Reduction in Penalties at Sentence

August 2009

A report of the NSW Sentencing Council

A report of the NSW Sentencing Council pursuant to section 100J (1) (c) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

The views expressed in this report do not necessarily reflect the private or professional views of individual Council members or the views of their individual organisations. A decision of the majority is a decision of the Council—Schedule 1A, clause 12 *Crimes (Sentencing Procedure) Act 1999* (NSW).

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CONTENTS

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2. Ms Jennifer Mason became Director General of the Department of Community Services in March 2008. Prior to this appointment, she was the Director General of the Department of Juvenile Justice.
3. Ms Penny Musgrave was appointed to the Council on 25 February 2008.

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In particular thanks are extended to the Mr Paul Winch and Mr Mark Carmody of the Public Defender's Office for their contribution to the murder case study

[4] Ms Katherine McFarlane was Executive Officer for the Council from January 2006 to June 2009.
[5] Ms Anna Butler was appointed Executive Officer for the Council in June 2009.

TABLE OF CASES

TABLE OF LEGISLATION

New South Wales

s 33(4)(a) [7.68];
s 33(4)(b) [7.68];
s 33(6) [7.68];
s 34(1) [7.67]; [7.88];
s 35(1)(b) [7.70]
s 35(5) [7.70];
s 45(4) [8.118];
s 47(1) [7.8];
s 47(2) [7.8]-[7.9];
s 47(4) [7.9];
s 48(3) [8.118];
s 50(3) [8.118];
s 54B(5) [8.118];
s 54C(2) [8.118];
s 54D Annexure [1.3]; Annexure [1.30];
s 55 [7.10]; [8.107];
s 55(1) [7.10]; 7.12];
s 55(2) [7.10]- [7.11];
s 55(4) [7.10]-[7.11];
s 55(5) [7.10];
s 56 [7.12];
s 57 [7.12]-[7.14]; [8.113];
s 58(1) [7.20];
s 58(3) [7.20];
s 61(1) Annexure [1.10]
s 70 [7.8];
s 80 [7.8].

Crimes (Sentencing Procedure) Regulation 2005
Regulation 4 [8.117].

Crimes (Serious Sex Offenders) Act 2006[[7.15]; [7.18], [8.110]; [8.112]-[8.113].
s 6(1)(a) [7.18];
s 14(1)(a) [7.18].

Criminal Appeal Act 1912 (NSW) [3.51];
s 5DA [3.52];
s 7(1A) [8.107].

Criminal Assets Recovery Act 1900 (NSW) [8.81].

Criminal Case Conferencing Trial Act 2008 (NSW) [6.23].

Criminal Legislation Amendment Act 2007 (NSW) [8.61].

Criminal Procedure Act 1986 (NSW) [4.4]; [8.65];
Chapter 3, Pt 3, Div 3-Div 4 [4.2];
s 134 [8.61];
s 137 [8.61];
s 139 [8.61];
s 148 [8.62];
s 150 [8.60];
s 151 [8.60];
s 153 [6.2].

Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001 (NSW) [8.61].

Director of Public Prosecutions Act 1986 (NSW)
s 13 [6.8].

Road Transport (General) Act 2005 (NSW)
s 199 [7.81].

Victims Rights Act 1996 (NSW) [6.9];

Australian Capital Territory

Crimes (Sentencing) Act 2005 (ACT)
s 35(2)(b) [8.22];
s 35(2)(c)-(e) [8.9]; [8.22].
s 35(4) [8.23];
s 35(6) [8.23];
s 35(7) [8.23];
s 54-60 [8.123];
s 55(2) [8.123];
s 57(4) [8.123];
s 57(5) [8.123];
s 57(6) [8.123].

Commonwealth

Crimes Act 1914 (Cth) [4.34]; [8.33];
s 16A(2)(g) [2.45];
s 16A(2)(h) [3.59]; [3.61];
s 16A(2)(p) [3.50]; [4.41]; [4.43];
s 16A(4) [4.41]
s 16B [7.21];
s 19AK [4.38];
s 21D [4.52];
s 21E [3.52]; [3.60];
s 21E(1) [8.48];
s 21E(3)(a) [3.61];
s 21E(3)(b) [3.61].

Proceeds of Crime Act 1987 (Cth) [8.81].

Northern Territory

Sentencing Act (NT)
s 5(2)(j) [8.22];
s 107 [8.123];
s 107(1)(a) [8.123];
s 107(3) [8.123];
s 107(6) [8.123].

Queensland

Penalties and Sentences Act 1992 (Qld)
s 13(2) [8.22];
s 189 [8.123];
s 189(1)(b)(iii) [8.123].

South Australia

Child Sex Offenders Registration Act 2006 (SA) [8.79].

Criminal Law (Sentencing) Act 1988 (SA)
s 10(4)(a) [8.79].

Tasmania

Criminal Code (Tas)

S 389(7) [8.103]

Sentencing Act 1997 (Tas)

s 89 [8.123];

s 89(1)(c) [8.123];

s 89(3) [8.123];

s 89(6) [8.123].

United Kingdom

Criminal Justice Act 2003 (UK)

s 144(1)(b) [8.9].

Victoria

County Court Act 1958 (Vic)

s 78(1)(hh) [8.32].

Crimes (Criminal Trials) Act 1999 (Vic)

s 23A [8.32].

Criminal Procedure Legislation Amendment Act 2008 (Vic) [8.32];

s 12 [8.32].

Sentencing Act 1991 (Vic) [8.15]; [8.64];

s 5(2)(e) [8.22];

s 5(2A) [8.82];

s 5(2B) [8.82];

s 5(2BA) [8.79];

s 5(2BC) [8.79]

s5(2C) [8.64];

s 5(2D) [8.64];

s 100 [8.123];

s 100(1)(a) [8.123];

s 100(3) [8.123];

s 100(6) [8.123].

Supreme Court Act 1986 (Vic)

s 25(1) [8.32].

Magistrates' Court Act 1989 (Vic)

s 16(1A) [8.32]

s 50A [8.32].

Western Australia

Community Protection (Offender Reporting) Act 2004 (WA)

s 13 [8.79].

Sentencing Act 1995 (WA)

s 8(2) [8.22];

s 31-33 [8.123];

s 32(3) [8.123];

s 32(4) [8.123];

s 33(2) [8.123];

s 123(2) [8.79]

s 124A [8.79].

RECOMMENDATIONS

1. The Council recommends that consideration be given to amending s 22(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) so as to include the circumstances in which the offender indicated an intention to plead guilty as a further matter to be taken into account when sentencing an offender who has pleaded guilty.

2. The Council recommends that consideration be given to amending s 22 of the *Crimes (Sentencing Procedure) Act 1999* so as to include a provision that stipulates where a lesser penalty is imposed it must not be unreasonably disproportionate to the nature and circumstances of the offence.

3. The Council confirms its view that where a discount is given for an offender's provision of assistance to authorities there should be no presumption that the offender will necessarily suffer harsher custodial conditions, and it recommends that any evidence of hardship consequent upon the provision of assistance to be addressed in a pre-sentence report. It also recommends, as noted later, that the Department of Corrective Services provide information in relation to its facilities and the programs available in the course of judicial training and education programs.

4. The Council recommends that consideration be given to repealing s 23(2)(a) of the *Crimes (Sentencing Procedure) Act 1999*.

5. The Council recommends that consideration be given to repealing s 23(2)(j) of the *Crimes (Sentencing Procedure) Act 1999*.

6. The Council recommends that consideration be given to amending s 23 of the *Crimes (Sentencing Procedure) Act 1999* so as to include a provision that requires the court to specify that the sentence is being reduced because of the assistance provided and to state the sentence that would have been imposed but for that reduction.

7. The Council recommends that consideration be given to amending s 135(2) of the *Crimes (Administration of Sentences) Act 1999* so as to explicitly identify the provision of post sentence assistance to law enforcement as a matter to which the NSW Parole Authority may have regard when determining whether or not to grant parole, subject to the acceptance of such assistance as reliable and of value.

8. The Council recommends that consideration be given to amending s 22A of the *Crimes (Sentencing Procedure) Act 1999* so as to allow the court to have regard to the degree of defence co-operation before and during the trial and impose a lesser penalty on that basis where appropriate.

9. The Council recommends that consideration be given to amending the *Crimes (Sentencing Procedure) Act 1999* so as to include a provision that where an offender is a 'prohibited person' under the *Commission for Children and Young People Act 1998* (NSW) and accordingly may become ineligible to work with children, the court is precluded from regarding such exclusion as extra curial punishment.

10. The Council recommends that consideration be given to amending the *Crimes (Sentencing Procedure) Act 1999* so as to include a provision that where an offender is subject to orders made under state or federal legislation providing for the confiscation of assets or for the forfeiture of the proceeds of crimes, the court is precluded from regarding such confiscation or forfeiture as extra curial punishment.

11. The Council recommends that consideration be given to amending the *Crimes (Sentencing Procedure) Act 1999* so as to include a provision that would require, in circumstances where a charge negotiation has occurred:
    (i) any statement of facts tendered to the court on sentence to be accompanied by a certificate signed by an appropriate responsible officer to the effect that the statement of facts has been the subject of consultation with the victim (or his or her family where the victim is deceased), and with the police officer-in-charge of the case and that the statement constitutes a fair and accurate account of the objective criminality of the offender having regard to the relevant and provable

facts. Where there has been no such consultation, the certificate should record the reasons why that has not occurred.

(ii) any Form 1 listing additional matters to be taken into account on sentence to be accompanied by a certificate signed by an appropriate responsible officer to the effect that there has been consultation with the victim the subject of the charge in respect of which the Form 1 matters have been taken into account, and with the police officer-in-charge of the case, so far as that has been possible, that the terms thereof have been recorded, and that the inclusion of each matter in the Form 1 is in accordance with ODPP Guidelines. Where there has been no such consultation the certificate should record the reasons why that has not occurred.

12. The Council recommends that consideration be given to amending the *Crimes (Serious Sex Offenders) Act 2006* so as to include a provision that where an offender is serving cumulative sentences, any one or more of which is in relation to a serious sex offence or an offence of a sexual nature, an application may be made under the *Crimes (Serious Sex Offenders) Act* regardless of the sequence in which the cumulative sentences were imposed.

13. The Council recommends that consideration be given to amending s 57 of the *Crimes (Sentencing Procedure) Act 1999* so as to require the court to first set the sentences for the non-escape offences, with the sentence for the escape to be made cumulative upon it.

14. The Council recommends that consideration be given to amending s 33 of the *Crimes (Sentencing Procedure) Act 1999* to include a provision that where the court falls into procedural error in the application of the section, any sentence imposed by the court is not invalidated.

15. The Council recommends that a formalised program be developed by the NSW Judicial Commission, the Department of Corrective Services, Juvenile Justice and Justice Health, to keep judicial officers informed of the facilities, programs and procedures available or in place for the detention and management of adult and juvenile offenders, including the provision of visits to the centres in which such persons may be detained or services provided.

EXECUTIVE SUMMARY

This report by the NSW Sentencing Council ('the Council') reviews the current principles and practices governing reductions in sentence and examines the way in which factors leading to a discount on sentence are taken into account. The report focuses on a number of specific discounting factors, such as guilty pleas and assistance to authorities, and also considers the use of charge negotiation and the Form 1 procedure. Attention is also given to the application of the totality principle to offenders being sentenced for multiple offences.

The allowance of a reduction in penalty at sentence for pleas of guilty is usually justified on the basis that: the plea is a manifestation of remorse or contrition; it avoids the need to call witnesses and victims to give evidence; and that it has a utilitarian value to the efficiency of the criminal justice system. Chapter 2 of this report deals with guilty pleas with a focus on their utilitarian value and also examines the guideline judgment issued by the New South Wales Court of Criminal Appeal with respect to the manner in which a court should take into account a plea of guilty.

The provision of a discount on penalty for an offender's assistance to authorities is said to be in the public interest on the basis that it will assist in bringing other offenders to justice, it results in a saving of costs in the investigation and prosecution of criminal offences and can help improve the clear up rate for crimes. Chapter 3 considers a number of issues in relation to assistance to authorities, such as: the voluntary disclosure by an offender of his or her criminal activity otherwise unknown to the police (the 'Ellis discount'); the quantification of the discount for assistance; and the consequences where an offender fails to fulfil an undertaking to provide assistance which had led to a reduction in sentence.

Other specific factors that can lead to a reduction in penalty at sentence are considered in Chapter 4, including pre-trial disclosure and efficient conduct of the defence at trial; ill health and age of the offender; hardship to family or dependants; and extra curial punishment.

The exercise of arriving at an appropriate sentence requires a sentencing judge to weigh up a range of relevant factors, such as the objective seriousness of the offence, the aggravating and mitigating factors, the subjective features of the person to be sentenced, as well as the factors which may warrant a sentencing discount and Chapter

5 examines the application of discounting factors in the context of the whole sentencing process.

Charge negotiation is examined in Chapter 6 of this report. Sometimes referred to as plea bargaining, charge negotiation involves negotiation between the prosecution and the defence in criminal court matters with a view to reaching an agreement on charges, the contents of the statement of facts provided to the sentencing court and/or procedural matters such as whether to proceed with a matter in the District Court or Local Court. This chapter discusses the arguments advanced for and against charge negotiation together with a review of the Prosecution Guidelines of the Office of the Director of Public Prosecutions (ODPP).

The totality principle, which applies where an offender is sentenced for more than one offence or where he or she is sentenced for a further offence while subject to an existing sentence, is examined in Chapter 7. The principle requires that the severity of the aggregate sentence for multiple offences is a just and appropriate measure of the totality of the criminality involved in the offences. This Chapter also considers the issue of cumulation and concurrency of sentences; offences committed in the course of a single episode; overlapping elements of the charges; where the offender is serving a term of imprisonment for unrelated offences; offences in different jurisdictions; multiple victims; and the relationship between totality and parity. Consideration is also given to the use of the Form 1 procedure.

Chapter 8 reviews the various principles and issues identified in the preceding chapters and where appropriate the Council has made recommendations to address those issues.

The Council observes that there is strong support for the awarding of discounts on sentence for pleas of guilty, and while some commentators have raised philosophical objections to the provision of a discount in return for pleas of guilty, the Council is not satisfied that any of these objections, whether considered individually or in combination, provide cause for any re-appraisal in principle of the system. Minor legislative amendments are recommended to promote transparency and consistency in relation to discounts for pleas of guilty.

The Council is satisfied that the discount for assistance to authorities should be preserved, however a number of issues and areas for reform are identified. The Council confirms its view that where a discount is given for an offender's provision of assistance

to authorities there should be no presumption that the offender will necessarily suffer harsher custodial conditions and any evidence of hardship consequent upon the provision of assistance should be addressed in a pre-sentence report. Minor amendments are also recommended to fine tune the legislation in relation to the discount for assistance, including the repeal of redundant or irrelevant provisions.

Further recommendations are made by the Council in relation to the provision of a discount for defence disclosure and co-operation during the course of the trial, and specific legislative limitations in relation to the circumstances that can be regarded as a form of extra curial punishment. In particular the court should be precluded from regarding as extra curial punishment the forfeiture of the proceeds of crime or the exclusion of a 'prohibited person' under the child protection laws from working with children.

In relation to charge negotiation the Council considers that it is not only essential to the efficient operation of the criminal justice system, but that it is also fair to offenders who may benefit from being dealt with for less serious offences than those charged or for representative charges, where their objective or subjective circumstances warrant. The Council does not consider that the ODPP Guidelines need to be formalised by legislation however some additional procedural safeguards are recommended to ensure accountability and transparency, thereby enhancing community and victim satisfaction.

The overall conclusion of the Council is that the existing laws and sentencing practice provide an appropriate response in relation to the several matters that might justify a lessening of the sentence that would otherwise be appropriate. The Council recognises that transparency of the process remains important, and it encourages the provision by judges of reasons that will indicate that account has been taken of the principles settled by the courts and that will explain how the sentence was reached.

