

‘GUILTY, YOUR HONOUR’: RECENT LEGISLATIVE DEVELOPMENTS ON THE GUILTY PLEA DISCOUNT AND AN AUSTRALIAN CAPITAL TERRITORY CASE STUDY ON ITS OPERATION

ABSTRACT

The overwhelming majority of defendants in Australian criminal courts plead guilty and most Australian jurisdictions include a guilty plea in their sentencing legislation as a mitigating factor. However, the application of this reduction varies significantly. In an attempt to provide a better understanding of this aspect of sentencing, this article examines the legislation and case law on guilty pleas, with a particular focus on the Australian Capital Territory. The article contextualises this discussion by examining the High Court’s position on sentence reductions for guilty pleas, as well as the New South Wales Court of Criminal Appeal’s guideline judgment in *R v Thomson; R v Houlton* (2000) 49 NSWLR 383. Recent key legislative amendments in relation to quantifying guilty pleas are then discussed, revealing the often subtle but meaningful differences in the legislation across Australia. This is followed by a case study analysis of 300 recent cases in the Australian Capital Territory Supreme Court, which provides important insight into the practical operation of the discount in a jurisdiction that has traditionally seen little sentencing research. The article concludes with some observations on future directions for policy and practice.

I INTRODUCTION

Nearly 80 per cent of defendants in Australian criminal courts plead guilty.¹ Every Australian jurisdiction except Tasmania includes a guilty plea as a mitigating factor in their sentencing legislation.² Geraldine Mackenzie

* LLB (UC).

** BA, LLB, LLM (UNSW), PhD (UTas). Associate Professor, University of Canberra; Honorary Associate Professor, University of Tasmania.

¹ Australian Bureau of Statistics (‘ABS’), *Criminal Courts, Australia, 2011–12* (Cat No 4513.0, ABS, 2013).

² *Crimes Act 1914* (Cth) s 16A; *Criminal Law (Sentencing) Act 1988* (SA) s 10B; *Sentencing Act 1991* (Vic) s 6AAA; s 5(2)(e); *Penalties and Sentences Act 1992* (Qld) s 13; *Sentencing Act 1995* (WA) s 9AA; *Sentencing Act 1995* (NT) s 5(1)(j); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22; *Crimes (Sentencing) Act 2005* (ACT) s 35.

and Nigel Stobbs describe an offender’s guilty plea as ‘one of the most important mitigating factors to be taken into account by the court’,³ which will ‘attract a sentencing discount of up to 30 per cent, depending on the case and the jurisdiction’.⁴

This article examines the operation of the guilty plea discount in Australian state and territory courts,⁵ before presenting a case study of the legislation and case law in the Australian Capital Territory (‘ACT’). In order to contextualise this analysis, Part II examines the High Court’s position with respect to guilty pleas and Part III provides an overview of the New South Wales Court of Criminal Appeal’s guideline judgment in *R v Thomson; R v Houlton*.⁶ Part IV details recent legislative amendments in other Australian jurisdictions in relation to quantifying guilty pleas. Part V then presents an analysis of 300 cases in the ACT Supreme Court, which provides important insight into the practical operation of the discount in a jurisdiction that has traditionally seen little sentencing research. In Part VI we conclude by making some observations on future directions for policy and practice.

There are a number of advantages to pleading guilty, both for the state and the offender.⁷ The offender may plead guilty because of a desire to express remorse for the crime, to spare complainants the further trauma of a contested trial or for the purposes of attracting a reduced sentence. The state rationale for reducing a sentence is primarily based on the purported utilitarian value of a guilty plea, in terms of the time and cost of a trial. However, this is not without controversy. As discussed further below, some consider the guilty-plea discount to discriminate against offenders who elect to proceed to trial and are ultimately found guilty as they often receive a more severe sentence.

While a reduction in sentence can be an incentive to plead guilty, there may also be disadvantages for an offender who chooses to do so. Some offenders, particularly

³ Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 89.

⁴ Ibid 90.

⁵ The position in respect of federal matters is not considered further, given such offenders account for only 1.5 per cent of defendants finalised in Australian courts in 2011–12: ABS, above n 1; ABS, *Federal Defendants, Australia, 2011–12* (Cat No 4515.0, ABS, 2013).

⁶ (2000) 49 NSWLR 383 (‘*Thomson and Houlton*’).

⁷ For discussion, see Geraldine Mackenzie, ‘The Guilty Plea Discount: Does Pragmatism Win Over Proportionality and Principle?’ (2007) 11 *Southern Cross University Law Review* 205; Sharyn Roach Anleu and Kathy Mack, ‘Intersections Between In-Court Procedures and the Production of Guilty Pleas’ (2009) 42 *Australian and New Zealand Journal of Criminology* 1; New South Wales Sentencing Council, *Reduction in Penalties At Sentence* (NSW Department of Justice and Attorney-General, 2009); David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 5th ed, 2011); Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 2014).

those without proper legal representation, may feel pressured to plead guilty to charges that may not be appropriate in the circumstances. A self-represented accused may not realise that there are defences available for particular offences, or that lesser charges may be more appropriate. It is also difficult to withdraw a guilty plea after it has been entered; generally, a plea entered deliberately and on an informed basis must be considered final.⁸ However, a miscarriage of justice may occur if an accused did not appreciate the nature of the plea entered, had not intended to admit guilt, there was no evidence on which he or she could be convicted, or the plea was induced by fraud or threats.⁹ Finally, it is particularly difficult to appeal a conviction that results from a guilty plea.

Arguably the biggest beneficiary of the guilty plea system is the state. Offering reductions in sentences to induce offenders to plead guilty at the earliest available opportunity ensures the criminal justice system runs as efficiently as possible. Running contested hearings for every matter would create an enormous burden on a system that already experiences significant delays. Avoiding this need means resources can be allocated more efficiently. Other benefits include providing certainty, due to a conclusive determination of guilt, and securing a conviction in cases where the complainant might otherwise withdraw and the case be abandoned.

In respect of victims, there are competing arguments: guilty pleas can save them from having to give evidence in court or make them feel they have not had an opportunity to have their day in court. In *Cameron v The Queen*, Kirby J observed that guilty pleas

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. Especially in cases of homicide and sexual offences, a plea of guilty may spare the victim or the victim's family and friends the ordeal of having to give evidence.¹⁰

However, where a defendant pleads guilty to a lesser charge, victims may feel their account of events has been devalued.¹¹

Discounting a sentence as a result of a guilty plea is not without contention, and, as this paper will demonstrate, there are no definitive solutions to the difficulties associated with the practical application of the discount and the conceptual framework within which it operates. Regardless, because of the benefits the system affords offenders and the state, it is likely to remain a crucial aspect of the criminal justice system.

⁸ *Maxwell v The Queen* (1996) 184 CLR 501.

⁹ *R v Boag* (1994) 73 A Crim R 35.

¹⁰ (2002) 209 CLR 339 (*'Cameron'*), 361 [67] (Kirby J) (citations omitted).

¹¹ For discussion, see Bagaric and Edney, above n 7, 303.

