*.²²⁵ In *Director of Public Prosecutions v Karklins*, the plea of guilty to assault in a domestic violence context was said to be at a relatively early stage but not at the earliest possible opportunity (after the application had been made for preliminary proceedings) and the sentence was reduced from three years and four months by six months (15%).²²⁶ In other cases, it has been 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

211 [2018] TASCRA 5.
212 Ibid [25] (Estcourt J), [30], [38] (Geason J).
213 Ibid [25] (Estcourt J).
214 Ibid [9].
215 [2018] TASCRA 6.
216 Ibid [69].
217 Ibid [2].
218 Ibid.
219 Ibid [103].
220 (2005) 157 A Crim R 150.
221 Ibid [39].
222 Ibid [50].
223 [2018] TASCRA 5, [39] (Geason J).
224 Ibid [10].
225 [2018] TASCRA 3, [27].
226 [2018] TASCRA 6, [95].

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'.²²⁷ This was a reduction of 17%–25%.²²⁸

4.2 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.²²⁹ As shown in Table 4.1, 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 4.1 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.²³⁰

Table 4.1: Finding of guilt and guilty plea by offence type, Supreme Court of Tasmania 2015–30 June 2017²³¹

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
All offences	536	76%	150	21.3%	19	2.7%

227 (2009) 19 Tas R 201, [2].

228 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, 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].

229 The Council identified an additional case where the sentencing comments were suppressed. This excludes commonwealth offences.

230 This accords with research conducted by VSAC which found that there was a significant difference in the guilty plea rate depending on the type of offence: see VSAC, above n 6, 25–34.

231 This is classified by the offence category of the most serious offence, in cases involving multiple offences.

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)²³² 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.

4.2.1 THE SCOPE OF THE SENTENCING REDUCTION

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.

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'.²³³ 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 to any great credit for it'.²³⁴ 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).

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'.²³⁵ This reduction 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.²³⁶ However, as recognised by the Court of Criminal Appeal, in cases of sexual offending, some reduction 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).²³⁷

4.2.2 QUANTIFYING THE REDUCTION

Although the Council had only identified one case prior to 2018 where the sentencing judge (at first instance) specified the extent of the reduction arising from the utilitarian value of the plea, in the period from April 2018 to 2 August 2018, the Council has identified 14 further cases where the reduction has been disclosed. This accounted for 22.6% of sentences imposed for guilty pleas in this period. This change indicates a clear shift in approach by the Supreme Court to disclosing the value of the guilty plea, reflecting the recent decisions of the Court of Criminal Appeal. These cases are summarised in Table 4.2.

232 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.

233 *Tasmania v Kernan*, 20 October 2015 (Estcourt J).

234 *Tasmania v Stephenson*, 24 June 2016 (Estcourt J).

235 *Tasmania v MCW*, 13 March 2015 (Pearce J).

236 See for example, *Tasmania v RJM*, 10 March 2016 (Porter J); *Tasmania v KR*, 7 October 2015 (Porter J); *Tasmania v RSJ*, 15 May 2015 (Wood J). *Tasmania v JKK*, 18 February 2016 (Pearce J); *Tasmania v SGH*, 9 June 2016 (Wood J).

237 *Tasmania v G*, 12 April 2017 (Brett J); *Tasmania v KRR*, 6 August 2015 (Estcourt J).

Table 4.2: Supreme Court cases specifying utilitarian reduction (Tasmanian offences)

Case	Judge	Date	Offence(s)	Timing of plea	Reduction
<i>Tasmania v Matthews</i>	Estcourt J	28/09/2017	<ul style="list-style-type: none"> one charge of accessing child exploitation material one charge of possession of child exploitation material and one charge of possessing a bestiality product 	Earliest practicable opportunity and cooperation with police	20% on an otherwise appropriate head sentence
<i>Tasmania v ACJ</i>	Wood J	11/04/2018	<ul style="list-style-type: none"> maintaining a sexual relationship with a young person 	Early indication of plea	If the defendant had not entered a plea of guilty, the sentence imposed would not have been less than 3 and half years, but due to the plea of guilty a sentence of two years and 8 months was imposed (23.8%)
<i>Tasmania v Gomes</i>	Estcourt J	7/05/2018	<ul style="list-style-type: none"> commonwealth charges of dishonestly acquiring a financial advantage. 	Early plea	25%
<i>Tasmania v Triffett</i>	Brett J	7/05/2018	<ul style="list-style-type: none"> interfering with a witness 	Early plea	Would have imposed a sentence of 15 months' imprisonment if the offender had not entered a guilty plea to the charge of interfering with a witness, and instead imposed a sentence of 12 months (20%)
<i>Tasmania v Bennetts</i>	Geason J	18/05/2018	<ul style="list-style-type: none"> drug trafficking 	Early indication of plea	25%
<i>Tasmania v Trappes</i>	Brett J	6/06/2018	<ul style="list-style-type: none"> assault (family violence) 	Made shortly before the matter was listed for trial but indicated following a resolution with the prosecution not to proceed with some of the counts of assault	Sentence of 21 months and indicated but for the plea of guilty, he would have imposed a sentence of 24 months in respect of charges of assaults (12.5%)
<i>Tasmania v KCC</i>	Brett J	6/06/2018	<ul style="list-style-type: none"> manslaughter (arising out of use of motor vehicle) 	Described as later but indicated that the delay had been the result of the previous legal advisers obtaining extensive psychiatric evidence	Reduce the sentence from seven years to six years to reflect the guilty plea (14.3%)
<i>Tasmania v Walker</i>	Pearce J	13/06/2018	<ul style="list-style-type: none"> fraud (112 counts) 	Very late (day before trial due to commence) and after numerous reassurances in pre-trial management that a trial required	A reduction of four months to give a sentence of two years and eight months (12.5%)
<i>Tasmania v Clark</i>	Pearce J	20/06/2018	<ul style="list-style-type: none"> stalking 	Early plea	A reduction of one month on a head sentence of six months (16.7%)

Case	Judge	Date	Offence(s)	Timing of plea	Reduction
<i>Tasmania v Pearce</i>	Pearce J	20/06/2018	• wounding	Unclear but after preliminary proceedings (where complainant gave evidence) Commented that not giving up much of chance of acquittal	A reduction of three months and imposed a head sentence of two years and one month (10.7%)
<i>Tasmania v Armstrong-Singline</i>	Geason J	22/06/2018	• drug trafficking	Early plea	A reduction from 8 months to 6 months (25%). The sentence was then suspended
<i>Tasmania v Riley-McDonald</i>	Pearce J	6/07/2018	• assault and stealing	Unclear	A reduction of two months and a sentence of 10 months imposed (16.7%)
<i>Tasmania v Giles</i>	Geason J	6/07/2018	• drug trafficking	Unclear but admissions to police	A reduction of two months and a sentence of nine months imposed (18.2%)
<i>Tasmania v Cianter</i>	Pearce J	31/07/2018	• cause grievous bodily harm	Unclear	A reduction of 3 months and a sentence of 2 years and 3 months imposed (11%)
<i>Tasmania v Dare</i>	Pearce J	2/08/2018	• prepared for commission of crime	Relatively early	A reduction of 2 months and a sentence of 10 months imposed (16.7%)

In these cases, the utilitarian value of the plea is identified and the reduction is transparent. While there are only a few cases to date, the reductions provided indicate that a reduction of between 16.5%–25% has been provided for an early plea and 11–14% for a late plea. Further, the court recognised that the value of the plea as the sole factor relevant to suspending the sentence of imprisonment imposed (in part) in one case.²³⁸

As indicated, however, previously 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 reduction was provided but it was not possible to determine the actual extent. In other cases, relative terms such as 'some mitigation' or 'some weight' 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'.²³⁹ 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'.²⁴⁰

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 term of imprisonment or to justify the imposition of a non-custodial sentence.²⁴¹ 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 reduction 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:

238 See *Tasmania v Bender*, 13 February 2018 (Brett J).

239 *Tasmania v Robinson-Stacey*, 27 April 2015 (Tennent J).

240 *Tasmania v Shaw*, 9 August 2016 (Pearce J).

241 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 [5.2.1].

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.²⁴²

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 4.3 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 reductions) between the two groups of offenders with a negative sign indicating the penalty for offenders convicted by guilty plea is lower while a positive number indicating the penalty is higher.²⁴³ This allows a tentative assessment to be made in relation to the reduction 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 4.3: Severity of penalty by method of conviction 2015–30 June 2017²⁴⁴

	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

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.²⁴⁵ 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.

242 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.

243 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.

244 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.

245 Roberts and Bradford, above n 40, 190.

4.3 SUBMISSIONS RECEIVED AND VIEWS FROM CONSULTATIONS

In the Consultation Paper, the Council asked whether there was 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.

In response, the Law Society indicated that in practice, there was not a sentencing benefit to offenders:

Whilst the respective benches in both the Magistrates and in the Supreme Court of Tasmania understand and articulate the varying basis and degree of mitigation pleas of guilty illicit, both defence counsel and clients cannot discern a clear benefit and distinction in sentencing for an early guilty plea.²⁴⁶

In contrast, the submission of CLC (Tas) stated that there was a sentencing benefit for an offender to enter an early plea of guilty compared to a later plea of guilty. It observed that it was 'aware of very few judicial officers who give any weight to late pleas of guilty, even in circumstances in which those pleas are the result of late disclosure of new material by the State'.²⁴⁷ However, it also indicated that:

Anecdotally, it is extremely rare for a judicial officer to refuse to give any benefit for a plea. Whilst some lawyers we have spoken to felt that there had been no benefit, or very little benefit, attached to their client's early plea of guilty, they also recognised that sentences have been increasing over the last decade.²⁴⁸

In the Magistrates Court, consultations with Tasmania Police indicated its experience was that magistrates did take a guilty plea (and the timing of the plea) into account in imposing sentence. Tasmania Police indicated that it was not the usual practice for prosecutors in the Magistrates Court to make a sentencing submission (as compared to a sentencing appearance).

4.4 CONCLUSIONS

Research elsewhere suggests that there is scepticism about the sentencing benefit received by an offender for a guilty plea and that there is flexibility in the application of the reduction for pleas that occur later in the proceedings.²⁴⁹ This view was reflected in the feedback received by the Council from the Law Society. In contrast, CLC (Tas)'s view was that there was a discernible benefit from an early plea of guilty. These different views highlight the lack of clarity and uncertainty that exists in Tasmania in relation to the benefit of a guilty plea and the relative value of later compared to an early plea of guilty. The survey of Tasmanian sentencing comments indicates that a guilty plea (and the timing of the plea) is identified as a relevant sentencing factor in many cases but in terms of identifying an actual benefit to reflect the utilitarian value of the plea, the traditional approach of the Supreme Court has been not to state the value of the reduction in sentencing attributable to the utilitarian value of the plea. This meant that a defendant was not able to access (and defence counsel has not been able to give clear advice on) the likely reduction arising from an early (or late) plea of guilty. There has been a shift in judicial approach in the Supreme Court more recently in relation to the practice of stating the reduction to reflect the principles set out by the Court of Criminal Appeal in *DPP v Broad*,²⁵⁰ however, to date, this has been done in less than 25% of cases.

246 Submission 4.

247 Submission 2.

248 Submission 2.

249 See [2.3.1].

250 [2018] TASCRA 5. See discussion at [4.2.2].

5. Approaches to Statutory Sentencing Reduction Schemes in other Comparable Jurisdictions

As required by Term of Reference 2, this chapter examines legislative approaches to sentencing reductions 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.

5.1 OVERVIEW OF STATUTORY SENTENCING REDUCTION SCHEMES IN OTHER COMPARABLE JURISDICTIONS

As indicated at [1.4], all Australian jurisdictions (other than Tasmania) have legislation that makes provision for a sentencing reduction 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 5.1.

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 reduction received, with earlier pleas attracting a greater reduction 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 reduction, however, this is not legislatively prescribed in all jurisdictions. An offender may receive a reduction 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.²⁵¹

There are important differences, however, in approaches to how the reduction 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 reduction to a particular time identified in the pre-trial process. This is also the model recommended by the NSWLRC²⁵² and introduced in New South Wales on 30 April 2018.²⁵³ 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 reduction, but the utilitarian value of the plea reflects whether the offender entered a plea of guilty at the 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 state the sentence that would otherwise have been imposed so the reduction received can be readily discerned and calculated. In New South Wales, similarly (until the commencement of recent legislative changes which introduced a statutory sliding scale for many indictable offences), 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 reduction received, with 'the earlier the guilty plea, the greater the utilitarian value and the greater the reduction that will be given by the sentencing court'.²⁵⁴ There is guidance from the judgment in *Thomson and Houlton* in relation to the likely amount of the reduction and the desirability of the court stating the reduction given. These principles still apply in New South Wales in relation to summary offences and certain indictable offences that are not dealt with by the statutory

251 Freiberg, above n 7, 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.

252 See NSWLRC, Final Report, above n 18.

253 See *Crimes (Sentencing Procedure) Act 1999* (NSW) Div 1A introduced by the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW).

254 NSWLRC, above n 3, 119 citing *R v Borkowski* [2009] NSWCCA 102; *R v Thomson and Houlton* 48 NSWLR 283, [154], [160].

utilitarian reduction scheme.²⁵⁵ This is also the approach in Queensland, the Northern 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.²⁵⁶

In New South Wales, reforms to the utilitarian guilty plea reduction to provide clear time frames where particular reduction applies were introduced (in part) to address concerns that this discretion in the common law system allowed a defendant who entered a late plea (even on the day of the trial) to obtain the maximum sentence reduction.²⁵⁷

In addition, 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'.²⁵⁸ However, in New South Wales, in *R v Borkowski*²⁵⁹ it was stated that there 'may be offences that are so serious that no discount should be given'. This is reflected in the *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A where the general position is that the sentencing reductions are mandatory, meaning that the full reduction must be given.²⁶⁰ However, there are two exceptions where the court may decide that no reduction or a reduced reduction 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.²⁶¹ In addition, no discount will apply where the court imposes a life sentence.²⁶²

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'.²⁶³ 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 reduction. 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.²⁶⁴ As a general rule, the offender's motivation for entering a guilty plea, including remorse, is not relevant to the reduction for a guilty plea (but may provide a separate ground of mitigation).²⁶⁵ However, in the Northern Territory the courts have treated remorse as relevant to the provision of the maximum reduction for the guilty plea.²⁶⁶

255 These are Commonwealth indictable offences and offences committed by a person who was under the age of 18 years when the offence was committed and under the age of 21 years when charged before the court with the offence. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25A.

256 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.

257 Department of Justice (NSW), *Early Guilty Pleas Reform* <<https://www.justice.nsw.gov.au/Pages/Reforms/early-guilty-pleas.aspx>>.

258 Freiberg, above n 7, 379.

259 (2009) 195 A Crim R 1 [32].

260 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017 (Mark Speakman); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25D(1).

261 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25F(2), (4).

262 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017 (Mark Speakman); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25F(9).

263 *R v Cardamone* [2017] VSC 493 [98].

264 Freiberg, above n 7, 380; Sentencing Council (UK), above n 251, 4; Bagaric and Edney, above n 31, 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].

265 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 242, 37.

266 *JKL v The Queen* [2011] NTCCA 7.

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 has not been taken into account in relation to the utilitarian value of the plea but is relevant to remorse.²⁶⁷ In contrast, in other jurisdictions, this is generally taken to be a factor to be considered under the utilitarian justification for the sentencing reduction.²⁶⁸

Table 5.1 shows the nature of the reduction 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 5.1: Overview of how a court takes a guilty plea into account²⁶⁹

	Court must take into account	Discretionary impact of plea on sentence	Specifying the reduction	Other
Cth ²⁷⁰	Fact of plea.	No further direction on how a plea is taken into account and different approach between jurisdictions.	No further direction on how a plea is taken into account and different approach between jurisdictions.	
NSW (former position for indictable offences and current position for summary offences). ²⁷¹	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 reduction is given. Encouraged to quantify reduction. ²⁷²	No legislatively stated reduction but between 10% and 25% depending on timeliness of plea. ²⁷³
NSW (current indictable offences) ²⁷⁴	Fact of plea. Timing of plea.	Must impose the reduction unless exception applies (level of culpability, disputed facts and life sentences).	Court must record how the sentence was calculated if the sentencing reduction is applied and must record reasons for determination if determines not to apply or to reduce the reduction.	Sliding scale from 5% up to 25% depending on timing of the plea (specific periods and percentages outlined in legislation).
Victoria ²⁷⁵	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 reduction but statistical evidence is that the average is around 25–33%.

267 *Morton v The Queen* [2014] NSWCCA 8 referring to *R v Thomson and Houlton* 48 NSWLR 283.

268 See [1.4].

269 This table is adapted from NSWLRC, above n 16, Table 9.2.

270 *Crimes Act 1914* (Cth) s 16A(2)(g). For a discussion of the approach to a guilty plea discount in relation to federal offences, see National Judicial College, *Commonwealth Sentencing Database – Guilty Plea* (2018) <https://csd.njca.com.au/principles-practice/general_sentencing_principles/s16a_specific_relevant_factors/guilty-plea/>.

271 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(3)(k), 22.

272 *R v Thomson & Houlton* (2000) 49 NSWLR 383.

273 *Ibid*; *R v Borkowski* [2009] NSWCCA 102.

274 *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A.

275 *Sentencing Act 1991* (Vic) ss 5(2)(e), 6AAA.

	Court must take into account	Discretionary impact of plea on sentence	Specifying the reduction	Other
SA ²⁷⁶	<p>Whether 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.</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>Whether the defendant was initially charged with a different offence in respect of the same conduct and whether (and at what stage in the proceedings) negotiations occurred with the prosecution.</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>	May reduce sentence but courts ordinarily provide a reduction close to the maximum, in the absence of a good reason. ²⁷⁷	Practice to specify reduction. ²⁷⁸	Sliding scale from 10% up to 40% based on timing of plea (specific periods and percentages outlined in legislation).
Queensland ²⁷⁹	<p>Fact of plea.</p> <p>Timing of plea or indication of intention to plead guilty.</p>	May reduce sentence.	Court must state that took into account guilty plea and must state the reasons if it did not reduce the sentence.	No legislatively stated reduction but reduction of 30% ordinarily granted where plea is entered or indicated at an early stage. ²⁸⁰
WA ²⁸¹	<p>Fact of plea.</p> <p>Timing of plea (the earlier in proceedings, the greater the reduction in sentence).</p>	May reduce the head sentence to recognise the benefits to the State and to any victims or witness to the offence.	Court must state reduction in sentence and extent of reduction.	Reduction of up to 25% (set out in legislation).

276 *Sentencing Act 2017 (SA)* ss 39 and 40 (commenced 30 April 2018) replacing provisions in the *Criminal Law (Sentencing) Act 1988 (SA)* ss 10B and 10C.

277 Brian Martin, *Review of the Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012 and Criminal Law (Sentencing) (Supergrass) Amendment Act 2012* (Report, 2015) 33.

278 *R v Harris* (1992) 59 SASR 300.

279 *Penalties and Sentences Act 1992 (Qld)* s 13.

280 Mackenzie, above n 10, 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.

281 *Sentencing Act 1995 (WA)* s 9AA.