CHAPTER 1: INTRODUCTION

1.1 This report is provided by the NSW Sentencing Council in response to a reference given to it by the Attorney General to examine the practices of the Courts, and the provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW), in relation to:

1. The current principles and practices governing reductions in sentence.

2. How factors leading to a discount on sentence are taken into account, particularly where several factors must be considered at the same time.

3. The application of the totality principle to offenders being sentenced for multiple offences.

4. The effect of charge negotiation.

5. The use of a "Form 1" to deal with additional offences.

6. Other relevant matter.

1.2 The review was expressly required not to consider the procedures employed, or the outcome of, the Criminal Case Conferencing trial, whereunder the DPP and the accused have the opportunity of engaging in a process of charge bargaining prior to committal for trial. This can have the effect of encouraging an offender to offer an early plea of guilty, which will then attract a larger discount than one offered at a later date. Although this scheme has a direct relevance for the present reference, it has been excluded from consideration as it is subject to a separate assessment process.

1.3 Although submissions in relation to the reference were invited and received in 2008, its completion has been delayed by the need to attend to several more urgent references. The Council is, however, now able to deliver this report, with the benefit of these submissions and its examination of the authorities and of sentencing law and practice in other jurisdictions.

1.4 In undertaking this review the Council has had the benefit of the submissions noted in Annexure B, and has undertaken a comprehensive review of the authorities, and where appropriate, of legislation in other jurisdictions.

1.5 The Council recognises that there are a number of subjective circumstances that are required to be taken into account that can lead to a reduction in a sentence, such as prior good character, favourable prospects for rehabilitation, as well as factors such as provocation, duress or lack of planning that may be relevant in determining the objective criminality of an offence. It has however concentrated on a number of specific discounting factors which arise independently of the offence or which can be a consequence of the sentence.

1.6 Apart from considering the relevance of these factors and whether they are or are not appropriately available as discounting factors, the Council has also given attention to the manner in which the use of charge negotiation, and of the Form 1 procedure and the application of the totality principles in those cases which involve multiple offences, can have the effect of reducing the overall sentence. Their proper role in the effective administration of the justice system is recognised, as is the need for clear guidance by the New South Wales Criminal Court of Appeal and public education so as to make their application understandable.

1.7 Where the Council considers it appropriate a limited number of recommendations have been made.

1.8 The report is supplemented by a limited review of the manner in which the application of discounts for pleas of guilty and for assistance to the authorities has affected sentencing for murder over a five-year period (Annexure A). The Council recognises its statistical limitations, but includes the analysis so far as it may provide some indication of the criminal justice response to the most serious cases in the criminal calendar, and possibly provide a precedent for a more comprehensive ongoing review in relation to this offence and other serious offences.

CHAPTER 2: DISCOUNT FOR PLEA OF GUILTY

STATUTORY BASIS FOR THE DISCOUNT

2.1 Section 22 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the Act') requires a court, when sentencing an offender who has pleaded guilty to an offence, to take into account the fact that the offender has pleaded guilty, and the timing of the plea or indication of an intention to plead. The court has then a discretion as to whether or not, taking into account these factors, it will impose a lesser penalty than might otherwise have been warranted. If the court does not impose a lesser sentence, it must advise the offender and record its reasons for so deciding. The failure to comply with this section does not however invalidate the sentence imposed.[1]

2.2 The fact that the offender has pleaded guilty is expressed to be a mitigating factor at sentence pursuant to s 21A(3)(k) of the Act.

RATIONALE BEHIND ALLOWING A DISCOUNT FOR A PLEA OF GUILTY

2.3 The reasons usually advanced to justify the allowance of discounts for pleas of guilty are that the plea:

- is a manifestation of remorse or contrition;
- has a utilitarian value to the efficiency of the criminal justice system; and
- has a value in avoiding the need to call witnesses, especially victims, to give evidence, particularly in sexual assault cases and crimes involving the elderly or children.[2]

2.4 Each has a proper role to play but they have been recognised as separate factors which need to be given separate consideration. The focus has largely been on the

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1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(4).
2. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [3] (Spigelman CJ). See also *Siganto v The Queen* (1998) 194 CLR 656, [22].

utilitarian value of the plea, with matters of remorse and contrition, and the avoidance of stress to victims and witnesses playing a greater role in relation to other subjective factors such as the offender's prospects for rehabilitation. This chapter notes their relevance but concentrates more closely on the utilitarian value of the plea.

Remorse and contrition

2.5 Remorse is directly concerned with the circumstances of the offender and may have significant implications for other aspects of the sentencing process. Genuine remorse may indicate that the element of personal deterrence should be given lesser significance in an individual case, and may suggest that the offender has good prospects of rehabilitation.[3] The plea is of itself equivocal with respect to remorse. It may be entered because it is an acceptance of the inevitable, or in order to obtain an advantage. In such cases it does not indicate genuine remorse or contrition.[4] The bare fact of a plea is at best a very simple expression of remorse, the strength of which may better be displayed by the words and actions of the offender over time. When it is taken into account, any reduction in sentence is given for the contrition exhibited, and not for the plea of guilty itself.[5]

2.6 In *R v MAK; R v MSK*[6] the Court observed that the usual practice is to specify a discount for the utilitarian value of the plea and then to take remorse into account as a mitigating factor with reference to the factors identified in s 21A(3) of the Act, such as the offender is unlikely to re-offend, has good prospects of rehabilitation, and other factors such as the absence of any need for specific deterrence. The Court stated that if it was found that the offender's remorse did not give rise to any of these factors then it was difficult to see its relevance, or why the sentence should be discounted as a result.[7] The Court also referred to *R v Saleib*,[8] and the comments made by Bell J (with whom the other members of the court agreed) warning against quantifying remorse as it is a factor that is so inter-related with other subjective factors that any attempt to separate it out might be artificial.[9]

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3. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [116] (Spigelman CJ).
4. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [117] (Spigelman CJ).
5. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [118] (Spigelman CJ).
6. *R v MAK; R v MSK* (2006) 167 A Crim R 159.
7. *R v MAK; R v MSK* (2006) 167 A Crim R 159, [42].
8. *R v Saleib* [2005] NSWCCA 85.
9. *R v MAK; R v MSK* (2006) 167 A Crim R 159, [41], referring to *R v Saleib* [2005] NSWCCA 85, [37].

2.7 In *Kite v The Queen*[10] Blanch J noted that the circumstances in which remorse is to be taken into account in mitigation are regulated by s 21A(3)(i) of the *Crimes (Sentencing Procedure) Act*, that is, only where:

> (i) the offender has provided evidence that he or she has accepted responsibility for his or her actions; and
>
> (ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both).[11]

His Honour observed:

> In my view it would have been appropriate to give to the applicant some benefit in the overall sentencing process for the fact that he understood how serious his conduct was and that he was remorseful for it. It is not appropriate to express that as a percentage or to engage in a mathematical exercise but it is a factor to be taken into account in arriving at an appropriate sentence, see *R v Gallagher* (1991) 23 NSWLR 220 and *R v Saleib* [2005] NSWCCA 85.[12]

2.8 Earlier in *R v Merrin*[13] Howie J observed:

> The Judge indicated that he allowed a discount of 20% for the pleas of guilty because they were indicative of the respondent's remorse and for their utilitarian value. The Judge's approach in this respect is erroneous and at variance with a decision of this Court delivered last year that makes it plain that no part of a numerical discount should be attributed to remorse whether it is derived from the plea or otherwise: *R v MAK and MSK*. This was not a point raised by the Crown and the respondent should therefore be allowed the discount given by the Judge.[14]

2.9 The court must consider the evidence provided by the offender as to whether the requirements of s 21A(3)(i) have been satisfied.[15] A judge is not obliged to accept the assertions of an offender as to the presence of contrition.[16]

2.10 In *R v Holder*,[17] Street CJ observed that the extent to which a plea of guilty can reflect the presence of contrition depends upon the time and circumstances of the plea, for example, where an accused person confesses to the police and maintains his attitude throughout the proceedings, the accused person's contrition will weigh more heavily in

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10. *R v Kite* [2009] NSWCCA 12.
11. *R v Kite* [2009] NSWCCA 12, [11].
12. *R v Kite* [2009] NSWCCA 12, [10].
13. *R v Merrin* (2007) 174 A Crim R 100.
14. *R v Merrin* (2007) 174 A Crim R 100, [57].
15. *Saddler v The Queen* [2009] NSWCCA 83, [27]
16. *R v Stafrace* (1997) 140 FLR 427 (Hunt CJ at CL). Followed in *R v Nguyen* [2004] NSWCCA 438, [21] Cited in Judicial Information Research System, *Sentencing Benchbook (online) Sentencing: Section 21A Factors "in addition to" any Act or Rule of Law* (2009) <http:/jirs/>.
17. *R v Holder* [1983] 3 NSWLR 245.

favour of the accused person compared to an offender who pleads guilty in the course of proceedings. 'Shades of genuineness, too, can affect the extent of the favourable weight attracted by protestations of contrition coupled with a plea of guilty'.[18]

Willingness to facilitate the course of justice

2.11 The High Court in a majority joint judgment in *Cameron v The Queen*[19] observed that the rationale for the rule for taking the plea into account in mitigation, so far as it depends on factors other than remorse and acceptance of responsibility, should be expressed in terms of a 'willingness to facilitate the course of justice'[20] and not on the basis that the plea has saved the community the expense of a contested hearing. In this respect attention was drawn to the potential discriminatory consequences in treating offenders differently when they are sentenced where the only difference in their circumstance depends on whether they were convicted after pleas of guilty or after trial.[21]

2.12 The decision in *Cameron* has however been distinguished in New South Wales, where the New South Wales Court of Criminal Appeal (NSWCCA) held that the decision needed to be understood in the context of the Western Australian legislation.[22] The mandatory language of the NSW statute[23] requires a court to take the fact of a plea into account regardless of whether the offender intended subjectively to assist the administration of justice.[24] It follows that the objective utilitarian value of the plea can be taken into account.[25]

Benefits for witnesses and victims

2.13 An associated benefit arising from a plea of guilty is the fact that any witnesses, particularly victims (and especially, sexual assault victims) or their families, will not need to give evidence at trial.[26] Such benefits may include sparing the victim from

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18. *R v Holder & Johnston* [1983] 3 NSWLR 245, 258.
19. *Cameron v The Queen* (2002) 209 CLR 339.
20. *Cameron v The Queen* (2002) 209 CLR 339, [14], [22] (Gaudron, Gummow and Callinan JJ).
21. *Cameron v The Queen* (2002) 209 CLR 339, [13], [44].
22. *R v Sharma* (2002) 54 NSWLR 300.
23. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22.
24. *R v Sharma* (2002) 54 NSWLR 300, [50]–[53]. See also *R v Sutton* [2004] NSWCCA 225; *R v Grbin* [2004] NSWCCA 220.
25. *R v Sharma* (2002) 54 NSWLR 300, [62], [67]–[68].
26. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [119].

dealing with the uncertainty of not knowing whether he or she will be believed, of scepticism from friends and relatives, from reliving the offence through 'personal rumination', and allowing the healing process to begin.[27] The impact of this consideration will depend on the specific circumstances of the offence and may substantially overlap with other aspects of the individual case which are relevant to the sentencing task.[28]

Utilitarian value

2.14 The utilitarian value that flows from an early guilty plea is demonstrated by the impact that the plea has on the efficiency of the criminal justice system. There is an associated saving in the time and resources of the courts, the prosecution, the Public Defender, Legal Aid and witnesses (including police witnesses), who would otherwise have their time occupied by preparing and giving evidence in trials. It also avoids the need for having jurors assembled for trials which do not eventuate.[29]

2.15 An express recognition, on sentence, of the value of a plea of guilty is important in that it acts as a practical means of encouraging prompt and appropriate pleas of guilty. King CJ in *R v Shannon*[30] stated:

> There are features of the current conditions which emphasise the need for practical encouragement for guilty persons to admit their guilt. … If a plea of guilty, as distinct from remorse evidenced by such a plea, cannot be regarded as a factor in mitigation of penalty, there is no incentive, other than the demands of honesty, for an offender to admit his guilt, and experience indicates that the demands of honesty have but little influence on many of those who appear in the docks of criminal courts. In most cases, if the offender has nothing to gain by admitting his guilt, he will see no reason for doing so.[31]

2.16 The availability of a discount for a plea should be understood in the light of the accepted principle that a person accused of a criminal offence is entitled to enter a plea of not guilty, and if convicted after trial, is not to be penalised by an increase in what would be a proper sentence in order to mark the Court's disapproval of the Crown being put to proof of the offence or of the Court's time being wasted.[32]

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27. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [120].
28. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [121].
29. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [131].
30. *R v Shannon* (1979) 21 SASR 442.
31. *R v Shannon* (1979) 21 SASR 442, 451.
32. *Siganto v The Queen* (1998) 194 CLR 656, [21]–[22].

THE GUIDELINE JUDGMENT

2.17 In *R v Thomson; R v Houlton*[33] ('the Guideline') the NSWCCA issued a guideline judgment with respect to the manner in which a court should take into account a plea of guilty for the purposes of sentence. The Guideline indicates that a sentencing judge should explicitly state that a plea of guilty has been taken into account, and quantify the effect of the plea on the sentence where it is appropriate to deal with that matter separately. In determining the weight to be given to the plea, the judge should detail the matters thought to be of relevance, such as contrition, witness vulnerability, and the utilitarian value of the plea. The latter should generally be assessed in the range of a 10 to 25 per cent discount on sentence.

2.18 Where it is thought appropriate to quantify the impact of other factors relevant to a particular matter, such as assistance to authorities, a single combined quantification will generally suffice.

2.19 The Guideline stressed that when determining its utilitarian value the timing of the plea is the primary consideration in determining where in the range a particular case should fall. The definition of what constitutes an early plea will vary according to the circumstances of the case, and is a matter for determination by the sentencing judge.

2.20 It was emphasised that the failure of a sentencing judge to explicitly state that a plea of guilty had been taken into account, would generally be regarded as evidence that the plea had not been considered.[34] The Guideline noted in some cases the combination of the plea and other relevant factors may change the nature of the sentence imposed. In some instances, a plea would not lead to any discount.[35]

2.21 In issuing the guideline judgment the Chief Justice stressed that, consistent with previous guideline judgments issued by the NSWCCA, the guideline was not binding, did not constrain the discretion of the sentencing judge, and operated as an encouragement rather than a prescription.[36]

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33. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [160].
34. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [52].
35. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [160].
36. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [32].

General principles

2.22 The general principles applicable to discounts for the utilitarian value of pleas of guilty were recently and conveniently summarised by Howie J in *R v Borkowski*[37] as follows:

> 1. The discount for the utilitarian value of the pleas will be determined largely by the timing of the plea so that the earlier the plea the greater discount: *Thomson* at [154]; *Forbes* [2005] NSWCCA 377 at [116].
>
> 2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy: *Thomson* at [154].
>
> 3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse: *Thomson* at [119] to [123]; nor is it affected by post-offending conduct: *Perry* [2006] NSWCCA 351.
>
> 4. The utilitarian discount does not take into account the strength of the prosecution case: *Sutton* [2004] NSWCCA 225.
>
> 5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse: *MAK and MSK* [2006] NSWCCA 381; *Kite* [2009] NSWCCA 12 or for the "Ellis discount"; *Lewins* [2007] NSWCCA 189; *S* [2008] NSWCCA 186.
>
> 6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence: *SY* [2003] NSWCCA 291
>
> 7. There may be offences that are so serious that no discount should be given: *Thomson* at [158]; *Kalache* [2000] NSWCCA 2; where the protection of the public requires a longer sentence: *El-Andouri* [2004] NSWCCA 178.
>
> 8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced: *Stambolis* [2006] NSWCCA 56; *Giac* [2008] NSWCCA 280.
>
> 9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain: *Dib* [2003] NSWCCA 117; *Ahmad* [2006] NSWCCA 177; or where the offender is waiting to see what charges are ultimately brought by the Crown: *Sullivan and Skillin* [2009] NSWCCA 296; or the offender has delayed the plea to obtain some forensic advantage: *Stambolis* [2006] NSWCCA 56; *Saad* [2007] NSWCCA 98, such as having matters put on a Form 1: *Chiekh and Hoete* [2004] NSWCCA 448.
>
> 10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value: *Oinonen* [1999] NSWCCA 310; *Johnson* [2003] NSWCCA 129
>
> 11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount: *Lo* [2003] NSWCCA 313.