II GUILTY PLEAS AND THE HIGH COURT

In *Siganto v The Queen*,¹² the High Court heard an appeal against a conviction of rape from the Northern Territory Court of Criminal Appeal. The appeal arose from the sentencing judge's comments that the distress of the victim was aggravated by having to give evidence multiple times throughout the course of the trial. Counsel for the appellant argued that these comments indicated the judge treated the plea of not guilty as an aggravating factor because the victim was required to give evidence, and increased the punishment in response.¹³ Not penalising an accused who elects to go to trial has consistently been held to be of significance when determining an appropriate sentence.¹⁴ There are a number of reasons for this, the most important being that the potential for a more severe punishment may deter innocent defendants from attempting to defend themselves.¹⁵

The High Court held in *Siganto* that a sentencing judge should be punishing the offender for the crime they have committed and not for the conduct of the defence case.¹⁶ Gleeson CJ, Gummow, Hayne and Callinan JJ also noted the rationale for a reduction in sentence:

[A] plea of guilty is ordinarily a matter to take into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial.¹⁷

The Court went on to indicate that the extent of the mitigation would usually vary depending on the circumstances of the case.

Incidentally, remorse is listed as a separate mitigating factor in most jurisdictions.¹⁸ This will ordinarily only result in a discount where there is some clear evidence to support it, such as a letter of apology. It has been suggested that it does not generally play a significant mitigatory role.¹⁹

The emphasis placed on the pragmatic grounds for discounting a sentence was effectively discredited by the High Court in the 2002 case of *Cameron*.²⁰ In that

¹² (1998) 194 CLR 656 ('*Siganto*').

¹³ *Ibid.*

¹⁴ *R v Gray* [1977] VR 225, 231.

¹⁵ *Siganto* (1998) 194 CLR 656, 666 [31].

¹⁶ *Ibid.*

¹⁷ *Ibid* 663–4 [22].

¹⁸ *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(f); *Sentencing Act 1991* (Vic) s 5(2)(c); s 5(2)(e); *Penalties and Sentences Act 1992* (Qld) s 9(4)(i); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(9); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(w). For discussion, see Mackenzie and Stobbs, above n 3, 92–3; Bagaric and Edney, above n 7, 310–16.

¹⁹ Mackenzie and Stobbs, above n 3, 92–3.

²⁰ (2002) 209 CLR 339.

case, the accused pleaded guilty to the offence of possession of methylamphetamine with the intent to sell or supply. The arresting officers assumed that the substance was ecstasy before analysing it, and this was reflected in the original charge. It was not until the substance had been correctly identified some time later that the offender pleaded guilty to the charge. This lengthy period between the offender's first appearance and the eventual plea was a significant factor in the sentencing judge's decision and resulted in a sentence reduction of only 10 per cent.

On appeal to the Western Australian Court of Criminal Appeal, the offender's counsel submitted that the sentencing judge erred in finding that his guilty plea was not made at an early point in the proceedings. The Western Australian legislation, discussed further below, provides that pleas made at the 'first reasonable opportunity' can attract a discount of 25 per cent.²¹ In dismissing the appeal, Pidgeon J indicated that, having regard to all the relevant factors, he was not persuaded that the sentencing judge was wrong in not reducing the sentence more than 10 per cent.²² It should be noted that in Western Australia guilty pleas for indictable offences can be entered in the Local Court before an offender is committed to a superior court for sentencing.²³ This process takes place with the prosecution having to produce minimal evidence. It is colloquially known as 'fast-tracking' pleas and generally results in a greater discount than pleas entered after committal proceedings.²⁴ Malcolm CJ suggested in *Verschuren v The Queen* that a fast-track guilty plea would generally attract a discount of between 20 to 35 per cent.²⁵

The High Court allowed Cameron's appeal, ordering that the earlier decision be set aside and the matter remitted for further hearing. In deciding the case, Gaudron, Gummow and Callinan JJ discussed whether rewarding a person for pleading guilty by reducing an otherwise appropriate sentence is ultimately discriminatory to those who elect to go to trial and test the prosecution's evidence, as they invariably receive a more severe sentence if found guilty. The Court acknowledged that this distinction between encouraging early guilty pleas and not penalising those who choose not to enter such a plea is 'not without its subtleties but it is, nonetheless, a real distinction.'²⁶ The Court determined that if the sole reason for the discount was expressed as utilitarian benefit of sparing the expense of a trial, the distinction

²¹ *Sentencing Act 1995* (WA) s 9AA.

²² *Cameron v The Queen* [2000] WASCA 286 (3 October 2000) [21].

²³ Originally this system operated under s 100 of the *Justices Act 1902* (WA). Since its repeal, the fast-track system is now codified in s 41 of the *Criminal Procedure Act 2004* (WA).

²⁴ David Field, 'Plead Guilty Early and Convincingly to Avoid Disappointment' (2002) 14 *Bond Law Review* 251, 252.

²⁵ (1996) 17 WAR 467. In the debate around the 2012 amendments to the Western Australian legislation discussed below, it was noted that '[t]he courts have developed a system in which the discount for an early plea would range somewhere between ... 20 per cent and 35 per cent of the sentence': Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 November 2012, 8212c (John Quigley).

²⁶ *Cameron* (2002) 209 CLR 339, 343 [12].

would admittedly be unclear.²⁷ Instead, their Honours indicated the discount should be expressed as a willingness to facilitate the course of justice and an offender's acceptance of responsibility for their conduct, and not because of the expense spared as a result of the plea.²⁸

Kirby J also considered the appropriate rationale for the discount in his judgment; however, in his Honour's view, the reasoning for discounting a sentence is that it is in the public interest to provide the discount. Overall, his Honour appeared to endorse the view rejected by the majority, namely that pragmatism and the utilitarian benefit are reason enough for the discount.

Ultimately there does not appear to be any significant difference between these approaches, as both have the same result of reducing a sentence. However, given research on the overall discriminatory effect of the reduction in sentence on those who plead not guilty, adopting the approach by the majority in *Cameron* seems a more appropriate response to these criticisms.²⁹ We also suggest that the significant emphasis that each jurisdiction places on the timing of the plea is indicative of the utilitarian approach being regarded as more persuasive, given a plea will facilitate justice regardless of when it is entered, but will only have significant utilitarian value when entered early.

In this context, it is also necessary to consider the High Court's comments in *Cameron* about the timeliness of a guilty plea, as this was the ground of appeal on which the case was heard and what ultimately persuaded the Court to find in the offender's favour. Cameron's counsel argued that it was unreasonable to expect him to plead guilty to the initial charge of possession with intent to sell or supply, when the illicit substance was incorrectly identified as ecstasy. The timeliness of a plea, as discussed further below, is consistently held to be of primary importance when determining how substantial a reduction in sentence an offender should receive.³⁰ However, 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 of timeliness is not one that can be answered 'simply by looking at the charge sheet'.³¹ Rather, the question to be asked is when would it be reasonably practicable to expect the offender to have entered a plea.

The Court held that the Western Australian Court of Criminal Appeal had erred in finding that it was reasonable to expect the offender to plead guilty earlier than he

²⁷ Ibid.

²⁸ Ibid.

²⁹ See Mackenzie, above n 7, 205.

³⁰ Field, above n 24, 253. See also Bagaric and Edney, above n 7, 290.

³¹ *Cameron* (2002) 209 CLR 339, 345 [20].

did, as it was not reasonable to expect someone to plead guilty to a charge that was wrongly particularised. It was not within the offender's control that the substance had been wrongly particularised and there was minimal time between the correct identification of the substance and the offender's indication that he intended to enter a guilty plea. Therefore, the majority considered that the offender had pleaded guilty at an early point in time, following the correct charges being laid. Their reasoning indicates that this is of particular importance to ensure an offender is not actively participating in conduct that could ultimately result in an error in the court record.³² The issue of timeliness is considered further below in the context of the ACT case law.