	Court must take into account	Discretionary impact of plea on sentence	Specifying the reduction	Other
ACT ²⁸²	<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 charge to which the offender pleaded guilty.</p> <p>The seriousness of the offence.</p> <p>The effect of offence on anyone who can make a victim impact statement (including the victim or victims' family).</p> <p>Must not make any significant reduction if the court considers that the prosecution's case was overwhelmingly strong.</p>	<p>May impose a lesser sentence (but must not impose a lesser penalty that is unreasonably disproportionate to the nature and circumstances of offence).</p>	<p>Must state penalty it would have otherwise imposed.</p>	<p>No legislatively stated reduction but generally applies NSW guideline judgment re quantum of reduction.²⁸³</p> <p>Applies if there is a real likelihood that the court will sentence the offender to imprisonment.</p>
NT ²⁸⁴	<p>Fact of plea.</p> <p>Timing of plea or indication of intention to plead guilty.</p>	<p>May reduce sentence.</p>	<p>Desirable for the court to indicate the extent to which a plea of guilty has been given weight as a mitigating factor.²⁸⁵</p>	<p>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.²⁸⁶</p> <p>However, there is no set range or tariff and needs to be determined in the circumstances of the case.²⁸⁷</p>
England/Wales ²⁸⁸	<p>Timing of indication of intention to plead guilty.</p> <p>Circumstances of indication to plead guilty.</p>	<p>Limited exceptions set out in guideline.</p>	<p>Court must state that imposed lesser penalty.</p> <p>Court should state the amount of the reduction.²⁸⁹</p>	<p>Sliding scale from 1/10th to 1/3rd based on timing of the plea (details set out in Guideline judgment).²⁹⁰</p>
NZ ²⁹¹	<p>Fact of plea.</p> <p>Timing of plea.</p>	<p>May reduce sentence.</p>	<p>Should set out reduction.²⁹²</p>	<p>Should not exceed 25%.²⁹³</p>

282 *Crimes (Sentencing) Act 2005* ss 35(3), 37(2)(b).

283 Wren and Bartels, above n 256. In *Monfries v The Queen* [2014] ACTCA 46, Murrell CJ stated that: 'The bare fact of a plea of guilty entered in the Supreme Court will usually attract a s 35 discount of 10–15%. A common sense approach to "utilitarian value", the case law and the terms of s 35(2)(b) and s 35(5) of the *Sentencing Act* all support the importance of the timing of a plea to the assessment of an appropriate discount. A last-minute plea commonly attracts a discount of 10%. A plea entered (or firmly indicated) after committal and before a trial date has been set will usually result in a discount of more than 10% and, commonly, leads to a discount of 15%. Occasionally, a plea in the Supreme Court attracts a higher discount; it is always a matter in the discretion of the sentencing judge' at [47]. This was cited in *Cranfield v The Queen* [2018] ACTCA 3, [37] where the Court indicated that the court generally applied predictable discounts in different circumstances.

284 *Sentencing Act* (NT) s 5(2)(j).

285 *JKL v The Queen* [2011] NTCCA 7, [24].

286 *Ibid* [28].

287 *Ibid* [31].

288 *Criminal Justice Act 2003* (UK) ss 144, 174(7).

289 Sentencing Council (UK), above n 251, 5.

290 *Ibid* 5.

291 *Sentencing Act 2002* (NZ) s 9(2)(b).

292 *Hessell v R* [2009] NZCA 450.

293 *Hessell v R* [2010] NZSC 135.

5.2 RESEARCH EXAMINING IMPACT OF STATUTORY REDUCTION ON THE COURT SYSTEM

5.2.1 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 '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'.²⁹⁴ Additionally, the provision aimed to encourage people who 'intended to plead guilty to do so as early as possible, without encouraging inappropriate guilty pleas'.²⁹⁵

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'.²⁹⁶ 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.²⁹⁷ 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.²⁹⁸ 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".²⁹⁹

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

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.³⁰⁰ This meant that it was now possible to ascertain the precise reduction that had been obtained in a particular case and also to determine the relationship between plea timing (late or early) and the reduction 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.³⁰¹ It reported that 'a large proportion of offenders sentenced to a suspended sentence, an intensive correction order, a community based order, or a community correction order would have faced a sentence of immediate

294 VSAC, above n 6, 12.

295 Ibid 22.

296 Ibid.

297 Ibid.

298 Ibid 12.

299 Ibid 12–13, citations omitted.

300 Ibid 47.

301 Ibid 59.

imprisonment if they had not pleaded guilty'.³⁰² In the remaining two-thirds of cases, the guilty plea reduced the sentence length³⁰³ 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'.³⁰⁴

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).³⁰⁵ It found 'a small but statistically significant difference between the average sentence discounts at each stage'³⁰⁶ and concluded that the research suggested 'that plea timing, independent of sentence length, is an important factor in determining the level of the discount'.³⁰⁷ 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.³⁰⁸ 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.³⁰⁹

However, there is scepticism in relation to the operation of s 6AAA with participants in a Victorian study examining plea negotiation expressing the view that the approach is 'artificial', 'speculative and superficial', with concerns expressed that the original sentence is inflated and that judges 'pluck[ed] a figure out the air'.³¹⁰ Yet, despite the acknowledged artificiality of the s 6AAA statement, 'the value of having the discount articulated by the sentencing judge or magistrate was acknowledged as a way to provide transparency and "peace of mind" ... to accused persons'.³¹¹

5.2.2 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"'.³¹² This scheme was introduced in a jurisdiction where the practice of the court had been to specify the reduction provided for a guilty plea.³¹³ However, there were concerns that there was a lack of transparency in relation to the reductions given and inconsistency in the approach taken by judicial officers to the reduction provided for late (compared to early) pleas. This resulted in inconsistency and a lack of incentive for the defendant to enter a guilty plea. In addition, there was a concern that some offenders were receiving too substantial reductions for their plea. There have also been more recent reforms to the statutory guilty plea system as well as the introduction of reforms to criminal procedure to address some perceived issues with the initial scheme and to facilitate the early resolution of matters.

The hierarchy of reductions for matters dealt with in Magistrates Court or for matters dealt with as summary offences are set out in Table 5.2.³¹⁴

302 Ibid 75.

303 Ibid 59.

304 Ibid.

305 Ibid 69.

306 Ibid.

307 Ibid 76.

308 Ibid 69.

309 Ibid 76.

310 Flynn and Freiberg, above n 45, 174–177.

311 Ibid 179.

312 NSWLRC, Final Report, above n 18, 133 quoting SA, *Parliamentary Debate*, Legislative Council, 4 September 2012, 2001.

313 See Table 5.1.

314 *Sentencing Act 2017 (SA)* s 39 replacing *Criminal Law (Sentencing) Act 1988 (SA)* s 10B.

Table 5.2: South Australia statutory sentencing reduction for guilty pleas: Magistrates Court and matters dealt with as summary offences

Time frame	Reduction
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 commencement of 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 5.3 sets out the hierarchy of reductions for all other cases that are currently contained in the *Sentencing Act 2017* (SA) s 40 and the former time frames that were contained in the *Criminal Law (Sentencing) Act 1988* (SA) s 10C.

Table 5.3: South Australia statutory sentencing reduction for guilty pleas: Indictable offences

Former time frame	Current time frame	Reduction
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 [to] trial; by encouraging offenders who [were] minded to plead guilty, to do so in a timely way'.³¹⁵ 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 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.³¹⁶

315 Attorney-General's Department, Government of South Australia, *Transforming Criminal Justice: Consultation Paper* (2015) 2–3.

316 Ibid 3.

In 2015, a review of the operation of the provisions was undertaken by Mr Brian 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 5.4 and show that there had been 'a substantial increase in the percentage of major indictable offences finalised by guilty pleas in the Magistrates Court'.³¹⁷ There had also been an increase in the percentage of matters finalised within the first four weeks of the first appearance.³¹⁸

Table 5.4: Evaluation of Criminal Law (*Sentencing (Guilty Pleas) Amendment Act 2012 (SA)*), Timing of guilty pleas³¹⁹

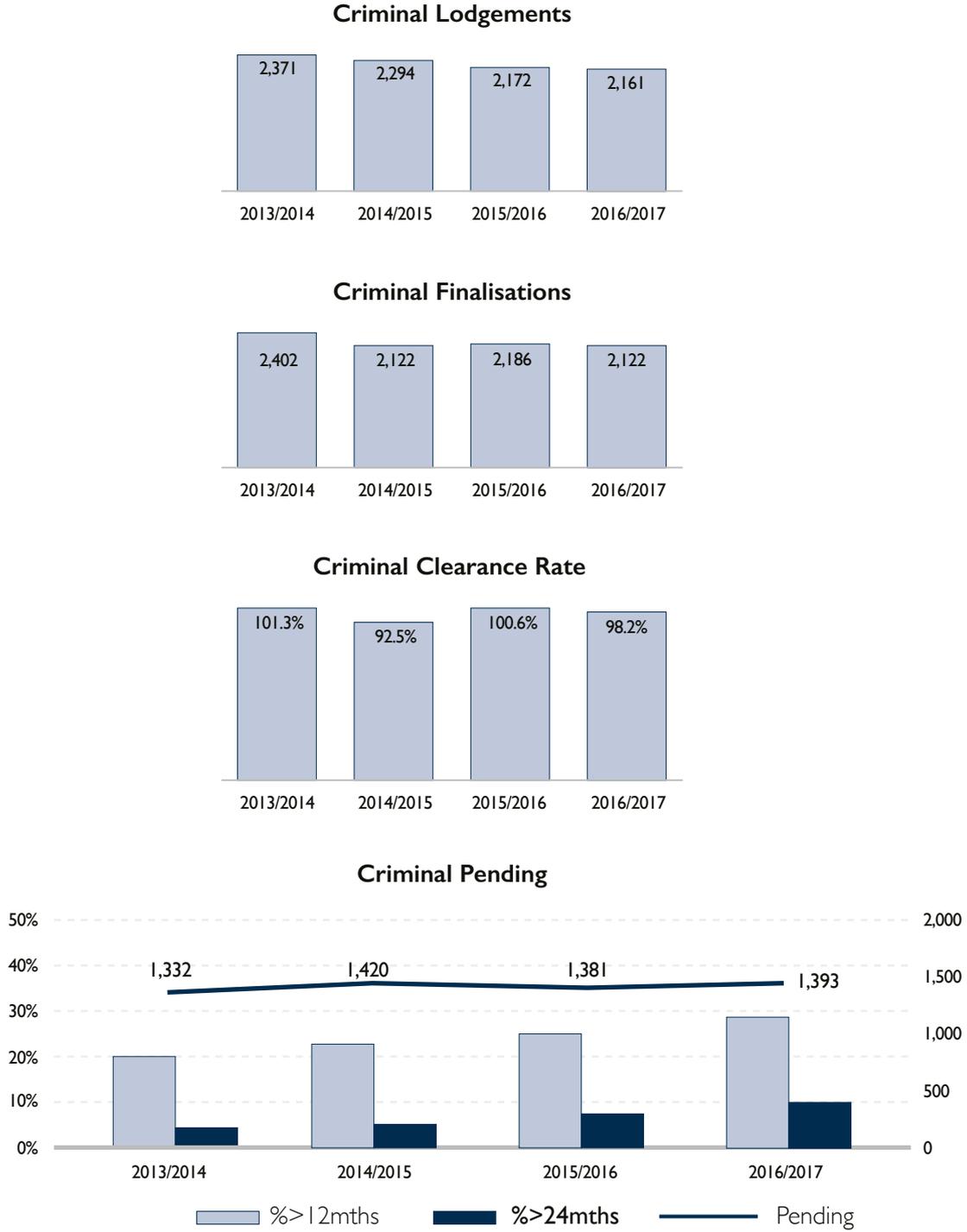
	Within four weeks of first appearance	Prior to committal	More than 12 weeks post arraignment
Three years prior to commencement (March 2013)	4% to 6%	38% to 52%	25% to 32.5%
12 months post commencement	8%	62%	16%

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.³²⁰ 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'.³²¹ 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.³²² 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'.³²³

It appears that there still has not been a reduction in backlog in the District Court with data provided in the 2018 Report on Government Services indicating that there has been an increase in pending matters in the District Court since 2010–11 (1289) to 2016–17 (1393).³²⁴ There has also been a decrease in the clearance rate over this period from 107.7% to 98.2%. This is set out in Figure 5.1 which shows that there has also been an increase in the proportion of matters that are pending for greater than 12 months and 24 months.

317 Office of Crime Statistics and Research (SA), *Evaluation Report Executive Summary* (2015) annexed in Martin, above n 277.
 318 Office of Crime Statistics and Research, above n 317.
 319 Parliament of South Australia, House of Assembly, 16 November 2016, (Rau) referring to Martin, above n 277.
 320 Ibid.
 321 Martin, above n 277, 28.
 322 Ibid 34.
 323 Ibid.
 324 Productivity Commission, above n 72, Table 7A.17.

Figure 5.1: Court performance statistics, District Court South Australia



Source: Courts Administration Authority of South Australia <<http://www.courts.sa.gov.au/OurCourts/CourtsAdministrationAuthority/statistics/Pages/Court-Performance-Statistics.aspx#district>>

Martin also considered that a benefit of the sentencing reduction scheme was that it provided transparency in relation to the reduction allowed in sentences in recognition of guilty pleas.³²⁵

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'.³²⁶ This period created a particular disadvantage for indigenous offenders.³²⁷
- Difficulties created for unrepresented defendants understanding the operation of the scheme at the time of the first appearance in court.³²⁸
- 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'.³²⁹
- 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'.³³⁰ 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.³³¹

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'.³³² 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.³³³ 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.³³⁴

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.³³⁵

Figure 5.2 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 2015–16.³³⁶ 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 reduction scheme in 2013.

325 Martin, above n 277, 28.

326 Ibid 30.

327 Ibid 23.

328 Ibid 29.

329 Ibid 23.

330 Ibid 30.

331 Ibid 3.

332 Ibid 31.

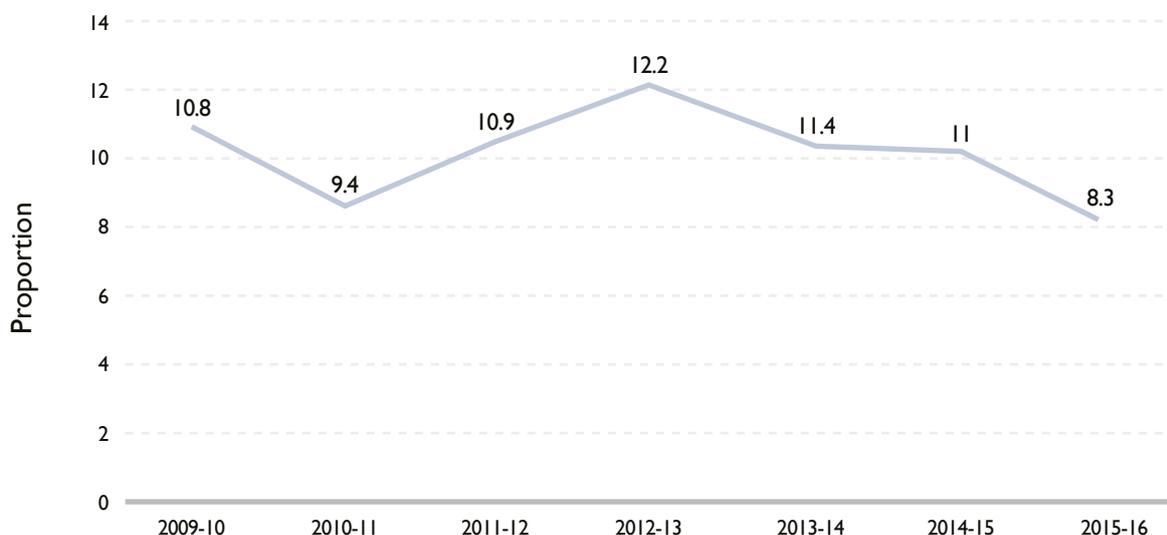
333 Ibid. It is noted that these views differ from the approach adopted in New South Wales, where detailed disclosure is made to the defendant before there is an expectation of a guilty plea, see [5.2.3].

334 Ibid.

335 Ibid 32–33.

336 This information was obtained from the Office of the Director of Public Prosecution, Annual Reports for the period 2010–11 to 2015–16.

Figure 5.2: Proportion of trials in District and Supreme Court, South Australia resolved by guilty plea at or during the trial



This is consistent with the increase in matters that are committed to the higher court for sentence rather than for trial since the introduction of the scheme (see Table 5.4).

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 with³³⁷ and this indicated that late guilty pleas and delay were still of concern.³³⁸ It was reported that in 2015–16, 36% of major indictable criminal trials that were vacated were due to late guilty pleas.³³⁹

In discussions with the South Australian Director of Public Prosecutions, Adam Kimber, as well as representatives of the profession (Legal Aid Commission and the Law Society) about the operation of the South Australian sentencing scheme, it was noted that there had been an increase in the number of offenders entering early guilty pleas, including pleas to serious indictable matters such as murder and dangerous driving causing death entered within the four-week period. This is reflected in the data provided in Table 5.4. Their view was that the reforms had provided a clear and transparent incentive for defendants (and their advisers) to give early consideration to entering a plea and, that while a plea to serious matters was still rare (but now not unheard of) within four weeks of the first appearance, the scheme provided a strong incentive to entry a plea before the matter was committed for trial in the District Court.

As discussed, there were significant changes made to criminal procedure for indictable offences, which accompanied the most recent changes to the sentencing reduction scheme including:

- Changing the timing and amount of sentencing reductions available (as set out in Table 5.3).
- Providing a specific reduction as an incentive for complying with pre-trial disclosure. A deduction of 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 ordered 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.³⁴⁰

337 Attorney-General's Department, Government of South Australia, above n 315.

338 Ibid 1.

339 Attorney-General's Department, Government of South Australia, above n 108, 1.

340 Ibid 2.

Other significant changes were made to criminal procedure in the *Summary Procedure (Indictable Offences) Amendment Act 2017 (SA)*. These reforms require that major indictable matters are the subject of a 'charge determination' by the DPP prior to the commencement of the committal proceedings.³⁴¹ The reforms also introduced a staged disclosure scheme for major indictable offences.³⁴²

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'.³⁴³ It is unclear as yet how these changes will influence the timing of pleas and court delay generally. In addition, in September 2018, a new review has been announced into the operation of the scheme.³⁴⁴

5.2.3 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.³⁴⁵ 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*,³⁴⁶ that indicated that the utilitarian value of an early plea can result in a sentencing reduction of 10–25%, depending on the timing of the plea. The guideline judgment also directed that sentencing judges should explicitly quantify the reduction afforded by the guilty plea. Other reforms included pilot plea indication schemes and criminal case conferencing.³⁴⁷ 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'.³⁴⁸ 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'.³⁴⁹

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 were finalised by the entry of a guilty plea.³⁵⁰ 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.³⁵¹ 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.³⁵² In 2012–13, there had been a slight increase in day-of-trial pleas to 66% (516) of all later guilty pleas.³⁵³ 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%).³⁵⁴ It was also observed that '[m]any matters that commence in the indictable jurisdiction are ultimately withdrawn or resolved in the Local Court. In 2012/13, 41% of indictable matters did not proceed to the higher courts mostly because they were dropped by the prosecution or the charge was downgraded or resolved in the Local Court'.³⁵⁵

341 Director of Public Prosecutions, South Australia, above n 109, 5.

342 See Appendix A; *ibid*.

343 Attorney-General's Department, Government of South Australia, above n 315, 3.

344 Australian Associated Press, 'Sentencing Review Set for South Australia' (10 September 2018) <<https://www.news.com.au/national/breaking-news/sentencing-review-set-for-south-australia/news-story/ce8a6fe7e0242389117bc32a3d9ce28f>>.

345 NSWLRC, above n 16, 3–4.

346 (2000) 49 NSWLR 383.

347 See NSWLRC, above n 16, 3–4.

348 *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).

349 NSWLRC, Final Report, above n 18, 4.

350 *Ibid* 18.

351 *Ibid* 22.

352 *Ibid* 23.

353 *Ibid* 24.

354 *Ibid*.

355 *Ibid* 8–9.