37. *R v Borkowski* [2009] NSWCCA 102, [32].

> 12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.[38]

Quantification of the utilitarian discount

2.23 The Guideline encouraged the quantification of the utilitarian value of the plea of guilty and stated that the range for the appropriate discount for this aspect of the plea should generally be assessed at between 10 and 25 per cent.[39] The NSWCCA has confirmed that the evaluation of the discount on a utilitarian basis is not affected by other factors such as the strength of the Crown case, and does not reflect remorse or contrition or take into account other factors such as the rehabilitation of the offender.[40]

2.24 The Guideline also indicated that existing sentencing practice allowing for a discount for a plea of guilty of up to 35 per cent for all matters relevant to the plea remained appropriate.[41] The NSWCCA has noted a change in practice since the Guideline, such that a 'rolled up' discount given for all aspects of the plea of guilty is now rare. Instead, the usual practice is to specify a discount for the utilitarian value of the plea only and to take other factors, such as remorse, into account as reflected in the other mitigating factors referred to in s 21A(3) of the Act, along with other considerations such as the absence of a need for deterrence. The NSWCCA warned against the quantification of a discount for remorse generally, or as manifested by the plea of guilty, or in combination with the discount for the utilitarian value of the plea because of the risk of double counting.[42]

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38. *R v Borkowski* [2009] NSWCCA 102, [32].
39. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [160].
40. *R v Scott* [2003] NSWCCA 286, [18].
41. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [162]. See also *R v Scott* [2003] NSWCCA 286, where Howie J noted that while the guideline encouraged quantification of the utilitarian value of the plea of guilty 'where it was appropriate to separately deal with that matter', the Chief Justice in the guideline judgment referred to a court being entitled to take a course other than that encouraged by the guideline, 'including quantifying a discount for all aspects of the plea': see *Thomson & Houlton* at [113]. Howie J determined that *R v Scott* was such a case where it was appropriate not to separate out the utilitarian value of the plea of guilty, as the plea was part of a process of rehabilitation by the applicant which was underway by the date of sentencing, and which indicated remorse and an attempt to redress harm: [22]–[25].
42. *R v MAK; R v MSK* (2006) 167 A Crim R 159, [41]–[44], where the NSWCCA noted the introduction of s 21A subsequent to the Guideline and the factors that a court is required to take into account under this section, including if an offender is unlikely to offend and has good prospects of rehabilitation. The NSWCCA noted that remorse will be a factor in determining whether these mitigating factors exist. See also *R v Salieb* [2005] NSWCCA 85; *Kite v The Queen* [2009] NSWCCA 12 and *R v Mitchell; R v Gallagher* (2007) 177 A Crim R 94, [24].

2.25 There are exceptional cases where the sheer enormity of the offending is such that no discount can be given for a plea of guilty. As the Chief Justice has observed, 'There are crimes that so offend the public interest that the maximum sentence, without any discount for any purpose, is appropriate. This includes situations in which a life sentence can be and is imposed, notwithstanding the plea'.[43]

2.26 Sentencers have been urged to quantify the discount for the utilitarian value of the plea[44] although there is no obligation to do so[45]. If a judge is not prepared to clearly indicate the discount, either by quantifying it or stating the starting point of the sentence that applies before the discount is to be applied, then 'they should carefully and correctly enunciate the factors taken into account and the principles being applied in determining the discount which they are applying'.[46] The crucial factor is to 'expose the transparency of the process so that it can be seen that an appropriate discount has been allowed'.[47]

Measuring the utilitarian value of the plea

2.27 As the Chief Justice noted in the Guideline, the level of discount applicable in a particular case would commonly be affected by two circumstances: namely, the time at which a plea is entered and the complexity of the issues about which evidence will have to be gathered and adduced. The earlier a plea is entered the greater is its utilitarian value, and the greater the length and complexity of the trial and the greater the difficulty in bringing together the necessary evidence, the greater the utilitarian value of the plea.[48] The Chief Justice stated that the top of the range would be expected to be restricted to pleas entered at the 'earliest possible opportunity' and should not be given, save in an exceptional case, after a matter has been set down for trial. He added that, unless there were particular benefits arising from avoiding a lengthy and complex trial, a discount at the bottom of the range would be appropriate for late pleas.

2.28 The NSWCCA has regularly held that a plea of guilty on the first day of a trial, or thereabouts, warrants a discount for its utilitarian value in the order of 10 per cent,

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43. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [158].
44. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383.
45. *R v Sutton* [2004] NSWCCA 225, [16].
46. *R v Sutton* [2004] NSWCCA 225, [16].
47. *R v Mako* [2004] NSWCCA 90, [21] (Dunford J).
48. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [154].

that is, 'towards the bottom of the range' as recommended by the guideline judgment.[49] The NSWCCA has held that a discount of 25 per cent is excessive for a plea entered just before a trial date including cases where the plea has been entered following charge negotiations after committal.[50]

Plea at the earliest available or first reasonable opportunity

2.29 Commonly, issues arise concerning the discount to be given for pleas of guilty entered late in the proceedings, as a result of the prosecution preferring a different charge to that originally laid, or as a result of charge negotiations resulting in the acceptance of a plea to a lesser charge. When considering this issue, the NSWCCA has emphasised the need to focus on a realistic recognition of the utilitarian value of the plea.[51]

2.30 *R v Dib*[52] provides an example of the approach taken in such a case. The applicant was committed for trial on the charge of accessory after the fact to murder. The prosecution presented a fresh indictment on the first day of the trial containing a new alternative count of accessory after the fact to malicious wounding with intent to do grievous bodily harm. A plea of guilty to this charge was accepted in full satisfaction of the indictment.[53] The NSWCCA accepted that the plea of guilty was entered at the earliest available opportunity, but found that the applicant should not receive the full discount in the range for its utilitarian value.[54] Hodgson JA observed that the fact that there are less advantages to the administration of justice can justify a smaller discount, and that although this may, in some cases, result in an offender obtaining a lower discount where the Prosecuting authorities initially brought a greater charge than that ultimately pursued, this 'is consistent with the nature of the discount as being at least

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49. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [155]. See also *Choi v The Queen* [2007] NSWCCA 150, [150]; *R v Mitchell; R v Gallagher* (2007) 177 A Crim R 94, [24]; *Maxwell v The Queen* (2007) 177 A Crim R 498, [20]; *R v Daniels* [2001] NSWCCA 181.

50. See *Ahmad v The Queen* [2006] NSWCCA 177, [18] (McClellan CJ at CL); *R v SY* [2003] NSWCCA 291, [85]–[88] (Howie J). Both these cases appear to have applied the Guideline by reserving discounts at the top of the range for pleas at the earliest possible opportunity and generally not for pleas occurring after a matter has been set down for trial: *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [155].

51. *R v SY* [2003] NSWCCA 291, [86], that is of the advantages to the administration of justice that actually flow from it.

52. *R v Dib* [2003] NSWCCA 117.

53. *R v Dib* [2003] NSWCCA 117, [23]–[24].

54. *R v Dib* [2003] NSWCCA 117, [3] (Hodgson JA, with whose remarks Barr J agreed), [29], [31]–[32] (Dowd J, with whom Hodgson JA and Barr J generally agreed).

in part a recognition of practical advantages, and not merely a recognition of mitigation of culpability'.[55]

2.31 In *R v Stambolis*[56] the respondent made full admissions to the police upon his arrest, but did not plead guilty in the Local Court. Instead he entered into negotiations with the prosecution which resulted in an offence of escape being removed from the indictment and placed on a Form 1, at which point he indicated that he would plead guilty to the remaining offences. This was eight months after his arrest.[57] The sentencing judge allowed a discount of 25 per cent for the plea of guilty.[58] Howie J noted that by withholding the plea the offender had achieved the result he wanted. Rarely if ever, His Honour remarked, will the accused's reasons for withholding a plea be regarded as relevant in determining the discount. Where the plea 'has been used as a bargaining tool in order to achieve a favourable outcome from the Crown in respect of some other charge'[59] it cannot then be asserted that the plea was made at the first reasonable opportunity. His Honour however accepted that there may be exceptional cases where, as a matter of fairness, a discount will be given for a plea despite its lack of any utilitarian value, citing as an example cases where the Prosecution rejects a plea to manslaughter and the accused is later acquitted of murder but convicted of manslaughter after trial.[60]

2.32 In *R v Cheikh; R v Hoete*[61] the NSWCCA held that, in the case of the offender Cheikh, a discount of 25 per cent for the pleas of guilty was excessive, in circumstances where they were entered in the District Court to some charges, with other charges then being taken into account on a Form 1. The NSWCCA pointed out that the offender could have pleaded guilty to the same mix of charges earlier, but he had not, and as a result there had been a committal and preparation for trial, so that the utilitarian value was much less than would have flowed from earlier pleas. The Court determined that a discount of 25 per cent at the top of the usual range was not warranted, and that a

55. *R v Dib* [2003] NSWCCA 117, [5]–[6].
56. *R v Stambolis* (2006) 160 A Crim R 510.
57. *R v Stambolis* (2006) 160 A Crim R 510, [9]–[10].
58. *R v Stambolis* (2006) 160 A Crim R 510, [8].
59. *R v Stambolis* (2006) 160 A Crim R 510, [11].
60. *R v Stambolis* (2006) 160 A Crim R 510, [12].
61. *R v Cheikh; R v Hoete* [2004] NSWCCA 448.

discount in excess of 15 per cent would have been outside a proper exercise of the judge's discretion.[62]

Discount where an offender is convicted of a lesser offence following rejection by the prosecution of an offer to plead to that offence

2.33 The principle enunciated in *R v Oinonen*[63] has been consistently applied by the appeal courts where the prosecution has rejected an offer by the defence to plead guilty to a lesser charge, and the defendant has subsequently been acquitted of the substantial charge and convicted after a trial of this lesser charge. The NSWCCA noted that there had been a long practice to take into account the offer of a plea of guilty to the crime for which a person is ultimately convicted.[64] In *R v Cardoso*[65] the NSWCCA rejected a submission that the reasoning in *Oinonen* could not stand with the decisions in *Thomson and Houlton* and *R v Sharma*,[66] and the further submission that there was no concept of 'notional utility' in a case where an offender is convicted after trial of an offence to which an earlier offer was made to plead guilty.[67]

2.34 It was held in *Cardoso* that it was not to the point that the offer having been rejected, the accused chose to plead not guilty to manslaughter, in the presence of the jury and raised an issue of self defence that could have led to his acquittal.[68]

2.35 In the matter of *R v Curry*,[69] the NSWCCA distinguished the decision in *Oinonen*. It found that prior to the murder trial, the Crown had rejected the applicant's offer to plead guilty to manslaughter, a charge of which the applicant was eventually convicted. The NSWCCA observed that the basis for the applicant's offer of a plea had not been discussed, and, noting the many ways in which manslaughter can be made out, concluded that there was no reason why one such basis could not have been put forward. It also noted that there would be a difficulty in identifying any utilitarian value to the

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62. *R v Cheikh; R v Hoete* [2004] NSWCCA 448, [49], [59] Other matters dealing with these principles include *R v Harmouche* (2005) 158 A Crim R 357, [39]–[41]; *R v Young* [2003] NSWCCA 276, [11]; *R v SY* [2003] NSWCCA 291, [85]–[88]. See also *R v Boney* [2008] NSWCCA 313; *Veale v The Queen* (2008) 181 A Crim R 149, [9], [14]–[15]; *Sullivan v The Queen; Skillin v The Queen* [2008] NSWCCA 296, [17]; *Salah v The Queen* [2009] NSWCCA 2.
63 *R v Oinonen* [1999] NSWCCA 310.
64. *R v Oinonen* [1999] NSWCCA 310, [15], [18].
65. *R v Cardoso* (2003) 137 A Crim R 535.
66. *R v Sharma* (2002) 54 NSWLR 300.
67. *R v Cardoso* (2003) 137 A Crim R 535, [17]–[21].
68. *R v Cardoso* (2003) 137 A Crim R 535 [20].
69. *R v Curry* [2002] NSWCCA 109.

plea where the trial was a joint trial and the applicant was the only defendant to offer a plea.[70]

Relevance of the strength of the Crown case

2.36 The Guideline made it clear that the strength of the Crown case has no impact on the utilitarian value of the plea of guilty, but rather, is a factor that might be taken into account when assessing contrition or remorse.[71]

2.37 This principle has been consistently applied by the NSWCCA but often overlooked by sentencing judges. In *R v Carter*[72] Howie J was critical of

> the view held by some judges that in determining the quantum of such a discount a relevant consideration is the strength of the Crown case. It is not. That is a factor that is relevant to a consideration of whether the plea of guilty shows contrition and whether any discount over and above that for the utilitarian benefit of the plea should be allowed.[73]

Administrative arrangements of a particular court are not to determine the amount of the discount

2.38 The Council is aware that there have been certain regional practices followed by District Court Judges with respect to the amount of discount awarded for a plea of guilty, which have been adopted for the purpose of managing large caseloads, but which are inconsistent with the principles set out above.

2.39 This practice as it existed in the District Court at Parramatta was noted in *Do v The Queen*,[74] where the sentencing judge allowed a 20 per cent discount for the plea of guilty despite the fact that the plea was entered the day before the trial date, but within the period which was regarded as the 'case management period' for that court.[75] Simpson J described this discount as 'generous' although without holding the approach to involve error.

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70. *R v Curry* [2002] NSWCCA 109, [23]. Referred to in Judicial Information Research System, *Sentencing Bench Book* (online) 'Crimes (Sentencing Procedure) Act 1999 – Sentencing Procedures Generally – Guilty plea to be taken into account' http://jirs/.
71 . *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [137].
72. *R v Carter* [2001] NSWCCA 245, [13].
73. *R v Carter* [2001] NSWCCA 245, [13]. See also *R v Sutton* [2004] NSWCCA 225, [12]–[14].
74. *Do v The Queen* [2008] NSWCCA 34.
75. *Do v The Queen* [2008] NSWCCA 34, [13].

2.40 This question arose again in *R v Borkowski*,[76] a Crown appeal against a sentence imposed in the Penrith District Court. In this matter, the sentencing judge had allowed a discount of 25 per cent in circumstances where the respondent pleaded guilty on arraignment in the District Court 14 months after he was charged with the offences.[77] Howie J observed, in finding error,:

> [28] The result was that the Judge's discretion miscarried in relation to the exercise of his discretion in determining the value of the plea because he had set up a practice that was inconsistent with the decision in *Thomson and Houlton* and subsequent decisions of this Court. So far as his Honour was concerned, at least in the Penrith District Court and presumably only when his Honour was sitting in that Court, there was a regional practice that applied whereby the maximum discount was available when the plea of guilty came at arraignment regardless of when that occurred or whether there were committal proceedings in the Local Court. Hence the amount of the discount was being determined with insufficient consideration being given to the true utilitarian value of the plea.
>
> [29] With respect to the Judge, who was very senior and experienced, there is no place in the administration of the criminal law in this State for sentencing variations, including the amount of discount to be given for the plea of guilty, between District Courts or judges depending on where the court is sitting or whether there is in place a particular practice for the arraigning of accused persons who have been committed for trial to a particular court. Regional courts and judges of course may develop practices for the better management of their lists and the early determination of the issues at trial. They should be encouraged to do so. But those practices cannot be founded upon rewards for compliance, such as sentencing discounts, that do not accord with the general law of this State as determined by the judgments of this Court unless that variation has been prescribed by the legislature.
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> …
>
> [31] As a matter of general practice, the maximum discount for the utilitarian value of the plea of guilty should be awarded only to those accused persons who plead guilty in the Local Court and continue that plea of guilty in the District Court. There may be a valid reason in the exercise of discretion for awarding the maximum discount where the plea of guilty does not occur until the District Court but that would be exceptional and arise from the peculiar factual situation in a particular case. The amount of the discount cannot depend upon the practice of the particular court based upon its administrative arrangements.[78]

Howie J further noted that in this instance the community, upon learning of the initial sentence of the respondent, might have questioned why the co-offender had received the

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76. *R v Borkowski* [2009] NSWCCA 102.

