

Consistency in sentencing and discounts for guilty pleas

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Introduction

Consistency, and avoiding undue disparity, is a central tenet of the sentencing system.¹ Whilst consistency is a key sentencing goal, it must be balanced against other important goals, such as fairness and accountability.

This paper explores the issue of consistency in the particular context of guilty pleas. If an offender is to be afforded a sentencing discount for pleading guilty, this raises issues of consistency and fairness, both in relation to the nature and quantity of discount given as between offenders, and in particular in relation to offenders who exercise their right to trial and cannot access the discount.

In Australia, it has been held by the High Court that an offender who exercises their right to trial cannot be penalised for having done so.² On the other hand, an offender who does plead guilty is entitled to receive a discount in sentence.³

Whilst there has been considerable judicial and academic debate in Australia over the nature and justification for the guilty plea discount,⁴ this paper examines the discount itself, and asks what effect it is having more generally in the context of consistency in sentencing.

¹ Geraldine Mackenzie, 'Achieving Consistency in Sentencing: Moving to Best Practice?' (2002) 22 *University of Queensland Law Journal* 74.

² *Siganto v The Queen* (1998) 194 CLR 656.

³ *Cameron v The Queen* (2002) 209 CLR 339.

⁴ *Ibid*; see also, Kathy Mack and Sharyn Roach Anleu, 'Sentence Discount for a Guilty Plea: Time for a New Look' (1997) 1 *Flinders Journal of Law Reform* 123; Kathy Mack and Sharyn Roach Anleu, 'Reform of Pre-Trial Criminal Procedure: Guilty Pleas' (1998) 22 *Criminal Law Journal* 263; David Field, 'Plead Guilty Early and Convincingly to Avoid Disappointment' (2002) 14 *Bond Law Review* 251; Mirko Bagaric and Julie Brebner, 'The Solution to the Dilemma Presented by the Guilty Plea Discount: The Qualified Guilty Plea - I'm Pleading Guilty Only Because of the Discount...' (2002) 30 *International Journal of the Sociology of Law* 51.

Guilty plea discount

In most common law jurisdictions it has now been accepted that an accused person is entitled to a discount in sentence for a guilty plea.⁵ How much discount is given in a particular case varies from jurisdiction to jurisdiction and case to case, but there is rarely a prescribed amount. Generally the discount is left to the discretion of the individual sentencer, taking into account all of the circumstances of the case. Factors which are relevant can include the time at which the guilty plea indication is given and remorse.

Because the discount given varies from case to case and depends on the discretion of the individual sentencer, this has an inevitable effect on consistency, albeit justifiable in many cases. Unless a set discount is given in particular nominated circumstances, the actual sentence to be obtained cannot be accurately predicted, or indeed compared with that given in another case.

Justification for the discount

There has been a paradigm shift in recent years from earlier Australian cases where a plea of guilty could only be taken into account in mitigation of sentence where it resulted from 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.⁶ These earlier cases did not agree that a plea of guilty on its own could mitigate:

⁵ In Australia see *R v Cameron* (2002) 209 CLR 339; and summary of the principles in Australian Law Reform Commission, 'Same Crime, Same Time: Sentencing of Federal Offenders' (Australian Law Reform Commission, 2006), Chapter 11 "Discounts and Remissions". See generally Ralph Henham, 'Bargain Justice or Justice Denied? Sentencing Discounts and the Criminal Process' (1999) 62 *Modern Law Review* 515; Ralph Henham, 'Truth in Plea-Bargaining': Anglo-American Approaches to the Use of Guilty Plea Discounts at the Sentencing Stage' (2000) 29 *Anglo-American Law Review* 1.

⁶ *The Queen v Shannon* (1979) 21 SASR 442, at 452-453 per King CJ; see also *R v Gray* [1976] VR 225; and *R v Harman* [1989] 1 Qd R 414.

On the other hand, a simple confession of guilt cannot, by its own force, operate so as to command that the sentence be less than that which it would have been had there been no such confession.⁷

Perhaps the change to a more pragmatic approach in Australia can be traced to the move in the early 1990's to dedicated sentencing legislation setting out principles to be applied. For example, the Victorian *Sentencing Act 1991* looks at “whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so”.⁸ The Queensland *Penalties and Sentences Act 1992* similarly refers only to the time at which the offender pleaded guilty or indicated the intention to so plead.⁹ In Queensland remorse is mentioned separately, and is only relevant in offences involving violence against another person, or sexual offences against children under the age of 16.¹⁰ In these instances it is the *lack of* remorse which is more relevant than the remorse itself.