Research conducted by BOSCAR in 2010 also indicated that despite the guideline judgment, 'the very high rate of late guilty pleas has persisted'.³⁵⁶ 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.³⁵⁷ A key component of this scheme was that a reduction 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 reduction of up to 12.5%.³⁵⁸ 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 reductions with scepticism.³⁵⁹

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.³⁶⁰ Another reason identified was that there was no clear sentence benefit to offenders for earlier rather than later guilty pleas.³⁶¹ According to Weatherburn and Baker, this perception was 'soundly based in fact' given that sentencing discounts were not applied in a consistent manner.³⁶² 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 who plead guilty at a later stage. Sentence benefits are also applied somewhat inconsistently across different types of offences.³⁶³

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.³⁶⁴ 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'.³⁶⁵

Despite this research demonstrating that reforms in relation to guilty plea reductions 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.³⁶⁶ 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.³⁶⁷ 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

356 Yin Wan, Jones, Moffatt and Weatherburn, above n 348, 2.

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

358 Yin Wan, Jones, Moffatt and Weatherburn, above n 348, 2.

359 *Ibid* 8. See discussion in NSWLRC, Final Report, above n 18, 223, and ff.

360 Weatherburn and Baker, above n 243, 26.

361 *Ibid* 27.

362 *Ibid* 36.

363 *Ibid*.

364 *Ibid* 38.

365 *Ibid*.

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

367 *Ibid* 78.

reduce the case backlog from 702 cases to 430 cases by the end of 2019.³⁶⁸ 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).³⁶⁹ 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.³⁷⁰ 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.³⁷¹ 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 only slow the rate of increase in the size of the backlog, rather than cause a decline’.³⁷² 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.³⁷³

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 reductions for guilty pleas).³⁷⁴ 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).³⁷⁵

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’³⁷⁶ 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’.³⁷⁷

Significant reforms have now been introduced in New South Wales (commencing 30 April 2018), and Table 5.5 sets out the time frames that are now applicable in New South Wales for indictable matters (other than those involving Commonwealth offences or offenders aged under 18 at the time of the offence and under 21 at the time the matters is charged in court).

368 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.

369 Ibid 3.

370 Ibid 1.

371 Ibid 7.

372 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.

373 Ibid 1.

374 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).

375 Ibid 8–9.

376 Ibid 13.

377 Ibid 10.

Table 5.5: Utilitarian Sentence Reductions: Adult Accused of State Offences ³⁷⁸

Circumstances	Timing of plea of guilty or offer to plead guilty			Exceptions
	Before Committal	At least 14 days before trial	Less than 14 days before trial	
Defence pleas and offers				
Plea to offence charged or to an alternative accepted by Crown	25%	10%	5%	1. Extreme culpability 2. Loss factual dispute 3. Judge sentences to life
Defence offer rejected and not withdrawn is later accepted	25%	10%	5%	1. Extreme culpability 2. Loss factual dispute 3. Judge sentences to life
Defence offer rejected and not withdrawn – at trial found guilty of reasonably equivalent charge (ie the maximum penalty is the same or less than for the offence offered and the facts can for both)	25%	10%	5%	1. Extreme culpability 2. Loss factual dispute 3. Judge sentences to life
Crown changes charges after committal	As soon as reasonably possible	At least 14 days before trial	Less than 14 days before trial	
Plea to new charge laid by Crown after committal	25% – Unless: New offence has same or lower penalty than original charge and is based on substantially the same facts or evidence; or Defence refused previous Crown offer of the new offence	10%	5%	1. Extreme culpability 2. Loss factual dispute 3. Judge sentences to Life

These reforms were based on the recommendations of the NSWLRC, which aimed to address the uncertainty and inconsistency of the common law approach where there was a belief that the timing of the plea had little effect upon whether the maximum discount is applied:

It has been reported to us that — even during the criminal case conferencing trial — a late guilty plea entered after committal could still generate the maximum, or a significant, discount. This practice may be tied to systemic problems with the current criminal justice system, but it continues to seriously undermine the use of the maximum discount as an incentive to enter a guilty plea early in proceedings.³⁷⁹

The NSWLRC indicated that the introduction of a graduated statutory sentencing discount scheme was necessary 'to ensure that there are clear incentives for a defendant to plead guilty early, and that the available discounts are transparent and available only in cases where the efficient operation of the criminal justice system is facilitated'.³⁸⁰

378 This table was produced in Law Society of New South Wales, 'Case Conferences for Indictable Matters in the Local Court Explanations to Legally Represented Accused if Statutory Utilitarian Discount Caps Apply' <<https://www.lawsociety.com.au/advocacy-and-resources/publications-and-resources/my-practice-area/criminal-law/early-appropriate-guilty-pleas>>.

379 NSWLRC, Final Report above n 18, 224.

380 Ibid 225.

The Department of Justice has indicated that the expected benefits of the early guilty plea reforms are to:

- reduce stress on victims by resolving criminal cases faster;
- reduce the District Court backlog;
- reduce time and money wasted on police, courts and lawyers preparing for trials that don't go ahead;
- allow offenders to enter programs to address their offending behaviour earlier;
- ensure that guilty pleas are only entered by defendants where appropriate.³⁸¹

However, there has not yet been time to assess the effectiveness of the reforms in changing plea behaviour, legal culture and reducing court delay.

It is also crucial to understand that the intention in New South Wales was that the guilty plea reforms should not be separated from the broader reforms to pre-trial process:

We must stress that the statutory discount regime proposed in this chapter should be implemented only where the blueprint is adopted — particularly disclosure in the Local Court and early charge advice. Without the other proposed components that operate to ensure that the charge in the Local Court is the most appropriate, excluding pleas entered in the higher courts from the maximum discount could produce unfair and unwanted results.³⁸²

These reforms included fundamentally changing the nature of committal proceedings so that magistrates have a supervisory role and no longer determine the sufficiency of evidence, the involvement of senior lawyers early in the proceedings to settle the appropriate charge to conduct effective discussions between defence and prosecution, and early disclosure of the brief.³⁸³

5.2.4 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.³⁸⁴ As indicated in Table 5.1, 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 reduction for a guilty plea but has not considered the broader implications in terms of the effect of the timing of an 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 reduction for a guilty plea operates and examined the relevance of the timing of the plea to the reduction 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'.³⁸⁵ 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 reduction of 18%.³⁸⁶ Wren and Bartels referred to the case of *R v Howard*,³⁸⁷ where the offender entered a plea on the morning of the trial and, in sentencing, Penfold J stated that:

381 Department of Justice (NSW), above n 257.

382 NSWLRC, Final Report above n 18, 218.

383 See IM Ierace SC, 'Early Guilty Pleas: A New Ball Game' (28 April 2018) <<https://www.lawsociety.com.au/advocacy-and-resources/publications-and-resources/my-practice-area/criminal-law/early-appropriate-guilty-pleas>>. See also Chief Magistrate, 'Local Court Practice Note Comm 2' (14 March 2018) <<https://www.lawsociety.com.au/advocacy-and-resources/publications-and-resources/my-practice-area/criminal-law/early-appropriate-guilty-pleas>>; 'Agreement Between NSW Police Force and Office of the DPP (NSW): Concerning the Content and Service of an Early Appropriate Guilty Plea Brief and Charge Certification' <<https://www.lawsociety.com.au/advocacy-and-resources/publications-and-resources/my-practice-area/criminal-law/early-appropriate-guilty-pleas>>.

384 *Crimes (Sentencing) Act 1995* (ACT) s 35(1).

385 Wren and Bartels, above n 256, 378.

386 Ibid.

387 22 November 201 (Penfold J).

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.³⁸⁸

In this case, the offender received a reduction 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 reductions for pleas entered at a later stage.³⁸⁹

5.2.5 ENGLAND AND WALES

In England, legislation provides that a guilty plea and the timing of the plea is relevant to the imposition of sentence³⁹⁰ and case law indicates that a guilty plea generally attracts a sentence reduction of 25–30%.³⁹¹ 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.³⁹²

Research conducted by the Sentencing Council reported that in the Crown Court, a vast majority of offenders pleaded 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 2014.³⁹³ 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%.³⁹⁴ However, other research has commented on a reduction in the number of cases where the offender enters a plea 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).³⁹⁵

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.³⁹⁶

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%.³⁹⁷ These data have been analysed by Roberts and Bradford, who reported that the following deductions based on a guilty plea were made:³⁹⁸

388 Ibid [25].

389 Wren and Bartels, above n 256, 381.

390 *Criminal Justice Act 2003* (UK) s 144.

391 See Home, above n 44, 34.

392 Sentencing Council (UK), above n 251, 6.

393 Office of the Sentencing Council, *Crown Sentencing Survey Annual Publication 2014* (2015) 36.

394 Ibid.

395 Ministry of Justice, National Audit Office, *Efficiency in the Criminal Justice System* (2016) 17.

396 VSAC, above n 1, 29.

397 Office of the Sentencing Council, above n 393, 36.

398 Roberts and Bradford, above n 40, 197.

	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.³⁹⁹ However, it was noted that there was offence variation with smaller reductions for certain offence categories such as homicide.⁴⁰⁰ 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'.⁴⁰¹

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 previous guideline judgement was not being applied consistently and that in some cases, the levels of reductions were higher than those recommended.⁴⁰² 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 and the community.⁴⁰³ 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'.⁴⁰⁴

5.2.6 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 2007.⁴⁰⁵ 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.⁴⁰⁶

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.⁴⁰⁷ 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). It also found 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'.⁴⁰⁸

399 Ibid 197–198.

400 Ibid 208.

401 Ibid 207.

402 Sentencing Council (UK), *Reduction in Sentence for a Guilty Plea – Guideline Consultation* (2016) 5.

403 Ibid.

404 Law Society of England and Wales, *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.

405 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.

406 Ibid.

407 Ibid 3.

408 Ibid 25–26.

5.3 CONCLUSION

There are two key issues highlighted in the analysis of statutory sentencing reduction 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.⁴⁰⁹ Further, it is noted that a statutory sentencing reduction 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.⁴¹⁰ However, research suggests that it is possible that an incentive to enter a guilty plea can 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 reduction 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.
- (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 (in their own right) do not support the conclusion that such reforms have been effective in reducing court delay. This reflects the broader systemic factors that contribute to delay. In contrast, research in New South Wales has demonstrated that a case management approach where matters 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 had a significant impact on the early resolution of matters.

409 VSAC, above n 1, 29.

410 Ibid 16, 20. See also [2.3]–[2.5].

6.

Issues and Recommendations for Reform

The Terms of Reference require the Council to examine and report on a statutory sentencing discount for pleas of guilty in Tasmania and to provide advice as to the appropriate parameters for the introduction of such a scheme. The Council was asked 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 reduction of a guilty plea. A separate but related question is whether the court should be directed to state the reduction given in a particular case. Both setting out the value of the reduction in legislation and requiring the court to state the value of the reduction in a particular case are a means of creating certainty, transparency and consistency in terms of the reduction to be received for a guilty plea.

To enable the Council to address Term of Reference 5, the Consultation Paper sought 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 considers these issues and outlines possible models for reform that may be used for a sentencing reduction scheme for guilty pleas in Tasmania.

As shown in Chapter Five, there is considerable diversity in the approach to statutory provisions relating to the relevance of a guilty plea in sentencing in other comparable jurisdictions. However, it is possible to identify four models that could inform reforms in Tasmania:

(1) There is a statutory requirement to take into account a guilty plea (and its timing) in sentencing with the court left with discretion in relation to the extent of the reduction provided.⁴¹¹ There is no legislative requirement for the court to state the discount provided. There is no legislative statement of the amount of discount, but the courts have provided some guidance as to the appropriate discount for an early plea. As a matter of practice, a court may also state the discount provided. This is the approach in Queensland, the Northern Territory, New Zealand, and in New South Wales in relation to summary offences and indictable offences involving offenders who were under the age of 18 years when the offence was committed and under the age of 21 years when charged before the court with the

⁴¹¹ Although it is noted that jurisdictions differ in relation to the extent of legislative guidance that is given in relation to the factors to the exercise of the discretion, see [5.1].

offence and commonwealth offences. It is also the approach in Western Australia in matters where a fixed term of imprisonment is not imposed. However, in Western Australia, legislation provides that the sentence reduction must be stated.

In the Tasmanian context, this model reflects the more recent approach of the Tasmanian Supreme Court, and at a minimum a statutory reform could be made that specified that a plea of guilty is to be taken into account and that a lesser penalty may be imposed to reflect the plea of guilty.

(2) There is a statutory requirement to take into account a guilty plea (and its timing) in sentencing with the court left with broad discretion in relation to the extent of the reduction provided. There is a legislative requirement for the court to state the discount provided. There is no legislative statement of the amount of discount, but the courts provide some guidance as to the appropriate discount for an early plea. This is the approach in Victoria.

In the Tasmanian context, this model would provide legislative confirmation of the more recent approach of the Tasmanian Supreme Court to state the discount and could be introduced in conjunction with the amendment to the *Sentencing Act 1997* (Tas) to recognise the utilitarian value of the plea as outlined at (1) above. This is the model recommended by the Council.

(3) In cases where a fixed term of imprisonment is imposed, there is a statutory requirement that provides that the maximum discount is 25% and the legislation provides that the sentence reduction must be stated.

(4) Legislation sets out a sliding scale of discounts based on fixed points within the pre-trial process. This is the approach in South Australia and New South Wales. It is also the position in the England and Wales, but this is contained in a sentencing guideline rather than legislation. In New South Wales, legislation requires that the reduction that is provided be stated by the court in imposing sentence. This is not set out in legislation in South Australia but is the practice of the court. There are some other key differences in the operation of the sliding scale approach in terms of whether the reductions provided are fixed (that is mandatory) or 'up to', the level of disclosure required to be provided by the prosecution to the defence, and the exceptions to the scheme.

After considering the various options, the approach taken by the Council is to recommend a package for reform that reflects model 2 (as set out above) as follows:

- Amend the *Sentencing Act 1997* (Tas) to recognise a guilty plea as a mitigating factor (Recommendation 2).
- Amend the *Sentencing Act 1997* (Tas) to set out three factors that are relevant to the reduction provided for a guilty plea: (1) the fact of the guilty plea; (2) the timing of the plea or the indication of the intention to plead guilty assessed in the circumstances of the case; and (3) the lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence (Recommendation 3).
- Amend the *Sentencing Act 1997* (Tas) to require that the court is to state the effect of the guilty plea on the sentence. This is to apply in cases where a sentence of imprisonment is the appropriate sentence (without the reduction for a guilty plea). The court *must* state the discount in these cases and this may involve a reduction in the length of the sentence of imprisonment, the imposition of a partly suspended or fully suspended sentence or a probation or community service order (or a community corrections order) on the basis of the plea of guilty. In other cases, the court *may* (not *must*) state the discount (Recommendation 4).

The Council notes that these recommendations form a package of recommendations and does not support any legislative reform that would adopt only some aspects of the recommendations. The Council's intention is that the legislative reform would provide a statutory basis for a sentencing reduction for a guilty plea and provide for a statement of that discount by the court — either as a mandatory or discretionary requirement depending on the sentence contemplated. The aim of these reforms is to provide clarity, transparency and greater certainty in relation to the sentencing reduction attributable to an early guilty plea, and to provide a signal to participants in the criminal justice system of the need to give early attention to the determination of charges and the appropriateness of a guilty plea. This reflects the Council's conclusions that delay in Tasmania is supported by a legal culture and funding model that does not encourage the early resolution of matters and the need to provide a signal to defence practitioners about the need to be in a position to provide timely advice to their clients about the benefit of a guilty plea rather than to focus on matters close in time to the trial date.⁴¹² In this regard, the Council notes the ethical obligations on

412 See [2.5].

barristers to provide advice about the consequences of entering a plea of guilty.⁴¹³ It is also stressed that the inclusion of a guilty plea as a discrete factor in legislation does not mean that this is the only or the most significant sentencing factor.

However, the Council *does not* consider that the value of the plea should be set out in legislation, either as a legislative cap or a sliding scale. As explained further at [6.2.4], the Council's view is that use of a sliding scale is dependent on the legal culture, resources available to both the prosecution and defence and appropriate funding to both parties. Successful operation of a sliding scale would require early disclosure to allow the office of the DPP to determine the most appropriate charge(s) and defence counsel to give proper advice as well as appropriate legal aid funding for early attention to the matter. Presently, these conditions do not exist in Tasmania. As indicated at [2.5], delay is endemic in the pre-trial process in Tasmania and many systemic factors (other than the timing of defendant pleas) contribute to this problem, a problem that will not be resolved by the introduction of a prescriptive sentencing discount scheme in isolation from broader reforms. Accordingly, it is the Council's view that Tasmania does not have the appropriate institutional or legal infrastructure that would support the adoption of a sliding scale.

In making its recommendations, the Council has considered challenges to the introduction of a statutory framework for the reduction in sentence for pleas of guilty that may arise 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. The Council has also addressed 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.

6.1 LEGISLATIVE RECOGNITION OF A GUILTY PLEA AS A MITIGATING FACTOR

Currently, there is no statutory recognition in Tasmania of the relevance of a guilty plea as a mitigating factor. However, the courts have accepted that a guilty plea is a matter relevant to sentencing and that an offender may receive a reduction in sentence based on a guilty plea. Accordingly, in Tasmania, as a means of clarifying the operation of the sentencing reduction for a guilty plea as a mitigating factor in its own right, legislative recognition of a guilty plea as a relevant mitigating factor could be provided in the *Sentencing Act 1997* (Tas).

6.1.1 APPROACH IN OTHER JURISDICTIONS

As indicated, all Australian jurisdictions other than Tasmania have legislatively recognised 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. As indicated at [1.4], there are competing views about the appropriateness of a sentencing reduction 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'.⁴¹⁴

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 the amount of a fine.

6.1.2 SUBMISSIONS RECEIVED AND VIEWS FROM CONSULTATIONS

In the Consultation Paper, the Council asked for feedback on whether the *Sentencing Act 1997* (Tas) should be amended to provide that a guilty plea is a mitigating factor relevant to the sentence imposed.

Justice Geason's view was that statutory reform was appropriate for the following reasons:

9. The pursuit of an objective such as that which accrues to the administration of justice from a plea, is a matter of policy. Policy is, broadly speaking a matter for parliament. Because it is a policy matter it should be legislated. That approach ensures the policy is required to be applied by all sentencing courts within a jurisdiction. Once implemented courts can offer a fast track system of case management for criminal matters, which may assist in reducing case backlogs.

413 *Legal Profession Uniform Conduct (Barristers) Rules 2015*, Rule 40.

414 Wren and Bartels, above n 256, 363. See also Bagaric and Edney, above n 31, 331.

10. A statutory approach also overcomes any concern that this procedure is contrary to common law principles applicable to sentencing; see *Cameron v The Queen* [2002] HCA 6, (2002) 209 CLR 339.⁴¹⁵

The Law Society also indicated that it agreed that the *Sentencing Act 1997* (Tas) should be amended to provide that a guilty plea is a mitigating factor relevant to the sentence imposed. This was said to remove 'judicial disagreement and doubt as to the basis and utility of a plea of guilty and [to] simplify the process'. It was also considered to provide 'clarity and certainty for defendants as to that factor'.⁴¹⁶

Similarly, the CLC (Tas) submission expressed strong support for the creation of such a provision 'as a means of clarifying the sentencing discount for a guilty plea as a mitigating factor'. Its view was 'that such a reform [would] create certainty for offenders and their counsel as well as enshrining the judicial view that there is a utilitarian value in a guilty plea'.⁴¹⁷

The DPP was also in favour of a statutory scheme setting out a sentencing reduction (as discussed further at [6.2.3]). In the view of the DPP, reform was necessary to ensure that any discount applied to reflect the utilitarian value of the plea should be appropriately weighted to reflect the timing of the plea.⁴¹⁸

Tasmania Police also expressed the view that a legislative provision would achieve greater transparency.

6.1.3 THE COUNCIL'S VIEWS AND RECOMMENDATIONS

Based on research from other jurisdictions and the submissions received and views expressed as part of the consultation process, the Council's view is that there should be amendment to the *Sentencing Act 1997* (Tas) to provide that a guilty plea is a mitigating factor relevant to the sentence imposed. This will clarify the common law approach to the recognition of the utilitarian value of the plea. Accordingly, the Council recommends that the *Sentencing Act 1997* (Tas) be amended to provide that a guilty plea is a mitigating factor relevant to the sentence imposed. This reform has the advantage of creating certainty 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.