77. *R v Borkowski* [2009] NSWCCA 102, [21]. It is noted that the Court observed that the respondent obtained an order for the attendance of witnesses at committal, which resulted in the prosecution abandoning the allegation that the respondent had travelled through a red light (at [12], [38]). Consistent with the authorities discussed above, Howie J noted that notwithstanding that the respondent having contested this allegation, he could have indicated in the Local Court a plea of guilty to manslaughter with a denial of that allegation (at [21]).

78. *R v Borkowski* [2009] NSWCCA 102, [28]–[31].

same discount in circumstances where he had pleaded guilty at the first opportunity before a magistrate.[79]

2.41 The Council is also aware of the existence of *District Court Practice Note 7: Management of Country Circuit Lists* dealing with the management of telephone call-overs conducted by judges after committals for trial. Practice Note 7 states:

> It should be readily understood that the maximum benefit for the utilitarian benefit of a plea of guilty will be earned if the plea is notified during the telephone callover process. A plea on the day of trial in a circuit list has little or no benefit because trial time has been allocated to that case during the circuit thus preventing another trial being listed.[80]

It is arguable that this Practice Note contravenes the principles of the guideline judgment in a similar manner to that identified by the NSWCCA in *R v Borkowski*.

THE ROLE OF THE PARTIES IN THE COURT'S DETERMINATION OF THE DISCOUNT FOR THE PLEA OF GUILTY

2.42 It is the role of the prosecution to assist the court with sentencing principles and authorities relevant to the matter before it. It is therefore inappropriate for the Crown to come to an agreement with defence which would result in the Crown not being able to meet its obligations to the court in this respect. The issue arose in *R v Darcy*[81] where, prior to the sentencing hearing, an agreement had been reached between counsel that the Crown would not argue against a discount of 20 per cent for the utilitarian value of the plea of guilty. In submissions, the Crown Prosecutor stated that he disagreed with defence's suggestion that the discount should be 20 per cent but did not wish to make further submissions on the issue. Berman AJ criticised the Crown's stance, on the grounds that it was 'in effect, an agreement not to assist the Court by reference to binding principles and authorities. To that extent the agreement was inconsistent with the Crown prosecutor's obligations to the Court'.[82]

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79. *R v Borkowski* [2009] NSWCCA 102, [24].
80. The Hon Justice R O Blanch, Chief Judge of District Court of New South Wales, *District Court Practice Note 7: Management of Country Circuit Lists* (28 September 2007).
81. *R v Darcy* [2007] NSWSC 1392.
82. *R v Darcy* [2007] NSWSC 1392, [51].

2.43 A court is not bound by a prosecution's submission on this issue, even if that submission accords with that of the defence. In *Ahmad v The Queen*[83] the offender argued that the sentencing judge had erred in finding that he had not pleaded at the earliest reasonable opportunity and in rejecting submissions by both the Crown and defence on this point.[84] The NSWCCA held that the sentencing judge had been correct in rejecting the submissions by both parties that the plea of guilty should attract a discount of 25 per cent.[85]

2.44 McClellan CJ at CL observed:

> [23] With respect to any aspect of the agreement which relates to the appropriateness of any particular sentence, or a component of it, the Crown's agreement is confined to an undertaking to make a submission to the sentencing judge consistent with the terms of that agreement. The agreement can neither bind the judge nor be given any greater weight than is appropriate to a submission of counsel with knowledge of the facts relevant to the offence and the offender. It must of course be carefully considered but carries no greater weight than any other submission which the Crown may make in the sentencing process. If it were otherwise the fundamental assumption that it is for the judge to determine an appropriate sentence would be seriously compromised.[86]

COMMONWEALTH OFFENCES

2.45 In sentencing for Commonwealth offences, a court is required to take into account an offender's plea of guilty pursuant to s 16A(2)(g) of the *Crimes Act 1914* (Cth).[87]

2.46 As noted earlier, when considering an appropriate discount in relation to a plea of guilty for Commonwealth offences, the court is to take into account the offender's willingness to facilitate the course of justice rather than the utilitarian value of the plea.[88] The strength of the prosecution case is a relevant consideration in determining the offender's willingness to facilitate the course of justice.[89]

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83. *Ahmad v The Queen* [2006] NSWCCA 177.
84. *Ahmad v The Queen* [2006] NSWCCA 177, [14].
85. *Ahmad v The Queen* [2006] NSWCCA 177, [21]–[26].
86. *Ahmad v The Queen* [2006] NSWCCA 177. In this instance, the NSWCCA looked to the fact that the applicant had maintained his not guilty plea until shortly before the trial when he bargained for the reduced charge of manslaughter, and pointed out that the applicant could have indicated his willingness to plead guilty to manslaughter at an earlier stage in proceedings.
87. *Crimes Act 1914* (Cth) s 16A(2)(g).
88. *Cameron v The Queen* (2002) 209 CLR 339, [14], [22] (Gaudron, Gummow and Callinan JJ).
89. *Danial v The Queen* [2008] NSWCCA 15, [28]. See too *Tyler v The Queen; R v Chalmers* (2007) 173 A Crim R 458, [114].

CHAPTER 3: DISCOUNTS FOR ASSISTANCE TO AUTHORITIES

STATUTORY BASIS FOR THE DISCOUNT

3.1 The power to reduce a penalty for assistance provided or undertaken to be provided by the accused to law enforcement authorities is contained in s 23 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), ('the Act') which provides:

> (1) A court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.
>
> (2) In deciding whether to impose a lesser penalty for an offence and the nature and extent of the penalty it imposes, the court must consider the following matters:
>
> (a) the effect of the offence on the victim or victims of the offence and the family or families of the victim or victims,
>
> (b) the significance and usefulness of the offender's assistance to the authority or authorities concerned, taking into consideration any evaluation by the authority or authorities of the assistance rendered or undertaken to be rendered,
>
> (c) the truthfulness, completeness and reliability of any information or evidence provided by the offender,
>
> (d) the nature and extent of the offender's assistance or promised assistance,
>
> (e) the timeliness of the assistance or undertaking to assist,
>
> (f) any benefits that the offender has gained or may gain by reason of the assistance or undertaking to assist,
>
> (g) whether the offender will suffer harsher custodial conditions as a consequence of the assistance or undertaking to assist,
>
> (h) any injury suffered by the offender or the offender's family, or any danger or risk of injury to the offender or the offender's family, resulting from the assistance or undertaking to assist,
>
> (i) whether the assistance or promised assistance concerns the offence for which the offender is being sentenced or an unrelated offence,
>
> (j) the likelihood that the offender will commit further offences after release.

(3) A lesser penalty that is imposed under this section in relation to an offence must not be unreasonably disproportionate to the nature and circumstances of the offence.

3.2 Additionally, s 21A(3)(m) of the Act includes assistance by the offender to law enforcement authorities as a mitigating factor which is to be taken into account in accordance with s 21A(1) of the Act.

RATIONALE BEHIND ALLOWING A DISCOUNT FOR ASSISTANCE TO THE AUTHORITIES

3.3 The provision of a discount on penalty for an offender's assistance to authorities is frequently referred to as a matter of public policy. It is thought to be 'clearly in the public interest' to encourage the supply of information to the authorities that will assist in bringing other offenders to justice, and to give evidence against those other offenders.[1] This kind of assistance can result in a saving of costs in the investigation and prosecution of criminal offences and can help in improving the clear up rate for crimes thereby vindicating the public process of punishing and deterring crimes.[2] The assistance may also be regarded as a manifestation of remorse and a factor in favour of rehabilitation.[3]

3.4 In *R v Cartwright*[4] Hunt and Badgery Parker JJ noted that 'in order to ensure that such encouragement is given, the appropriate reward for providing assistance should be granted whatever the offender's motive may have been in giving it, be it genuine remorse (or contrition) or simply self interest', and added that if 'the motive with which the information is given is one of genuine remorse or contrition …that is a circumstance which may well warrant even greater leniency being extended …but that is because of normal sentencing principles and practice'.[5]

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1. *R v Cartwright* (1989) 17 NSWLR 243, 252.
2. *R v Ryan* (2001) 206 CLR 267, [92] (Kirby J).
3. *S v The Queen* [2008] NSWCCA 186, [10].
4. *R v Cartwright* (1989) 17 NSWLR 243.
5. *R v Cartwright* (1989) 17 NSWLR 243, [252].

3.5 The discount reflects the interests of encouraging the provision of assistance and of compensating the accused but also recognising any difficulties for the offender which may follow from that assistance.[6]

3.6 It has been recognised that 'often it will be the case that an offender's conduct in pleading guilty, his expressions of contrition, his willingness to co-operate with the authorities, and the personal risk to which he thereby exposes himself, will form a complex of inter-related considerations, and any attempt to separate out one or more of those considerations will not only be artificial and contrived, but will also be illogical'.[7] This will have relevance when a sentencing judge comes to determine an appropriate discount.

3.7 Notwithstanding the policy considerations which underlie the power to give a discount for assistance provided to authorities, the ultimate sentence that is imposed must not constitute 'an affront to community standards'.[8] As Howie J has observed:

> After taking into account the various statutory and common-law principles and applying such discounts that arise on the particular facts, the sentencing judge is required to stand back and ask whether the resulting sentence is just and reasonable, not only to the offender but also to the community at large.[9]

3.8 The failure to provide assistance to authorities and any refusal to disclose the identity of co-offenders is not an aggravating factor at sentence. It may however be a consideration of relevance for the offender's level of contrition and prospects of rehabilitation.[10]

ASSISTANCE PROVIDED TO LAW ENFORCEMENT AGENCIES

3.9 The types of assistance provided by an offender to law enforcement agencies will vary. In some cases the offender provides assistance in relation to the criminal activity in which he has been involved, which may include the identification of co-offenders.[11] In

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6. *R v Heard aka Summers* (1987) 11 NSWLR 46, 50 (Hunt J); *R v Cartwright* (1989) 17 NSWLR 243, [255].
7. *R v Gallagher* (1991) 23 NSWLR 220, 228.
8. *R v Gallagher* (1991) 23 NSWLR 220, 232 (Gleeson CJ).
9. *SZ v The Queen* (2007) 168 A Crim R 249, [5]; and see *R v Dodd* (1991) 57 A Crim R 349.
10. *R v Baleisuva* [2004] NSWCCA 344, [29]–[30]. Cited in LexisNexis Butterworths, *Criminal Practice and Procedure (NSW)* (online), [5-s 23.1] 'Assistance to Authorities'.
11. *Many v The Queen* (1990) 51 A Crim R 54, [67].

such cases there is a direct connection between the information and assistance given and the offence with which the offender is charged.

3.10 A second form of assistance may be provided by an offender who furnishes information going beyond the crimes in which he was involved and for which he stands for sentence.[12]

3.11 A third type of assistance, which may be less common, involves the offender, prior to being arrested on a particular matter, acting as an informer providing information to the police about criminal matters not related to the offence for which he later stands for sentence. In these instances, the conduct 'never carries any connotation of contrition but would often appear as conduct undertaken in the hope of a quid pro quo, namely a good word put in for the prisoner on any occasion when he himself might come before a court'.[13]

3.12 A fourth type of assistance involves the offender agreeing to assist police in an undercover operation, either by agreeing to wear a listening device when speaking to other offenders, or by taking part in a controlled operation.

3.13 A fifth type of assistance, considered in a following chapter, relates to that given by an accused by way of pre-trial disclosure made for the purposes of reducing the issues or length of the anticipated trial.

3.14 An sixth form of assistance can be seen in the case of *Many v The Queen*,[14] where the NSW Court of Criminal Appeal (NSWCCA) found that, although the offender showed no contrition or remorse for several offences of sexual violence, he was entitled to receive leniency on the basis of his assistance to authorities, in providing information about a crime in contemplation by an inmate in prison, which prevented its commission. The NSWCCA considered that it was appropriate to discount the offender's sentence in the order of one third. In that case the Court noted:

> Bearing in mind the principles stated in *R v Cartwright* (1989) 17 NSWLR 243,, the following may be stated as important factors in determining whether a discount should be allowed and, if so, the amount of the discount:
>
> (i) whether there was full and frank co-operation;

12. *Many v The Queen* (1990) 51 A Crim R 54, [67].
13. *Many v The Queen* (1990) 51 A Crim R 54, [67].
14. *Many v The Queen* (1990) 51 A Crim R 54.

(ii) whether the assistance given was extensive;

(iii) whether the assistance given was such as to have the potential to significantly assist the authorities;

(iv) whether the information given was true;

(v) whether the applicant believed that the authorities were not already in possession of the information;

(vi) whether consequences of the appellant giving the assistance were likely to be:

(a) threats to the applicant's safety;

(b) more onerous conditions of imprisonment in protective custody;

(c) danger to the applicant after his release from custody.[15]

3.15 It is important that letters of assistance (commonly referred to as 'letters of comfort') tendered by the prosecution to the court which provide evidence in relation to assistance to the authorities in whatever form it is given, are carefully prepared and accurately record the level of assistance provided and its worth. Otherwise they can be a vehicle for corrupt conduct.

3.16 A question has arisen in relation to evidence of assistance that is led at sentencing, where it extends to information that may be adverse to the offender, but was provided on the understanding that it should not be used against him. In *R v Bourchas*,[16] Giles JA held that in principle it was permissible for such information to be received as evidence of the offender's assistance, but not used against the offender, for example by way of enhancement of his offending conduct.[17] Giles J summarised the relevant principles, as follows:

1. The offender carries the burden of proving assistance to the authorities, as a matter going to mitigation;

2. The Crown should assist the offender in the discharge of that burden;

3. The assistance may extend to the Crown tendering the evidence of assistance to the authorities, but the Crown should not do so over the objection of the offender;

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15. *Many v The Queen* (1990) 51 A Crim R 54, [69].

16. *R v Bourchas* (2002) 133 A Crim R 413.

17. *R v Bourchas* (2002) 133 A Crim R 413, [98] following *R v Raz* (Unreported, NSW Court of Criminal Appeal, 17 December 1992).