III THE NEW SOUTH WALES GUIDELINE JUDGMENT IN *THOMSON AND HOULTON*

In 2000, the New South Wales Court of Criminal Appeal handed down its guideline judgment on guilty pleas in *Thomson and Houlton*. This decision developed four guidelines to be adopted by a sentencing judge when a discount in sentence is considered. First, the sentencing judge should explicitly state that a guilty plea has been taken into account. Failure to do so can be taken to indicate that the plea was not given weight in determining the sentence.³³ Second, the Court encouraged sentencing judges to quantify the effect of the plea by reference to contrition, witness vulnerability and the utilitarian value of the plea. However, the Court noted that it is not always possible to separate the utilitarian value of a plea from an offender's remorse.³⁴

The Court went on to say that the utilitarian benefit of a plea should be assessed in the range of a 10 to 25 per cent discount on the total sentence to be served.³⁵ Furthermore, consistent with the majority of state legislation, the primary consideration in determining where in the 10 to 25 per cent range a discount should fall is the timeliness of the plea. Although the decision predated the High Court's decision in *Cameron*, the Court recognised that what is considered an 'early plea' will be a matter for the sentencing judge. Finally, the Court stated that, in some cases, given the totality of circumstances and all other relevant factors, a guilty plea may change the *nature* of the sentence imposed (for example, a shift from a custodial to non-custodial penalty). However, the Court held that there are some circumstances where the protection of the public requires that no reduction in sentence be given, and referred to cases where an offence 'so offends the public interest' that a discount

³² Ibid 346 [24].

³³ This has been codified in some jurisdictions: *Sentencing Act 1991* (Vic) s 6AAA(1)(iii); *Penalties and Sentences Act 1992* (Qld) s 13(3); *Sentencing Act 1995* (WA) s 9AA(5).

³⁴ *Thomson and Houlton* (2000) 49 NSWLR 383, 401 [70].

³⁵ Within this range, there may be some connection between the quality of the plea in mitigation at sentencing and the quantum of the plea discount, although it would be difficult to test this empirically.

on the maximum sentence, even in light of a guilty plea, would be inappropriate.³⁶ As discussed further below, the ACT courts have been strongly influenced by this guideline judgment.

IV RECENT LEGISLATIVE DEVELOPMENTS IN RELATION TO GUILTY PLEAS

As noted above, almost all Australian jurisdictions explicitly reference guilty pleas in their sentencing legislation. This part presents a chronological review of recent key legislative developments in relation to courts quantifying guilty pleas, with some jurisdictions going so far as to prescribe the discount in the legislation itself. In *Markarian v The Queen*,³⁷ the High Court signalled its approval of an instinctive synthesis approach to sentencing, whereby the sentencing judge (or magistrate) weighs all the relevant factors to arrive at the appropriate sentence. Clearly, quantifying the discount for a guilty plea is an exception to this approach. Together with the discount for assistance to authorities, it is ‘one of only two situations where a numerical discount is often indicated by the courts’.³⁸

In 2008, Victoria introduced s 6AAA of the *Sentencing Act 1991* (Vic), which requires a court providing a discount for a guilty plea to specify the sentence it would have given in the absence of the discount (the notional sentence).³⁹ This provision was introduced following a recommendation of the Victorian Sentencing Advisory Council (‘VSAC’). The rationale was to ensure that this part of the sentencing process was more transparent and accessible.⁴⁰ However, there has been judicial

³⁶ See eg *R v Kalache* (2000) 111 A Crim R 152. For a recent example where an offender who pleaded guilty to murder nevertheless received no discount, see *R v Bayley* [2013] VSC 313 (19 June 2013). This was upheld on appeal: *Bayley v The Queen* [2013] VSCA 295 (21 October 2013).

³⁷ (2006) 228 CLR 357. For a critique, see Arie Freiberg, ‘Twenty Years of Changes in the Sentencing Environment and Courts’ Responses’ (Paper presented at the Sentencing: Principles, Perspectives and Possibilities Conference, Canberra, 10–12 February 2006). For further discussion of the intuitive/instinctive synthesis versus a more structured approach, see Dean Mildren, ‘Intuitive Synthesis or the Structured Approach’ (Paper presented at Sentencing Principles, Perspectives and Possibilities Conference, Canberra, 10–12 February 2006); Terry Hewton, ‘Instinctive Synthesis, Structured Reasoning and Punishment Guidelines: Judicial Discretion in the Modern Sentencing Process’ (2010) 31 *Adelaide Law Review* 79; Arie Freiberg and Sarah Krasnostein, ‘Statistics, Damn Statistics and Sentencing’ (2011) 21 *Journal of Judicial Administration* 72; Peter McClellan, ‘Sentencing in the 21st Century’ (Paper presented at the New South Wales Crown Prosecutors’ Conference, Pokolbin, 10 April 2012); Sarah Krasnostein and Arie Freiberg, ‘Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You’re Going, How Do You Know When You’ve Got There?’ (2013) 76 *Law and Contemporary Problems* 265.

³⁸ Bagaric and Edney, above n 7, 287. The other factor is assistance to the authorities.

³⁹ VSAC, *Sentence Indication and Specified Sentence Discounts Final Report* (VSAC, 2007).

⁴⁰ *Ibid.*

criticism of the provision, with Buchanan JA stating in *Scerri v The Queen* that the provision has an ‘inherent artificiality’ in that it requires judges to revisit sentences that have been arrived at by instinctive synthesis and quantify the discount by stating sentences that would have otherwise been imposed.⁴¹

Also in 2008, New South Wales enacted the *Criminal Case Conferencing Trial Act* (NSW). Section 17 of the Act provided that an early plea would attract a discount of up to 25 per cent, while a late plea could obtain a discount of up to 12.5 per cent. The operation of this scheme was evaluated by the New South Wales Bureau of Crime Statistics and Research in 2010,⁴² which found only weak evidence for its effectiveness. Accordingly, the scheme was abolished by the *Criminal Case Conferencing Trial Repeal Act 2012* (NSW). For completeness, it should be noted that the New South Wales Law Reform Commission (‘NSWLRC’) recently recommended that a proposed new *Crimes (Sentencing) Act* continue to provide for a guilty plea discount in terms similar to the current provision, but that this should clarify ‘that the lesser penalty imposed must reflect the utilitarian value of the plea’ and ‘require the court to quantify the reduction in penalty given for the utilitarian value of a guilty plea, unless there are reasons for not doing so which the court must record in its reasons for sentence’.⁴³ As with Victoria, the NSWLRC’s objective in recommending this is that legislative requirements of this type allow the process to be more transparent.⁴⁴

In 2012, Western Australia passed the *Sentencing Amendment Act 2012* (WA), in an effort to codify and encourage fast-track pleas of guilty.⁴⁵ Section 9AA states that if a person pleads guilty to a charge, the court may reduce the head sentence in order to recognise the ‘benefits to the state, and any victim of or witness to the offence, resulting from the plea’. Western Australia is the only jurisdiction whose legislation specifically states the rationale for reducing a sentence, although the benefit to the state is widely recognised as a primary rationale for all jurisdictions promoting the practice.⁴⁶ Including this in the legislative provisions ostensibly allows for a degree of transparency and explanation for those who may not fully understand the reasoning for providing a discount. However, recognising the benefit of a guilty plea to ‘any victim of’ an offence is particularly interesting in light of the discussion in *Siganto*. While the High Court has held that a complainant having

⁴¹ (2010) 206 A Crim R 1, 5-6 [23] (Buchanan JA).

⁴² Wai Yin Wan et al, ‘The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court’ (Bureau Brief No 44, New South Wales Bureau of Crime Statistics and Research, 2010).