The Council acknowledges that 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.⁴¹⁹ The Council notes that the identification of the guilty plea as a factor to the mitigation of sentence does not affect the application of other sentencing factors, which will continue to have effect. The purpose of this amendment is to clarify the scope of the sentencing reduction to reflect the utilitarian value of the plea, not to alter the exercise of the sentencing discretion.

Recommendations

2. The *Sentencing Act 1997* (Tas) should be amended to recognise the utilitarian value of a guilty plea as a mitigating factor.
3. Recommendation 2 should only be implemented if Recommendations 5, 6 and 7 are also implemented.
4. The legislation should make it clear that the identification of the guilty plea as a factor relevant to the mitigation of sentence does not affect the application of other sentencing factors, which will continue to have effect.

415 Submission 3.

416 Submission 4.

417 Submission 2.

418 Submission 1.

419 *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 31, 305–312.

6.2 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 will be necessary to determine the factors that are (and those that are not) relevant to determining the weight of the plea.⁴²⁰

Currently, the common law position that applies in Tasmania means that in assessing the utilitarian value of the plea, the sentencer considers the timing of the plea reflecting the benefit to witnesses and the saving of time and resources to the State. In some cases, there has also been reference to the strength of the prosecution case and the type of offence in applying the discount. 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 6.1) 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.

If statutory recognition of a sentencing reduction for a guilty plea is created in Tasmania, it will be necessary to decide which factors should be included or excluded from consideration and if these factors should be set out in legislation or left to case law.

6.2.1 APPROACH IN OTHER JURISDICTIONS

All jurisdictions recognise the fact of the plea and the timing of the plea as relevant statutory factors in the application of the sentencing reduction for a guilty plea. In addition, other jurisdictions expressly recognise offence seriousness (NSW, South Australia, and the ACT), the circumstances of the plea (NSW, South Australia), plea negotiations and strength of the prosecution case (ACT). Table 6.1 sets out a summary of the factors that are relevant to the imposition of the discount in other jurisdictions.

Table 6.1: Factors that the court must take into account in providing a sentencing reduction for a guilty plea

	Court must take into account
NSW (summary offences and indictable offences involving offender aged under 18 at time of offence and under 21 at time charged before the court and commonwealth offences) ⁴²¹	Fact of plea. Timing of plea or indication of intention to plead guilty. Circumstances in which indicated intention to plead guilty. The lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence.
NSW (all other indictable offences) ⁴²²	Timing of plea within sliding scale discount scheme (see [5.2.3]). Exceptions: (1) Discount may not be provided or a reduced discount may be given 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, or a reduction of, that allowance. (2) Discount not applied or should not be reduced because the utilitarian value of the plea of guilty has been eroded by a dispute as to facts that was not determined in favour of the offender. (3) A life sentence is imposed.
Victoria ⁴²³	Fact of plea. Timing of plea or indication of intention to plead guilty.

420 VSAC, above n 1, 43.

421 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(3)(k), 22.

422 *Ibid* Division 1A.

423 *Sentencing Act 1991* (Vic) ss 5(2)(e), 6AAA.

	Court must take into account
SA ⁴²⁴	<p>Timing of plea within sliding scale discount scheme (see [5.2.2]).</p> <p>Whether reduction would be so disproportionate to the seriousness 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>
Queensland ⁴²⁵	<p>Fact of plea.</p> <p>Timing of plea or indication of intention to plead guilty.</p>
ACT ⁴²⁶	<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 charge to which the offender pleaded guilty.</p> <p>The seriousness of the offence.</p> <p>The effect of offence on anyone who can make a victim impact statement (including the victim or victims' family).</p> <p>Must not make any significant reduction if the court considers that the prosecution's case was overwhelmingly strong.</p> <p>The lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence.</p>
NT ⁴²⁷	<p>Fact of plea.</p> <p>Timing of plea or indication of intention to plead guilty.</p>
NZ ⁴²⁸	<p>Fact of plea.</p> <p>Timing of plea.</p>

6.2.2 DISCUSSION OF FACTORS RELEVANT TO THE EXERCISE OF THE COURT'S DISCRETION

Timing of the plea

As indicated, central to the utilitarian value of a guilty plea is its timing given that 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.

424 *Criminal Law (Sentencing) Act 1988* (SA) ss 10B and 10C.

425 *Penalties and Sentences Act 1992* (Qld) s 13.

426 *Crimes (Sentence Administration) Act 2005* (ACT) ss 35(3), 37(2)(b).

427 *Sentencing Act* (NT) s 5(2)(j).

428 *Sentencing Act 2002* (NZ) s 9(2)(b).

Seriousness of the case

In New South Wales, South Australia, and the ACT (as shown in Table 6.1), the seriousness of the offence is a matter relevant to the discount provided. The relevance of the circumstances of the offence to the exercise of the discretion is acknowledged in the legislation in New South Wales that applies to summary offences (the lesser penalty must not be unreasonably disproportionate to the nature and circumstances of the offence) and indictable offences (the court can reduce or deny a sentencing discount if the offender's level of culpability is so extreme that the community interest in retribution, punishment, community protection and deterrence can be met only imposition of a penalty with no allowance for, or a reduction of the discount). It is also acknowledged in 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 or may affect public confidence in the administration of justice). However, even if not set out in legislation, generally, in Australia the court has a broad discretion in relation to allowing a sentencing discount and this enables the court to impose a sentence that reflects the seriousness of the case.⁴²⁹ For example, in Victoria, in *Phillips v The Queen*⁴³⁰ 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'.⁴³¹ The court considered that the 'exceptional case arises when the gravity of the offending conduct is of such an order that no discount from the maximum sentence is appropriate'.⁴³²

Research also suggests that the discount actually applied by the court is less for offences attracting longer sentences. VSAC found that 'in practice, the longer the sentence of imprisonment imposed, the smaller the reduction is likely to be as a proportion of the overall sentence'.⁴³³ For sentences of imprisonment of two years or less, the average discount for a guilty plea was 39.3% and the median discount was 33.3% of the total effective sentence. In contrast, for sentences of more than 10 years imprisonment, the mean discount was 17.7% for a guilty plea and the median discount was 17.4%.⁴³⁴

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'.⁴³⁵ As a result, Leverick argues that the 'seriousness of the offence is appropriately reflected in the headline figure, not the discount'.⁴³⁶ It also allows greater uncertainty and subjectivity.

Overwhelming prosecution case

The Australian Capital Territory is the only jurisdiction where the strength of the Crown case is set out in legislation as a relevant matter, with the court directed not to make any significant reduction if it considers that the prosecution's case was overwhelmingly strong.⁴³⁷ However, 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.⁴³⁸ The *Sentencing Act 1995 (WA)* s 9AA 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'.⁴³⁹ This included securing the conviction of a person, not having to use resources to prepare

429 See [5.1].

430 (2012) 37 VR 594.

431 Ibid [36].

432 Ibid.

433 VSAC, *Guilty Plea in the Higher Courts*, above n 6, 68.

434 Ibid 69.

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

436 Ibid.

437 See Table 5.1.

438 *Abraham v Western Australia* (2014) 244 A Crim R 151.

439 Ibid [56].

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.⁴⁴⁰ 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 benefit received or derived by the State as a consequence of the offender entering a guilty plea.⁴⁴¹

The strength of the prosecution case has been accepted as 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 interest will depend on his or her prospects, and this in turn depends on the strength of the prosecution case'.⁴⁴² Case law has also suggested 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 negotiated a reduced charge.⁴⁴³

In contrast, in *Director of Public Prosecutions v Broad*,⁴⁴⁴ Geason J expressly stated that '[a] utilitarian discount does not have regard to the strength of the prosecution case. ... That is because the benefit to the administration of justice occurs by reason of the plea, simpliciter'.⁴⁴⁵ This approach to applying a sentencing reduction for a guilty plea reflects the approach of courts in most Australian jurisdictions with statutory schemes, which 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*,⁴⁴⁶ 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'.⁴⁴⁷ Similarly, in *Morton v The Queen*,⁴⁴⁸ the court summarised the principles applying to the sentencing discount for the utilitarian value of the plea to include the principle that the 'utilitarian discount does not take into account the strength of the prosecution case'.⁴⁴⁹ This is set out in the sentencing guideline in England and Wales. It is also the position in Scotland.⁴⁵⁰

From a policy perspective, there would appear to no basis to deny an offender a reduction in sentencing 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'.⁴⁵¹ 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 factual situation, and there may be more to them than meets the eye — for example, a possible defence such as duress of circumstances, automatism, or whatever'.⁴⁵² 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.⁴⁵³

440 Ibid.

441 Ibid [58].

442 VSAC, above n 1, 46.

443 See [4.1.1].

444 [2018] TASCRA 5.

445 Ibid [30].

446 (2012) 37 VR 594.

447 Ibid [36].

448 [2014] NSWCCA 8.

449 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].

450 *Gemmell* [2011] HCJAC 129 referred to in Leverick, above n 435.

451 Leverick, above n 22, 386.

452 Bagaric and Edney, above n 31, 318–319 quoting Andrew Ashworth, *Sentencing and Criminal Justice* (3rd ed, 2000) 144.

453 Sentencing Council (UK), above n 402, 15.

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'.⁴⁵⁴ 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'.⁴⁵⁵

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.⁴⁵⁶

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.⁴⁵⁷

Alternatively, as is the approach 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.⁴⁵⁸ In *Morton v The Queen*,⁴⁵⁹ 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*,⁴⁶⁰ 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'.⁴⁶¹ 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), the greater the benefit arising from a guilty plea.⁴⁶² 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.⁴⁶³ 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'.⁴⁶⁴ 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'.⁴⁶⁵

Circumstances of the plea and plea negotiation

As indicated at [3.1.1], the majority of offenders enter a plea of guilty rather than proceed to a contested trial and plea negotiation (in some form) is likely to have a role in the resolution of these matters. Although Tasmanian data are not available, research in other jurisdictions indicates that plea negotiation is common and typically results in a reduction of the number of charges, often with the offender pleading guilty to less serious charges. Victorian research has found that there were 14 forms of plea negotiation with the most common forms of plea negotiation being: (1) withdrawing and substituting charges; (2) rolled-up charges and representative counts; (3) negotiating an agreed

454 Ibid.

455 Ibid.

456 Leverick, above n 435, 346.

457 VSAC, above n 1, 45; VSAC, above n 242, 35.

458 VSAC, above n 1, 45; VSAC, above n 242, 36

459 [2014] NSWCCA 8.

460 (2012) 222 A Crim R 149.

461 Ibid [36].

462 VSAC, above n 242, 36.

463 VSAC, above n 1, 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 and Houlton* 48 NSWLR 283, [119]–[123].

464 Leverick, above n 435, 373.

465 VSAC, above n 242, 35.

summary of facts; and (4) agreements on the prosecution's sentencing submission.⁴⁶⁶ This research also found that the introduction of presumptive and mandatory sentencing influenced plea negotiations as it placed pressure on offenders to plead guilty to lesser offences that do not carry a mandatory penalty, even where the Crown case may not be particularly strong.⁴⁶⁷

Participants in the Victorian study also overwhelmingly acknowledged that 'Victoria Police tend to charge every possible offence that fits the offending conduct'.⁴⁶⁸ However, the majority view was that overcharging [was] not a deliberate or malicious approach; rather "'it [was] a product of the adversarial system" ... and "the way Victoria Police have done things for a long, long time".⁴⁶⁹ A common view was 'that charging an offender with multiple and alternative offences is a "defensive" approach aimed at ensuring that a conviction is secured'.⁴⁷⁰

In Tasmania, the DPP Guidelines provide advice on charge negotiations which 'involves negotiations between the defence and the prosecution in relation to the charges to proceed'.⁴⁷¹ This may mean that the accused pleads guilty to fewer charges or to a lesser charge. The Guidelines stress that care is taken in choosing the charges that are initially laid but that 'circumstances can change and new facts can come to light'.⁴⁷² The following guidance is provided in relation to accepting a defence proposal in relation to charges:

A proposal should not be entertained by the prosecution unless:

- the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused;
- those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case;
- there is evidence to support the charges.

Any decision whether or not to agree to a proposal advanced by the defence, or to put a counter-proposal to the defence, must take into account all the circumstances of the case and other relevant considerations including:

- whether the accused is willing to co-operate in the investigation or prosecution of others, or the extent to which the accused has done so;
- whether the sentence that is likely to be imposed if the charges are varied as proposed would be appropriate for the criminal conduct involved (taking into account such matters as whether the accused is already serving a term of imprisonment);
- the desirability of prompt and certain resolution of the case;
- the accused's antecedents;
- the strength of the prosecution case;
- the likelihood of adverse consequences to witnesses;
- in cases where there has been a financial loss to the State or any person, whether the accused has made restitution or arrangements for restitution;
- the need to avoid delay in the resolution of other pending cases;
- the time and expense involved in a trial and any appeal proceedings;
- the views of the investigating police officers; and
- the views of the victim or others significantly affected.⁴⁷³

466 Flynn and Freiberg, above n 45, 40. It is noted that prosecutors in Tasmania have greater flexibility to make submission in relation to sentence due to the provisions in the *Sentencing Act 1997* (Tas) s 80, which allow the prosecutor to address the court on sentence and may comment on the appropriateness of the kind of sentences that may be imposed for the offence and recommend that the court impose one of those kinds of sentence. This provides greater flexibility than that allowed by *Barbaro* [2014] HCA 2: see discussion in Flynn and Freiberg, above n 45, 58–65, 165–174. Other forms of negotiation included agreement as to what the prosecution will submit as part of their sentencing submission, agreement to change jurisdiction, accused to provide information on another matter, agreement for the police/prosecution not to pursue charges/investigate offences involving another person known to the accused, agreement not to pursue charges/investigate offences involving the accused, agreement to provide some form of protection or financial support to the accused and/or their family, bail as a point of negotiation, diversionary programs/options and agreements on costs: at 69–70.

467 Ibid 151.

468 Ibid 109.

469 Ibid 110.

470 Ibid.

471 DPP Guidelines, above n 55, 37.

472 Ibid.

473 Ibid 37–38.

In New South Wales (summary offences), 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.

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 bargain, 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 charges the prosecution are more likely to proceed with'.⁴⁷⁴ This provision directs the court to have regard to any plea bargain or negotiation in relation to charges 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'.⁴⁷⁵ 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.⁴⁷⁶

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'.⁴⁷⁷ 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. However, there are criticisms that exist in relation to plea negotiation 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'.⁴⁷⁸

6.2.3 SUBMISSIONS RECEIVED AND VIEWS FROM CONSULTATIONS

The Law Society's view was that there should be no subjective factors recognised in the sentencing reduction scheme (only the timing of the plea):

The basis of a sentencing discount should clearly be the benefits of a plea of guilty and should be linked to the time in which a plea is entered and no other subjective factors. The seriousness of an offence will lead to uncertainty, argument, potential appellate work and could seriously jeopardise the practical effects of a plea benefit mandated plea discount.⁴⁷⁹

For this reason, the Law Society did not think that the strength of the prosecution case, the circumstances of the plea, or any plea negotiation should be taken into account. The Law Society also considered that the reduction should be provided on basis of plea alone and not on the basis of weighing the actual (as opposed to notional) saving:

The preferred view is that a known and direct mandate discount applies on the basis of the timing of the plea relevant to the proceedings and there would be no need to have the type of discussions and considerations that underpin this question taken into account on that basis. Arguably that view provides greater transparency, certainty and potential and reduces the risk of appellate work or inconsistent applications which are to be avoided from the defence counsel point of view.⁴⁸⁰

In relation to the timing of the plea, the Law Society indicated support for concrete percentages for stages of the plea in the interests of transparency and certainty. Its view was that if discretionary ranges were used, then this would be 'open to differing judicial minds in respect of matters in an area of law that would be well served to eliminate those discrepancies'.⁴⁸¹ The Law Society's view was that a statutory scheme that set out the extent of the discount as a percentage reduction in sentence would remove judicial disagreement and doubt as to the basis and utility of a plea of guilty and simplify the process. It considered that it provided clarity and certainty for defendants. It considered

474 Wren and Bartels, above n 256, 375.

475 Ibid.

476 Ibid.

477 Hyland, Unreported 82/1996 relying on Shannon (1979) 21 SASR 442, 452. See discussion in Wamer, above n 57, 108–109.

478 Wren and Bartels, above n 256, 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 42, 261; K Graham, 'Overcharging' (2014) 11 *Ohio State Journal of Criminal Law* 701 for a discussion of overcharging.

479 Submission 4.

480 Submission 4.

481 Submission 4.

that a 'clear mandated sentencing discount offers clarity to defendants and a tangible, known realisable sentencing discount'.⁴⁸² However, it was strongly of the view that the discounts should be applied to the charges to which ultimately a plea of guilty is entered 'meaning that if an alternative or amended charge is pleaded to at the earliest opportunity the maximum discount should apply'. It was stated that:

Defence counsel's view is that it would be patently unfair to have a charge that is not proceeded with, an alternate charge put in place which therefore as a matter of law is the correct charge and which the evidence supports and have a client that is not able to achieve the benefits simply by virtue of having ensured that the correct charge is before the court. Having the reduction be attributable to the charge ultimately to which the plea is entered has the practical effect of encouraging and promoting negotiated outcomes which hasten resolution of matters even if not at the earliest opportunity and save victims and the State significantly.⁴⁸³

The Law Society considered that transparency of the discount was essential and was one that should apply even if mandated discount percentages are not applied. Its view was that:

Disclosure of the discount achieves the purpose of transparent justice and allows all concerned to easily determine that issue in assessing the appropriateness of any sentence. Defence counsels' experience is that a defined known benefit would act as a greater incentive to a defendant to enter a plea as they will have certainty of outcome in that regard. It should be noted that sentencing ranges are perceived to be on the increase by defendants and by defence counsel across a range of charges. That perception is heightened by the political push for mandatory sentencing. It is this reason that transparency in the amount of discount given is of particular use. Defence counsels' experience is that sentence indication through contestation usually resolves matters and a similar logic and outcome applies to disclosure of the discount on an early plea of guilty.⁴⁸⁴

The DPP also favoured a prescriptive scheme with the central criteria for the operation of the scheme being the timing of the plea. The DPP indicated that '[i]f such a scheme is introduced it would need to be prescriptive of the time period a particular discount would be available and what material would need to be provided by the prosecution authorities prior to the plea'.⁴⁸⁵ In setting out the scope of the statutory reduction scheme for guilty pleas, the DPP expressed the view that 'in order to obtain the highest discount available a plea should be made at the earliest opportunity without requiring the Crown to complete the disclosure process'. This reflects the South Australian approach and 'would have the effect of reducing police work on files that are to be pleas of guilty and quicken the completion of files that are to be trials'. In accordance with the South Australian approach, the DPP stated that:

if a statutory discount scheme came into existence it should be on the basis that the more the prosecution is required to disclose, the lesser the discount. This would reflect that the utilitarian benefit of pleas of guilty is highest at the commencement of proceedings when police investigative resources have not been unnecessarily diverted to matters that are pleas of guilty, victims and witnesses are saved the trauma of giving evidence and are given greater certainty at an early stage of the proceedings that they will not have to, and of course save costs for the prosecution, defence and courts.⁴⁸⁶

If a statutory discount scheme is introduced, then in addition to the amount of the discount and the stage of the discount, the DPP's view was that it also needed to be as to the material that is required to be provided to the defence in order 'to avoid arguments in court about what was reasonable in the circumstances'. The DPP considered that:

An accused person ought to know with some certainty the discount to be applied and any discounts need to be applied consistently. A transparent system that participants trust in is likely to be of greater success. To achieve this, a provision that requires the sentencing court to indicate if the sentencing discount was applied and how any discount was calculated, such as s 25F(7) of the *Sentencing Act 2017 (SA)* may be appropriate.⁴⁸⁷

In addition to certainty of the extent of disclosure required, the DPP recognised the need for certainty in relation to charges:

I accept that a statutory discount scheme is not without its problems, particularly in cases where charges alter. The appropriateness of charges would need to be reviewed by this Office at an early stage and there would need to be greater certainty for an accused that the charges will be those that are prosecuted to conclusion. Further in circumstances where there is to be some negotiation as to the charges, those negotiations must be had with this Office. In my view, the involvement of this Office at an early stage is crucial to the success of any proposed scheme. If such a scheme is introduced

482 Ibid.

483 Ibid.

484 Ibid.

485 Submission I.

486 Ibid.

487 Ibid.

it would require funding to allow earlier intervention in matters by this Office. I note significant funding has been given to the NSW Director of Public Prosecutions to enable much earlier intervention in the Magistrates Court since the recent amendments to their sentencing provisions. Also, additional funding has been given in NSW to Legal Aid to allow continuity with counsel.⁴⁸⁸

In conclusion, the DPP considered that the benefits of such a scheme would be worth adopting despite any complexities given that 'a statutory discount scheme has significant advantages in that a defendant will know generally what discount they will receive at whatever stage they enter a plea'.⁴⁸⁹

The DPP also indicated that an alternative to a prescriptive sentencing reduction scheme (such as a sliding scale model) would be to amend the *Sentencing Act 1997* (Tas) to set out factors that were to be considered by the court when weighing a plea of guilty. The DPP suggested that 'those factors might include that an early plea, particularly one prior to disclosure, would have significantly more weight than a later plea received after disclosure has been made'.⁴⁹⁰

In contrast, the view of Tasmania Police was that flexibility in the application of the sentencing reduction in the Supreme Court works well and should be retained.