4. A statement made by way of assistance to the authorities on an undertaking that the information in it will not be used against the offender may properly be admitted on the basis that the information in it will not be used against the offender, and with its use restricted accordingly;

5. When the offender tenders a statement made by way of assistance to the authorities, or accepts the Crown's assistance in tendering such a statement, it is prudent that the basis of the tender be agreed and stated showing any restriction on the use of the information in the statement; if there is disagreement, a ruling can be made in the normal way;

6. In the absence of an agreed basis of tender or a ruling at the time of admission, whether use of a statement made by way of assistance to the authorities is restricted will depend on the circumstances, but normally the information in the statement cannot be used against the offender.[18]

VOLUNTARY DISCLOSURE OF OTHERWISE UNKNOWN CRIMINAL ACTIVITY—'ELLIS DISCOUNT'

3.17 The voluntary disclosure by an offender of his criminal activity otherwise unknown to the police can justify the giving of a discount, or perhaps more appropriately an exercise of the court's leniency. This is often referred to as the 'Ellis discount' based on the decision in *R v Ellis*[19] where, in addition to pleading guilty to the current charge, the accused disclosed his involvement in seven armed robberies. Street CJ observed that:

> [T]he disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency, the degree of which will vary according to the degree of likelihood of that guilt being discovered by the law enforcement authorities, as well as guilt being established against the person concerned.[20]

3.18 In *Ryan v The Queen*,[21] McHugh J observed that according to *Ellis* the degree of leniency will vary according to: '(1) the likelihood that the offences would have been discovered by the authorities; and (2) the likelihood that the offences could have been proven beyond reasonable doubt in a court without the disclosure'.[22] McHugh J, also

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18. *R v Bourchas* (2002) 133 A Crim R 413, [99].
19. *R v Ellis* (1986) 6 NSWLR 603. The Council notes that the NSWCCA held that to refer to the 'Ellis discount' as a discount is an error as it was instead a matter that mitigated sentence and might be taken into account in the general sentencing synthesis, much like remorse. *R v Borkowski* [2009] NSWCCA 102, [33]–[34] see *R v Ronald King* [2009] NSWCCA 117; and *S v The Queen* [2008] NSWCCA 186.
20. *R v Ellis* (1986) 6 NSWLR 603, 604.
21. *Ryan v The Queen* (2001) 206 CLR 267.
22. *Ryan v The Queen* (2001) 206 CLR 267, [272].

observed that the principle of giving leniency to offenders who voluntarily disclose an otherwise unknown offence is

> a statement of general principle or perhaps more accurately of a factor to be taken into account. It is not the statement of a rule to be quantitatively, rigidly or mechanically applied. It is an indication that, in determining the appropriate sentence, the disclosure of what was an unknown offence is a significant and not an insubstantial matter to be considered on the credit side of the sentencing process. How significant depends on the facts and circumstances of the case.[23]

3.19 When an offender simply co-operates with the police by confessing to a crime of which he is charged, it does not follow that he should receive a discount or leniency for that form of assistance to the police over and above any discount for the plea of guilty and remorse. A further discount may be imposed 'if it can reasonably be seen that the guilt of the offender could not have been established but for his own co-operation and admissions'.[24]

3.20 The degree of leniency provided is likely to be less where the offender voluntarily surrenders to police and confesses in circumstances where his identification as a participant and arrest are imminent.[25] The fact that the confession allows a more serious charge to be preferred may, however, permit the extension of leniency.[26]

3.21 The court can take into account the fact that there has been a substantial period of time between the date of the offence and the confession during which the offender was able to demonstrate rehabilitation, although the value of the confession and assistance provided will be diminished where there has been a lengthy period of concealment or lying to the police.[27]

3.22 In *Lewins v The Queen*,[28] a case where the police had evidence of 17 matters against the appellant, and a further 61 matters were revealed by him, Howie J referred to *R v Ellis* as a 'quite exceptional case' and observed:

> Although the leniency referred to in these decisions extends to those cases where the offender volunteers additional criminality otherwise unknown to the police, the extent of the leniency will obviously not be of the same significance as in those

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23. *Ryan v The Queen* (2001) 206 CLR 267, [273].
24. *Bond v The Queen* (1990) 48 A Crim R 1, 15.
25. *R v Hasan* [2005] NSWCCA 21, [23].
26. *R v Bell* [2005] NSWCCA 81, [11]–[12].
27. *R v Baldacchino* (Unreported, NSW Court of Criminal Appeal, 3 November 1998).
28. *Lewins v The Queen* (2007) 175 A Crim R 40.

> cases where the police are unaware of any criminal offences committed by the offender. It is a matter of degree. In some cases the known criminality might be so great that little leniency can be shown for the further offences revealed by the offender.[29]

In this case an accumulation of discounts for the pleas and assistance in excess of 75 per cent was held to have resulted in sentences that were so manifestly inadequate as to amount to an affront to the offender's victims.

3.23 In *S v The Queen*[30] Bell JA (with whose reasons Latham J, but not Adams J, agreed) confirmed the *Ellis* factor as a 'useful shorthand way of describing the significant element of leniency that may be extended in a case in which an offender voluntarily discloses his or her guilt of an offence which he or she was not suspected of committing'. Her Honour however observed that *R v Ellis*, being an exceptional case, (in which the offender had come forward, as a matter of conscience and informed police of a number of offences of which he had not been suspected) was decided prior to the enactment of s 23 of the *Crimes (Sentencing Procedure) Act* and *R v Thomson and Houlton*;[31] and noted that where an offender's willingness to co-operate with the authorities is part of a complex of interrelated considerations relevant to the sentencing discretion, the allocation of a discrete 'Ellis discount' is likely to result in error.[32] Her Honour also noted that the voluntary disclosure of unknown guilt informs the assessment of remorse and prospects of rehabilitation.

QUANTIFYING THE DISCOUNT FOR ASSISTANCE

3.24 There is no fixed tariff to be applied to discounts for assistance, and discounts ranging between 20 and 50 per cent have been regarded as appropriate by the NSWCCA.[33] Essentially, the principle underpinning the discount for assistance is premised on the belief that such a discount 'must not produce a result which is disproportionate to the objective gravity of a particular offence and the circumstances of a particular offender'.[34]

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29. *Lewins v The Queen* (2007) 175 A Crim R 40, [18].
30. *S v The Queen* [2008] NSWCCA 186.
31. *R v Thomson and Houlton* (2000) 49 NSWLR 383.
32. *S v The Queen* [2008] NSWCCA 186, [14].
33. *R v Pang* (1998) 105 A Crim R 474, 477, *R v Sukkar* (2006) 172 A Crim R 151, [54].
34. *R v Sukkar* (2006) 172 A Crim R 151, [54]. See also *R v M* [2005] NSWCCA 224.

3.25 Section 23(3) of the *Crimes (Sentencing Procedure) Act* expressly provides that the discount must not be 'unreasonably disproportionate to the nature and circumstances of the offence'. In *R v C*[35] Mahoney JA in considering the legislative intent in enacting the predecessor[36] of this section said:

> In the present case, the legislative intention was to ensure that sentences were not, in general, disproportionate to the nature and circumstances of the offence. There was a clear public interest in that objective. The public unease said to have existed, or to have been generated, by the extent of the discount given in the *Many* case may evidence that. But there was another public interest involved, namely, the provision of the utmost assistance to the law enforcement authorities. The detection and arrest of offenders at the least cost to the public requires that such assistance be given and that the giving of it be encouraged by its recognition in the sentencing process.[37]

3.26 His Honour considered that the legislation encapsulates the two objectives of the legislature. Whilst it does not proscribe sentences which are disproportionate it does proscribe those which are 'unreasonably disproportionate', allowing the court to take into account the nature and the extent of the assistance when coming to its determination of what is 'unreasonable'.[38]

3.27 In most instances the provision of assistance will be accompanied by a plea of guilty, as well as positive indications of remorse and rehabilitation. As a result, more than one factor will need to be taken into account in fixing a sentence which, after consideration of the discounting elements, is proportionate to the gravity of the nature and circumstance of the offence. This then gives rise to the extent to which the discount for each element needs to be disclosed.

3.28 In *R v Gallagher*,[39] the offender was charged with, amongst other matters, conspiracy to import heroin into Australia along with his co-offenders. He had assisted police in providing information regarding other offenders involved in the distribution of narcotics. The assistance provided by the offender was described by the sentencing judge as being 'extensive and significant' such that he should receive a substantial discount for such assistance. The sentencing judge referred to the offender's assistance to authorities as well as his contrition, pleas of guilty and determination to rehabilitate himself and

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35. *R v C* (1994) 75 A Crim R 309.
36. *Crimes Act 1900* (NSW) s 442B.
37. *R v C* (1994) 75 A Crim R 309, 314. And see *R v NP* [2003] NSWCCA 195 for similar observations per Simpson J in relation to the current provision.
38. *R v C* (1994) 75 A Crim R 309, 315.
39. *R v Gallagher* (1991) 23 NSWLR 220.

gave him a 50 per cent deduction which was said to be in accordance with the authority of *Cartwright*.[40] Gleeson CJ considered the question of whether the sentencing judge ought to have given a discrete quantifiable discount for the assistance and referred to the difficulties this involved. His Honour said:

> It must often be the case that an offender's conduct in pleading guilty, his expressions of contrition, his willingness to cooperate with the authorities, and the personal risks to which he thereby exposes himself, will form a complex of inter-related considerations, and an attempt to separate out one of more of those considerations will not only be artificial and contrived, but will also be illogical.[41]

3.29 Gleeson CJ emphasised that a judge is entitled but not obliged to give a discrete quantifiable discount for assistance to authorities, and recognised that in many cases it may be impossible or inappropriate to take that course.[42] The Chief Justice also pointed out that what is involved is 'not a rigid or mathematical exercise, to be governed by "tariffs" derived from other and different cases but, rather, one of a number of matters to be taken into account in a discretionary exercise'.

3.30 Although no guideline judgment has been given in this area, in *SZ v The Queen*[43] (where it was held that the combined discount of 62.5 per cent given for the guilty plea and assistance was excessive) there was a detailed examination of the authorities. Buddin J (with whom Simpson and Howie JJ agreed) stressed that while circumstances may give rise to a discount in excess of 50 per cent being imposed, 'a combined discount exceeding 50% should be reserved for an exceptional case'.[44] Howie J observed additionally that 'an overall discount of more than 60%, however derived, will rarely, if ever, result in a sentence that is not manifestly inadequate'.[45] The Court emphasised the importance in quantifying that element of the discount which relates to future assistance. This was seen as crucial in permitting the parties to understand exactly the position, and for an appellate court to respond to any review of the sentencing court's decision in the event that such a promise was not complied with.

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40. *R v Gallagher* (1991) 23 NSWLR 220, 224–226.
41. *R v Gallagher* (1991) 23 NSWLR 220, 228.
42. *R v Gallagher* (1991) 23 NSWLR 220, 230. It is noted that this case was decided before the legislative provision.
43. *SZ v The Queen* (2007) 168 A Crim R 249.
44. *SZ v The Queen* (2007) 168 A Crim R 249, [51]–[53] (Buddin J).
45. *SZ v The Queen* (2007) 168 A Crim R 249, [11].

3.31 Earlier in *R v Sukkar*[46] Howie J said that the discount range that had previously been expressed by the courts of between 20 and 50 per cent had been formulated on the basis that part of the discount was allowance for the fact that the offender will suffer hardship as a result of the assistance he has provided. His Honour noted that where there is no evidence of disadvantage to be suffered in the prison system, a discount would not normally exceed 40 per cent for both a plea and assistance except in exceptional circumstances.[47]

3.32 In *Carruthers v The Queen*[48] the NSWCCA held that, in circumstances where assistance was provided, and the offender's life was under threat, such that he was placed in protection and experienced significant restrictions, a combined discount of less than 35 per cent for the utilitarian value of the plea, contrition and assistance was inappropriate.[49]

3.33 In *HVN v The Queen*,[50] the NSWCCA confirmed that in circumstances where an offender had provided assistance to authorities, then in the absence of evidence that he would be disadvantaged in prison because of the assistance, a discount for both a plea of guilty and assistance above 40 per cent would be exceptional.[51]

FACTORS COMMONLY CONSIDERED

Significance and usefulness of assistance provided to the authorities

3.34 Section 23(2)(b) of the Act requires the sentencing court to take into account the significance and usefulness of the assistance provided or undertaken to be provided, in the light of its evaluation by the authorities.

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46. *R v Sukkar* (2006) 172 A Crim R 151.
47. *R v Sukkar* (2006) 172 A Crim R 151, [3]–[5], referring to *R v Cartwright* (1989) 17 NSWLR 243, 250.
48. *Carruthers v The Queen* [2007] NSWCCA 276.
49. *Carruthers v The Queen* [2007] NSWCCA 276, [34].
50. *HVN v The Queen* [2007] NSWCCA 207.
51. *HVN v The Queen* [2007] NSWCCA 207, [10] (Latham J, with the concurrence of other members of the Court) also citing *R v Sukkar* (2006) 172 A Crim R 151, [5].

3.35 This provision modifies to some extent the common law as expressed by the majority in *R v Cartwright*,[52] where it was said that:

> the reward for providing assistance should be granted if the offender has genuinely co-operated with the authorities whether or not the information supplied objectively turns out in fact to have been effective.. What is relevant here is the potential of the information to assist the authorities, as comprehended by the offender himself.[53]

Mahoney JA dissented on this point referring to the public perception that a discount should only be given if the information was effective in the assistance which it provided.[54]

3.36 The dissenting opinion was however enacted in s 442B(3)(b) of the *Crimes Act 1900* (NSW), and subsequently in s 23(2)(b) of the *Crimes (Sentencing Procedure) Act*, and now represents the law, so that the court must consider the usefulness of the information given.

3.37 Section 23(2)(c) of the Act provides additionally that in deciding whether to impose a lesser penalty the court must consider the 'truthfulness, completeness and reliability of any information or evidence provided by the offender'. Where the information provided to the authorities is partly true and does in fact assist the authorities the fact that it was partly false does not of itself disentitle the offender from a reduction of sentence, although that circumstance may affect the reduction that would have been given had the disclosure been full and frank.[55] Where the information is totally false there is no occasion for any discount.[56]

3.38 The Crown has an obligation to inform the defence of and, if necessary, to bring to the attention of a sentencing court, an offender's offer of assistance to the authorities. In some cases even an offer of assistance that is not taken up by the Police can be taken into account by a sentencing court, though this will not always be the case.[57]

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52. *R v Cartwright* (1989) 17 NSWLR 243.
53. *R v Cartwright* (1989) 17 NSWLR 243, 252–253.
54. *R v Cartwright* (1989) 17 NSWLR 243, 244.
55. *R v Downey* (1997) 97 A Crim R 41.
56. *R v Downey* (1997) 97 A Crim R 41.
57. *De Campos v The Queen* [2006] NSWCCA 51, [23]–[25]. The offender, charged with importation of a trafficable quantity of heroin into Australia offered to participate in a controlled delivery. The police refused the offer due to the small amount of drug involved. The matter was not put to the sentencing judge by the Crown, nor was the defence provided with statements to support the claim

Benefit given by the authorities in not pursuing other offences

3.39 In the case of *R v Bourchas*[58] the NSWCCA considered a case in which the offender had given extensive frank assistance to the police in relation to drug offences, as a consequence of which police had agreed not to prosecute him for other matters which he had disclosed. His assistance had led him to be placed in protective custody.

3.40 The NSWCCA held that a discount of 50 per cent was appropriate, even though the offender had received some benefit through the undertaking not to prosecute him for other matters. The Court stated that regard to the benefit received is not irrelevant to the exercise of the sentencing discretion but noted that the rational for the discount must focus on the public interest in encouraging offenders to supply information. It acknowledged that information is unlikely to be supplied in the absence of an undertaking not to prosecute an offender for other offences, and noted that the consequences normally arising out of providing information (such as being placed in protective custody) will be to do with the offender's exposure to violence.[59]

3.41 Unwitting assistance provided by an offender to authorities does not come within the ambit of s 23 of the *Crimes (Sentencing Procedure) Act*.[60]

Allowance where the sentence will be served in protective custody

3.42 Courts have recognised that service of a sentence under more harsh or restrictive conditions is relevant to an assessment of the sentence as a whole. It was often assumed in the past that serving time in protective custody was more onerous than serving a sentence in the general prison population.[61] The fact that an offender is to serve a sentence in protective custody does not however, automatically result in a more lenient sentence. What is of relevance is the extent (if any) to which the offender will serve the sentence in fact under more onerous conditions than would otherwise be the case.[62]

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made by the offender. Howie J held that she was entitled to a further 5 per cent discount for the offer made to the police to provide assistance, though it was not taken up by the police.

58. *R v Bourchas* (2002) 133 A Crim R 413.

59. *R v Bourchas* (2002) 133 A Crim R 413, 441.