⁴³ NSWLRC, *Sentencing*, Report No 139 (2013) Recommendation 5.1. It should also be noted that the NSWLRC is currently conducting an inquiry on encouraging early pleas of guilty, and recently released a consultation paper which presents approaches in other jurisdictions and asks what models should be adopted in New South Wales to improve the rate of early guilty pleas. Submissions to the NSWLRC were due by mid-December 2013.

⁴⁴ *Ibid* 125.

⁴⁵ Explanatory Memorandum, *Sentencing Amendment Bill 2012* (WA).

⁴⁶ Field, above n 24, 263.

to give evidence cannot be an aggravating factor, the inclusion of this factor in the Western Australian legislation effectively treats sparing a witness or complainant as mitigating. The distinction between these two principles, although real, can be difficult to understand, and recognising this benefit in legislation could have the effect of making the process *less* transparent. It has been held that it takes a 'very subtle mind, unusually sympathetic to the law' to understand and accept the difficulties associated with guilty pleas.⁴⁷ Adding more of these subtle distinctions could potentially create more confusion for offenders and the general public, who may not have this mindset. This is particularly true for self-represented offenders.

In addition, the 2012 amendments introduced s 9AA(4), which provides:

- If the head sentence for an offence is or includes a fixed term, the court must not reduce the fixed term under subsection (2) —
- (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.

Other than the short-lived criminal case conferencing trial in New South Wales discussed above (which was limited to District Court matters in central Sydney), this represented the first time that Australian legislation had set out a specific discount to apply to all guilty pleas. It remains to be seen what impact this has on court practices.

South Australia followed suit soon after Western Australia and its legislation appears not only to be comprehensive, but potentially rather complicated. The *Criminal Law (Sentencing) Act 1988* (SA) was amended in 2012 to include two provisions directly relating to reductions of sentences. In introducing the Bill, Attorney-General John Rau stated that the primary objective of the amendment was to make transparent the discounts given to offenders pleading guilty in South Australia. Secondary objectives included improving the criminal justice system by reducing backlog and delay and encouraging those who intend to plead guilty to do so at the earliest available opportunity.⁴⁸ We suggest that this latter purpose raises some issues. If the focus is simply to reduce backlog and delay, then arguably this approach should be withdrawn once these are reduced. In any event, this approach appears to prioritise pragmatism to a greater extent than any other Australian jurisdiction, possibly at the expense of a principled approach to guilty plea discounts.

In South Australia, if an offender is sentenced in the Magistrates Court, or in relation to a matter dealt with as a summary offence and pleads guilty to an offence not more than four weeks after first appearing in court, the court may reduce the sentence by up to 40 per cent.⁴⁹ If an offender pleads guilty to an offence more than four weeks after their first appearance in court but not less than four weeks

⁴⁷ *R v Shannon* (1979) 21 SASR 442, 458 (Cox J).

⁴⁸ Explanatory Memorandum, *Criminal Law (Sentencing) (Guilty Pleas) Amendment Bill 2012* (SA).

⁴⁹ *Criminal Law (Sentencing) Act 1988* (SA) s 10B(2)(a).

before the date of trial, the court may reduce the sentence by up to 30 per cent.⁵⁰ This discount also applies if an offender pleads guilty less than four weeks before the date of trial but satisfies the court that they could not have pleaded guilty at an earlier stage of the proceedings due to factors outside their control.⁵¹ The list concludes with reference to guilty pleas in ‘circumstances other than those referred to in the preceding paragraph’, where a court may reduce the sentence imposed by up to 10 per cent if satisfied that there is good reason to do so.⁵²

The legislation also provides that even if the maximum reduction under the previous sections does not apply because the offender did not plead guilty within the relevant timeframe, the court may still reduce the sentence up to those maximum limits in certain circumstances.⁵³ This includes where an offender has not been able to plead guilty within the timeframe because the court was not sitting,⁵⁴ the court did not sit in a place where an offender could have reasonably been expected to have attended,⁵⁵ or the court was unable to hear the matter due to factors outside the offender’s control.⁵⁶ This appears to be a catch-all provision to ensure that administrative and practical matters relating to courts’ scheduling do not impact an offender’s ability to receive a discount.

The South Australian model is unique in Australia in legislating specific time frames and reductions available at each of these points. It is also unique in that it distinguishes reductions in sentences for summary offences and for those in higher courts. Section 10C relates to sentences imposed in matters other than those outlined in s 10B (including matters dealt with on indictment). For these offences, where an offender has pleaded guilty to an offence not more than four weeks after the offender first appears in court, the sentencing court may reduce the sentence by up to 40 per cent (that is, identical to s 10B). Like s 10B, under s 10C if an offender pleads guilty more than four weeks after appearing in court for the first appearance but before the offender is committed for trial, the court may reduce the sentence that it would have imposed by up to 30 per cent. However, where an offender has pleaded guilty during the period commencing ‘on the first day on which the offender is committed for trial for the offence or offences and ending 12 weeks after the first date fixed for the arraignment of the defendant’,⁵⁷ the court may reduce an otherwise appropriate sentence by up to 20 per cent. This is clearly generous, in comparison with 10 per cent discount advocated by the New South Wales Court of Criminal Appeal (and is a generous model overall; no other jurisdiction we are aware of routinely imposes discounts of 40 per cent).

⁵⁰ Ibid s 10B(2)(b)(i).

⁵¹ Ibid s 10B(2)(c).

⁵² Ibid s 10B(2)(d).

⁵³ Ibid s 10B(3)(b).

⁵⁴ Ibid s 10B(3)(b)(i).

⁵⁵ Ibid s 10B(3)(b)(ii).

⁵⁶ Ibid s 10B(3)(b)(iii).

⁵⁷ Ibid s 10C(2)(c).

The Explanatory Memorandum for the amending Bill indicated that this provision was intended as a last 'filter' to encourage offenders who would ultimately plead guilty to do so at an earlier opportunity, thus saving the time and expense of preparing for a fully contested trial.⁵⁸ In addition, in the case of applications by the offender to quash or stay the proceedings or in the instance of a ruling adverse to the offender in the course of a hearing, if the offender pleads guilty within seven days, the court may reduce the sentence by up to 15 per cent.⁵⁹ It remains to be seen how these provisions work in practice and whether other jurisdictions likewise embrace such a prescriptive model that seems to run counter to the basic concept of instinctive synthesis.

V GUILTY PLEAS IN THE ACT

The previous parts of this article have provided the context for a discussion on the guilty plea discount by examining the key High Court cases and recent legislative amendments. This part presents a case study of the legislation and case law on this issue in the ACT. There is a recognised paucity of research on sentencing practices in the ACT.⁶⁰ This is of particular concern given the legislative requirement that ACT courts take 'current sentencing practice' into consideration as a relevant sentencing factor.⁶¹ Accordingly, it is vital that the courts be informed about such sentencing practices, including the operation of the guilty plea. The part commences with a brief introduction to the *Crimes (Sentencing) Act 2005* (ACT) ('the Act'), before analysing recent decisions and calculating the discount given in 300 decisions handed down by the ACT Supreme Court over the 30 month period between January 2011 and June 2013.

A Guilty Pleas Under the Crimes (Sentencing) Act 2005 (ACT)

Section 33 of the Act provides a list of considerations that a court must have regard to when determining an appropriate sentence. Included in this list is a guilty plea by an offender.⁶² The provision also directs attention to s 35, which contains provisions relevant to the court reducing a penalty for a guilty plea. This applies to cases where an offender has not only pleaded guilty but, based on the information, the court considers that there is a real likelihood that the offender will be

⁵⁸ Explanatory Memorandum, above n 47.

