

THE GUILTY PLEA DISCOUNT: DOES PRAGMATISM WIN OVER PROPORTIONALITY AND PRINCIPLE?

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A discount in sentencing quantum is routinely provided to defendants who plead guilty to offences. This article examines the reasons for such a discount, and argues that there is little appropriate justification; and further that it creates, in effect, a penalty for defendants who exercise their right to trial. It is further argued that the existence of such a discount can provide an inappropriate incentive to enter a guilty plea for defendants who may otherwise have had a valid reason for exercising their right to trial.

I INTRODUCTION

Consistency, and avoiding undue disparity, are central tenets 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. If an offender is to be afforded a sizable sentencing discount simply because he or she has pleaded guilty to the offence, 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 accused persons who exercise their right to trial and cannot access the discount.

In Australia, it has been held by the High Court that an accused who exercises their right to trial cannot be penalised for having done so.² On the other hand, an offender who pleads guilty is entitled to receive a discount in sentence.³ On the face of it, these principles do not seem unreasonable, but on further examination there are significant problems.

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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.

Whilst there has been considerable judicial and academic debate in Australia over the nature and justification for the guilty plea discount,⁴ this article enlivens the little discussed issue of the quantum of the discount, and asks what effect it is having more generally in the important context of consistency and in particular fairness in sentencing.⁵ It argues that there is little appropriate justification for the discount, and that it creates, in effect, a penalty for those defendants who exercise their right to trial (for whatever reason). It also argues that in some cases the existence of the discount can provide an inappropriate incentive to plead guilty, when in some cases, defendants ought not to have done so.

II GUILTY PLEA DISCOUNT

In most common law jurisdictions it has now been accepted that an accused person is entitled to a discount in sentence in return for a guilty plea.⁶ 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. An exception is New South Wales with the guideline judgment of *R v Thomson*,⁷ where it was held that the

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.

⁵ This article does not however take an empirical approach to this question, but rather examines policy issues and critique in relation to the discount.

⁶ In Australia see *Cameron v R* (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.

⁷ (2000) 49 NSWLR 383.

discount should be in the range of 10-25%. 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 is given or indicated, and remorse.⁸

Because the discount given varies from case to case, and depends largely on the discretion of the individual sentencer, this has an inevitable effect on consistency. Further, unless a set discount is given in particular nominated circumstances,⁹ the actual sentence to be obtained cannot be accurately predicted, or indeed compared with that given in another case.¹⁰ The logical difficulty with this is that, because so many matters are disposed of by guilty pleas, there are few comparisons possible with cases where the accused was found guilty after trial.¹¹ It is difficult to show that an accused did in fact achieve an advantage from the guilty plea discount in the eventual outcome, as opposed to having gone to trial and not having had such a benefit. Further, if the sentencing judge is sentencing the offender on the basis of instinctive synthesis,¹² or whatever name is given to an integrated process in sentencing whereby distinct discounts in mitigation are not identified,¹³ unless the discount is specifically quantified, the discount may effectively be subsumed by a multiplicity of available mitigating factors, depending on which are operative in a particular case. But the question remains of how does an individual offender know (if it is not specified) what effect their guilty plea had on the eventual sentence? And secondly, if such a discount is intended to operate as an incentive to others to take a similar course, it is difficult to avoid the conclusion that they are

⁸ *Cameron v The Queen* (2002) 209 CLR 339.

⁹ Either by statute or case authority.

¹⁰ See discussion in Peter Tague, 'Tactical Reasons for Recommending Trials Rather than Guilty Pleas in Crown Court' (2006) *Criminal Law Review* 23.

¹¹ Part of the reason for this, apart from the fact that overwhelmingly most defendants plead guilty; is that because there are so few guilty pleas, few comparisons are available.

¹² *Markarian v R* (2005) 215 ALR 213. Note that *R v Williscroft* [1975] VR 292 was the original source of the term.