In clarifying the scope of the discount, CLC (Tas) expressed the view that:

- The seriousness of the offence should not be a matter relevant to the sentencing discount for a guilty plea. It considered that seriousness is taken into account in a very limited sense in that murder charges receive a significantly smaller discount and this means that they invariably go to trial. If the seriousness of the offence was expressly recognised as a matter relevant to the reduction provided, then 'benefit for other serious crimes is likely to see a similar effect'.
- The strength of the prosecution case should be a matter relevant to the sentencing discount for a guilty plea. This was on the basis that a plea of guilty to 'a charge where the State's case is weaker is indicative of considerable remorse, and should be recognised as such. The current scheme also makes allowances for circumstances in which the conviction is inevitable, and this can lead to a lowering of the value of the plea'. However, CLC (Tas) considered that '[t]his lowering of the value of the plea ought be, and is, used sparingly — it should be limited to those cases where an absence of remorse is demonstrated through other factors'.
- The circumstances of the plea should be considered. However, discretion should remain with the judicial officer and not prescribed in legislation.
- The existence of a plea bargain should not be recognised as a matter relevant to the sentencing discount for a guilty plea. The ability of defence counsel and prosecuting authorities to negotiate outcomes ought not be fettered in any way, particularly as it is unlikely to achieve better outcomes.⁴⁹¹

Despite CLC (Tas)'s view in relation to the relevant factors, it did not think that these factors should be defined in statute and rather should be left to the discretion of the court.⁴⁹²

In discussion with some stakeholders, there was some unease that an offender who was in no way remorseful and only entered an early guilty plea to obtain a reduction in sentence would be entitled to the same utilitarian benefit as an offender who was truly remorseful.

6.2.4 THE COUNCIL'S VIEWS AND RECOMMENDATIONS

Based on research from other jurisdictions and after the careful consideration of the submissions received and views expressed as part of the consultation process, the Council's view is that there should be amendment to the *Sentencing Act 1997* (Tas) to set out the following factors as relevant to the exercise of the court's discretion to give a discount to reflect the utilitarian value of the plea: (1) the fact of the guilty plea; (2) the timing of the plea or the indication of the intention to plead guilty assessed in the circumstances of the case; and (3) the lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence.

488 Ibid.

489 Ibid.

490 Ibid.

491 Submission 2.

492 Ibid.

The Council's view is that these factors should be set out in legislation to provide clarity, consistency and transparency in relation to the scope of the sentencing reduction provided for the utilitarian value of a guilty plea. These considerations were identified by stakeholders as being crucial aspects of any reform in relation to the sentencing reduction for a guilty plea. The Council agrees with the views expressed in the submissions that there is a need for a clear signal to be provided from the courts about the value of an early plea, so that this can be communicated by defence counsel to their clients. The Council also agrees that the approach taken to the discount provided needs to be consistent and transparent, and for this reason recommends that the discount should be stated by the court (see discussion at [6.3]). However, the Council's view is that the reduction actually provided in any particular case should be in the discretion of the court, and it may be that in some cases, the circumstances of the case mean that a plea of guilty should result in very little or no reduction in sentence.

Timing of the plea

In considering the matters that should be addressed in determining the sentencing reduction based on the utilitarian value of the plea, the Council's view is that the fact of the plea and the timing of the plea or indication of the intention to plead, guilty should be set out in the *Sentencing Act 1997* (Tas). These are factors identified in the legislative provisions in all comparable jurisdictions. As recognised by the Law Society, the timing of the plea is central to the utilitarian value of a plea, with a greater discount being appropriate for an early rather than a late plea. This is a principle that should be incorporated in the legislation to ensure that there is a clear signal provided that the time at which a plea is entered is a key determinant of the utilitarian reduction in sentence based on the plea.

However, the Council's view is that, in the Tasmanian context, the timing of the plea is not merely to be assessed solely on a temporal basis (that is, the stage of the proceedings at which the plea was made). While this measure will generally be highly persuasive in the determination of whether or not a plea is a timely, the Council's view is that there needs to be scope for the court to exercise its discretion to make a determination that a plea was early (even if it was made at a later stage in the proceedings) based on whether it was made at the first reasonable opportunity in the circumstances of the particular case. This is the approach in jurisdictions other than New South Wales (indictable offences) and South Australia where a sliding scale is provided based on particular time periods.⁴⁹³

The Council acknowledges that its recommendations are contrary to the approach preferred by the DPP, who considered that such a model would provide the potential for argument about what was the 'first' reasonable opportunity and do not go as far as setting out a prescriptive scheme as favoured by the Law Society and the DPP.⁴⁹⁴ The Council acknowledges that a prescriptive approach (as preferred by the DPP and the Law Society) in terms of the identified time periods relevant to the reduction attributable to the entry of the plea has the advantage of greatest degree of clarity and consistency. It provides the clearest signal to defendants and the prosecution about the sentencing benefit from an early plea. It also overcomes uncertainty and inconsistency in determining when a plea is 'entered at the earliest reasonable opportunity'.⁴⁹⁵

However, the Council's view is that systemic factors such as the problems relating to disclosure to allow the early identification of appropriate charges to be determined and to allow for robust advice to be given by defence counsel, as well as the lack of an appropriate funding model to allow legal representatives to give proper early attention to matters means that such a prescriptive sentencing reduction scheme is not appropriate in Tasmania at this time.

In considering the merits of a more prescriptive scheme, the Council notes that the NSW Government has made a considerable investment in pre-trial reforms in that jurisdiction with a view to addressing the key problems identified in relation to delay: (1) charge certainty; (2) disclosure; (3) people with authority to negotiate involved early in the process so that the issues in dispute are identified in the Local Court and focus is given at that stage to resolving matters by way of plea. The sentencing reduction scheme in that State needs to be understood as operating within this broader framework to provide an incentive for the offender to enter an early plea. There has been considerable stakeholder commitment over several years to the development of the scheme and, as indicated, it is too early to make any assessment of whether the reforms will be effective to make a difference to court delay. It may be that in the future, an evaluation of the NSW model will allow a judgment to be made of the components of the scheme that work (or do not work) and Tasmania would benefit from taking a 'wait and see' approach. Time will also allow

493 See [5.1], [5.2.2], [5.2.3], [6.4.3].

494 See discussion of the sliding scale schemes at [6.4.3].

495 See NSWLRC, Final Report, above n 18, 231. See also Sentencing Council (UK), above n 402, 17.

for the effectiveness of the more minimal reforms proposed by the Council to be assessed in terms of providing greater certainty and transparency in relation to the reduction provided for the utilitarian value of the plea. Once data systems are improved to allow information in relation to the timing of pleas to be captured, it will also be possible to ascertain whether the reforms have had any effect in changing plea behaviour.

Further, the Council's view is that a highly prescriptive scheme may 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. This will prevent injustice arising where an offender is unable to comply with prescriptive time frames through no fault of their own. It will also address concerns about potential difficulties created by a prescriptive scheme for vulnerable and/or unrepresented defendants. A prescriptive scheme 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. It is the Council's view that a more flexible scheme addresses these concerns that may be raised about the potential for injustice that a prescriptive scheme creates for unrepresented defendants.

Accordingly, the Council's view is that it is more appropriate to adopt a more flexible guilty plea scheme to allow the court greater discretion to accommodate the realities of the pre-trial process with the sentencing reduction provided for a guilty plea. This is also supported by research elsewhere that clearly shows the limited ability of changing a defendant's plea behaviour to improve court delay given the nature of other systemic factors that contribute to delay.⁴⁹⁶

Proportionality

As indicated, the Council's view is that the amendment to the *Sentencing Act 1997* (Tas) should also include a provision to allow the court to ensure that the penalty imposed is not unreasonably disproportionate to the nature and circumstances of the offence. This reflects the approach in New South Wales, South Australia and the Australian Capital Territory.⁴⁹⁷ This principle has also been recognised by case law in other jurisdictions where it has been accepted that it is appropriate for the court to decline to provide a discount for a guilty plea in exceptional cases where no discount from the maximum penalty is warranted. This is important to allow the court to impose, for example, a life sentence for murder even in a case where the offender has entered a guilty plea. While this may introduce a level of uncertainty into the scheme, the Council's view is that this principle should be incorporated in legislation to reaffirm the principle of proportionality in sentencing and to ensure that it is clear that the courts may decline to make a reduction of sentence in particularly abhorrent cases.

Strength of prosecution case

Contrary to the view of CLC (Tas) and the approach in some Tasmanian sentencing cases, the Council does not consider that the strength of the prosecution case should be a factor considered in determining the sentencing reduction attributable to the utilitarian value of the plea. As Geason J observed in *Director of Public Prosecutions v Broad*, the basis for the reduction is the benefit to the administration of justice and this is separate from issues of remorse or the strength of the prosecution case.⁴⁹⁸ This benefit focuses on the objective/notional benefits of the plea (rather than the actual benefit of the plea in the particular case).⁴⁹⁹ As noted by the Law Society, the reduction should be provided on the basis of the plea alone and not on the basis of weighing the actual savings to promote consistency, certainty and transparency.⁵⁰⁰ Further, the Council's view is that there is no policy basis to deny an offender a reduction in sentence in circumstances where the offender 'did not give up much of a chance of an acquittal' as these are the offenders who should be encouraged to enter an early plea of guilty. The Council notes that the Sentencing Council (in England and Wales) has recently removed the strength of the prosecution case as a factor relevant to the sentencing reduction provided to encourage early pleas where there is a strong Crown case.⁵⁰¹

496 See [2.3], [5.2].

497 See Table 6.1 and discussion at [6.2.2].

498 [2018] TASCRA 5, [27]–[30].

499 See [6.2.2].

500 See [6.2.3].

501 See [6.2.2].

The Sentencing Council's view was that, regardless of the strength of the prosecution case, the systems benefits (saving of time and resources of a trial) and the benefit to witnesses remained the same.

Level of disclosure

The Council also has concerns in relation to the DPP's proposal that the sentencing reduction provided for a guilty plea be based on the level of disclosure provided to the offender. This model reflects the approach taken in the South Australian reforms,⁵⁰² where the maximum statutory discount is provided while the offender only has access to limited information about the nature of the prosecution case (the statement of facts by the police and the information). While an early plea may be made before the prosecution papers are ready for trial, it is the Council's view that there are inherent risks for both prosecution and defendants in creating a system where offenders have a strong incentive to enter a plea of guilty before having sufficient disclosure to understand the case against them. It is noted that the courts are typically dealing with vulnerable people and that the police have a role not only as prosecutors but also as investigators (that is, to find out what happened). Accordingly, the proper administration of justice requires a thorough investigation and disclosure of relevant information to the prosecution (to determine appropriate charges) and to the offender (to obtain proper advice about criminal liability).

While the Council acknowledges that different views may be taken as to what level of disclosure is necessary for this purpose, concerns have been raised about the pressure applied on an offender to enter a plea of guilty before understanding the case against them by a prescriptive scheme based on staged disclosure by the prosecution. Ashworth has 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'.⁵⁰³ Additional concerns exist about the pressure that a sentencing reduction 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.⁵⁰⁴ It has been suggested that the English reforms undermine the requirement to put the prosecution to proof as the tenor of the sentencing reduction reforms are that 'defendants know if they are guilty or not, should be clear about this at an early stage, and should be cooperative'.⁵⁰⁵ Similar comments have been made in the context of the New South Wales scheme, where it has been observed that reforms that tie the sentencing reduction to a reduced level of disclosure are premised on the assumption that a the defendant knows whether they are guilty. This may not be the case if the offender was intoxicated or had a mental impairment. An offender may also have knowledge of the relevant facts but not whether they are guilty of the particular charges as a matter of law.

Further, the Council is concerned that a model based on the South Australian model (maximum discount on the basis of a plea entered to the charges laid by police and the police summary of facts) may result in pleas of guilty entered to offences that do not appropriately reflect the criminality of the matter. In Tasmania, the Council understands that the DPP frequently upgrades charges. For example, there is tendency of the police to charge with assault contrary to the *Police Offences Act 1935 (Tas)* in circumstances involving the use of a weapon or kicking the victim in the head whereas the DPP tends to take the view that a charge contrary to the *Criminal Code (Tas)* s 170 (act intended to cause grievous bodily harm) is more appropriate in such circumstances. Another example is in relation to family violence, where the police may charge with assault contrary to the *Police Offences Act 1935 (Tas)* for an offence involving strangling or smothering, whereas the DPP takes the view that assault contrary to the *Criminal Code (Tas)* may be more appropriate.⁵⁰⁶ In cases of drug trafficking, where further investigation may result in more charges being laid, the prosecution may be disadvantaged if the offender enters a plea of guilty to lesser charges based on police charging.

502 See [5.2.2].

503 Ashworth, above n 42, 175.

504 Ed Johnston, 'The Early Guilty Plea' (2016) 180 *Criminal Law and Justice Weekly*.

505 Ibid.

506 See DPP Guidelines, above n 55.

Accordingly, it is the Council's view that under a more flexible approach, as recommended by the Council, there is greater scope for the timing of prosecution disclosure and other circumstances of the case relevant to the timing of the plea to be considered in determining the appropriate sentencing reduction for the guilty plea. In this context, the Council notes that the structured New South Wales scheme that has recently been adopted has been designed around early disclosure model rather than a staged disclosure model. The focus is on having case conferencing held in the lower court with senior lawyers who have the authority to negotiate charges. The aim is to 'front load' resources in the system rather than reduce the resources necessary to prepare the case file. The view is that there will still be time and money saved by reducing the ongoing management of the file and need to keep in contact with witnesses and having the matter resolve in a lower cost jurisdiction.⁵⁰⁷ In addition, the Council notes that, currently, the proposition that an increase in guilty pleas can reduce delay in the criminal justice system overall is not supported by the research evidence.⁵⁰⁸

Plea negotiations

The Council has considered whether the fact that a guilty plea was the result of a plea negotiation process should be relevant to the discount provided. There has been acceptance in the Court of Criminal Appeal that a discount may not be appropriate in circumstances where the offender's plea of guilty is entered as a means of inducing the prosecution not to proceed with a more serious charge.⁵⁰⁹ It could be argued that to receive a reduction in sentence in these circumstances is to obtain a 'double discount' — a lower sentence imposed given that the offender has entered a plea of guilty to a less serious offence and then a discount for entering a plea of guilty. However, the Council's view is that it is not appropriate to include a statutory provision that would require the court to have regard to plea legislation in determining the appropriate reduction for a guilty plea. This was supported by the Law Society and CLC (Tas). The Council's view is that the settled charges are the appropriate charges that reflect the criminality of the offender's conduct. This is reflected in the DPP Guidelines that set out the principles applied to charge negotiations.

Global sentencing

The Council's view is that the scheme it has recommended is more compatible with global sentencing than a prescriptive sliding scale scheme. 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 (if a prescriptive scheme were adopted) arises if an offender enters guilty pleas for all charges but does so at different times giving rise to different discounts. 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).⁵¹⁰ Tasmanian courts 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. Accordingly, concern can be 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 a plea of guilty has potential to involve significant complexity. For example, an offender may have entered pleas of guilty to a 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. In the Magistrates Court, it is more common for offenders to be dealt with for multiple matters at the same time and these matters may be unrelated in time and circumstance. For this reason, concerns in relation to the complexity posed by global sentencing are even greater in that jurisdiction.

507 See [5.2.3].

508 See [5.3].

509 See *Hyland v R* [1995] TASSC 144. See [4.1.1].

510 *Sentencing Act 1997* (Tas) s 11. See Warner, above n 57, 56–57.

The Council notes that the Law Society considered that a statutory scheme with specified percentage reductions for pleas entered at particular time points would not create a difficulty with global sentencing in Tasmania. It wrote that: 'In reality defence counsel sees this as being a non-existent problem. The judicial officer will simply need to articulate the relevant discount for each and then identify the overall global sentence'. However, the Council's view is that global sentencing does pose more difficulties in relation to a prescriptive scheme with set time frames than a more flexible scheme. This has been highlighted in South Australia, where the operation of the sentencing discount for a guilty plea in the 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) had been considered in several South Australian decisions.⁵¹¹

In contrast, if the scheme does not have prescriptive time periods, then global sentencing is more easily accommodated. The model that the Council recommends be adopted is that contained in the s 6AAA of Victoria's *Sentencing Act 1991*, which 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:

- (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.⁵¹²

The model recommended by the Council allows the court to determine the appropriate global sentence, and then make a reduction for the guilty plea based on the matters to which pleas of guilty are entered and taking into account the timing of those pleas.

Characteristics of offender

The Terms of Reference also ask the Council to consider whether the characteristics of a defendant should be relevant to eligibility for statutory reductions in sentence. The Council's view is that there 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.⁵¹³ 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 recidivism⁵¹⁴ 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

511 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] SASCFC 154. A more detailed discussion of these cases is set out in TSAC, above n 130, [5.2.1].

512 VSAC, *Guilty Pleas and Sentencing – Specified Sentence Discount* (2017) <<https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/guilty-pleas-and-sentencing>>.

513 VSAC, above n 1, 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 of the criminal justice system: Payne, above n 21, ix.

514 Ibid 60.

eligibility for a discount for a guilty plea.⁵¹⁵ In relation to any proposal to identify and exclude any particular groups such as offenders who have committed designated serious offences, the Council agrees with VSAC 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'.⁵¹⁶

Recommendation 4

The *Sentencing Act 1997* (Tas) be amended to set out the following factors as relevant to the exercise of the court's discretion to give a discount to reflect the utilitarian value of the plea:

- (1) the fact of the guilty plea;
- (2) the timing of the plea or the indication of the intention to plead guilty assessed in the circumstances of the case; and
- (3) that the lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence.