⁵⁹ This section specifically relates to applications and rulings during the period commencing from the day the defendant is committed for trial and ending not less than five weeks before the commencement of the trial: see *Criminal Law (Sentencing) Act 1988* (SA) ss 10C(2)(e)(i)–(ii).

⁶⁰ For discussion, see Lorana Bartels and Simon Rice, 'Reviewing Reforms to the Law of Suspended Sentences in the Australian Capital Territory' (2012) 14 *Flinders Law Journal* 253; Lorana Bartels, 'Sentencing Statistics, Sentencing Councils and the Quest for Data in the Australian Capital Territory' in Patricia Eastal (ed), *Justice Connections* (Cambridge Scholars Publishing, 2013) 60.

⁶¹ *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(za).

⁶² *Ibid* s 33(1)(j).

sentenced to a term of imprisonment.⁶³ Under s 35(2), the court must consider five matters, namely:

- (a) the fact that the offender pleaded guilty;
- (b) when the offender pleaded guilty or indicated an intention to do so;
- (c) whether the guilty plea was related to negotiations between the defence and the prosecution, specifically about the charge to which the offender pleaded guilty;
- (d) the seriousness of the offence; and
- (e) the effect of the offence on any victims or their family, or anyone who may make a victim impact statement in relation to the offence.

The first two issues are consistent with the Australia-wide approach of considering the timeliness of the plea to be of particular importance.⁶⁴ However, the provisions relating to the strength of the prosecution's case and whether the plea is the result of negotiations are unique to the ACT. Two other features of the ACT model are also worth noting. First, like the Victorian scheme and the NSWLRC proposal, ACT courts are required to state the penalty they would have imposed but for the guilty plea.⁶⁵ Second, in September 2013, a new provision was introduced, providing for a discount where the offender has assisted in the administration of justice.⁶⁶ In the Explanatory Memorandum accompanying the Bill, the provision was described as being designed to encourage cooperation between the defence and prosecution, to ensure that a trial is focused on the real issues in dispute.⁶⁷ The provision was specifically included to allow an accused to plead not guilty but still facilitate the administration of justice by making disclosures before or during the trial. This additional discount is similar in effect to provisions in New South Wales and Queensland sentencing legislation.⁶⁸ The Explanatory Memorandum further indicated that the New South Wales case law regarding the equivalent provision would assist the ACT judiciary in the application of this discount.

1 *The Strength of the Prosecution's Case*

Section 35(4) provides that a court must not make any significant sentence reduction in light of a guilty plea if the court considers that the prosecution's case is overwhelmingly strong.⁶⁹ In determining whether s 35(4) will apply, the court must consider what constitutes an overwhelming prosecution case. A number of decisions since the enactment of the legislation have made reference to this issue without

⁶³ Ibid ss 35(1)(a)–(1)(b).

⁶⁴ Field, above n 24, 253.

⁶⁵ *Crimes (Sentencing) Act 2005* (ACT) s 37. This is similar to the provision in Victoria.

⁶⁶ Ibid s 35A.

⁶⁷ Explanatory Memorandum, *Crimes (Sentencing) Amendment Bill 2013* (ACT).

⁶⁸ *Crimes (Sentencing) Procedure Act 1999* (NSW) s 22A; *Penalties and Sentences Act 1992* (Qld) s 13A.

⁶⁹ *Crimes (Sentencing) Act 2005* (ACT) s 35(4).

going so far as to say that the case against the accused was overwhelming. In *R v Boyle and Coogan*, for example, Burns J indicated that the prosecution’s case against each of the accused was ‘strong’, however because the pleas were entered relatively early in the proceedings, the offenders were entitled to a reduction of 20 per cent.⁷⁰ Conversely, in *R v Silkeci*, Nield J indicated that the prosecution’s case was ‘strong to the point of being overwhelming,’ and as a result the offender was entitled to a discount of only 10 per cent.⁷¹

It is evident that the strength of the prosecution’s case is also relevant when the case may not be particularly strong. In *R v Fortaleza* Penfold J indicated that because the offender pleaded guilty to a case that would not have been ‘overwhelmingly strong’, the offender was entitled to an increased discount of 23 per cent.⁷² Similarly, if an offender pleads guilty to a charge that may not have been able to be proved beyond reasonable doubt, the offender may be entitled to ‘some reasonable discount over and above the ordinary plea of guilty.’⁷³

The effect of this provision in the ACT is that the prosecution’s case is often a consideration in determining the weight a plea should be given, whether or not the prosecution’s case is strong. By contrast, other jurisdictions have indicated that the strength of the prosecution’s case is not to be considered in determining an appropriate reduction. Indeed, the Queensland Court of Appeal has held that consideration of the strength of the prosecution’s case goes against the fundamental rationale for the discount, with Byrne J stating in *Bulger v The Queen*:

I remain to be convinced that this reluctance to make any allowance for guilty pleas in apparently indefensible cases is justified. If administrative expediency resulting from a guilty plea is sufficient basis for moderation in sentencing, it ought not be decisive against a lesser sentence that conviction seems certain in the event of a trial.⁷⁴

Bulger was cited by the New South Wales Court of Criminal Appeal in *Thomson and Houlton*, where it indicated that the strength of the prosecution’s case should

⁷⁰ *R v Boyle and Coogan* (Unreported, Supreme Court of the Australian Capital Territory, Burns J, 29 June 2012) [19].

⁷¹ *R v Silkeci* (Unreported, Supreme Court of the Australian Capital Territory, Nield AJ, 16 February 2011) [30].

⁷² *R v Fortaleza* (Unreported, Supreme Court of the Australian Capital Territory, Penfold J, 8 February 2012) [27].

⁷³ *R v Beahan* (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 21 October 2011) [19]. This is similar in effect to the common law ‘Ellis discount’ in New South Wales, whereby an offender who makes voluntary disclosures of involvement in crimes that the police had no knowledge of is entitled to a ‘significant added element of leniency’: *R v Ellis* (1986) 6 NSWLR 603.

⁷⁴ (1990) A Crim R 162, 170 (*Bulger*). His Honour went on to indicate that where the discount is lessened due to the strength of the prosecution’s case, there will be less incentive for offenders to plead guilty.

not be considered a relevant factor in determining the utilitarian value of a plea.⁷⁵ Rather, the strength of the prosecution's case should be linked only to questions of contrition or remorse.⁷⁶ Recently, the Victorian Court of Appeal stated that '[t]he 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.'⁷⁷ This is generally due to the proposition that it negates the remorse that may be indicated by a plea and the difficulty for the court to be aware of the strength of the prosecution's case before the evidence has been tested.⁷⁸

Therefore, the ACT approach on this issue is at odds with most other Australian jurisdictions. Indeed, it is seen by some as incompatible with present sentencing law and practice.⁷⁹ In addition to any concerns about principle, the ACT approach would also be impractical in some Australian jurisdictions, as sentencing judges are not always in a position to evaluate thoroughly the strength of the prosecution's case. For example, it would be difficult for Western Australia to include a similar provision due to its fast track system, which often requires the prosecution to show very minimal evidence before the offender is committed to a superior court for sentence.

2 *Plea Bargaining*

Under s 33(2)(c) of the Act, the court must consider whether the guilty plea was related to negotiations between the prosecution and the defence about the specific charge to which the offender has pleaded guilty. The ACT is the only Australian jurisdiction to include this concept of 'plea negotiating' in sentencing legislation. Generally speaking, Australian courts do not recognise formal plea bargaining,⁸⁰ 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.

When introducing the Crimes (Sentencing) Bill 2005 (ACT), then Attorney-General Jon Stanhope indicated that diminishing credit for pleas that are the result of negotiations with the prosecution is consistent with a number of judgments.⁸¹ However,

⁷⁵ *Thomson and Houlton* (2000) 49 NSWLR 383, 416 [137].