¹³ Geraldine Mackenzie, *How Judges Sentence* (2005), 17ff.

often operating on blind faith that the discount will indeed be real and significant. As Fox and Freiberg rightly note,

if the policy is to encourage pleas of guilty, in order to reduce the burden on the courts, then the nature and extent of the discount should be made manifest so that other similarly minded accused persons will be aware of the advantages to them of pleading guilty.¹⁴

It is difficult to see how the discount will have the effect of an incentive unless such open disclosure of the discount occurs.¹⁵

Further, if the sentencing judge states in their reasons that the plea of guilty has been taken into account in mitigation of sentence, even if a specific discount is not mentioned, it is difficult to see how this would be an appellable error, unless the sentence itself was manifestly excessive. And in addition, as stated above, because comparisons with the discounting outcomes of other cases are difficult, because of a multiplicity of reasons, including lack of transparency, it is difficult to quantify what the discount ought to have been in any event.

There has been a paradigm shift¹⁶ 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.¹⁷ These

¹⁴ Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), 199.

¹⁵ It is perhaps assumed that lawyers representing accused persons will make them aware of the potential discount for a guilty plea. But this may not necessarily be the case.

¹⁶ I use this term deliberately to indicate what has been a major shift from the previous practice of treating the guilty plea as mitigatory only where remorse or savings in the administration of justice were present; to the present system of treating the plea as mitigatory on purely utilitarian grounds.

¹⁷ *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.

earlier cases did not necessarily agree that a plea of guilty on its own could mitigate:

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.¹⁸

In 1985, Willis noted that judicial pronouncements to that point had not generally given clear approval to the practice of guilty plea discounts, and that this,

no doubt stems in large measure from the difficulties appellate courts have felt in reconciling the essentially pragmatic convenience of allowing discounts for guilty pleas with such basic and traditional principles as the presumption of innocence, the right to trial and the requirement that a defendant's plea be voluntary.¹⁹

Significantly, Willis pointed out that the sentencing discount incorporated a new element based on administrative considerations rather than traditional pedagogical grounds, and this introduced what amounted to “a principle of disparity” into sentencing.²⁰ In a later contribution to the literature on this issue he argued that the presence of the guilty plea discount was “a powerful commentary on the problems besetting the courts especially in the more populous jurisdictions”.²¹

¹⁸ *The Queen v Shannon* (1979) 21 SASR 442, 446 per King CJ. *Shannon* made it clear that other matters would have to be present to attract a discount, other than a mere plea of guilty.

¹⁹ J E Willis, 'The Sentencing Discount for Guilty Pleas' (1985) 18 *Australian and New Zealand Journal of Criminology* 131, 137.

²⁰ *Ibid* 143.

²¹ John Willis, 'New Wine in Old Bottles: The Sentencing Discount for Pleading Guilty' (1995) 13(2) *Law in Context* 39.

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".²² 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.²³ 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 16.²⁴ In these instances it is the *lack of* remorse, in the sense of an aggravating factor, 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*.²⁵ 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 the expense of a contested hearing.²⁶

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.²⁷ In Queensland, the current practice is that a guilty plea will attract a discount of around 30% of the

²² *Sentencing Act 1991* (Vic) s 5.

²³ *Penalties and Sentences Act 1991* (Qld), s 13.

²⁴ See ss 9(4)(i), and 9(6)(h).

²⁵ (2002) 209 CLR 339.

²⁶ *Ibid* at 343. The possible penalising of an offender who pleads not guilty is discussed below.

²⁷ See eg, *Atholwood* (1999) 109 A Crim R 465 (WA); *R v Corrigan* [1994] 2 Qd R 415.

sentence, particularly when the plea is entered or indicated at an early stage of the proceedings.²⁸ 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.²⁹

III JUSTIFICATION FOR THE DISCOUNT

This analysis of relevant authorities suggests that the main reason for offering a guilty plea discount is administrative efficiency; in return for the offender saving the state the costs of a trial, preventing the victim and witnesses from having to give evidence,³⁰ and assisting in the speedy resolution of the matter, he or she in return is given a benefit in the form of a discount either off their head sentence (if imprisonment), or perhaps an amelioration of another nature in the form of a recommendation for early release on parole, or a conversion to a community based order instead of a custodial one.