60. *R v Fabrizio Calderoni* [2000] NSWCCA 511, [9].

61. *R v Burchell* (1987) 34 A Crim R 148, 151; *R v Scott* [2003] NSWCCA 28, [21]–[26]; *AB v The Queen* (1999) 198 CLR 111, 152.

62. *R v Durocher-Yvon* (2003) 58 NSWLR 581, [18]; *R v Totten* [2003] NSWCCA 207, [43]; *R v Way* (2004) 60 NSWLR 168, [179]; *R v Potier* [2004] NSWCCA 136, [93].

3.43 In *R v Mostyn*[63] Howie J described the conundrum posed by these cases as follows:

> [T]he court is placed in a difficult position. On the one hand, the sentencer should take into account the conditions of the prisoner's custody where it appears that they will be unduly onerous because of some matter particular to that prisoner. This requires that, at the time of sentence, the court make some prediction about the nature of the custody that will be endured by the prisoner. On the other hand, the courts should now be aware that assumptions or predictions, which have been made in the past about the nature of an offender's custody because, for example, the offender has given assistance to the authorities, no longer hold good. But the vagaries of prison life are such that it could never be confidently assumed or predicted that a prisoner will serve the whole of his sentence in any particular type of custodial arrangement.[64]

3.44 The Court reduced the original discount given to the offender as a result of evidence placed before it that he was not deprived of rehabilitative programs in custody, and was not required to serve his sentence in more difficult circumstances.[65]

3.45 In taking into account any hardship faced by a prisoner who has given assistance to authorities, a sentencing judge must be careful to avoid the risk of double counting. The potential hardship faced by an offender on account of assistance provided to authorities is a factor that has already been accounted for in the discount itself.[66]

3.46 The Sentencing Council has previously noted the changes which have been introduced to reduce the harshness of protective custody and their relevance for sentencing, as part of its review of sexual offences in NSW.[67]

Allowance for physical retaliation upon release and danger to the offender's family

3.47 Section 23(2)(h) of the *Crimes (Sentencing Procedure) Act* requires the Court to take into account 'any injury suffered by the offender or the offender's family, or any

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63. *R v Mostyn* (2004) 145 A Crim R 304.
64. *R v Mostyn* (2004) 145 A Crim R 304, [180]. The NSWCCA noted that it could no longer be assumed that a prisoner on protection will experience a more difficult prison life or be deprived of amenities or opportunities for self-improvement, courses and education: *R v Mostyn* (2004) 145 A Crim R 304, [179].
65. See *R v Sukkar* (2006) 172 A Crim R 151, [4].
66. *R v S* (2000) 111 A Crim R 429, [19], referring to *R v Cartwright* (1989) 17 NSWLR 243, 255.
67. NSW Sentencing Council, Penalties attaching to Sexual Assault Offences in New South Wales, August 2008, see Chapter6.

danger or risk of injury to the offender or the offender's family, resulting from the assistance or undertaking to assist'.[68]

3.48 As mentioned above, s 23(3) specifies that any lesser penalty imposed under the section 'must not be unreasonably disproportionate to the nature and circumstances of the offence'.[69] In *R v C*[70] the NSWCCA considered the meaning of 'unreasonably disproportionate' under s 442B of the *Crimes Act* (the precursor to s 23 of the *Crimes (Sentencing Procedure) Act*). Mahoney JA, with whom the other members of the Court agreed, concluded that '[t]he protection of a person who has given assistance to the authorities and of those sufficiently close to him is in my opinion a factor to be taken into account in deciding the reasonableness and/or the disproportion of the sentence for the purposes of the section'.[71] The NSWCCA concluded that it was open to the court in the circumstances to find, in its consideration of this factor, that there was a danger to the respondent's family which would be increased if the respondent was not present because he was in custody.[72]

3.49 In *R v Huang*[73] the NSWCCA acknowledged both the great value of the assistance of the offender, and that the risks to himself and his family were so severe as a result of this exceptional assistance that he would need to remain in protection upon his release and assume a new identify, with his life being at risk indefinitely. These factors were held to justify some reduction in the sentence although not to a point where the sentence would be unreasonably disproportionate to the nature and circumstances of the case.

3.50 Section 16A(2)(p) of the *Crimes Act 1914* (Cth) requires the judge, when sentencing generally, to take into account the probable effect that any sentence would have on an offender's family or dependants. When considering this section in *R v El Hani* Howie J, with whom the other members of the court agreed, determined that the sentencing judge had erred in deciding that it was only possible to mitigate the sentence

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68. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(2)(h).
69. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(3).
70. *R v C* (1994) 75 A Crim R 309.
71. *R v C* (1994) 75 A Crim R 309, 316.
72. In his comments at *R v C* (1994) 75 A Crim R 309, 317, James J referred to the sentencing judge being entitled in this instance to form the view that the case was 'exceptional' in its nature.
73. *R v Huang* (1995) 78 A Crim R 111.

for hardship caused to the offender's family as a result of assistance to the authorities if the circumstances were sufficiently exceptional or extraordinary.[74] Howie J stated:

> s 16A(2)(p) is only concerned with the impact of the sentence upon the offender's family; that is the impact of the offender being imprisoned for a specific term, or at all. The provision, and the limit placed upon it, is not concerned with some other relevant consideration arising in the course of sentencing the offender that has some bearing upon his or her family and may impact upon the sentence to be imposed. In particular, there is no principle that limits the court's consideration of the effect upon the offender's family of the fact that the offender has co-operated with the investigating or prosecuting authorities.[75]

His Honour noted the provision under s 23(2)(h) of the state legislation, and indicated that a similar consideration could be taken into account in determining the discount to be granted to a federal offender.[76]

FAILURE TO COMPLY WITH AN UNDERTAKING TO PROVIDE FUTURE ASSISTANCE

3.51 Where a discount for future assistance has been granted, it has been regarded as 'essential that there be some reference to the way in which the discount translates arithmetically in order to make patent to the prisoner the consequences, under the *Criminal Appeal Act 1912* (NSW), should his offer of assistance be withdrawn' and to allow an appeal court to deal appropriately with a review of any such case.[77]

3.52 Section 5DA of the *Criminal Appeal Act* makes provision for those cases where, after sentence, the offender fails to fulfil an undertaking to provide assistance (usually involving giving evidence in the trial of another offender) which had led to a reduction in the sentence that was imposed. It provides a right of appeal to the NSWCCA by the Attorney General or the Director of Public Prosecutions where a person fails wholly or partly to fulfil an undertaking to assist law enforcement authorities.[78] Section 21E of the *Crimes Act 1914* (Cth) contains a specific requirement for identifying the component of a sentence that relates to future assistance in Commonwealth matters.

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74. *R v El Hani* [2004] NSWCCA 162, [61].
75. *R v El Hani* [2004] NSWCCA 162, [58].
76. *R v El Hani* [2004] NSWCCA 162, [60].
77. *SZ v The Queen* (2007) 168 A Crim R 249, [51]. See also *R v Halls* (2002) 127 A Crim R 209 and *R v Waqa (No 2)* (2005) 156 A Crim R 454.
78. See *R v Hocking* [2000] NSWCCA 339, [32]–[33].

3.53 In *R v O'Brien*[79] Gleeson CJ confirmed that this power is discretionary and not intended to be punitive. Its purpose is to enable the Court, in an appropriate case, and to an appropriate extent, 'to intervene to adjust or correct a sentence where the sentencing process can be seen, with the benefit of hindsight, to have miscarried by reason of the circumstances set out in the section'. [80]

3.54 In *R v El-Sayed*,[81] the Crown appealed against a sentence imposed by the District Court for two charges of robbery in company and two charges of detaining for advantage. The offender had given an undertaking that he would give assistance by way of evidence at the co-offender's trial. As a consequence the sentencing judge reduced what would have been five-year sentences of imprisonment for the robbery offences to sentences of three years imprisonment (and imposed 12 month fixed terms for the detain for advantage offences). At the co-offender's trial, the offender did not comply with his undertaking and his parents gave evidence that threats had been made if their son complied with his undertaking.[82]

3.55 The NSWCCA held that notwithstanding that the offender had been threatened, the discount could not be maintained in the circumstances of that case. Simpson J, (with whom Wood CJ at CL and Adams J agreed) said that the discount attaching to assistance provided to authorities is 'purely utilitarian'.[83] The fact that the failure to comply with the undertaking arose from an understandable fear of reprisals did not affect the fact that the undertaking had not been complied with. The discount had been premised on the understanding that assistance would be forthcoming, and the failure to provide that assistance effectively negated the basis for the discount.[84]

3.56 There have been exceptional cases where the NSWCCA has declined to re-sentence an offender who has not fulfilled an undertaking. In *R v Bagnall and Russell*[85] two offenders had given undertakings to give evidence against a co-offender. The offender Russell was transported by Corrective Services to court to give evidence against the co-offender in the same van as the co-offender who made threats towards him, and

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79. *R v O'Brien* (Unreported, NSW Court of Criminal Appeal, 10 June 1993).
80. *R v O'Brien* (Unreported, NSW Court of Criminal Appeal, 10 June 1993).
81. *R v El-Sayed* (2003) 57 NSWLR 659.
82. *R v El-Sayed* (2003) 57 NSWLR 659, [19]–[21].
83. *R v El-Sayed* (2003) 57 NSWLR 659, [31].
82. *R v El-Sayed* (2003) 57 NSWLR 659, [32]-[33]; and see *R v Hammond* (2001) 121 A Crim R 1 and *R v DV* [2005] NSWCCA 319.
85. *R v Bagnall and Russell* (Unreported, NSW Court of Criminal Appeal, 10 June 1994).

at one stage during the trial was placed in the same holding cell as the co-offender who indicated to him that he knew about Russell's statement to the police. The other offender Bagnall gave evidence against his co-offender on the first day of the trial but was subsequently placed in cells in view of other prisoners and received threats against himself and his family. On the second day of the trial he told the Court that he did not wish to give further evidence and that his evidence to that point had been lies. The prosecution was given leave to cross-examine him.

3.57 The NSWCCA held that the circumstances which might lead an offender to depart from an undertaking to assist the authorities, such as threats to the offender, are factored into the leniency given by the court in reducing the sentence. However, 'a witness who offers assistance in circumstances such as existed when these two offered their assistance is entitled to expect that the authorities will adopt reasonable measures to protect the witness and if need be his family'.[86] Accordingly, the NSWCCA exercised its discretion and held that the failure of the authorities to extend such support and protection as might reasonably have been expected meant that the original sentences should stand.

3.58 The *R v Bagnall and Russell* precedent however, only arises in exceptional circumstances. In *R v Chaaban*[87] the Court declined to exercise its discretion and permit the discount to stand, although the offender had been assaulted in prison, threatened with a makeshift knife and his family had been threatened. By majority the Court held that the discount should not stand upon the basis that the threats and history of violence experienced by the offender were not exceptional and had already been taken into account.[88]

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86. *R v Bagnall and Russell* (Unreported, NSW Court of Criminal Appeal, 10 June 1994), 9–10.

87. *R v Chaaban* (2006) 166 A Crim R 406.

88. See also *R v Waqa* (2004) 149 A Crim R 143, [26]–[27], and *R v Waqa (No. 2)* (2005) 156 A Crim R 454, [14], referred to in *R v Chaaban* (2006) 166 A Crim R 406, [22]–[25] where the court rejected the Crown argument that the discount for both past and future assistance should be revisited.

COMMONWEALTH OFFENCES

3.59 The court is required in relation to Commonwealth offences to take into account the extent to which an offender has co-operated with law enforcement agencies pursuant to s 16A(2)(h) of the *Crimes Act 1914* (Cth).[89]

3.60 As noted earlier, s 21E of the *Crimes Act 1914* (Cth)[90] provides for those cases where the offender has given a promise to co-operate with the law enforcement agencies. It requires the Court to disclose the fact and the extent of any reduction given on that account and permits an appeal to be brought where the promise is not fulfilled.

3.61 The Commonwealth legislation distinguishes between past assistance as provided in s 16A(2)(h)[91] and future promised assistance as referred to in s 21E(1).[92] In *R v Vo and R v Tran*[93] McClellan CJ at CL (with the concurrence of other members of the court) observed that the Commonwealth legislation recognises two distinct bases for the discount (being 'past cooperation' and 'prospective cooperation') and held that the sentencing judge had erred in giving a discount that did not distinguish between the two. His Honour emphasised that the distinction was important 'if for no other reason than to ensure that if the promised cooperation is not forthcoming the Court of Criminal Appeal is able to identify the component of the sentence which may require to be substituted by another sentence pursuant to s 21E(3)(a) or (b)'.[94]

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89. *Crimes Act 1914* (Cth) s 16A(2)(h).
90. *Crimes Act 1914* (Cth) s 21E.
91. *Crimes Act 1914* (Cth) s 16A(2)(h).
92. *Crimes Act 1914* (Cth) s 21E(1).
93. *R v Vo and R v Tran* [2006] NSWCCA 165.
94. *R v Vo and R v Tran* [2006] NSWCCA 165, [37]–[38].

CHAPTER 4: OTHER DISCOUNTING FACTORS IN MITIGATION AT SENTENCE

4.1 In this chapter consideration is given to certain specific discounting factors, other than those traditionally taken into account for the purposes of mitigation, such as the existence of good character, remorse, good prospects of rehabilitation and an absence of any record of previous convictions. Not all of the additional considerations mentioned are reflected in the *Crimes (Sentencing Procedure) Act 1999* (NSW) or in the *Crimes Act 1914* (Cth); rather they apply as a result of case decisions or are part of the common law which, in relation to state offences, is preserved by s 21A(1) of the Act.

FACILITATING THE ADMINISTRATION OF JUSTICE AT TRIAL

Pre-trial disclosure

4.2 Sections 21A(3)(l) and 22A of the *Crimes (Sentencing Procedure) Act* provide for pre-trial disclosures by the defence to be taken into account as a mitigating factor in determining the appropriate sentence.[1]

4.3 In *R v Janceski*[2] the Court held that error was made by the sentencing judge in regarding the admissions made to police by the respondent when interviewed shortly after the accident, as 'significant' in circumstance where, at the trial, apart from admitting that he was the driver, the respondent put the whole of the Crown case in issue. Hunt AJA confirmed the need to ensure that any mitigation of sentence by reference to s 22A should not be disproportionate to the nature and circumstances of the offence.[3]

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1. See *Criminal Procedure Act 1986* (NSW) ch 3 pt 3 div 3 in relation to the power of the court to order pre-trial disclosure in complex criminal trials; as well as div 4, in relation to those cases where an accused wishes to call evidence of an alibi or of a substantial mental impairment; and the consequences of non compliance.
2. *R v Janceski (No 2)* [2005] NSWCCA 288.
3. *R v Janceski (No 2)* [2005] NSWCCA 288, [36].

Efficient conduct of the defence at trial

4.4 In *R v Abou-Chabake*,[4] Howie J expressed some reservations, obiter, in relation to the justification for s 22A, observing that it relates to the system of pre-trial disclosure for which provision is made in the *Criminal Procedure Act 1986* (NSW), and 'tends to discriminate in favour of those persons who have been charged with a more complicated offence where disclosure by the defence can facilitate the administration of justice by limiting the issues in dispute and hence limiting the length and complexity of the trial', whereas in the vast majority of cases there is no necessity to order disclosure and nothing that the defence could usefully disclose.[5] His Honour noted that the section is somewhat inconsistent with the common law acknowledgment that the manner in which the trial is conducted is irrelevant to sentence.[6] While recognising the unfairness involved in not extending to the accused the benefit of s 22A that would be available in a more complex case, His Honour rejected a defence argument that the accused should be given some consideration for relying on a single issue in the trial and not requiring the Crown to call evidence on some matters. His Honour observed: 'the accused went to trial and cannot expect, in the circumstances of this particular case, any consideration for remorse, contrition or a willingness to facilitate the course of justice'.[7]

4.5 Although lacking a statutory basis, on occasions leniency has been extended where the Court is satisfied that as a result of admissions made at trial, or otherwise through the efficient manner in which the defence has been conducted, the trial has been shortened and the administration of justice assisted.