⁷⁶ *Ibid.* See also *R v Pajic* (2009) 23 VR 527. For discussion on the perceived differences between 'contrition' and 'remorse', see *R v Pereira* (1991) 57 A Crim R 46 (NSWCCA). See also *DPP (Cth) v Goldberg* (2001) 184 ALR 387, 395 [41] (Vincent JA).

⁷⁷ *Phillips v The Queen* (2012) 222 A Crim R 149, 158 [36] (Redlich JA and Curtin AJA, Maxwell P agreeing).

⁷⁸ 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, 51.

⁷⁹ Bagaric and Edney, above n 7, 292.

⁸⁰ Mackenzie and Stobbs, above n 3, 92.

⁸¹ See, eg, *R v Gray* [1977] VR 225; *R v Shannon* (1979) 21 SASR 442.

he also noted that it may at times be difficult to determine whether the plea is a direct result of these negotiations. Similarly, it may be difficult to determine conclusively that negotiations with the defence influenced the prosecution's decision not to proceed with certain charges. Because of this, the legislation was drafted with the intention of leaving the circumstances surrounding plea negotiations a matter for an individual sentencing judge to determine.⁸² The legislation does not specifically state the effect of negotiations on a plea. However, there is often a relationship between the timeliness of a plea and negotiations with the prosecution. In some situations, a plea will be considered early if it follows late negotiations with the prosecution.⁸³ Where this has occurred, the court will generally make a statement in the sentencing decision to that effect.⁸⁴ In *R v Del Solar*,⁸⁵ Refshauge J cited with approval the following passage from the New South Wales case of *R v Dib*, indicating that the effect of negotiations with the prosecution is ultimately often a question of timeliness:

In my opinion, the amount of any discount to be allowed by reason of the utilitarian benefit of a plea of guilty should not be reduced on the ground that the plea was offered in association with the abandonment by the Crown of a greater charge; and if in such a case the plea is offered as soon as the Crown indicates willingness to accept a plea to the lesser charge, it should be regarded as being made at the earliest opportunity.⁸⁶

A number of general criticisms are put forward against plea bargaining, making the inclusion of this provision somewhat controversial. Some argue that the secrecy which surrounds plea bargaining and the lack of transparency means that prosecutorial decisions are not able to be carefully scrutinised.⁸⁷ Additionally, the potential to 'overcharge' an offender (by charging them with numerous or more serious offences) in order to induce a guilty plea to a lesser charge is of significant concern.⁸⁸ Whether this is indicative of a need to ensure plea negotiation is more carefully regulated is beyond the scope of this discussion. However, it should be noted that, at the very least, including this as a provision for judicial consideration in sentencing ensures the process is not conducted entirely behind closed doors.

⁸² Explanatory Memorandum, Crimes (Sentencing) Bill 2005 (ACT).

⁸³ See *R v Ayres* (Unreported, Supreme Court of the Australian Capital Territory, Penfold J, 13 December 2012); *R v Williams* (Unreported, Supreme Court of the Australian Capital Territory, Higgins CJ, 16 November 2011).

⁸⁴ *R v Ayres* (Unreported, Supreme Court of the Australian Capital Territory, Penfold J, 13 December 2012).

⁸⁵ *R v Del Solar* (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 14 March 2013).

⁸⁶ [2003] NSWCCA 117 (27 May 2003) [3] (Hodgson JA).

⁸⁷ See 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, 915. See also New South Wales Sentencing Council, above n 7.

⁸⁸ Flynn and Fitz-Gibbon, above n 86, 916.

B *How Does the Discount Operate in the ACT?*

The intended effect of the ACT legislation is very similar to other jurisdictions as it seeks to facilitate the discounting of sentences and provide a framework within which a sentencing judge must operate. In *Ross v Williams*, Refshauge J noted that there is a tendency in the ACT to apply percentage discounts for pleas of guilty, and that this is heavily influenced by New South Wales sentencing practice.⁸⁹ Similarly, in the recent case of *Mcdonald v Vandervalk and Wong (No 1)*, Burns J stated in relation to the New South Wales case law on guilty plea discounts:

This Court is not bound by the decisions of the [New South Wales Court of Criminal Appeal]; however the above decisions [including *Thomson and Houlton*] are strongly persuasive authority and should not be departed from unless I consider them plainly wrong. With respect, I consider them to be plainly correct.⁹⁰

The reliance of ACT judges on New South Wales jurisprudence is clearly evident when examining recent sentences from the ACT Supreme Court. The ACT courts have generally accepted the guidelines suggested by the New South Wales Court of Criminal Appeal in *Thomson and Houlton*. This is particularly true of Spiegelman CJ's reasoning that 'the absence of any reference to actual consideration of the guilty plea in the course of sentencing should, as a general rule ... lead to an inference that the plea was not given weight.'⁹¹ This passage is often cited with approval in cases where a ground of appeal is that the sentencing judge erred in not considering that the offender pleaded guilty in determining an appropriate sentence.⁹² As discussed above, the requirement that a sentencing judge make a statement in relation to discount for a guilty plea is also codified into the ACT legislation.⁹³

In relation to quantifying an appropriate discount, ACT courts have also indicated that the range of discounts suggested in *Thomson and Houlton* is appropriate (10 to 25 per cent on the head sentence and above 25 per cent for pleas entered at the earliest opportunity).⁹⁴ However, while the courts have expressly accepted these guidelines; examination of recent sentences imposed in the ACT following guilty pleas indicates that the court may be more generous with sentence reductions than the court in *Thomson and Houlton* recommended. This is particularly true of pleas entered later in the proceedings.

The ACT Supreme Court publishes all of its sentencing remarks on its website. In order to assess current sentencing practices in the ACT, we examined all sentencing remarks between January 2011 and June 2013. We identified 300 Supreme Court cases where the offender had pleaded guilty and the following analysis is based on those cases.

⁸⁹ [2012] ACTSC 168 [42].

⁹⁰ [2014] ACTSC 67 (1 May 2014) [11] (Burns J).

⁹¹ (2000) 49 NSWLR 383, 395 [52].

⁹² See, eg, *Westin v Gordon* [2012] ACTSC 44 [93].

⁹³ *Crimes (Sentencing) Act 2005* (ACT) s 37.

⁹⁴ See *R v Cooper* [2012] ACTCA 9 [49].

1 *The Timing of the Plea*

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. This appears to be a matter of judicial discretion; while the legislation requires that the timing of the plea be taken into account, there is no requirement that the timing of the plea be indicated by the court. Similarly, many sentencing decisions included the specific percentage by which a sentence had been reduced. This assisted in analysing average percentages; however, the majority of these decisions did not reference the percentage by which a sentence was reduced. Rather, the majority of sentences referenced only what a sentence would have been had the offender pleaded not guilty and subsequently been convicted.

By comparing the difference between what Victorian courts refer to as the 'notional' sentence, and the actual sentence imposed we were able to calculate the percentage by which the sentence had been reduced and we determined that the average reduction for a guilty plea in the ACT was 22 per cent. Table 1 sets out the reduction in sentence by timing of plea (including pleas entered at later stages in the proceedings, pleas identified as early and instances where the timing of the plea is not stated). The significant percentage of cases where the timing of the plea is not indicated could impact on the data below. However, the sample size of cases where the timing of the plea was articulated is sufficient to provide some tentative conclusions on the impact of the timing of the plea on the discount provided.