The reasons above may also be utilitarian in nature and linked with rehabilitation. An offender who is willing to admit their guilt could be argued to be more receptive to the possibility of rehabilitation (as may be the case in relation to remorse, below), and therefore would benefit from a reduced sentence of whatever nature.

A third justification is to see the discount as a reward for the guilty plea, which is closely linked with co-operation with law enforcement agencies. In this way, the discount is not linked with the remorse or the offender's future prospects, but operates purely as an incentive to admit guilt.

28 From the author's own knowledge; also discussions with defence counsel.

29 Ibid.

30 See later discussion in relation to victims.

But is the guilty plea discount justified on any of these three grounds, or indeed for any other reasons? Does it in fact act as an incentive for accused persons to plead guilty, or would these accused have entered a guilty plea in any event? Or is the discount inappropriately rewarding those who take a certain course?

IV REMORSE

Although this article does not examine in any detail whether or not remorse should be taken into account in sentence, it is worth noting in passing that the presence of remorse can result in a further sentencing discount, although some studies have suggested that its effect may be small.³¹ The justification for taking into account remorse in sentencing is at least partly utilitarian, in that an offender who is remorseful is presumably more likely to be able to be rehabilitated, although studies have shown this link to be small, at best.³²

In *Cameron*, the joint judgment of the High Court did not elaborate in any detail on the factors of remorse and acceptance of responsibility, and how these should be taken into account. Justice Kirby however in a separate judgment (largely concurring with the result), suggests a logical and workable solution, which involves a separation of the guilty plea and its attendant discount (given on purely utilitarian grounds), from the discrete issue of remorse, itself a controversial matter.³³

In his judgment, Kirby J elaborates in detail on the way in which a guilty plea should be taken into account, and distinguishes between the pure discount for a guilty plea, with that resulting from a “spontaneous and immediate expression of remorse conducive to

³¹ Michael Proeve, David Smith and Diane Niblo, 'Mitigation Without Definition: Remorse in the Criminal Justice System' (1999) 32 *The Australian and New Zealand Journal of Criminology* 16.

³² *Ibid.*

³³ See eg, Mirko Bagaric and Kumar Amarasekara, 'Feeling Sorry? - Tell Somone Who Cares: The Irrelevance of Remorse in Sentencing' (2001) 40(4) *The Howard Journal of Criminal Justice* 364, and Steven Tudor, 'The Relevance of Remorse in Sentencing: A Reply to Bagaric and Amarasekara (and Duff)' (2005) 10 *Deakin Law Review* 760.

reform”.³⁴ And further, his Honour’s statement that “[c]ases do exist where, upon apprehension, a prisoner expresses genuine and believable regret” has more than a small element of truth. In acknowledging what is in fact arguably the reality of the situation facing the courts on a daily basis, 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.³⁵

His Honour is also correct in my view in stating that the main features of the public interest in a discount of a guilty plea are “purely utilitarian”.³⁶ These include the saved cost and inconvenience of a potentially lengthy trial, easing the congestion in the courts, vindicating public confidence in the criminal justice system, and assisting the victims of crime to put the experience behind them.³⁷ I would also agree with Kirby J that if remorse is to be taken into account at all,³⁸ it should be an entirely separate consideration from the discount for a plea of guilty.

His Honour then points out a paradox; that an accused person is entitled to plead not guilty to the charges against them, and to put the prosecution to proof, and so cannot be punished more severely for having exercised those rights;³⁹ while on the other hand an

34 *Cameron* at [65], subpara (4).

35 *Ibid* 360 [references omitted].

36 *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.

37 *Cameron* at 361.

38 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.

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

accused person who pleads guilty and gets an almost automatic discount will be better off. This is where the major point of inconsistency lies, and will be discussed further below.