The present Australian position on guilty pleas is expressed in the High Court case of *Cameron v The Queen*.¹¹ According to Gaudron, Gummow and Callinan JJ,

Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice, and not on the basis that the plea has saved the community of the expense of a contested hearing.¹²

Most, if not all, Australian courts now accept that an accused person is entitled to a discount when pleading guilty, even when that plea occurs at the last moment.¹³ In Queensland, the current practice is that a guilty plea will attract a discount of around 30% of the sentence, particularly when the plea is entered or indicated at an early

⁷ *The Queen v Shannon* (1979) 21 SASR 442, 446 per King CJ.

⁸ *Sentencing Act 1991* (Vic) s 5.

⁹ *Penalties and Sentences Act 1991* (Qld), s 13.

¹⁰ See ss 9(4)(i), and 9(6)(h).

¹¹ (2002) 209 CLR 339.

¹² *Ibid* at 343. The possible penalising of an offender who pleads not guilty is discussed below.

¹³ See eg, *Atholwood* (1999) 109 A Crim R 465 (WA); *R v Corrigan* [1994] 2 Qd R 415.

stage of the proceedings. The discount may not always take the form of a reduction in the head sentence, but may for example be a community based sentence instead of custodial, or a recommendation for early release. The closer to the trial date, the less benefit there is likely to be, but there is no formal sliding scale, and the practice is that a substantial discount will still be available, even if the plea is entered at a late stage.

Remorse

In *Cameron*, the joint judgment did not elaborate on the factors of remorse and acceptance of responsibility, and how these should be taken into account. I would respectfully agree with the approach by Kirby J on these issues, where his Honour elaborates on the way in which a guilty plea should be taken into account, and distinguishes between the discount for a guilty plea, with that resulting from a “spontaneous and immediate expression of remorse conducive to reform”.¹⁴ To those of us who have practised in criminal law, his Honour’s ironic statement that “[C]ases do exist where, upon apprehension, a prisoner expresses genuine and believable regret” rings true. But as his Honour goes on to say:

However, judges have lately expressed doubt as to the extent to which pleas of guilty really proceed from such motives. In a prisoner who has been caught red-handed, the plea of guilty may indicate regret at being caught and charged, rather than regret for involvement in the crime. [references omitted]¹⁵

I also respectfully agree with his Honour that the main features of the public interest in a discount of a guilty plea are “purely utilitarian”.¹⁶ These include the saved cost and inconvenience of a potentially lengthy trial, easing the congestion in the courts, vindicating public confidence in the in the criminal justice system, and assisting the

¹⁴ *Cameron* at [65], subpara (4).

¹⁵ *Ibid* at 360.

¹⁶ *Ibid*. Theoretically there is little valid justification. See discussion in Mirko Bagaric and Julie Brebner, 'The Solution to the Dilemma Presented by the Guilty Plea Discount: The Qualified Guilty Plea - I'm Pleading Guilty Only Because of the Discount...' (2002) 30 *International Journal of the Sociology of Law* 51; and Kathy Mack and Sharyn Roach Anleu, 'Sentence Discount for a Guilty Plea: Time for a New Look' (1997) 1 *Flinders Journal of Law Reform* 123.

victims of crime to put the experience behind them.¹⁷ I would also agree that if remorse is to be taken into account at all,¹⁸ it should be a separate consideration from the discount for a plea of guilty.

His Honour then points out that an accused person is entitled to plead not guilty to the charges against them, and to put the prosecution to proof; and further the fact that they cannot be punished more severely for having exercised those rights.¹⁹ This is where the major point of inconsistency lies.

No penalty for exercising right to trial

As the majority judgment of Gaudron, Gummow and Callinan JJ in *Cameron* pointed out, an accused person cannot be penalised for having exercised their right to trial, applying the principle from the earlier case of *Siganto v The Queen*.²⁰ According to their Honours:

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, albeit one the rationale for *which may need some refinement in expression if the distinction is to be seen as non discriminatory*.²¹ [My emphasis]

Their Honours then go on to note that the reconciliation between the requirement not to penalise the accused person for pleading not guilty, and to be able to take into

¹⁷ Ibid (*Cameron*) at 361.

¹⁸ There are those who argue that it has no place in mitigation of sentence: Mirko Bagaric and Kumar Amarasekara, 'Feeling Sorry? - Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing' (2001) 40 *The Howard Journal* 364.