Table 1: Reduction in Sentence, by Timing of Plea

Timing of Plea	Number of Cases	Average Reduction (per cent)
Early plea	134	24
Late pleas	102	18
Timing of plea not indicated	64	20
Total	300	22

Pleas identified by the sentencing judge as being entered early naturally attracted a more significant discount, with an average reduction of 24 per cent. Pleas entered at an identifiably late stage in the proceedings attracted an average discount of 18 per cent. In *R v Howard* the offender entered a plea on the morning of trial; Penfold J discussed the need to 'steer a careful path'⁹⁵ when dealing with sentencing discounts:

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 late plea that

⁹⁵ *R v Howard* (Unreported, Supreme Court of the Australian Capital Territory, Penfold J, 22 November 2012) [25].

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 making a late plea.⁹⁶

In sentencing the offender, her Honour noted that a plea entered at an earlier stage would have attracted a discount of 28 per cent. Instead, the offender was entitled to a discount of 17 per cent. This discount is still significant compared with the 10 per cent suggested in *Thomson and Houlton*. Conversely, in *R v Ennis*, Nield AJ indicated that because the plea was entered so late in the proceedings, the offender was not entitled to anything above a 10 per cent discount.⁹⁷

2 Differences by Judicial Officer and Offence Type

Over the period under consideration, there were four permanent judges of the ACT Supreme Court (Higgins CJ, Penfold, Burns and Refshauge JJ) and one acting judge (Nield AJ). There were clear differences in the number of decisions determined by each judge. There may have also been differences in the seriousness of the cases. Subject to these caveats, there was a notable difference among the judges of the ACT Supreme Court. As set out above, in *Ennis*, Nield AJ awarded a discount of only 10 per cent for a late plea. Overall, Nield AJ offered the lowest sentence reduction, at 18 per cent (with reductions of 21 per cent for pleas entered at an early opportunity and 15 per cent for those entered at later stages). Similarly, the largest reduction in a sentence by Nield AJ was substantially lower than the largest discount given by the permanent ACT judges. The most significant discount given by Nield AJ was 25 per cent, while the largest discounts given by Penfold and Burns JJ were 33 per cent. Burns and Penfold JJ both averaged 24 per cent for pleas entered early and 17 per cent for pleas entered later. Refshauge J had an average sentence reduction of 25 per cent for pleas entered at an early opportunity and 21 per cent for those entered later. Higgins CJ, who retired in September 2013, averaged 22 per cent for pleas entered early and 17 per cent for those entered at later stages.

It is beyond the scope of this article to explore possible reasons for these differences, which may simply reflect subtle differences in the cases before each judicial officer. Generally speaking, there appears to be a reluctance to analyse sentencing practice on the basis of differences among judicial officers,⁹⁸ though anecdotal evidence from legal practitioners suggests that they are aware of individual differences in terms of severity or approaches to particular aspects of the sentencing discretion.

⁹⁶ *R v Howard* (Unreported, Supreme Court of the Australian Capital Territory, Penfold J, 22 November 2012) [25].

⁹⁷ *R v Ennis* (Unreported, Supreme Court of the Australian Capital Territory, Nield AJ, 14 April 2012).

⁹⁸ Cf Don Weatherburn and Bronwyn Lind, 'Sentence Disparity, Judge Shopping and Trial Court Delay' (1996) 29 *Australian and New Zealand Journal of Criminology* 147; Tasmania Law Reform Institute, *Sentencing*, Report No 11 (2008). For a recent international study, see Susan Long, 'Examining Current Federal Sentencing Practices: A National Study of Differences Among Judges' (2012) 25 *Federal Sentencing Reporter* 6.

In a system that maintains judicial discretion, however, some variation among judicial officers is to be expected and is probably not cause for significant concern.

Of the sentences analysed, the maximum discount afforded solely on the basis of a guilty plea was 50 per cent. In *R v McKenzie*, Refshauge J reduced a sentence of imprisonment for aggravated robbery from 24 months to 12 months.⁹⁹ This was despite the plea not being made at the earliest opportunity and the prosecution’s case against the offender being ‘very strong’. His Honour indicated that the plea was evidence of real remorse and, as a result, the offender had substantial prospects for rehabilitation. While acknowledging that sentencing is an exercise in discretion and a number of factors are relevant in deciding an appropriate sentence, this reduction in sentence is significantly higher than any reduction discussed in the previous section.

Table 2: Reduction in Sentence, by Offence Type

Type of Offence	Number of Cases	Average Reduction (per cent)
Offences against the person	131	21
Theft and related offences	106	22
Drug related offences	25	22
Sexual offences	26	20
Other offences	12	20

While the average sentence reductions varied across the five judges, the discounts varied very little for different offences, as set out in Table 2. Section 35(2)(d) requires the court to take into account the seriousness of the offence, but this does not appear to have had an impact in this context, with sexual offences attracting almost the same discount as theft offences (20 per cent and 22 per cent respectively), even though the latter would generally be regarded as involving much less serious offending. On the other hand, it may be that the court assesses offence seriousness within the range of that type of offence (for example, indecent assault within the context of sexual offending more generally), rather than where the offence sits along the spectrum of all offences (for example, property offences as opposed to sexual offences).

3 *Utilitarian Value or the Facilitation of Justice?*

Our analysis of ACT cases shows an adherence to the notion that the utilitarian value of a guilty plea is the primary rationale for the discount. It appears from our analysis that the ACT Supreme Court favours Kirby J’s approach in *Cameron*: the utilitarian benefit of a plea (and sparing the cost of a trial for the public) is the

⁹⁹ *R v McKenzie* (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 10 September 2010).

paramount consideration. This is evident from the number of decisions that make reference to the significant utilitarian value in a guilty plea (n=102), compared with the relatively few that discuss the concept of a willingness to facilitate the course of justice (n=19).¹⁰⁰

A late plea, particularly one entered immediately before the beginning of a trial, cannot realistically be seen as a willingness to facilitate the course of justice. Rather, pleas such as this are more likely to be viewed as an acceptance of the inevitable, or a plea for the sake of attracting the discount. The ACT Supreme Court, however, has still given significant discounts in such situations by recognising that even a late plea has some utilitarian value. In *R v Roberts*, the plea was entered on the morning of trial;¹⁰¹ nevertheless, Penfold J held that the utilitarian value of sparing the cost of a trial and the complainants having to give evidence warranted a sentence reduction of 20 per cent. In *R v Fortaleza*, where the plea was entered not long before the commencement of the trial, Refshauge J still determined that a reduction of 33 per cent was warranted.¹⁰² This discount would be considered significant even had the plea been entered at the earliest available opportunity, given the average reduction of early pleas in the ACT is 24 per cent.

Overall, the approach taken by the ACT Supreme Court is generally consistent with that recommended in *Thomson and Houlton*. While the discount for pleas entered at a later stage in the proceeding is higher than that suggested in the guideline judgment, in general the discounts fall in the recommended range. In accepting the sentencing practice of New South Wales courts, the ACT Supreme Court has also demonstrated that the utilitarian value of a plea is of more significance than the facilitation of justice. The recent amendments to the Act, allowing a court to reduce a sentence for cooperation with the administration of justice, further indicate that this is a separate consideration for the court and should not be directly related to a guilty plea.

VI REFORM

Discounting an otherwise appropriate sentence for the sole reason of a guilty plea is not without criticism. In 2014, Mirko Bagaric and Richard Edney argued that the majority position in *Cameron* ‘places semantics over reality’¹⁰³ and that there ‘is no clear *principled* criminological basis for punishing offenders who plead guilty less severely than those who elect to proceed to trial’.¹⁰⁴

¹⁰⁰ It should be noted that the cases under consideration were handed down before the introduction of a specific discount for facilitating the administration of justice, discussed above.