6.3 DISCLOSURE OF THE VALUE OF THE PLEA

In Tasmania, the traditional approach of the court has been not to specify the sentencing reduction given for a guilty plea in a particular case and, accordingly, there has been no general indication from the Court of Criminal Appeal of the range of the discount for guilty pleas that may be appropriate. This is contrary to the approach in comparable jurisdictions.⁵¹⁷ More recently, there has been a clear shift in the approach of the Court of Criminal Appeal to the recognition of the permissibility of specifying the reduction applicable for the utilitarian value of the plea. This is reflected in a change in the approach taken to the disclosure of the value of the plea in the Supreme Court, where the actual reduction in sentence provided on the basis of the utilitarian value of the plea has been provided in 22.6% of cases from April 2018 to 2 August 2018. Unlike some other jurisdictions, there is no legislative basis requiring (or allowing) a sentencer to specify the value of the sentencing reduction attributable to the value of the guilty plea.

6.3.1 APPROACH IN OTHER JURISDICTIONS

There are two broad approaches to stating the value of the plea by the court that have been adopted in other comparable jurisdictions:

- (1) **The statute is silent about the requirement of the court to state the value of the discount provided for a guilty plea.** However, the practice of the court is to specify the reduction attributable to a guilty plea. This is the approach in New South Wales (summary offences and commonwealth offences and offences involving offenders under the age of 18 at the time of the offence and 21 at the time when charged before the court), South Australia, the Northern Territory and New Zealand.⁵¹⁸ This is also the position that applies in England and Wales by virtue of the sentencing guideline.⁵¹⁹
- (2) **The statute requires the court to state the value of the guilty plea (that is the reduction given for the guilty plea).** This is the approach in Victoria (for offences where the sentence is one of imprisonment, a community correction order for a period of two years or more, or a fine exceeding 10 penalty units or an aggregate fine exceeding 20 penalty units), Western Australia, New South Wales (most indictable offences) and the Australian Capital Territory.

515 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 31, 247.

516 VSAC, above n 1, 60.

517 See Table 5.1.

518 See Table 5.1.

519 See Table 5.1.

- 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'.⁵²⁰ VSAC considered that this allowed for transparency, accountability and clarity.⁵²¹ 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.⁵²² However, the section has been criticised by judges on the basis that it introduces artificiality into the sentencing process.⁵²³ 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.⁵²⁴
- In Victoria and the ACT, where the requirement to state the reduction is set out in legislation (rather than applying as a matter of practice or required by a guideline judgment), it does not apply to all offences. In Victoria, the requirement to state the discount provided is only intended to apply for more serious offending as it applies in relation to custodial orders, sentences of imprisonment, community correction orders for a period of two years or more or fines exceeding 10 penalty units or aggregate fines exceeding 20 penalty units, s 6AAA(1)(b). In other cases, under the Victorian legislation the court may state the sentence that it would have imposed.⁵²⁵ Similarly, in the Australian Capital Territory, the obligation to state the value of the plea only applies if the court is considering imprisonment.⁵²⁶ This approach has the advantage of allowing the offender and his or her legal representative in more serious cases to see that a reduction has been provided and to allow for the discount to be calculated (to inform other offenders of the value of the plea). However, the legislation does not impose this obligation on courts that are dealing with less serious matters but allows the court to specify the reduction if desired.
- In New South Wales, the provisions in relation to the recently introduced guilty plea sentencing reduction scheme only apply to indictable offences (other than commonwealth offences or offences where the offender was under the age of 18 years when the offence was committed and under the age of 21 years when charged before the court with the offence).⁵²⁷ In these cases, the court must record how the sentence was calculated if the sentencing reduction is applied and must record the reasons for the determination if the court determines not to apply or to reduce the fixed reduction.⁵²⁸

In contrast, in Western Australia, the *Sentencing Act 1995* (WA) provides that the court may reduce the head sentence to recognise the benefits to the State and to any victims or witness to the offence from a guilty plea. If the court reduces the head sentence for an offender, the court must state that fact and the extent of the reduction in open court.⁵²⁹ This applies to all offences.

6.3.2 SUBMISSIONS RECEIVED AND VIEWS FROM CONSULTATIONS

A key theme in the submissions received and in consultations with stakeholders in Tasmania and interstate was the need for transparency and consistency in the application of a sentencing reduction for a guilty plea.

Justice Geason supported a statutory approach to stating the value of the discount attributable to a guilty plea. His Honour's analysis indicated that this did not interfere with the sentencing discretion or the instinctive synthesis approach as it involves a non-sentencing purpose (rather than a sentencing purpose). In relation to setting out the value of the guilty plea as part of the sentencing process, his Honour wrote that:

520 *Sentencing Act 1991* (Vic) s 6AAA(1).

521 VSAC, above n 1, 54.

522 *Ibid* 34, 41.

523 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). See also the findings from the study by Flynn and Freiberg, above n 45 discussed at [6.1.5].

524 *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).

525 *Sentencing Act 1991* (Vic) s 6AAA(3).

526 *Crimes (Sentencing) Act 2005* (ACT) s 37.

527 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25A.

528 *Ibid* s 25F(8).

529 Sections 9AA(2), (4).

6. Nor is the sentencing discretion interfered with, a matter sometimes cited to resist change. The utilitarian benefit of a plea is not engaged as a consideration within the “instinctive synthesis” involved in weighing the various sentencing considerations to arrive at a sentence. (Contra mandatory sentencing which is a direct interference in the exercise of that discretion because it mandates a result irrespective of the sentencing considerations in play: youth, remorse, etc).
7. The utilitarian benefit of the plea is recognised by the application of a discount *after* the discretionary exercise has been completed. Because it is a non-sentencing consideration, its application to the sentence at this point is not contrary to the injunction against a two-tiered approach to sentencing: *Wong v R* (above); *Veen (no.2)*. So much is recognised by McHugh J in *Markarian v The Queen* (above) at [74].
8. The amount of the discount applied to the sentence should be published in the comments on sentencing, in the interest of transparency; *Xiao v The Queen* [2018] NSWCCA 4; *DPP v Broad* (above) per Estcourt J at [27].
9. The pursuit of an objective such as that which accrues to the administration of justice from a plea, is a matter of policy. Policy is, broadly speaking a matter for parliament. Because it is a policy matter it should be legislated. That approach ensures the policy is required to be applied by all sentencing courts within a jurisdiction. Once implemented courts can offer a fast track system of case management for criminal matters, which may assist in reducing case backlogs.
10. A statutory approach also overcomes any concern that this procedure is contrary to common law principles applicable to sentencing; see *Cameron v The Queen* [2002] HCA 6, (2002) 209 CLR 339.⁵³⁰

Similarly, CLC (Tas) indicated that it ‘strongly believe[d] that court should be required to state the weight that has been given to the guilty plea and its effect on the sentence imposed and believe[d] that the Victorian approach provides a good model’. It was the opinion of CLC (Tas) that:

In our opinion, the introduction of a legislative provision requiring the court to state the weight attached to the guilty plea and its effect on the sentence imposed will lead to greater transparency, accountability and clarity and may well result in a reduction in appeals before the Court of Criminal Appeal. This is because defence counsel will have the confidence to advise clients of the likely reduction in sentence if there is an early guilty plea. The other advantage of the Victorian approach is that judicial officers retain some discretion.⁵³¹

The DPP would also support a model where the court was required to state the value of guilty plea.⁵³²

The Law Society considered that the benefit of a requirement to state the reduction by the court would depend upon the nature of any scheme imposed. For example, if there were mandated discounts attributable to stages of the pre-trial process (such as applies in New South Wales and the England and Wales), then the Law Society did not consider that it would be necessary for the expression of weight to be given by the court. However, in the scenario where the Magistrate needs to provide a discount within a range, then the court should be required to give that information in their reasons. The Law Society did not support a model where the legislation recognised the permissibility of stating how much weight has been given to the guilty plea and its effect on the sentence imposed but did not obligate the court to do this. It considered that consistency and transparency were essential.⁵³³

In relation to whether there should a different approach adopted for more serious offences or for different sentencing types, the Law Society considered that:

the preferred position would be for uniformity. However, from a practical point of view defence counsel’s experience is in terms of motivation for early resolution and known for defendants is:

- i Length of sentence; and
- ii Whether any imprisonment would be suspended or partially suspended and accordingly a delineation if it is needed between types offences is perhaps better expressed in terms of ... possible outcome. That is if imprisonment is to be the outcome for offences.⁵³⁴

6.3.3 THE COUNCIL’S VIEW

The Council’s view is that a statutory provision should be introduced in the *Sentencing Act 1997* (Tas) that requires that a judge or magistrate to set out the reduction in sentence that is attributable to a plea of guilty. This would be consistent with the legislative approach in Victoria, Western Australia, New South Wales (indictable offences other than commonwealth offences or offenders under the age of 18 when the offence was committed and under

530 Submission 3.

531 Submission 2.

532 Submission 1.

533 Submission 4.

534 Submission 4.

21 when the matters was charged in court), the ACT and the practice of the courts in South Australia, New South Wales (summary offences and indictable offences to which the new scheme does not apply), the Northern Territory, New Zealand and England and Wales. It would provide a statutory endorsement to the approach of the Court of Criminal Appeal articulated by Geason J in *Broad*⁵³⁵ and subsequently reflected in a number of sentencing comments. This approach was also supported by his Honour, in his submission to the Council, as well as by the DPP, The Law Society and CLC (Tas).

As discussed above, the Council's view is that, if enacted, the legislative provision should make it clear that the sentencing reduction should be stated, not only where the utilitarian value of the plea results in a reduction in the length of the sentence, but also where the nature of the sentence has changed due to the plea (for example, where an executed sentence of imprisonment is changed to a partly or fully suspended sentence or another sentence type such as a community correction order (once introduced)). This reflects the experience in Victoria that in one-third of cases the sentence type changed as a result of the guilty plea.⁵³⁶

Research in Victoria indicates that the introduction of a statutory requirement for judges (in certain cases) to state the sentence that they would have imposed has resulted in greater certainty and transparency as there has been a very high compliance rate with this requirement by judicial officers.⁵³⁷ Subsequent evaluation found that the provision did not appear to have resulted in an increase in the number of guilty pleas (which indicated that it did not inappropriately operate as an inducement to enter a plea of guilty) but that since the introduction of the *Sentencing Act 1997* (Vic) s 6AAA, there had been a significant increase in the rate of early guilty pleas. However, it was not possible to determine the extent to which this particular reform had contributed to this outcome given other reforms that had been adopted to improve efficiency.⁵³⁸ Research in New South Wales examining the effect of the guideline judgment in *Thomson* found a significant increase in the percentage of judges quantifying the discount for the guilty plea (4.4% compared to 63.4%) for the offence of robbery. There was also an indication of an increase in the number of early guilty pleas for this offence. However, more generally, it was found that there had not been a change in plea behaviour or a reduction in court delay.⁵³⁹ This was attributed to scepticism in relation to the actual sentencing benefit from an early plea and inconsistency between judicial officers in the application of the sentencing reduction. In Scotland, research suggested that a requirement for judicial officers to state the extent of the discount for a plea of guilty had resulted in an increase in early pleas. However, as with Victoria, other reforms in the pre-trial process relating to the legal aid structure and disclosure also occurred and these would also have contributed to earlier pleas.⁵⁴⁰

Although the research evidence is not clear about the extent to which the statement of the value of the reduction in open court is effective (on its own) to change plea behaviour, it is clear that such a provision is effective to change judicial behaviour. It is also clear that such a provision can be effective with other reforms to the pre-trial process to facilitate earlier pleas of guilty. Currently, it is believed that there is little incentive to resolve matters early. In this context, a requirement for judicial officers to provide a statement of value addresses concerns that there may be no or little practical sentencing benefit applicable to an early plea. A clear signal from the courts about the value of an early plea may be useful to shift cultural practices within the legal profession that have resulted in little focus being given to addressing the merits of an early plea, as well as leading to a change in defendant behaviour. The Council's view is that requiring the court to set out the sentencing reduction provided to reflect the utilitarian value of the plea will create greater clarity and transparency. It will provide information to offenders and their legal representatives about the tangible benefit from an early guilty plea and provide a basis for legal practitioners to clearly communicate the likely extent of the discount to their clients, with a view to facilitating appropriate early pleas of guilty. While the Council acknowledges that some people will always enter a late plea of guilty regardless of any sentencing incentive for an early guilty plea and that this reform is unable (in itself) to address the broader systemic factors that contribute to court delay, as Geason J wrote in his submission, it will create transparency and it will allow the court to better adapt its pre-trial processes to address court delay.

The Council's view is that this provision should apply in both the Supreme Court and the Magistrates Court to offenders sentenced under the *Sentencing Act 1997* (Tas). It is the Council's view that transparency and consistency

535 See [4.1.2].

536 See [5.2.1].

537 Ibid.

538 Ibid.

539 See [5.2.3].

540 See [5.2.6].

is important in both jurisdictions. The Council does not consider that there should be any offences that are specifically excluded from the scheme (such as drink driving or traffic offences as raised in Term of Reference 5) or any offenders specially excluded (such as offenders with previous convictions or juvenile offenders sentenced under the *Sentencing Act 1997* (Tas) as raised in Term of Reference 5).⁵⁴¹

As discussed above, the Council's view is that there 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.⁵⁴² 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,⁵⁴³ 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.⁵⁴⁴ In relation to any proposal to identify and exclude any particular groups such as offenders who have committed designated serious offences, the Council agrees with VSAC 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'.⁵⁴⁵

However, the Council does not consider that the requirement to state the discount should apply to all cases. It is the Council's view that the requirement that the court must state the discount should be reserved for more serious matters and so the Council recommends that the requirement should only apply where a sentence of imprisonment is the appropriate sentence (without the reduction for the guilty plea). This reflects the Victorian, New South Wales and Australian Capital Territory models where the equivalent provision only applies to more serious offences. As indicated, in Victoria, the *Sentencing Act 1991* (Vic) s 6AAA only applies to sentences of imprisonment, community correction orders for a period of two years or more or fines exceeding 10 penalty units and in the Australian Capital Territory, the *Crimes (Sentencing) Act 2005* (ACT) only applies if the court is contemplating a sentence of imprisonment. Similarly, in New South Wales, the legislative requirement to state the discount (rather than the requirement of the guideline judgment) only applies to indictable offences.

This approach is aimed at preventing difficulties that may arise due to the volume of cases in the Magistrates Court in relation to lower scale penalties such as fines and good behaviour bonds. In the Magistrates Court, in 2016–17, 81% of offenders received a non-custodial sentence and the provision that the court must state the discount would not apply to these matters (unless the court had determined that a sentence of imprisonment was the appropriate sentence without the reduction for the guilty plea). The Council acknowledges that there may be concerns about specifying the reduction in sentence attributable to the guilty plea when sentencing an offender to a short period of imprisonment. However, the Council's view is that this is not an insurmountable difficulty (for example, a sentence of imprisonment for one month could be reduced to 24 days to take account of an early guilty plea). It is the Council's view that there should be consistency in the approach to the imposition of sentences of imprisonment in both the Supreme Court and the Magistrates Court. In addition, the proposed reforms would be undermined if offenders sentenced in the Magistrates Court were excluded, given that the vast majority of offenders are dealt with in the Magistrates Court. In the period 2016–17, 91.7% of defendants were finalised in the Magistrates Court.⁵⁴⁶ Further, there are matters that are remitted for sentence from the Supreme Court to the Magistrates Court, as well as matters that can be tried in the Supreme Court and the Magistrates Court and the same sentencing principles should apply to these offences.

541 The application of the scheme to driving offences is further considered at [6.6].

542 VSAC, above n 1, 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 21, ix.

543 Ibid 60.

544 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 31, 247.

545 VSAC, above n 1, 60.

546 ABS, above n 83.

In contrast, the reforms proposed will require the Supreme Court to state the discount in most cases given that in 2016–17 only 9.6% of offenders sentenced in the Supreme Court received a non-custodial sentence.⁵⁴⁷ However, in cases where the court is not required to state the reduction, the Council's view is that the legislation should make it clear that the court may indicate the sentence reduction if the court considers that it is appropriate.

Recommendations

6. The *Sentencing Act 1997* (Tas) should be amended to require that a judge or magistrate *must* set out the reduction in sentence that is attributable to a plea of guilty in cases where a sentence of imprisonment is the appropriate sentence (without the reduction for the guilty plea).
7. The *Sentencing Act 1997* (Tas) should be amended to provide that a judge or magistrate *may* set out the reduction in sentence that is attributable to a plea of guilty in cases other than where a sentence of imprisonment is the appropriate sentence (without the reduction for the guilty plea).
8. The legislative provision should make it clear that the sentencing reduction should be stated where the utilitarian value of the plea results in a reduction in the length of the sentence or where the nature of the sentence has changed due to the plea.

6.4 QUANTIFYING THE VALUE OF THE PLEA IN LEGISLATION

A number of jurisdictions have legislative provisions that require a statement of the value of the sentencing reduction attributable to a guilty plea. If such a legislative statement of value were introduced in Tasmania, there are some interrelated issues that would need to be resolved including:

- (1) whether the statutory scheme should be prescriptive model where the reduction is linked to a particular stage in the pre-trial process or more flexible model based on a plea at the 'first reasonable opportunity';
- (2) whether the reduction should be expressed as a single cap (that is, the maximum reduction that may be provided) or a sliding scale (different maximums reflecting the time in the plea is entered);
- (3) whether the discount should be fixed or expressed as 'up to';
- (4) the amount(s) of the reduction set out in legislation.

Further, it would be necessary to determine exceptions to the statutory schemes.

Accordingly, as an initial matter, the Council needs to determine whether the value of the sentencing reduction should be set out in legislation or left as a matter of case law. It is only if the Council recommends that the value of the plea should be set out in legislation that it is necessary to provide further advice on the precise way in which the value of the plea should be quantified.

It is the Council's view that the value of the discount should be left as a matter of case law and should not be set out in legislation. Accordingly, it is not necessary for the Council to provide further advice on the structure of the scheme. However, as these were matters about which feedback was sought in the consultation process, the Council has included an overview of the position in other jurisdictions and the feedback received. It is stressed that the Council does not have a decided view about any of these additional issues or make any recommendations about the details of a sentencing reduction scheme that contains a statement of the value of the plea.

6.4.1 APPROACHES IN OTHER JURISDICTIONS

There are four approaches that can be identified in relation to a statutory statement of the value of the sentencing reduction attributable to a guilty plea:

- (1) **Statute is silent about the value of the discount.** This is the approach in Victoria, the Australian Capital Territory, Queensland, New South Wales (summary offences and certain indictable offences), the Northern Territory and New Zealand.

547 Ibid.

- In New South Wales, for summary offences, the 'gap' is filled by a guideline judgment that specifies the range of the reduction between 10% and 25% depending on the timeliness of the plea.⁵⁴⁸ This involves an assessment of whether the plea was entered at the earliest opportunity. This was also the position in relation to indictable offences until recent reforms contained in the *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A were introduced. Similarly, case law in New Zealand and the Australian Capital Territory has filled the gap and provided an indication of the appropriate level of reduction that should apply based on the timing of the plea.
 - In Victoria, it is possible to determine the reduction given in a particular case (as there is a requirement to state the value of the discount).
- (2) **The statute sets out a prescribed discount based on the timing of the plea and this is expressed as a single cap** (for example, up to 25%). The court has a discretion as to the extent of the reduction provided up to this amount. This is the approach in Western Australia, where the *Sentencing Act 1997* (WA) s 9AA(4) provides the court must not reduce the fixed term of imprisonment — (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).
- (3) **The statute sets out a prescribed reduction based on the timing of the plea and this is expressed as a series of 'up to' caps attributable to a particular stage in the pre-trial process** (that is, a sliding scale). This is the approach set out in the South Australian legislation. The court retains discretion as to the amount of the reduction as the discount is 'up to' the amount provided. However, it is noted that the courts have interpreted the provision to mean that the maximum specified reduction attributable to the particular time frame should be given unless a good reason exists to provide a reduced discount. In *R v McPhee*,⁵⁴⁹ Nicholson J observed that:

sentencing judges should take a robust view with respect to pleas which satisfy the various criteria ... Ultimately, the actual discount provided remains discretionary ... Nevertheless, if guilty persons are to be encouraged to plead early ... they will need to be confident that their expectations of a substantial discount in accordance with the requirements of the legislative regime will be met. Related to this is the need for defence counsel to be in a position to advise their clients on this topic with confidence.⁵⁵⁰

Accordingly, in *R v Palmer*,⁵⁵¹ it was held that 'sentencing judges in utilising s 10C should adopt a utilitarian approach by giving the maximum discount available for a guilty plea pursuant to the provision unless good reason exists not to do so'.⁵⁵²

The legislation in South Australia 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% if the offender enters a guilty plea between arraignment and the first day of the trial (for indictable offences or minor indictable offences being dealt with in a higher court) or if the offender enters a guilty plea 'in any other circumstances' (for summary offences or minor indictable offences to be dealt with as a summary offence).