¹⁹ *Cameron v The Queen* (2002) 209 CLR 339 at 361.

²⁰ (1998) 194 CLR 656.

²¹ *Cameron v The Queen* (2002) 209 CLR 339 at 343.

account the plea, lies with the rationale of the accused's willingness to facilitate the course of justice.²²

No doubt what the High Court is guarding against is the situation where an accused person receives an additional penalty for having gone to trial. In other words, having the election to go to trial act as an aggravating factor on the eventual sentence, as opposed to simply missing out on the discount which a guilty plea will almost inevitably provide. As their Honours said, this distinction is "not without its subtleties".²³

Once an accused person exercises their right to trial, the opportunity to claim a discount for a guilty plea is lost. This discount can be sizable, up to 30% in some instances. In Queensland, and no doubt most Australian jurisdictions, the discount is available even where the guilty plea is entered the last minute, with little or any co-operation with law enforcement agencies, let alone remorse.²⁴ On the other hand, an accused person may have co-operated extensively in the investigation, be genuinely remorseful, willing to facilitate the course of justice, yet may wish to exercise their right to trial. There are a number of reasons why this would be so.

The classic reason why an accused may elect to put the Crown to proof is where they have no memory of the event in question due to intoxication by drugs or alcohol, or perhaps another reason, for example temporary amnesia following a car accident the subject of the charge. Although there is a view that a guilty plea can be entered in these circumstances provided that the accused person understands and agrees that the plea indicates an acceptance of the Crown case,²⁵ many accused would take the option of putting the Crown to proof in these circumstances, particularly if they have no recollection and cannot understand how the offence came about.

²² Ibid.

²³ Ibid. See also discussion in David Field, 'Plead Guilty Early and Convincingly to Avoid Disappointment' (2002) 14 *Bond Law Review* 251; Mirko Bagaric and Julie Brebner, 'The Solution to the Dilemma Presented by the Guilty Plea Discount: The Qualified Guilty Plea - I'm Pleading Guilty Only Because of the Discount...' (2002) 30 *International Journal of the Sociology of Law* 51.

²⁴ See eg the case of *R v Corrigan* [1994] 2 Qd R 415, an early case under the *Penalties and Sentences Act 1991* (Qld).

²⁵ Peter Hidden, 'Some Ethical Problems for the Criminal Advocate' (2003) 27 *Criminal Law Journal* 191.

Another reason why a person may elect to go to trial notwithstanding remorse, co-operation or willingness to facilitate the course of justice, is where there is the availability of a defence to the charges. For example, there may be a valid argument that the person was acting in self defence, which would result in a full acquittal should the elements of the defence be accepted. This however may put the accused in the invidious position of having to decide whether to forgo the possibility of acquittal and plead guilty to the offence, knowing that a discount of up to 30% of the sentence would be available for the guilty plea; or plead not guilty on the basis of self defence, knowing that a conviction was still a distinct possibility, and further in the full knowledge that no discounting in the sentence could occur on the basis of the not guilty plea.

On the other hand, there may be reasons why a person may want to plead guilty whilst maintaining their innocence. These can include a wish to get the matter over and done with quickly; a desire not to admit guilt to the legal representatives or the court even though the person may in fact be guilty; or a desire not to reveal other conduct, legal or illegal, which a trial may disclose.²⁶ To these can be added a desire to plead guilty to attract a discount of up to 30% on sentence, not insignificant where the chances of success on a trial may be slim.²⁷ The other benefit of pleading guilty, which may particularly arise in marginal cases, is the opportunity to negotiate a set of agreed facts which form the basis of the plea, rather than relying on the evidence which may come out at trial.

Victims

Underlying some of the assumptions of the desirability of a guilty plea, and therefore discount, is the premise that it benefits victims by more rapidly dealing with the matter, and sparing the victim the ordeal of giving evidence. This may well be the

²⁶ Ibid at 196.