¹⁰¹ *R v Roberts* (Unreported, Supreme Court of the Australian Capital Territory, Penfold J, 3 November 2011).

¹⁰² *R v Fortaleza* (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 16 August 2011). This is a separate decision to the case discussed above.

¹⁰³ Bagaric and Edney, above n 7, 296.

¹⁰⁴ *Ibid* 286.

In order to overcome these concerns, suggested reforms have included the creation of a 'qualified guilty plea',¹⁰⁵ which would have the effect of pleading guilty and therefore allowing for the discount, while still allowing the defendant to advance submissions that suggest innocence. If the sentencing judge is persuaded that there was a plausible chance of an acquittal, the defendant would be entitled to a discount in excess of the ordinary guilty plea discount. This suggestion is made to ensure that the utilitarian benefits of a plea are being preserved, while acknowledging that the discount can induce innocent defendants to plead guilty and, further, that not all people who plead guilty are equally guilty.¹⁰⁶

In our view, this approach is problematic for a number of reasons. Allowing a defendant to plead guilty while still maintaining their innocence endorses the criminal justice system imposing penalties on defendants who may not be guilty. This has the potential to significantly impair the integrity of the system. In addition, establishing that the defendant has a plausible defence to a charge is likely to create burdens and delays, undermining the basic utilitarian rationale for the system.¹⁰⁷ There is also the potential for even greater pressure to be placed on defendants (especially vulnerable defendants) to plead guilty because of this extra discount. Furthermore, courts have consistently held that a judge must reject an unequivocal or qualified guilty plea, that is, those that are accompanied by statements that may indicate the person is not guilty of the offence.¹⁰⁸ On the other hand, the discount for assisting the administration of justice available under both the New South Wales and ACT legislation may provide something of a middle ground in this context, by enabling defendants who wish to contest the charges against them to nevertheless obtain some benefit from facilitating the administration of justice.

Another proposal is to abolish the discount entirely, on the basis that discounting a sentence for a guilty plea imposes a deliberate penalty on defendants who plead not guilty, which is incompatible with general sentencing principles.¹⁰⁹ This argument suggests that the discount is a result of administrative factors and the desirability of expediency, both of which are unrelated to an offender or their circumstances. In addition, the discount results in lenient sentences, which cause significant public dissatisfaction with the justice system. Kathy Mack and Sharyn Roach Anleu claimed that these disadvantages are not outweighed by the practical benefit of the discount. However, they acknowledged that because the discount is so widely included in sentencing legislation and has been a matter of common law for so long, there may be some justification for a minimal discount of only 10 per cent in recognition of the plea.¹¹⁰

¹⁰⁵ Bagaric and Brebner, above n 77, 52.

¹⁰⁶ Ibid 53.

¹⁰⁷ Ibid 69.

¹⁰⁸ See *Tudman v Flower* (1996) 73 A Crim R 321; *DPP v King* (2008) 187 A Crim R 219.

¹⁰⁹ 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, 141.

¹¹⁰ Ibid 142.

While this approach has the benefit of ensuring that offenders are not punished more severely for choosing to go to trial, this analysis largely ignores the utilitarian value of the guilty plea discount as a way of inducing offenders to plead guilty and thus spare the cost of a trial. Mack and Roach Anleu indicate that any loss of efficiency will be minimal and that there may be other ways of ensuring that the system is not unduly burdened by an increase in contested trials. For example, such as establishing mechanisms for the prosecution and defence to identify well before trial which facts are capable of being proved beyond reasonable doubt, which charges are appropriate based on those facts and the likelihood of any conviction.¹¹¹ However, it is difficult to determine whether these mechanisms would adequately mitigate the burden on the justice system that would likely arise from an increase in the number of offenders pleading not guilty. These burdens would ultimately result in delays in a system that already experiences significant delays.¹¹²

VII CONCLUSION

There are no clear answers to the theoretical or practical difficulties posed by the guilty plea discount, but we believe that the benefits of the discount for both the individual and the state are obvious. Ultimately, the significant advantages of this system — to the offender, the victim and the state — mean that the discount afforded to those who plead guilty will and should continue to be an integral part of the criminal justice system.

What is perhaps less clear is how prescriptive courts and legislatures should be in determining the quantum and the practical operation of the discount. In relation to the former, Bagaric and Edney argued recently that '[a]ll jurisdictions should follow the New South Wales approach and set a defined discount and quantify it according to the time at which it the plea was taken'.¹¹³ They made no reference to the NSWLRC report. It may therefore be inferred that their recommendation preceded its release and they were simply endorsing the New South Wales Court of Criminal Appeal's guideline judgment in *Thomson and Houlton*. The NSWLRC recommendation would go further and enshrine this in legislation. Whether legislatures should or will follow the highly prescriptive model recently laid down by South Australia remains to be seen. It might be inferred that judicial officers would resist any intrusion on their ability to instinctively synthesise the appropriate sentence, taking into account *all* the relevant factors, including an offender's guilty plea. Certainly, the High Court has made its commitment to the instinctive synthesis approach very

¹¹¹ Ibid 143.

¹¹² Indeed, in her swearing in speech in October 2013, the new ACT Chief Justice stated that she 'would make it a priority to continue to reduce the backlog and delay that has plagued the Supreme Court in recent years': Christopher Knaus, 'New ACT Chief Justice Helen Murrell Vows to Cut Delays in Supreme Court', *Canberra Times* (online), 28 October 2013 <<http://www.canberratimes.com.au/act-news/new-act-chief-justice-helen-murrell-vows-to-cut-delays-in-supreme-court-20131028-2wapl.html#ixzz2vFrIOt3X>>.

¹¹³ Bagaric and Edney, above n 7, 303.

clear. Although Hayne J remains the only serving judge who was on the Court at the time of *Markarian v The Queen*,¹¹⁴ it has since been endorsed by every member of the current High Court.¹¹⁵

This article has discussed the operation of the guilty plea discount across Australia. Clearly there is some discrepancy, not only in regards to the legislative position, but also the practical application of the discount. The article expands on our understanding of the operation of the discount by presenting an analysis of 300 recent ACT Supreme Court cases. The approach adopted by the ACT is an important site of analysis: it demonstrates some similarities with other national practices as well as some significant differences. It also highlights some unique legislative developments in respect of the strength of the prosecution’s case and plea negotiations, which may be instructive for other Australian jurisdictions. The former position runs counter to the jurisprudence in other jurisdictions, indicating that the strength of the prosecution’s case should not be a relevant consideration, but perhaps it makes intuitive sense that a plea should not be rewarded as highly if it is simply an acceptance of the inevitable. It may also offer some insight as to how a sentencing judge reaches a decision in relation to the discount. On the basis of our case analysis, however, it appears that the inclusion of these provisions does not make any significant difference to sentencing practice, given the averages are similar to other jurisdictions, particularly New South Wales. Through this analysis, we hope to contribute to the research literature on one of the most significant mitigating factors considered by Australian courts, as well as shining a light on ACT sentencing practices.

¹¹⁴ (2006) 228 CLR 357.

¹¹⁵ See *Muldrock v The Queen* (2011) 244 CLR 120, 131-2 [26] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Munda v Western Australia* (2013) 249 CLR 600, 621 [59] (French CJ, Hayne J, Crennan, Kiefel, Gageler and Keane JJ); *Achurch v The Queen* (2014) 306 ALR 566, 569 [7] (French CJ, Crennan, Kiefel and Bell JJ).