V NO PENALTY FOR EXERCISING RIGHT TO TRIAL

As the majority judgment of Gaudron, Gummow and Callinan JJ in *Cameron* also 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*.⁴⁰ 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*.⁴¹ [My emphasis]

Their Honours then go on to note that the reconciliation between the requirement not to penalise the accused person who chooses to go to trial and reducing the penalty for a guilty plea lies with the rationale of the accused's willingness to facilitate the course of justice.⁴² No doubt what the High Court is guarding against is the situation where an accused person receives an additional penalty, in the form of a heavier sentence, for having gone to trial. In other words, the High Court is guarding against the situation of 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, in somewhat

40 (1998) 194 CLR 656.

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

42 *Ibid.*

of an understatement, this distinction is “not without its subtleties”.⁴³

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 25 or 30% in some instances. In most Australian jurisdictions, a discount is in principle available even where the guilty plea is entered at the last minute, with little or any co-operation with law enforcement agencies, let alone remorse.⁴⁴ It will however normally be greater the earlier it occurs in the proceedings; for example an offender who co-operates with police from the time of arrest, admitting their guilt immediately, and indicating an intention to plead guilty from the earliest opportunity can expect to receive the maximum discount.⁴⁵

On the other hand, an accused person may have co-operated extensively in the investigation, be genuinely and demonstrably remorseful, willing to facilitate the course of justice, and yet may wish to exercise their right to trial. There are a number of compelling and entirely justifiable reasons why this would be so, in addition to the basic right of the accused to put the Crown to proof, which also should not be overlooked.

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, by no means universally held, that a guilty plea can be entered in these circumstances provided that the accused person understands and agrees that the plea indicates an

⁴³ 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.

⁴⁴ See eg the case of *R v Corrigan* [1994] 2 Qd R 415, an early case under the *Penalties and Sentences Act 1991* (Qld).

⁴⁵ *R v Thomson* (2000) 49 NSWLR 383; see also discussion in Editorial, 'Sentencing Discounts for Pleas of Guilty' (2005) 29 *Criminal Law Journal* 69.

acceptance of the Crown case.⁴⁶ Many accused in this position would take the option of putting the Crown to proof, particularly if they have no recollection of the events in question and cannot understand how the offence came about.

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. Further, provided they were properly advised, they would be making this decision in the full knowledge that no discounting in the sentence was possible on the basis of the not guilty plea.

On this basis, the accused person is placed in an unfair and disadvantageous position simply because they exercised their right to trial, despite the fact that they may have done so for legitimate, valid and entirely justifiable reasons, both on legal and ethical grounds.

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.⁴⁷ To these can be added a desire to plead guilty to attract a discount of up to 30% on sentence,

⁴⁶ Peter Hidden, 'Some Ethical Problems for the Criminal Advocate' (2003) 27 *Criminal Law Journal* 191.

⁴⁷ *Ibid* 196.

not insignificant where the chances of success on a trial may be slim.⁴⁸

From these reasons it can be seen that a discriminatory situation exists where an offender receives a generous discount for pleading guilty, despite their motive, valid or otherwise, when on the other hand another accused will lose any possibility of the discount because they have exercised their right to trial, whether just to put the Crown to proof, or for a number of other entirely justifiable reasons. As the law currently stands, there is no recourse for the accused who legitimately goes to trial, is found guilty and is therefore not entitled to any discount for a guilty plea, even though they may have entered such a plea had they not elected, for example, to raise a defence to the charge. It is difficult to see how this situation is anything but discriminatory against the accused who exercises their right to trial.⁴⁹

VI PLEA BARGAINING

The other benefit of entering a guilty plea,⁵⁰ 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. Going further, a guilty plea allows the possibility of negotiating with the prosecution on the actual charges which will be the subject of the plea. Again, this puts the accused at a substantial advantage over another who elects to go to trial and is later found guilty, although conversely it can operate as an inducement to plead guilty when the accused in fact had a

48 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.