4.6 In *R v Doff*[8] the sentencing judge referred to the efficient manner in which the offender's trial had been conducted.[9] In sentencing the offender, Barr J said:

> In my opinion the offender's conduct of the case was exemplary. Parties who conduct their cases in such a manner ought to be encouraged, by appropriate

4. *R v Abou-Chabake* [2003] NSWSC 125.
5. *R v Abou-Chabake* [2003] NSWSC 125, [23].
6. *R v Abou-Chabake* [2003] NSWSC 125, [24], referring to *Siganto v The Queen* (1998) 194 CLR 656, 663.
7. *R v Abou-Chabake* [2003] NSWSC 125, [25].
8. *R v Doff* (2005) 23 ACLC 317.
9. In *R v Doff* (2005) 23 ACLC 317, [37], the sentencing judge referred to the; 'substantial agreement about the elements of the offence, about the evidence to go before the jury and about directions to be given to them. Objections to evidence were clearly identified at the commencement of the trial and dealt with conveniently before it was necessary to call the jury. Two days were enough to deal with those matters. The resulting case before the jury took only seven working days'.

> consideration in sentencing where necessary, to conduct their cases in a manner which permits the most efficient use of Court time.[10]

The NSW Court of Criminal Appeal (NSWCCA) on a Crown appeal confirmed the correctness of this approach, remarking that the

> efficient way in which the Appellant's trial was conducted, including the making of extensive admissions, which, while not demonstrating contrition or remorse, did show a willingness to facilitate the course of justice by refraining from resort to dilatory and technical objections of no merit.[11]

4.7 In *Choi v The Queen*,[12] Hulme J (with whom other members of the court agreed) cited *R v Doff*, but noted that the admissions made by Choi, were 'insignificant' as they related to matters that were not in issue and that could have been proved through documents and as a consequence would not seem to have saved more than an hour in a five-week trial. His Honour observed with respect to admissions made in the course of a trial, that a Court should;

> not seek to quantify, except in the most unusual case, any discount or allowance for admissions of the nature of those here. In many cases, the weight to be given to admissions such as those made here will, as in this case, be none or insignificant.[13]

4.8 Other cases in which allowance was made for defence cooperation at trial include:

- *R v Campbell*,[14] where Berman SC DCJ took into account the fact that the defendant made a number of concessions and placed few of the primary facts in issue. The resulting agreed facts and limited cross examination meant that the trial was considerably shorter than it would otherwise have been;

- *R v Podesta*[15] where McCallum J, took into account the fact that the offender had conducted the trial efficiently by admitting to causing the death of the victim, leaving as the only issue his psychiatric condition at the time of the killing, thereby showing a willingness to facilitate the administration of justice;

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10. *R v Doff* (2005) 23 ACLC 317, [38].
11. *R v Doff* (2005) 54 ACSR 200, [58]; see also *R v Podesta* [2008] NSWSC 1204, [36].
12. *Choi v The Queen* [2007] NSWCCA 150.
13. *Choi v The Queen* [2007] NSWCCA 150, [152]; see also *Cooper v The Queen* [2009] NSWCCA 57, [82].
14. *R v Campbell* [2007] NSWDC 232.
15. *R v Podesta* [2008] NSWSC 1204, [36], citing *R v Doff* (2005) 54 ACSR 200.

- *R v Edwards; ex parte Cth DPP*[16] where the Supreme Court of Queensland (Court of Appeal), when dismissing an appeal against the inadequacy of a sentence, accepted that some allowance was appropriate for the fact that even though the offender had gone to trial he had facilitated the administration of justice by 'narrowing the issues and making admissions which considerably reduced the length and expense of the trial'.[17]

4.9 The authorities do suggest that some caution needs to be exercised in this area, and that the making of admissions or consenting to the tender of documents in relation to matters which were beyond dispute[18] will not suffice to attract an allowance.

ILL HEALTH OF THE OFFENDER

General principles

4.10 The state of health of the offender can be a relevant consideration in setting a reduced sentence although subject to certain qualifications. The general principle was stated by King CJ in *R v Smith*,[19] where it was noted that ill health is not:

> a licence to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health. It is the responsibility of the Correctional Services authorities to provide appropriate care and treatment for sick prisoners. Generally speaking, ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health.

4.11 In *R v Martin*[20] the NSWCCA similarly observed that those with illnesses and disabilities 'cannot entertain the expectation that they will necessarily escape the

16. *R v Edwards; ex parte Cth DPP* (2008) 183 A Crim R 83.

17. *R v Edwards; ex parte Cth DPP* (2008) 183 A Crim R 83, [27].

18. *R v Christoff* (2003) 140 A Crim R 45, [65]. Cited in JIRS Sentencing Benchbook (online), Sentencing Procedures Generally, Power to Reduce Penalties for Pre-Trial Disclosure http://jirs/. *Gillies v DPP (NSW)* [2008] NSWCCA 339, [134]. The NSWCCA did not find error in the sentencing judge's consideration of this factor and found that the sentencing judge had adequately provided for any discount on account of saving the court time and facilitating the course of justice.

19. *R v Smith* (1987) 44 SASR 587, 589; and see *R v Bailey* (1988) 35 A Crim R 458, [462]; and *R v Keir* [2004] NSWCCA 106.

20. *R v Martin* (1990) 47 A Crim R 168, [19]; and see *R v L* (Unreported, NSW Court of Criminal Appeal, 17 June 1996); *Jones v The Queen* (1993) 70 A Crim R 449, [456]; *R v Eliasen* (1991) 53 A Crim R 391 [396]; *R v Bailey* (1988) 35 A Crim R 458, [462]. Also applied in *R v Ta* [2002] VSCA 142; *R v Cocking* [2000] NSWCCA 435, [30]; *R v H* [2005] NSWCCA 282, [104].

punishment which the law would otherwise provide by reason only of their illness or disability'.

4.12 The fact that there is a substantial possibility that by reason of illness in conjunction with the conditions attaching to custodial detention an offender would not survive what would, in normal circumstances, be the expected non-parole period for the offending, can be taken into account in fixing a sentence.[21]

4.13 In *R v Miranda*[22] Dowd J (with whom Sheller JA and Kirby J agreed) observed that even though an illness is not life threatening nor life-shortening, if a prisoner's health condition would result in a significantly harsher prison life, as was the case for this prisoner because of his unresolved bowel function problems following surgery for bowel cancer, then this is a relevant matter for the Court to take into account in sentencing the offender.

4.14 A court cannot determine the relevance of an offender's illness without hearing evidence about the nature and extent of the illness and its impact on the offender's conditions of imprisonment.[23] In *R v L*[24] the Court observed:

> Of course, given the flexibility of our sentencing process, statements on this subject in the decided cases can never be any more than guideposts and must not be allowed unduly to circumscribe the discretion of sentencing judges. Where the illness is seen to be relevant to the determination of sentence, its weight must be assessed in the light of all the circumstances of the case. Obviously, one of those circumstances will be the seriousness of the offence. In some cases it might lead to a reduction of the sentence otherwise appropriate, while in others it might justify a disposition other than a custodial sentence. In *Sopher* (1993) 70 A crim R 570, this court summarised the position (at 573):
>
> > "Health and age are relevant to the length of any sentence but usually, of themselves, would not lead to a gaol sentence not being imposed if it were otherwise warranted. Much depends on the circumstances. For example, a person may have but a short period to live, or need intense treatment which cannot be provided in gaol. There may be circumstances where, to keep a person in gaol would probably lead to his early death, and this would not otherwise occur. The variety and combination of circumstances are legion. An appropriate balance has to be maintained between the criminality of the conduct in question and any damage to health, or shortening of life. The Department of Corrective Services has the responsibility of providing for health care, but there may be cases where what is required on a permanent basis extends beyond what it can

21. *R v L* (Unreported, NSW Court of Criminal Appeal, 17 June 1996); *R v Sopher* (1993) 70 A Crim R 570, 573; *R v Dowe* (Unreported, NSW Court of Criminal Appeal, 1 September 1995).
22. *R v Miranda* (2002) 128 A Crim R 362, [40]–[41].
23. *R v L* (Unreported, NSW Court of Criminal Appeal, 17 June 1996).
24. *R v L* (Unreported, NSW Court of Criminal Appeal, 17 June 1996).

> provide and can be expected to provide. In almost all cases, what the Department is able to provide will suffice. If gaol is significantly harder for a person because of difficulties due to health and age, this would be a relevant matter to take into account".[25]

4.15 The health of the offender is relevant to both determining the head sentence;[26] and also in setting the non-parole period[27] where special circumstances are found to exist, although in such a case care needs to be taken to avoid double counting if the head sentence has been reduced because of ill health.[28] The sentencing judge must assess its weight in light of all the circumstances of the case, including the seriousness of the offence.[29]

4.16 Once an offender is sentenced the courts will not normally intervene to alter a sentence because of an emerging health condition. It is a matter for the Department of Corrective Services to provide for the overall care of prisoners including those with disabilities, and for Justice Health to arrange for their medical care. In *R v Vachalec*[30] Street CJ observed in relation to the role of the NSWCCA that:

> it is not its function, nor is it equipped, to fulfil a continuing supervisory role over the effect of imprisonment upon an individual. Such a matter involves essentially administrative considerations and remedial action involves essentially an exercise of administrative power that this Court does not possess.[31]

4.17 An exception exists where it can be seen that a significant miscarriage was so plainly observable at the time of sentencing as to justify a finding of error in the original sentencing decision.[32]

4.18 As was observed in *R v Badanjak*,[33] 'most conditions can be adequately managed by those authorities [Corrective Services] without the need for mitigating the sentence that would otherwise be appropriate, and it is only in relatively rare cases where the Smith principle is applicable'.

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25. *R v L* (Unreported, NSW Court of Criminal Appeal, 17 June 1996).
26. *R v Szabo* [2003] NSWCCA 341, [14]–[15].
27. *Griffiths v The Queen* (1989) 167 CLR 372, 379 (Brennan CJ and Dawson J); *R v Simpson* (2001) 53 NSWLR 704, 713;*R v Szabo* [2003] NSWCCA 341, [16].
28. *R v Badanjak* [2004] NSWCCA 395, [32].
29. *R v L* (1996) (Unreported, NSW Court of Criminal Appeal, 17 June 1996) [20].
30. *R v Vachalec* [1981] 1 NSWLR 351.
31. *R v Vachalec* [1981] 1 NSWLR 351, 353.
32. *R v Vachalec* [1981] 1 NSWLR 351, 354.
33. *R v Badanjak* [2004] NSWCCA 395, [11]; and see *R v BJW* (2000) 112 A Crim R 1, [27].

Where the illness is present at the time of offending

4.19 Common humanity may require the judge to treat a life threatening physical illness of an offender as a matter operating in mitigation of sentence, even though it was present at the time the offence was committed.[34] This is especially so where, 'the offender has not been to gaol before and his ill health will have a significant impact upon the conditions of custody'.[35] This principle is not rigid, however, and where the offending is of such a nature that protection of the community is necessary, common humanity will give way to concern for potential victims.[36] In *R v Wickham*,[37] for example, an offender with a lengthy history of sexual offending was held to have had no case for leniency by reason of his ill health at the time of his most recent offences. In *R v O'Brien, R v Mammone*,[38] the fact that the offender O'Brien was suffering from the AIDS virus was said to be, 'no excuse for him entering into the drug trade'.[39]

Appeals against sentence on the basis of fresh medical evidence

4.20 In *R v Bailey*[40]consideration was given to when it is appropriate to reconsider the appropriate sentence on the basis of fresh, or further, medical evidence. Lee J, with Maxwell and Yeldham JJ agreeing, held that it was appropriate to do so 'where it is clear that the disease with which the appellant is now suffering, was in fact, in existence at the time he was sentenced' but was unknown or unappreciated at that time.[41]

4.21 The Court has however stressed the need for caution and for the adoption of a principled approach in receiving fresh evidence in these cases where there was no error in the sentence reached on the basis of the facts then known.[42] As noted earlier, when the illness is contracted, or the relevant deterioration occurs after the date of sentence, there will normally be no basis for appellate Court interference.[43] This is in accordance

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34. *R v Wickham* [2004] NSWCCA 193, [18].
35. *R v Wickham* [2004] NSWCCA 193, [19].
36. *R v Wickham* [2004] NSWCCA 193, [18] and see *R v Higgins* (2002) 133 A Crim R 385**,** [32].
37. *R v Wickham* [2004] NSWCCA 193, [16].
38. *R v O'Brien, R v Mammone* (Unreported, NSW Court of Criminal Appeal, 23 August 1989).
39. *R v O'Brien, R v Mammone* (Unreported, NSW Court of Criminal Appeal, 23 August 1989) [31].
40. *R v Bailey* (1988) 35 A Crim R 458.
41. *R v Bailey* (1988) 35 A Crim R 458*;* see *R v Celiasen* (1991) 53 A Crim R 391.
42. See *R v Ehrenburg* (Unreported, NSW Court of Criminal Appeal, 14 December 1990); *R v Ashton* (2002) 137 A Crim R 73, [10]–[11]; and *R v Wickham* [2004] NSWCCA 193, [71]–[72].
43. *R v Smith* (1987) 44 SASR 587, [588].

with the notion that matters arising after sentence are a matter for the Executive government.[44]

HIV/AIDS

4.22 The Courts have acknowledged that the conditions of incarceration can be more onerous for prisoners who suffer from HIV/AIDS.[45]

4.23 In *R v Smith*,[46] the fact that the offender was a stage C sufferer of HIV/AIDS, and that there was an 'undeniable risk of deterioration' attributable to a term of imprisonment was taken into account, leading to a reduction in the non-parole period.

4.24 Cases of this kind can be seen as a 'specific application of the general principle relating to the ill-health of a sentenced person'.[47]

4.25 The Court can also take stressful personal circumstances associated with HIV/AIDS into account. In *R v Spinotti*,[48] both the offender and his wife were HIV positive, with life expectancies of 5 years and 2.5 years respectively. The court held the case was exceptional, and that the stress that the conditions of custody, and the inevitable death of his wife, would exact upon the offender, required the court to take a 'compassionate approach' and set a lenient non-parole period.[49]

4.26 The requirements of a rigorous course of treatment for HIV/AIDS may also justify leniency. In *R v Doyle*[50] the Court decided to take no further action in relation to breaches of recognisances in a case where the offender was undergoing experimental treatment for HIV/AIDS that was not available within the prison system, and had a very short life expectancy. This treatment was considered a 'valuable contribution by him to research into medical treatment for HIV/AIDS'.[51] As such, the court considered it

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44. *R v Munday* [1981] 2 NSWLR 177.
45. *R v Bailey* (1988) 35 A Crim R 458, [462].
46. *R v Smith* (1987) 44 SASR 587, [588].
47. *McDonald v The Queen* (1988) 38 A Crim R 470, [474].
48. *R v Spinotti* (1996) 67 SASR 244.
49. *R v Spinotti* (1996) 67 SASR 244, [247]. The head sentence was eight years, four months and one day, with a non-parole period of five years, reduced to two years on appeal.
50. *R v Doyle* (1996) 84 A Crim R 287.
51. *R v Doyle* (1996) 84 A Crim R 287, [291].

would be 'inhumane in the extreme' to return him to prison for breach of a recognisance.[52]

AGE OF THE OFFENDER

Advanced age

4.27 The relevance of an offender's advanced age at the time of sentence arose for consideration in *R v Holyoak*.[53] Allen J recognised that a sentence of imprisonment imposed on an aged offender, who may have little worthwhile life left after release, is 'likely to bear more heavily upon the offender than a similar term imposed upon a younger man who can look forward to a worthwhile life after release', but emphasised the need for any resulting sentence to be proportionate to the objective criminality involved in the offending conduct.[54] It was held that it is not the sentencing law that a minimum term (non-parole period) could never be imposed that would have the offender spend his remaining life in custody.