²⁷ See Mirko Bagaric and Julie Brebner, 'The Solution to the Dilemma Presented by the Guilty Plea Discount: The Qualified Guilty Plea - I'm Pleading Guilty Only Because of the Discount...' (2002) 30 *International Journal of the Sociology of Law* 51; David Field, 'Plead Guilty Early and Convincingly to Avoid Disappointment' (2002) 14 *Bond Law Review* 251; Ralph Henham, 'Bargain Justice or Justice Denied? Sentencing Discounts and the Criminal Process' (1999) 62 *Modern Law Review* 515.

case; however without the benefit of detailed research it is difficult to know whether these assumptions are correct. As Henham points out, not all victims may be of this view:

Further, some victims may prefer the ordeal of a court appearance to seeing the defendant receive a light sentence as a result of a sentencing discount, whether graduated or not. Past support for plea discounts and crime control ideology, with its emphasis on financial constraint, speed and finality of conviction, has been on the basis that it is broadly in the interests of victims because it spares the victims the ordeal of giving evidence while recognising that due process rights such as the right to a fair and public hearing may be infringed and some innocent defendants may be induced to plead guilty.²⁸

A study by Fenwick suggests that these matters are more complex than generally thought, and that there should be more consultation with victims in relation to these matters.²⁹

Transparency in the sentencing process

A study by Henham of sentencing discounts in the Crown Court in the UK has suggested the need for reform in the way in which guilty pleas are taken into account.³⁰ The findings of that study suggested a need for greater transparency in the way in which sentencing discounts are taken into account, and that greater guidance should be provided to sentencers.³¹ With little prescription of exactly how the discount should be taken into account in Australia being provided,³² the findings of the study would apply equally here.

²⁸ Ralph Henham, 'Bargain Justice or Justice Denied? Sentencing Discounts and the Criminal Process' (1999) 62 *Modern Law Review* 515, at 537.

²⁹ H Fenwick, 'Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process' (1997) 60 *Modern Law Review* 317.

³⁰ Ralph Henham, 'Bargain Justice or Justice Denied? Sentencing Discounts and the Criminal Process' (1999) 62 *Modern Law Review* 515.

³¹ *Ibid* at 535.

³² Cf *R v Thomson* (2000) 49 NSWLR 383.

Henham notes that well known sentencing scholar Andrew Ashworth argues convincingly that fundamental reform of the UK system of sentencing discounts is necessary on the basis of contravention of fundamental rights in the European Convention of Human Rights, namely the presumption of innocence, the privilege against self-incrimination, the right to equality of treatment and the right to a fair and public hearing.³³ Henham also notes Ashworth's support of the reappraisal of the guilty plea discount, which suggests either abolition or that major changes should occur.³⁴

An Australian study by Mack and Anleu involving over 50 interviews with judges, police prosecutors, DPP staff and defence lawyers concluded that the sentencing discount for guilty pleas was wrong in principle and should no longer be supported.³⁵ According to Mack and Anleu, the sentencing discount is a plea bargain in its crudest form.³⁶ They go on to say,

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.³⁷

One suggestion to improve efficiency and transparency is the use of sentence indications by judges at the pre-trial stage.³⁸ This call has been recently taken up by the Australian Law Reform Commission, who has recommended the use of sentence indication hearings in relation to the sentencing of Commonwealth offenders.³⁹ In a press release dated 22 June, the ALRC called for overhaul of the Federal sentencing

³³ Ralph Henham, 'Bargain Justice or Justice Denied? Sentencing Discounts and the Criminal Process' (1999) 62 *Modern Law Review* 515 at 537.

³⁴ Ibid.

³⁵ Kathy Mack and Sharyn Roach Anleu, 'Sentence Discount for a Guilty Plea: Time for a New Look' (1997) 1 *Flinders Journal of Law Reform* 123.

³⁶ Ibid at 124.

³⁷ Ibid.

³⁸ See discussion in Arie Freiberg and John Willis, 'Sentence Indication' (2003) 27 *Criminal Law Journal* 246.

³⁹ Australian Law Reform Commission, 'Same Crime, Same Time: Sentencing of Federal Offenders' (Australian Law Reform Commission, 2006), Chapter 15 "A Sentence Indication Scheme".

system to provide greater consistency, fairness and clarity. The review of the way in which sentencing discounts are provided is an important part of this.

Conclusion

Whilst it is uncontroversial that consistency is a major goal of sentencing, the way in which guilty pleas are dealt with, and in particular the routine use of the plea of guilty discount, may not be the best way to achieve this. Whilst there has been widespread acceptance of the need for such discounts,⁴⁰ there is a need for greater consideration of the theoretical and policy basis on which they are awarded, the way in which they are used in practice, and their effect on consistency and fairness in the sentencing system more generally.

⁴⁰ See discussion in Australian Law Reform Commission, 'Same Crime, Same Time: Sentencing of Federal Offenders' (Australian Law Reform Commission, 2006), Chapter 11.