49 See also the discussion in Sarah Gaden, 'Icing on the Cake: The Role of Remorse in Guilty Pleas' (2003) 77(6) *Law Institute Journal* 52.

50 And thereby attracting a discount.

defence to the charge, or where an element or elements of the offence may have been in question.⁵¹

Although in Australia such agreements may not commonly be called “plea bargains”, this is in effect what they are.⁵² Whatever it is called, the procedure is widely, although not necessarily openly, used in all Australian jurisdictions.⁵³ In the United States, between ninety and ninety-five percent of all convictions result from guilty pleas.⁵⁴ Of these, it is estimated that most result from a plea bargain.⁵⁵ Increasingly, this is being seen as a legitimate dispute resolution mechanism.⁵⁶ Although bringing with it its own problems and accusations of administrative pragmatism,⁵⁷ such agreements can place an accused in a powerful bargaining position by moving the exercise of discretion to outside the courtroom, and consequently lessening, at least to some extent, the adversarial nature of formal court proceedings.⁵⁸ Both the defence and prosecution can benefit: the defence by maximising their position in offering to plead guilty to a lesser number of charges or to reduced charges, and the prosecution by securing a conviction and thereby achieving greater certainty in the process.⁵⁹

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- 51 Oren Bar-Gill and Oren Gazal Ayal, 'Plea Bargains Only for the Guilty' (2006) 49 *Journal of Law and Economics* 353.
- 52 Kathy Mack, 'Balancing Principle and Pragmatism: Guilty Pleas' (1995) 4 *Journal of Judicial Administration* 232.
- 53 Robert Seifman and Arie Freiberg, 'Plea Bargaining in Victoria: The Role of Counsel' (2001) 25 *Criminal Law Journal* 64.
- 54 Steve Colella, "'Guilty, Your Honor": The Direct and Collateral Consequences of Guilty Pleas and the Courts that Consistently Interpret Them' (2004) 26 *Whittier Law Review* 305 ; Bar-Gill, above n 41.
- 55 Ibid (Bar-Gill). Note however that “plea bargain” is frequently used in a different sense in the US, however the situation is still analogous with that discussed here.
- 56 See eg, Diluca, 'Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada' (2005) 50 *Criminal Law Quarterly* 14.
- 57 Ibid.
- 58 Kathy Mack, 'Balancing Principle and Pragmatism: Guilty Pleas' (1995) 4 *Journal of Judicial Administration* 232.
- 59 Seifman and Freiberg, above n 53, 65.

Such bargaining agreements, whilst commonplace with offenders who enter guilty pleas, also have disadvantages in terms of lack of judicial oversight.⁶⁰ In these cases, the judge must sentence only on the facts put before the court, despite any misgiving they may have in relation to the matter.⁶¹ In terms of the guilty plea discount, plea bargains reduce the transparency of the process when the bargaining occurs outside the courtroom,⁶² and it is critical therefore that the rights of the accused are carefully protected; something which is difficult or indeed almost impossible to achieve when the sentencing judge has no input into the bargaining process.⁶³ Whether or not the bargaining outcome is successful is therefore largely dependent on the experience and skill of defence counsel.⁶⁴

In addition, in terms of sentencing outcomes, there is no way of actually knowing whether the accused is better off having taken the plea bargain, as opposed to having gone to trial on the original charges, unless the original charges were significantly different from those eventually pleaded to.

VII 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 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:

⁶⁰ Nancy King, 'Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment' (2005) 58 *Stanford Law Review* 293; Susan Klein, 'Enhancing the Judicial Role in Criminal Pleas and Sentencing Bargaining' (2006) 84 *Texas Law Review* 2023.

⁶¹ Mackenzie, above n 13, 24-25.

⁶² Seifman and Freiberg, above n 53, 64.

⁶³ In the US context, see discussion in Scott Moore, 'Re-examining the Admissive Effect of Guilty Pleas at Sentencing' (1998) *University of Chicago Legal Forum* 463.