- (4) **Statute sets out a sliding scale of caps attributable to a particular stage in the pre-trial process and this reduction is mandatory (subject to limited exception)**. This is the approach in NSW, for indictable offences following the commencement of the *Crimes (Sentencing Procedure) Act 1999* (NSW) Division 1A, which creates a sliding scale for indictable offences (other than Commonwealth offences and offences where the offender is under the age of 18 at the time when the offence was committed and under the age of 21 when charged before the court with the offence).⁵⁵³ This scale ranges 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

548 See [5.1], [5.2.3].

549 [2014] SASFC 107.

550 Ibid [46].

551 [2016] SASFC 34.

552 Ibid [19].

553 This Division is set out in full in Appendix B.

offender, to 5% if entered at a later time.⁵⁵⁴ These discounts are mandatory unless one of the exceptions apply in relation to the level of culpability of the offender, there are disputed facts or a life sentence is imposed.⁵⁵⁵

This reflects the recommendations of the NSWLRC. 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.⁵⁵⁶
- 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 applying the discount for an early plea and that this dilutes any impact of a statutory scheme and undermines the utilitarian rationale.⁵⁵⁷
- 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.⁵⁵⁸

This represents a significant move away from the situation that had applied for indictable offences in New South Wales, where the maximum sentencing reduction was available when the offender had entered a guilty plea at the ‘first available opportunity’.

It is noted that the change to the scheme that applies to discounts for guilty pleas has been accompanied by a significant change in the pre-trial process for indictable matters.⁵⁵⁹

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.⁵⁶⁰ This differed from the model contained in the earlier guideline, which provided for the maximum deduction applied when the plea was entered at the ‘first reasonable opportunity’.

6.4.2 A STATUTORY STATEMENT OF VALUE

As indicated, as an initial matter, it is necessary to determine if there should be a statutory statement of the value of sentencing reduction attributable to a guilty plea.

Submissions received and views from consultations

A statutory statement of value of the guilty plea was opposed by CLC (Tas) who stated that:

There should be no cap, range or sliding scale introduced. There will always be cases where an early plea of guilty is of truly enormous benefit and ought to be rewarded as such. On the other hand, there will be cases for similar crimes where an early plea of guilty is of less benefit. Both the defence and prosecution need to be able to make their case for a sentencing discount on the plea of guilty and provide the judicial officer with the discretion they need to arrive at an appropriate sentence, rather than have the sentencing discount prescribed in legislation.⁵⁶¹

CLC (Tas)’s opinion was that a statutory scheme setting out the extent of the discount as a percentage reduction was:

likely to amount to a blunt instrument. The amount of the discount may be counterproductive either because it is set too low and result in accused persons choosing to take the risk of a finding of guilt and imprisonment or because it is set too high and innocent persons plead guilty to avoid the possibility of a longer sentence.⁵⁶²

554 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25D(2).

555 *Ibid* s 25DF.

556 NSWLRC, Final Report, above n 18, 228.

557 *Ibid* 228.

558 *Ibid* 229.

559 See [5.2.3].

560 Sentencing Council (UK), above n 251, 5.

561 Submission 2.

562 Submission 2.

CLC (Tas) preferred a model where the existing discretion of the court to take into account a guilty plea in imposing sentence should be preserved.⁵⁶³

In contrast, the Law Society supported the creation of a statutory scheme that set out the extent of the discount as a percentage reduction in sentence. Its view was that would remove judicial disagreement and doubt as to the basis and utility of a plea of guilty and simplify the process. It considered that it provided clarity and certainty for defendants. The Law Society indicated that it supports the introduction of a statutory discount scheme for pleas of guilty. It considered that a 'clear mandated sentencing discount offers clarity to defendants and a tangible, known realisable sentencing discount'. It considers transparency of the discount was essential and was one that should apply even if mandated discount percentages are not applied. The Law Society's view was that:

Disclosure of the discount achieves the purpose of transparent justice and allows all concerned to easily determine that issue in assessing the appropriateness of any sentence. Defence counsels' experience is that a defined known benefit would act as a greater incentive to a defendant to enter a plea as they will have certainty of outcome in that regard. It should be noted that sentencing ranges are perceived to be on the increase by defendants and by defence counsel across a range of charges. That perception is heightened by the political push for mandatory sentencing. It is this reason that transparency in the amount of discount given is of particular use. Defence counsels' experience is that sentence indication through contest mention usually resolves matters and a similar logic and outcome applies to disclosure of the discount on an early plea of guilty.⁵⁶⁴

The Law Society's view was that, on balance, the same scheme should apply to the Magistrates Court as applied in the Supreme Court, even if 'the existence of contest mentions within the Magistrates Court might be seen a lessening of the need for mandated reductions in terms of practical effects — i.e. early resolution of matters without the need for contested proceedings'.⁵⁶⁵

The DPP supported a statutory statement of the value of the sentencing reduction attributable to a guilty plea. His view was that:

despite its complexities, a statutory discount scheme has significant advantages in that a defendant will know generally what discount they will receive at whatever stage they enter a plea. This will encourage earlier pleas, earlier negotiations between prosecution and defence and will allow valuable resources to be diverted to those cases which are genuine trials.⁵⁶⁶

The DPP indicated that an alternative to a statutory sentencing reduction scheme would be to amend the *Sentencing Act 1997* (Tas) to set out factors that were to be taken into account by the court when weighing a plea of guilty. The DPP suggested that 'those factors might include that an early plea, particularly one prior to disclosure, would have significantly more weight than a later plea received after disclosure has been made'.⁵⁶⁷

The Council's view

The Council's view is that a statutory statement of the utilitarian value of the plea should not be introduced in Tasmania. The Council accepts that a statutory statement of the value of a plea can be supported on the basis of transparency, clarity and consistency, and that it makes clear to sentencer, defence and prosecution the value of a guilty plea and removes uncertainty in relation to whether a discount is provided for a guilty plea. However, the Council considers that these benefits can also be achieved by requiring the court to state the discount provided. The Council's approach has been to retain the discretion of the court as to the value of the reduction in the context of the particular case, and it may be that in some cases no discount is appropriate. As indicated at [6.2.4], the Council is not in favour of a sliding scale scheme in relation to the sentencing reduction attributable to a plea entered at a particular time. Further, the Council also does not consider that an upper cap or a legislative indication of an overall range is necessary in the Tasmanian context.

563 Submission 2.

564 Submission 4.

565 Submission 4.

566 Submission 1.

567 Submission 1.

The Council notes that in Western Australia, the upper cap of 25% was introduced in response to community concern that the original maximum discount under common law of 35% was too high, resulting in sentences that did not reflect the criminality of the offending.⁵⁶⁸ There is no suggestion that too great a reduction is being applied for early guilty pleas in Tasmania. There is only limited information in Tasmania (given the traditional approach of the Supreme Court) in relation to the maximum discount provided but the information that does exist would suggest that the maximum discount provided is 25%.⁵⁶⁹ This is broadly consistent with approaches in most other jurisdictions (with the exception of South Australia) where the maximum discount ranges from 25% to 30%.⁵⁷⁰

Further, as discussed, there are difficulties in applying a percentage reduction to cases where the sentencing reduction would have the effect of changing the sentence type and would also fetter judicial discretion and not allow the circumstances of the particular case to be taken into account in determining the value of the guilty plea.⁵⁷¹

An additional objection to specifying a cap or a reduction range is that it would be premature given that there is only limited information about the extent to which courts recognise the value of a guilty plea.⁵⁷² As a general rule, Tasmanian courts have not specified 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'.⁵⁷³

The Council observes, however, that while it does not support a statutory statement of the utilitarian value of the plea, it is important that the sentencing practice of the court in providing a sentencing reduction for a guilty plea reflects a clear distinction between pleas of guilty that are made early and late in the particular circumstances of the case. In this regard, the Council notes that courts may find it useful to observe the range of discounts provided in other jurisdictions.⁵⁷⁴

Recommendation 9

A statutory statement of the utilitarian value of the plea should not be introduced in Tasmania.

6.4.3 PRESCRIPTIVE COMPARED TO A FLEXIBLE MODEL – A 'CAP' OR A SLIDING SCALE

If a statutory statement of value had been recommended, it would have been necessary to determine whether the value should be expressed as a single 'cap' or a sliding scale.

Broadly speaking, there are two general legislative approaches that can be identified in terms setting out the value applicable based on the timing of the guilty plea:

- (1) a prescriptive 'sliding scale' approach based on particular time periods such as the New South Wales and South Australian models; or
- (2) a more flexible 'cap' approach based on a plea at the 'first reasonable opportunity'. This is the Western Australian model where, under statute, the maximum sentencing discount in relation to a fixed term of imprisonment is available for a plea at the 'first reasonable opportunity' up to a maximum 'cap' of 25%.

568 NSWLRC, Final Report, above n 18, 228.

569 See [4.2.2].

570 See Table 5.1.

571 See [6.2.3].

572 VSAC, above n 1, 63.

573 Ibid.

574 See Table 6.2.

6.4.4 FIXED OR ‘UP TO’

If a sliding scale model had been recommended by the Council, it would have been necessary to determine if the scheme was a ‘fixed’ discount or a ‘maximum’ discount (‘up to’) scheme. As indicated at [5.1], even though South Australia, England and Wales and New South Wales have a sliding scale linked to pre-trial stages, there is a key difference in the operation of the sentencing reductions schemes. The approach in New South Wales and in England and Wales is that the reduction in sentencing is mandatory or fixed (subject to limited exceptions where the court may make no or a reduced discount) and South Australia where the legislation has a discretion to provide a discount ‘up to’ the relevant maximum. As discussed at [5.1], since the introduction of the sliding scale, the courts in South Australia have interpreted the sentencing reduction scheme to mean that, unless there is good reason, a reduction close to the maximum should ordinarily be given.⁵⁷⁵ However, there is greater scope to provide a reduction less than the maximum in the circumstances of the case. In contrast, in New South Wales and England and Wales, the maximum must be given unless one of the limited exceptions apply.

6.4.5 EXCEPTIONS TO A SLIDING SCALE SCHEME

If a sliding scale statutory reduction scheme were adopted, it would be necessary to decide the exceptions to the schemes that should be set out in legislation.

In statutory sentencing reduction schemes for guilty pleas where a sliding scale operates, there are two types of exceptions provided in the scheme:

- (1) provisions that operate in favour of the defendant to allow the defendant to obtain a bigger discount than that applicable to the time of the defendant’s actual plea; and
- (2) provisions that operate against a defendant, so that the defendant does not get the full discount (or any discount) even if he or she pleads within the requisite time period.

The South Australian, New South Wales and English scheme set out examples of the types of exceptions that may be created.⁵⁷⁶

6.4.6 DETERMINING THE VALUE AND THE TIME PERIODS

If it were 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, then it would have been necessary to decide on the amount by which a sentence can be reduced and how those values will relate to the timing of the plea.

Table 6.2 sets out the values of the reduction available in other comparable jurisdictions.

575 Martin, above n 277, 33.

576 For more details, see TSAC, above n 130, [5.2.1], [5.3.1].

6.5.1 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, unless there are exceptional circumstances. The Council has identified only one offender sentenced under this provision to date.⁵⁸⁰ The Tasmanian Government's stated criminal justice agenda may increase the number of mandatory minimum sentences in Tasmania. It has introduced a Bill that would expand the mandatory penalty contained in the *Sentencing Act 1997* (Tas) to serious bodily harm caused to off duty police officers (as well as on duty officers).⁵⁸¹ The Tasmanian Government has also previously (unsuccessfully) attempted to introduce mandatory minimum sentences for serious sexual offences committed against children.⁵⁸² However, this Bill has been reintroduced to Parliament⁵⁸³ and if passed, 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 in the *Police Offences Act 1935* (Tas) s 42 for a second conviction for the summary offence of taking or using a vehicle or vessel. 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.⁵⁸⁴ 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.⁵⁸⁵ In contrast, these offences involved many offenders with SAC Stats showing that 10 363 offenders were sentenced for a drink or drug driving offence. 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.

6.5.2 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'.⁵⁸⁶

Table 6.3: 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% ⁵⁸⁷
<i>Power of Criminal Courts (Sentencing) Act 2005</i> (UK) s 110 (third domestic burglary)	A discount of up to 20% ⁵⁸⁸
<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

580 See *Tasmania v McCabe*, 3 November 2017 (Slicer AJ).

581 Sentencing Amendment (Assaults on Off-duty Police) Bill 2018 (Tas).

582 Sentencing Amendment (Mandatory Sentencing for Serious Sexual Offences Against Children) Bill 2017 (Tas).

583 See Sentencing Amendment (Mandatory Sentencing for Serious Sexual Offences Against Children) Bill 2018 (Tas).

584 *Police Offences Act 1935* (Tas) s 42(5).

585 *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 17(5). See Warner, above n 57, 166–168 for a discussion of special circumstances.

586 Ashworth, above n 42, 172.

587 *Criminal Justice Act 2003* (UK) s 144(2).

588 *Ibid* s 144(2).

In South Australia, the *Sentencing Act 2017* (SA) s 48(2) 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.⁵⁸⁹ This is not a provision that relates to mandatory minimum sentences (rather, it relates to mandatory minimum non-parole periods), but it is indicative of a model that may be used to address the conflict between mandatory sentencing (in whatever guise) and a sentencing reduction scheme for guilty pleas. In relation to the corresponding provisions that existed under the former South Australian legislation, the Court of Criminal Appeal 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.⁵⁹⁰ 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.⁵⁹¹ 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 the case should be treated as an exception to the rule'.⁵⁹² 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.⁵⁹³ Given the similarity with the new provisions in the *Sentencing Act 2017* (SA) it is likely that this interpretation will continue to apply.

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.⁵⁹⁴

6.5.3 SUBMISSIONS AND VIEWS EXPRESSED

The Law Society indicated that its view was that there should be a statutory provision in the sentencing reduction scheme that allows the court to impose a sentence less than a mandatory minimum sentence in cases where an offender enters a plea of guilty. It considered that this should apply to all mandatory sentences and that there should be no variation in the applicable discount so that the discount available for a plea of guilty for an offence with a mandatory minimum sentence should be the full discount.

The CLC (Tas) expressed its strong opposition to mandatory penalties. Its view was that:

Where there are [mandatory penalties], those mandatory penalties should only be deviated from in exceptional circumstances. Making exceptional circumstances effectively conditional upon a plea of guilty will lead to further injustice.

6.5.4 THE COUNCIL'S VIEWS

At present, as noted at [6.5.1], there are very few mandatory minimum sentences to which the sentencing reduction scheme proposed by the Council would apply given that few offenders are sentenced in relation to *Sentencing Act 1997* (Tas) s 16A and the *Police Offences Act 1935* (Tas) s 42. In relation to mandatory minimum penalties under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 17, the Council notes that the sentencing reduction scheme would not apply to the mandatory fines and would only apply if the court had determined that a sentence of imprisonment was appropriate (before the reduction for the guilty plea is taken into account). Under the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 17, the terms of imprisonment relating to blood alcohol level or repeat offenders is set out as a maximum penalty (rather than a mandatory minimum term).

589 *Sentencing Act 2017* (SA) s 48(3)(b).

590 *R v Hallcroft* (2016) 126 SASR 415 [37] (Kourakis CJ).

591 *Ibid* [69] (Kourakis CJ).

592 *Ibid* [70].

593 *Ibid* [38].

594 VSAC, *Statutory Minimum Sentences for Gross Violence Offences*, Report (2011) 93.

However, if the government introduces mandatory minimum sentences for sexual offences against children it will need to be aware that this will potentially affect pleas of guilty for sexual offences and sentencing practices for these offences. The dilemma is that on the one hand, mandatory minimum sentences will discourage guilty pleas if there is no sentencing incentive to enter an early plea of guilty, but, on the other hand, it will undermine the purpose of having a mandatory minimum sentence. The two policies are inherently contradictory. The resolution of the relationship 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).

A significant 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.⁵⁹⁵ This concern is supported by recent Victorian research, which reported that feedback from participants was generally that an outcome of mandatory sentencing regimes was that offenders were less likely to plead guilty and there would be more trials.⁵⁹⁶ Alternatively, concerns were raised that plea negotiations had a greater role in a the context of a mandatory sentencing regime and there may be undue pressure on a defendant to plead guilty given that a defended trial would expose the defendant to the risk of a mandatory penalty.⁵⁹⁷

In this context, the Council reiterates its opposition to mandatory minimum sentences.⁵⁹⁸

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.⁵⁹⁹ 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 well beyond the saving of resources. 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.⁶⁰⁰ 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.⁶⁰¹ Guilty pleas also save the expense of a trial.⁶⁰²

595 See discussion in TSAC, *Mandatory Sentencing for Serious Sexual Offences Against Children*, Final Report No 7 (2016) 7.

596 Flynn and Freiberg, above n 45, 149. Flynn and Freiberg concluded that '[t]hese responses raise serious questions about the effects of mandatory sentencing regimes, and how they may affect the quality of justice provided – in terms of both pressuring defendants to plead guilty to lesser charges and influencing prosecutors to accept guilty pleas to lesser charges to reduce backlogs. ... The data thus suggest that there is a need to revisit the mandatory and presumptive sentencing regimes and consider whether they are achieving their purposes or creating more problems in the justice process': at 154.

597 Ibid 187–191. However, participants did not consider that this would lead to 'innocent' people pleading guilty but rather 'accused persons who had a "defensible" ... or strong case with a high chance of "beating the charges"': at 191.

598 See TSAC, above n 595, 5–10; TSAC, *Sex Offence Sentencing*, Final Report No 4 (2015).

599 TSAC, above n 595.

600 Ibid 63.

601 Ibid.

602 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 57, 105–106.

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.⁶⁰³

If the government continues to expand the range of offences for which mandatory minimum sentences apply, there are three options available to the government to resolve the issue:

- (1) Make no provision for a discount for a guilty plea in these circumstances (with the attendant risk in relation to reduced guilty pleas).
- (2) Allow for a discount for a guilty plea for all offences with mandatory minimum penalties.
- (3) Allow for a discount in 'special circumstances', for example child sexual offences if the legislation is adopted. A possible model in this regard is the approach to mandatory minimum non-parole periods in South Australia.

The Council provides these views only as an observation, and not as a recommendation of the most appropriate model to adopt.

6.6 MANDATORY SENTENCING

There are some provisions in Tasmania that involve the imposition of special penalties. These are mandatory fixed financial penalties with the court having no discretion in relation to whether or not to impose the penalty. These are in addition to any other sentencing options that a court may impose in the exercise of its discretion.

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 are monetary penalties calculated on the value of the fish or the number of pots, length of the net and/or apparatus used. These provisions provide that 'a court must not reduce or suspend a special penalty for any reason'.⁶⁰⁴ 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)).⁶⁰⁵ 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.

If a statutory discount scheme is adopted in Tasmania, the special penalty would still need to be imposed (without regard to the reduction attributable to a guilty plea). However, in imposing any other sentence in the exercise of the court's sentencing discretion, the timing of the plea would be taken into account.

6.7 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 the vast majority of 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'.⁶⁰⁶ Previously, the Council has identified 45 Acts (as well as other associated regulations) administered by various government departments and agencies that provide for the issue of infringement notices.⁶⁰⁷ 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). These include 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

603 TSAC, above n 595, 73.

604 *Living Marine Resources Management Act 1995* (Tas) ss 267(2), 268(2).