⁶⁴ Seifman and Freiberg, above n 53.

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.⁶⁵

A study by Fenwick suggests that these issues are more complex than generally thought, and that there should be more consultation with victims in relation to these matters.⁶⁶

If one of the justifications for the discount is that it is in the interests of victims of crime to have the matter dealt with expeditiously and without the need to give evidence, perhaps this needs to be re-examined, and at the very least, further research is called for.

VIII 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.⁶⁷ 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.⁶⁸ With little prescription of exactly how the discount should be taken into account in Australia being provided,⁶⁹ the findings of the study would apply equally here.

⁶⁵ Ralph Henham, 'Bargain Justice or Justice Denied? Sentencing Discounts and the Criminal Process' (1999) 62 *Modern Law Review* 515, at 537.

⁶⁶ H Fenwick, 'Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process' (1997) 60 *Modern Law Review* 317.

⁶⁷ Henham, above n 65.

⁶⁸ *Ibid* at 535.

⁶⁹ *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.⁷⁰ Henham also notes Ashworth's support of the reappraisal of the guilty plea discount, which suggests either abolition or that major changes should occur.⁷¹

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.⁷² According to Mack and Anleu, the sentencing discount is a plea bargain in its crudest form.⁷³ 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.⁷⁴

One suggestion to improve efficiency and transparency in the administration of the guilty plea discount is the use of sentence indications by judges at the pre-trial stage.⁷⁵ This call has been recently taken up by the Australian Law Reform Commission, who has recommended the use of sentence indication hearings in relation

⁷⁰ Henham, above n 65 at 537.

⁷¹ Ibid.

⁷² 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.

⁷³ Ibid at 124.

⁷⁴ Ibid.

⁷⁵ See discussion in Arie Freiberg, 'The Four Pillars of Justice: a Review Essay' (2003) 36 *Australian and New Zealand Journal of Criminology* 223.

to the sentencing of Commonwealth offenders.⁷⁶ In its final report, the ALRC called for overhaul of the Federal sentencing 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. Sentence indication hearings were also undertaken on an experimental basis as a pilot scheme in New South Wales District Court in the 1990s.⁷⁷

The advantage of a sentence indication scheme is greater openness in the process of awarding discounts for guilty pleas, and greater certainty for the accused person. In the New South Wales trial, the accused made the final decision only after a provisional plea of guilty, which was followed by sentencing remarks by the judge, and an indication of what the sentence would be. In the views of the author, a sentence indication scheme is a useful component of any sentencing system where guilty plea discounts are routinely offered. Although it does not overcome some of the theoretical and policy difficulties of the discount, it does offer much needed transparency in the process, which at least affords the accused and others a much greater degree of knowledge in relation to the discount given in a particular case. This in turn allows a more informed therefore better, decision on which approach to take in a particular case.

IX 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,⁷⁸ particularly in the courts, there has been little challenge to the widespread orthodoxy

⁷⁶ Australian Law Reform Commission, 'Same Crime, Same Time: Sentencing of Federal Offenders' (Australian Law Reform Commission, 2006), Chapter 15 "A Sentence Indication Scheme".

⁷⁷ See discussion in John Willis, 'The Sentence Indication Hearing' (1997) 7 *Journal of Judicial Administration* 98.

⁷⁸ See discussion in Australian Law Reform Commission, 'Same Crime, Same Time: Sentencing of Federal Offenders' (Australian Law Reform Commission, 2006), Chapter 11.

that such discounts are beneficial to the criminal justice system as a whole. Conversely, there has been little consideration of the discriminatory effect of the discount, together with the intellectual puzzle of an offender who exercises their right to trial somehow not being penalised for having done so, when clearly that is the case, at least in effect.⁷⁹ There is a clear 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, and this paper has highlighted the need for further research on the issue.

⁷⁹ Cf *Siganto v The Queen* (1998) 194 CLR 656; *Cameron v The Queen* (2002) 209 CLR 339.