605 It is noted that this is an indictable offence that can be heard in the Magistrates Court if the prosecution and defence agree.

606 *McQuade v Marion City Council* (1998) 100 A Crim R 203, 206.

607 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.

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.⁶⁰⁸

Infringement notices

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.

In relation to traffic offences, it should be made clear 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, forfeiture) that may be imposed. Further, the requirement for the court to state the sentencing reduction only applies where a sentence of imprisonment is the appropriate sentence (without the discount for a plea of guilty). In other cases, such as where the appropriate sentence is a fine or a community-based order, the court may state the discount but is not obligated to do so.

Commonwealth offences

Another area that may pose a challenge to the operation of a sentencing reduction scheme for guilty pleas is its application to Commonwealth offences. This was raised by the Law Society who observed that 'circumstances where a mix of State and Commonwealth offences are dealt with together need to be considered'.⁶⁰⁹ As noted in Table 5.1, the *Crimes Act* (Cth) s 16A provides that regard should be had to any plea of guilty but there is no indication as to how such a plea is taken into account.⁶¹⁰ There is a divergence of approaches in Australian jurisdictions to the discount for a guilty plea in sentencing a federal offender. The NSWLRC found that this resulted in 'different levels of discount being applied, an outcome that is not easy to justify to the offender or an external observer'.⁶¹¹ If Tasmania adopts a statutory sentencing reduction scheme to recognise the utilitarian value of a plea of guilty, then this would create two different approaches to sentencing reductions. This would mean that if an offender pleaded guilty to both State and Commonwealth matters, then the State scheme would apply to the State offence(s) and the pre-existing common law approach would apply to the Commonwealth offence(s). However, this is likely to be a largely theoretical rather than practical issue given that in the period 2014–17, the Council only identified four cases where offenders were found guilty or pleaded guilty to a mix of Commonwealth and State offences.

Assistance to authorities

An additional issue raised by the Law Society was the operation of a sentencing discount scheme for a guilty plea where an accused has also provided assistance to authorities:

The committee has raised what would occur when an accused provides assistance to authorities. In the Cth sphere, for example, s 16A(2) of the *Crimes Act* provides for a plea of guilty to be taken into account and s 16AC provides for reduction where assistance has been provided and that discount must be quantified. The result is that if the promised assistance is not provided, the re-sentencing exercise should be straightforward. It would only be in exceptional circumstances, where the level of assistance is high, that the total discount would be around the 50% mark.⁶¹²

The Council notes that cooperating with authorities and informing are separate mitigating factors (distinct from the reduction appropriate for a guilty plea). An examination of this ground of reduction is beyond the scope of this report. However, the Council notes that the model it has proposed would allow the court to consider whether the penalty to be imposed following the consideration of all other sentencing factors (which would include assistance with authorities) and then the reduction for the guilty plea would be unreasonably disproportionate to seriousness of the offence. This would provide a mechanism for allowing too great a discount to be provided that would be out of line with the requirements of proportionality once cooperation and the guilty plea are taken into account by the court.

608 *Police Offences Act 1935* (Tas) s 61.

609 Submission 4.

610 See National Judicial College, above n 270.

611 New South Wales Law Reform Commission, *Sentencing*, Report No 139 (2013) 127.

612 Submission 4.

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Appendix A

SOUTH AUSTRALIA: S 105 INFORMATION⁶¹³

IMPORTANT INFORMATION – EARLY GUILTY PLEA - SENTENCING REDUCTONS

(Section 105(2) *Criminal Procedure Act 1921*)

If you are thinking of pleading guilty, you may receive a sentencing discount of up to 40% if you plead guilty within 4 weeks of your first court date. Following that, sentence discounts still apply, however at reducing rates. See the tables below for more detail.

You should discuss the benefits of an early guilty plea with your lawyer as soon as possible. If you are applying for legal aid, get your application in immediately to take advantage of this possibility. If you require further information, contact the Legal Services Commission on 1300 366 424, or Aboriginal Legal Rights Movement on 1800 643 222.

If you are charged with a summary offence (or minor indictable offence to be dealt with as a summary offence) the following sentence discounts apply:

From 1st court date up to 4 weeks after	Not less than 4 weeks prior to trial	Less than 4 weeks prior to trial, if the court is satisfied that you could not have pleaded sooner	In any other circumstances
Discount up to 40%	Discount up to 30%	Discount up to 30%	Discount up to 10%

From 5 March 2018 - 30 April 2018: section 10B of the *Criminal Law (Sentencing) Act 1988*
 From 30 April 2018: section 39 of the *Sentencing Act 2017*

If you are before a court upon a major indictable offence (or a minor indictable offence being dealt with in a higher court), the following sentence discounts apply:

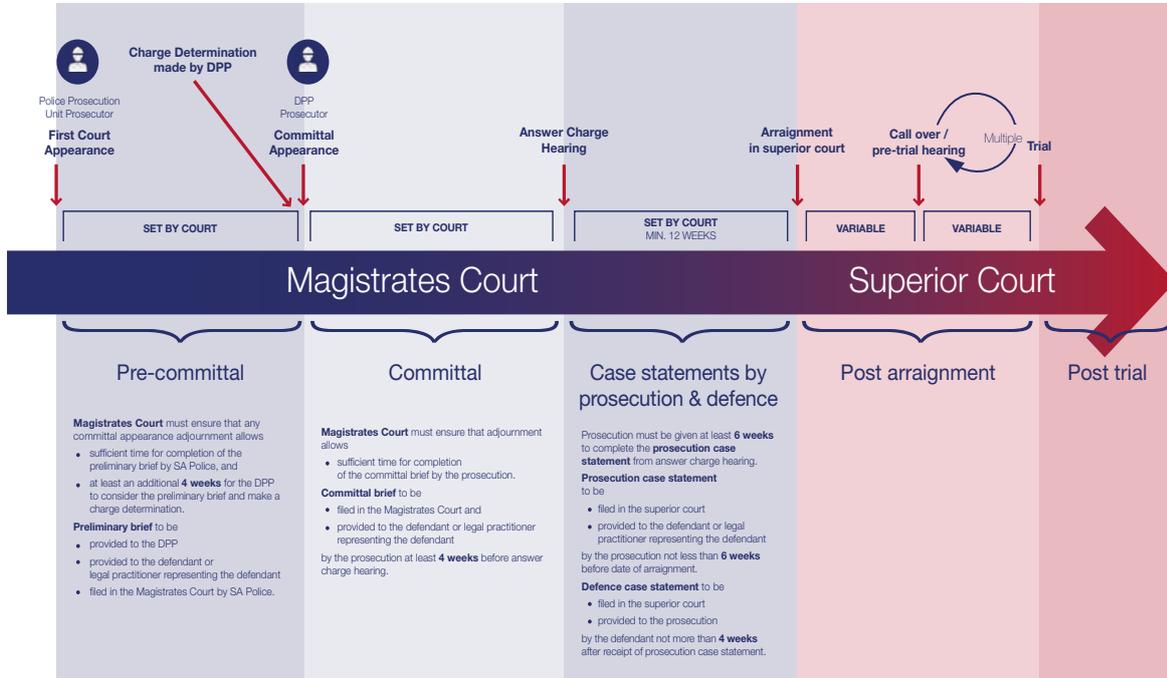
From 1st court date up to 4 weeks after	More than 4 weeks after 1st court date but on or before committal appearance	Between committal appearance and answer charge hearing	After answer charge hearing but on or before first appearance in superior court (arraignment)	Between arraignment and the first day of trial
Discount up to 40%	Discount up to 30% ¹	Discount up to 20%	Discount up to 15%	Discount up to 10%

From 5 March 2018 - 30 April 2018: section 10C of the *Criminal Law (Sentencing) Act 1988*
 From 30 April 2018: section 40 of the *Sentencing Act 2017*

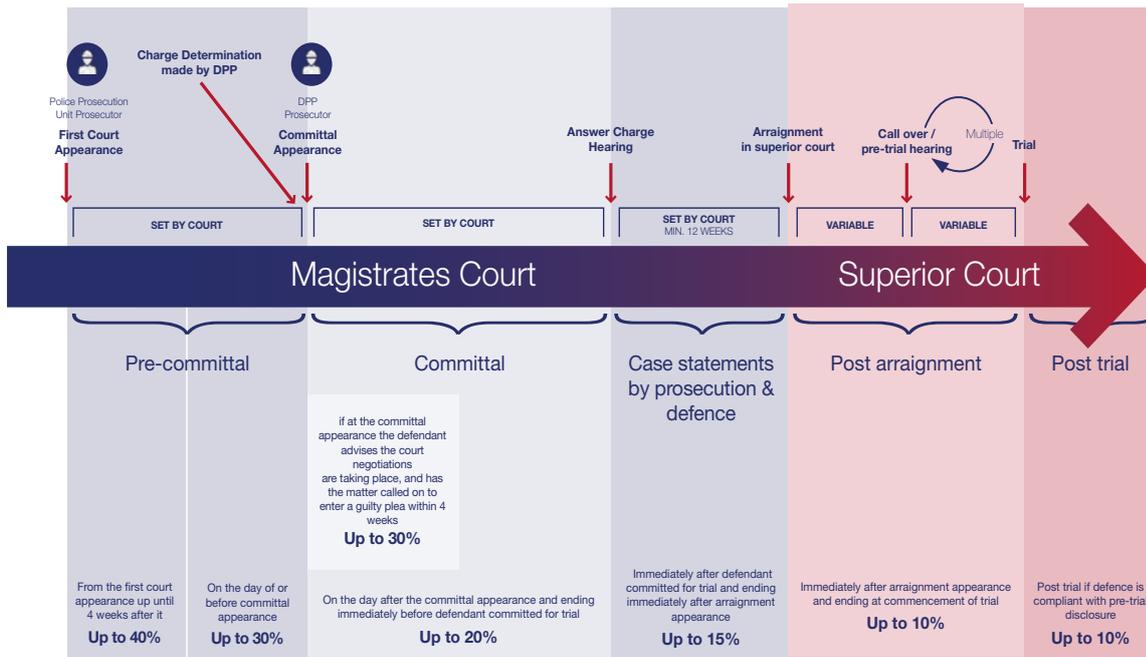
If you wish to plead guilty after your first appearance and the next court hearing date is not within 4 weeks you will need to write to the court registry of your next appearance to have the matter called on.

¹A discount of up to 30% applies if at the committal appearance you advise the Court that negotiations are taking place with the prosecution and within a 4 week period after that committal appearance you have the matter called on in the Magistrates Court for the purpose of entering an early guilty plea.

Major Indictable Reform Documentation Requirements



Major Indictable Reform Sentencing Reductions



Appendix B

NSW STATUTORY DISCOUNT SCHEME

CRIMES (SENTENCING PROCEDURE) ACT 1999 (NSW)

Division 1A Sentencing Discounts for Guilty Pleas to Indictable Offences

25A Application of Division

- (1) This Division applies to a sentence for an offence that is dealt with on indictment, other than:
 - (a) an offence under a law of the Commonwealth, unless the regulations otherwise provide in the case of a particular offence or class of offences, or
 - (b) an offence committed by a person who was under the age of 18 years when the offence was committed and under the age of 21 years when charged before the court with the offence.
- (2) A court must not apply any other discount for the utilitarian value of a guilty plea to an offence to which this Division applies other than the discount provided for by this Division.

25B Definitions

In this Division:

negotiations document means:

- (a) if an offender was represented by an Australian legal practitioner in proceedings:
 - (i) a case conference certificate (including any later plea offer) filed in committal proceedings for the offence concerned under the *Criminal Procedure Act 1986*, or
 - (ii) any other document, served on the prosecutor in proceedings for the offence following committal for trial or sentence, that records an offer made by the offender to plead guilty to an offence specified in the document, or
- (b) if an offender was not represented in proceedings, any document served on the prosecutor in the proceedings that records an offer made by the offender to plead guilty to an offence specified in the document.

new count offence means:

- (a) an offence the subject of an ex officio indictment, or
- (b) an offence for which the count is inserted in an indictment by amending the indictment (the **original indictment**).

sentence means a term of imprisonment, fine, number of hours of community service work or term of a good behaviour bond.

25C Timing of pleas and notice requirements

- (1) In this Division:
first day of the trial of an offender means the first day fixed for the trial of the offender or, if that day is vacated, the next day fixed for the trial that is not vacated.
- (2) For the purposes of this Division, an offender *complies with the pre-trial notice requirements* if the offender serves a notice on the prosecutor at least 14 days before the first day of the trial of the offender accepting an offer by the prosecutor to plead guilty to the offence or offering to plead guilty to the offence.

25D Sentencing discounts for guilty plea for offences dealt with on indictment

(1) **Mandatory nature of sentencing discount**

In determining the sentence for an offence, the court is to apply a sentencing discount for the utilitarian value of a guilty plea in accordance with this section if the offender pleaded guilty to the offence at any time before being sentenced.

(2) **Amounts of sentencing discounts**

The discount for a guilty plea by an offender (other than an offender referred to in subsection (3) or (5) or section 25E) is as follows:

- (a) a reduction of 25% in any sentence that would otherwise have been imposed, if the plea was accepted by the Magistrate in committal proceedings for the offence,
- (b) a reduction of 10% in any sentence that would otherwise have been imposed, if the offender was committed for trial and the offender:
 - (i) pleaded guilty at least 14 days before the first day of the trial of the offender, or
 - (ii) complied with the pre-trial notice requirements and pleaded guilty at the first available opportunity able to be obtained by the offender,
- (c) a reduction of 5% in any sentence that would otherwise have been imposed, if paragraph (a) or (b) does not apply.

(3) **Discount variations—new count offences**

The discount for a guilty plea by an offender in respect of a new count offence is as follows:

- (a) a reduction of 25% in any sentence that would otherwise have been imposed, if an offer to plead guilty was made by the offender and recorded in a negotiations document as soon as practicable after the ex officio indictment was filed or the indictment was amended to include the new count,
- (b) a reduction of 10% in any sentence that would otherwise have been imposed, if paragraph (a) does not apply and the offender:
 - (i) pleaded guilty at least 14 days before the first day of the trial of the offender, or
 - (ii) complied with the pre-trial notice requirements and pleaded guilty to the offence at the first available opportunity able to be obtained by the offender,
- (c) a reduction of 5% in any sentence that would otherwise have been imposed, if paragraph (a) or (b) does not apply.

(4) However, the discount in subsection (3) (a) does not apply if:

- (a) the facts or evidence that establish the elements of the new count offence are substantially the same as those contained in the brief of evidence or other material served on the offender by the prosecutor in committal proceedings relating to the original indictment and the penalty for the new count offence is the same as, or less than, the offence set out in the original indictment, or

- (b) the offender refused an offer to plead guilty to the new count offence that was made by the prosecutor in the committal proceedings relating to the original indictment and the offer was recorded in a negotiations document.

(5) **Discount variations—person found fit to be tried after committal for trial**

The discount for a guilty plea by an offender who is found fit to be tried after the offender is committed for trial, and whose matter was not remitted to a Magistrate for continued committal proceedings, is as follows:

- (a) a reduction of 25% in any sentence that would otherwise have been imposed, if the offender pleaded guilty as soon as practicable after the offender was found fit to be tried,
- (b) a reduction of 10% in any sentence that would otherwise have been imposed, if paragraph (a) does not apply and the offender:
 - (i) pleaded guilty at least 14 days before the first day of the trial of the offender, or
 - (ii) complied with the pre-trial notice requirements and pleaded guilty at the first available opportunity able to be obtained by the offender,
- (c) a reduction of 5% in any sentence that would otherwise have been imposed, if paragraph (a) or (b) does not apply.

(6) **Opportunities for legal help to be taken into account**

For the purpose of determining under subsection (3) or (5) whether the offender pleaded guilty as soon as practicable after an ex officio indictment was filed or the original indictment was amended or after a finding of fitness to be tried, the court is to take into account whether the offender had a reasonable opportunity to obtain legal advice and give instructions to his or her legal representative (if any).

25E Sentencing discounts to apply in certain cases where guilty plea offer made for different offences and refused when made

(1) **Discount where offer not accepted**

In determining the sentence for an offence, the court is to apply a sentencing discount in accordance with this section if:

- (a) the offender made an offer recorded in a negotiations document to plead guilty to an offence, and
- (b) that offence (the **different offence**) was not the offence the subject of the proceedings when the offer was made, and
- (c) the offer was not accepted by the prosecutor, and
- (d) the offer was not subsequently withdrawn, and
- (e) the offender was found guilty of the different offence or an offence that is reasonably equivalent to the different offence.

For the purposes of this subsection, an **offence is reasonably equivalent to a different offence** if:

- (a) the facts of the offence are capable of constituting the different offence, and
- (b) the maximum penalty for the offence is the same or less than the different offence.

(2) **Discount where offer later accepted**

In determining the sentence for an offence, the court is to apply a sentencing discount for the utilitarian value of a guilty plea in accordance with this section if:

- (a) the offender made an offer recorded in a negotiations document to plead guilty to an offence, and

- (b) that offence (the **different offence**) was not the offence the subject of the proceedings when the offer was made, and
 - (c) the offer was refused but accepted by the prosecutor after the offender was committed for trial, and
 - (d) the offender pleaded guilty to the different offence at the first available opportunity able to be obtained by the offender.
- (3) **Discount variation—offer to plead guilty to different offence**
- The discount to be applied by the court is as follows:
- (a) a reduction of 25% in any sentence that would otherwise have been imposed, if the offer was made before the offender was committed for trial,
 - (b) a reduction of 10% in any sentence that would otherwise have been imposed, if the offer was made after the offender was committed for trial and at least 14 days before the first day of the trial of the offender,
 - (c) a reduction of 5% in any sentence that would otherwise have been imposed, if the offer was made less than 14 days before or on or after the first day of the trial of the offender.

25F Other provisions applying to sentencing discount

(1) **Application**

This section applies to a sentencing discount under this Division.

(2) **Exception to application of discount—level of culpability**

The court may determine not to apply the sentencing discount, or to apply a reduced sentencing discount, if the court determines, on its own motion or on the application of the prosecution, that the discount should not be applied or should be reduced 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, or a reduction of, that discount.

- (3) If a case conference certificate was filed in committal proceedings for the offence, a prosecutor is not entitled to apply to the court for a determination that the discount should not be applied or should be reduced unless the certificate records that the prosecutor notified the offender's legal representative, at or before the conference, of the intention to make the application.

(4) **Exception to application of discount—disputed facts**

The court may determine not to apply the sentencing discount, or to apply a reduced sentencing discount, if the court determines that the discount should not be applied or should be reduced because the utilitarian value of the plea of guilty has been eroded by a dispute as to facts that was not determined in favour of the offender.

(5) **Offender to establish grounds for discount**

The burden of establishing that grounds exist for the sentencing discount lies on the offender and must be proved on the balance of probabilities.

(6) **Application to Drug Court proceedings**

The sentencing discount applicable to a person who is sentenced for an offence under the *Drug Court Act 1998* applies to a person who indicates an intention to plead guilty to an offence before being referred to the Drug Court, and who subsequently pleads guilty to the offence before the Drug Court, as if the person had pleaded guilty to the offence before being committed for sentence in committal proceedings for the offence.

(7) **Discount information to be given to offender by court**

The court must indicate the following to the offender when passing sentence for an offence and must record the matters indicated:

- (a) if the sentencing discount is applied, how the sentence imposed was calculated,
- (b) if the court determines in accordance with this section not to apply or to reduce the discount, the reasons for the determination.

(8) **Sentence not invalidated by failure to comply**

The failure by a court to comply with this Division does not invalidate any sentence imposed by the court.

(9) **No discount where life sentence**

A sentencing court must not allow any discount under this Division for a guilty plea if the court determines a sentence of life imprisonment.