4.28 In most instances the advanced age of a prisoner would not require him to be placed on protection, or to serve his sentence in more arduous conditions. Where the nature of his offending or the existence of some individualised threat causes that to be so, then the factor of his age may become relevant as a factor justifying some reduction in sentence. The Council does not expect that placement of an offender in the specialised aged-care section at the Long Bay Hospital, or in any similar hostel type facility to be established in the future, would constitute an increase in the hardship attributable to the detention of such a prisoner, sufficient to justify any sentence discount.

Young offenders

4.29 Whilst there is no sentencing discount on the basis of youth alone, specific principles of sentencing which apply to young offenders can permit an extension of the

52. *R v Doyle* (1996) 84 A Crim R 287, [292].

53. *R v Holyoak* (1995) 82 A Crim R 502. Referred to in Judicial Information Research System, *Sentencing Bench Book* (online) – 'Crimes (Sentencing Procedure) Act 1999 - Sentencing Procedures Generally - Subjective Matters taken into account' http://jirs/.

54. *R v Holyoak* (1995) 82 A Crim R 502, [507]; *R v Greenaway* (2000) 118 A Crim R 299, 303.

court's leniency. The sentencing principles set out in s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) apply to matters dealt with in the Children's Court and 'at law'.[55] In sentencing young offenders the court is to place less weight on punishment and general deterrence and a greater emphasis on the rehabilitation of the offender,[56] with the result that the sentences imposed on young offenders will normally be discounted when compared with adult offenders convicted of similar crimes.

4.30 However, where an offender acts in an adult manner, or is close in age to 18, years, then the severity of the offences, and the objectives of general deterrence, retribution and denunciation may have a greater role. In *R v Pham and Ly*[57] Lee CJ at CL observed:

> It is true that courts must refrain from sending young persons to prison, unless that course is necessary, but the gravity of the crime and the fact that it is a crime of violence frequently committed by persons even in their teens must be kept steadfastly in mind otherwise the protective aspect of the criminal court's function will cease to operate. In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes, particularly crimes involving physical violence to persons in their homes.

4.31 In *R v Tran*,[58] Wood CJ at CL confirmed the well established principle that in sentencing young offenders an emphasis should be placed on rehabilitation over general deterrence and punishment but noted the qualification concerning young offenders where they:

> conduct themselves in a way that an adult does, and commit a crime that involves violence or is one of considerable gravity. In such a case it is the function of the Court to protect the community, and to appropriately give effect to the retributive and deterrent elements of sentencing.

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55. The Children's Court has jurisdiction to hear and determine all criminal matters committed by a person who was a child when the offence was committed and under 21 at the time when charged. A child is defined in s 3 of the *Children (Criminal Proceedings) Act 1987* (NSW) as being a person under the age of 18, noting the conclusive presumption no child under 10 years of age can be guilty of an offence as outlined in s 5 of the Act and a rebuttable presumption of doli incapax which applies to a child between the age of 10 and 14. The Children's Court does not have jurisdiction to determine matters defined as 'serious children's indictable offences' (apart from committal proceedings in relation to these matters pursuant to s 28(1)(b) of the Act), defined in s 3 of the *Children's (Criminal Procedure) Act 1987* (NSW), which must be dealt with at law in the higher courts. Section 33(3) of the *Children's (Criminal Procedure) Act 1987* (NSW) also provides for other indictable matters to be referred to the District Court in certain circumstances. See also *R v WKR* (1993) 32 NSWLR 447.

56. *R v GDP* (1991) 53 A Crim R 112, 116; and see *R v Hearne* (2001) 124 A Crim R 451, [27].

57. *R v Pham and LY* (1991) 55 A Crim R 128, [13].

58. *R v Tran* [1999] NSWCCA 109, [10]; and see *R v Townsend and Cooper* (Unreported, NSW Court of Criminal Appeal, 14 February 1995).

His Honour also observed, citing *R v Nguyen*,[59] that the offender's proximity to the age of eighteen years is a relevant factor to which a sentencing judge must have regard.[60]

FOREIGN CITIZENS

4.32 The NSWCCA has recognised that an offender who is a foreign citizen, whose friends and family are unable to visit, or who has limited English language skills, may find the conditions of imprisonment more difficult than an Australian national.[61] In *R v Huang*,[62] Adams J (with whom Spigelman CJ and Newman J agreed) stated that the relatively greater harshness of serving a prison sentence under these conditions requires, 'some, though not much, recognition'.[63] In those circumstances some discount of the sentence may be warranted in order to treat the offender equally with other prisoners.

4.33 No mitigation of sentence is available however if an offender, without ties to Australia, came to the country for the specific and deliberate purpose of committing a serious crime and with the intention of leaving upon its completion. In *R v Ferrer-Esis*[64] the offender, a foreign citizen, entered Australia as a courier with a quantity of cocaine in excess of the trafficable quantity. As such, it was held that he had:

> no justifiable cause for complaint when, as the inevitable consequence of the discovery of his crime, he is obliged to remain incarcerated in this country, with its language and culture foreign to him, isolated from outside contact.

4.34 An associated issue that arises in this respect is the relevance, in setting the sentence, of the possibility, or in some cases the probability, that the offender (as a prohibited non-citizen who is unlikely to be given any extension of the permit or visa on which he entered the country) will be deported once released from custody. The *Crimes (Sentencing Procedure) Act* and the *Crimes (Administration of Sentences) Act 1999* (NSW) are each silent in this regard; but the *Crimes Act 1914* (Cth), which applies to offenders who are to be sentenced for offences under Commonwealth laws, provides that

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59. *R v Nguyen* (Unreported, NSW Criminal Court of Appeal, 14 April 1994).
60. *R v Tran* [1999] NSWCCA 109, [12].
61. *R v Huang* (2000) 113 A Crim R 386, [18]. See further: *Yang v The Queen* [2007] NSWCCA 37; *R v Yu* [2003] NSWSC 1153.
62. *R v Huang* (2000) 113 A Crim R 386.
63. *R v Huang* (2000) 113 A Crim R 386, [18].
64. *R v Ferrer-Esis* (1991) 55 A Crim R 231 [239]; *R v Chu* (Unreported, NSW Court of Criminal Appeal, 16 October 1998).

a court is not precluded, in such a case, from fixing a non-parole period merely because the offender 'is or may be liable to be deported from Australia'.[65]

4.35 The courts have recognised that, in many cases, there is an element of unreality in judging the utility of parole, and in fixing a non-parole period, where there is a likelihood that foreign nationals, particularly those who have come to Australia for the deliberate and specific purpose of committing an offence, will be deported.[66]

4.36 The question of whether an offender will be deported from Australia immediately upon completing his sentence is beyond the control of the court and of the NSW Parole Authority. It rests with the Australian Department of Immigration and Citizenship, and the Minister, whose powers extend to the issue of entry permits, bridging visas and criminal justice stay visas to non-citizens who would otherwise be deported.

4.37 In *R v Mesdaghi*[67] it was held by the NSWCCA that the prospect of deportation was not an admissible or relevant factor to be considered under the then existing provisions of the *Parole of Prisoners Act 1966* (NSW) in the exercise of a discretion to withhold the specification of a non-parole period. This view was embraced in relation to the subsequently amended provisions in *R v Chi Sun Tsui*.[68]

4.38 By majority the High Court in *R v Shrestha*,[69] a case decided upon the basis of the legislation preceding the enactment of s 19AK of the *Crimes Act 1914* (Cth), similarly held, that there was no rule that a foreign national who has no ties with Australia, and whose sole purpose in entering Australia was to commit a serious crime, should be ineligible for parole. In this regard reference was made by the majority to the inappropriateness of viewing this country's concern with the objective of rehabilitation as confined within its strict territorial limits; to its responsibility both moral and under international treaty, to treat all who are subjected to criminal proceedings in its courts and imprisonment in its gaols humanely and without discrimination based on national or ethnic origins; and to the fact that the compulsory detention of a prisoner released on

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65. *Crimes Act 1914* (Cth) s 19AK.

66. *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370.

67. *R v Mesdaghi* [1979] 2 NSWLR 68; differing, in this finding, from earlier decisions of the Court in *R v Hull* (1969) 90 WN (Pt 1) (NSW) 488, *R v Macaulay* (1969) 90 WN (Pt 1) (NSW) 682 and *R v Chapman* (1971) 1 NSWLR 544.

68. *R v Chi Sun Tsui* (1985) 1 NSWLR 308, [34].

69. *R v Shrestha* (1991) 173 CLR 48, [15] (Deane, Dawson and Toohey JJ; Brennan and McHugh JJ dissenting).

parole is something which is beyond the control of the prisoner and that decisions concerning release on parole have been reserved to parole authorities.[70]

4.39 As a consequence, the likelihood of deportation for non national offenders does not debar the sentencing court from fixing a non parole period, even though the result of immediate deportation upon release to parole is to bring the sentence to an effective early termination, without any prospect of effective supervision or return to custody upon breach of parole. A possibility exists in some cases for arrangements to be made with the country to which the offender is deported for it to supervise the offender during the balance of the term, although this is likely to be the exception rather than the rule. Even where that is the case, little opportunity will be available to deal with the kind of conduct which would constitute a breach of parole, in the case of a prisoner with Australian nationality or citizenship who remained in the local community,

4.40 The Council considers that there may be merit in a more comprehensive review of whether it should continue to be appropriate for non-parole periods to be set in these cases, having regard to the practical consequences for the sentence if the offenders is deported. This is an area which is strictly outside the terms of the current reference, and which needs to be addressed on a uniform basis across state, territory and federal laws, in which input from the Department of Immigration and Citizenship, law enforcement authorities and parole authorities would be necessary.

HARDSHIP TO FAMILY OR DEPENDANTS

4.41 The *Crimes (Sentencing Procedure) Act* is silent in relation to the relevance of hardship to family or dependants as a mitigating factor, and it accordingly falls to be considered in accordance with the common law. The *Crimes Act 1914* (Cth), however, provides, in relation to the sentencing of federal offenders, that the court must take into account 'the probable effect that any sentence or order under consideration would have on any of the (offender's) family or dependants'.[71]

4.42 Generally hardship occasioned to members of the family of the offender, including dependants, resulting from the imposition of a custodial sentence, will not

70. *R v Shrestha* (1991) 173 CLR 48, [6]–[10] (Dean, Dawson and Toohey JJ).

71. *Crimes Act 1914* (Cth) s 16A(2)(p)—the expression 'family' being given an extended definition in s 16A(4).

provide any basis for a discount. The only occasion when it can be taken into account is where 'highly exceptional' circumstances exist, to the point where it would be inhumane not to make some allowance for the consequences to the offender's family or dependants[72] either by way of a discount, or by a variation of the ratio between the non-parole period and the balance of the term, or by imposing periodic detention rather than full time detention, or by suspending any sentence of imprisonment.

4.43 The relevant principles were reviewed in *R v Togias*[73] a case in which the offender was to be sentenced in respect of a federal offence. It was there held that s 16A(2)(p) of the *Crimes Act 1914* (Cth) should be interpreted in accordance with the common law, and as a result, requiring the presence of 'exceptional hardship' in order for it to be taken into account.[74]

4.44 In these circumstances the Sentencing Council does not see any need for the *Crimes (Sentencing Procedure) Act* to be amended to include a reference to hardship of this kind, to achieve harmony with Commonwealth legislation.

ENTRAPMENT

4.45 There is no defence of entrapment known to the common law, although the courts have a discretion to reject evidence on public policy grounds where an element of the offence has been procured as a result of unlawful conduct by law enforcement officers,[75] for example where a controlled operation has been undertaken without an appropriate certificate.[76]

4.46 However the fact of police involvement or encouragement of an offender to engage in a criminal activity can, in appropriate circumstances, be regarded as diminishing the offender's criminality.[77] This can be the case where the court concludes that the offence

72. *R v Edwards* (1996) 90 A Crim R 510, 516–7, citing with approval Wells J in *R v Wirth* (1976) 14 SASR 291, 295–6; *R v Byrne* (Unreported, NSW Court of Criminal Appeal, 5 August 1998), and *R v Chan* [1999] NSWCCA 103, [35]–[39].

73. *R v Togias* [2001] NSWCCA 522.

74. *R v Togias* [2001] NSWCCA 522, [13]–[17] (Spigelman CJ).

75. *Ridgeway v The Queen* (1995) 184 CLR 19, *Tofilau v The Queen* (2007) 231 CLR 396.

76. See, eg, *Gedeon v NSW Crime Commission* (2008) 236 CLR 120.

77. *R v Taouk* (1992) 65 A Crim R 387, 404; *R v Si Leung* (Unreported, NSW Court of Criminal Appeal, 21 July 1994).

may not have been committed if it had not been facilitated by the police[78] or that the offender would not otherwise have engaged in the relevant criminal acts to the same extent.[79]

EXTRA CURIAL PUNISHMENT

4.47 A sentencing judge can take into account extra curial punishment suffered by the offender as a consequence of the offence arising by way of revenge or retribution, or organised community abuse and harassment.[80]

4.48 In *R v Daetz and Wilson*[81] James J with whom Tobias JA and Hulme J agreed observed:

> I have concluded from this examination of the authorities cited to the Court and especially *Allpass*, *Clampitt-Wotten* and *Cooney* that, while it is the function of the courts to punish persons who have committed crimes, a sentencing court, in determining what sentence it should impose on an offender, can properly take into account that the offender has already suffered some serious loss or detriment as a result of having committed the offence. This is so, even where the detriment the offender has suffered has taken the form of extra-curial punishment by private persons exacting retribution or revenge for the commission of the offence. In sentencing the offender the court takes into account what extra-curial punishment the offender has suffered, because the court is required to take into account all material facts and is required to ensure that the punishment the offender receives is what in all the circumstances is an appropriate punishment and not an excessive punishment. How much weight a sentencing judge should give any extra-curial punishment will, of course, depend on all the circumstances of the case. Indeed, there may well be many cases where extra-judicial punishment attracts little or no significant weight.

Matters which have been taken into account as constituting extra curial punishment have included: revenge attacks, injuries suffered in the course of an offence particularly when they were permanent and disabling,[82] public disgrace,[83] loss of employment or of

78. *R v Si Leung* (Unreported, NSW Court of Criminal Appeal, 21 July 1994).

79. *R v Thomson* [2000] NSWCCA 294, [77]–[80].

80. *R v Allpass* (1993) 72 A Crim R 561, [566]. Also cited in Cited in Judicial Information Research System, *Sentencing Bench Book* (online) 'Crimes (Sentencing Procedure) Act 1999 – Sentencing Procedures Generally –'Extra-curial punishment' http://jirs/; *R v Daetz and Wilson* (2003) 139 A Crim R 398.

81. *R v Daetz and Wilson* (2003) 139 A Crim R 398, [62].

82. *R v Barci & Asling* (1994) 76 A Crim R 103, 110–1; and *R v Haddara* (1997) 95 A Crim R 108; *Alameddine v The Queen* [2006] NSWCCA 317, [25]–[27]; *R v Sharpe* [2006] NSWCCA 255.

83. *Ryan v The Queen* (2001) 206 CLR 267, [123] (Kirby J) and [177] (Callinan JJ); McHugh and Hayne JJ contra (at [53]–[55]).

financial benefits,[84] but not deliberate self inflicted injury,[85] or the forfeiture of assets which are the proceeds of crime.[86]

4.49 In *R v KNL*[87] the NSWCCA held that in the circumstances of that case where the offender was not seeking to pursue an occupation involving access to children, registration under the *Child Protection (Offenders Registration) Act 2000* (NSW) could not be considered extra curial punishment entitling an offender to mitigation of the penalty. Latham J however noted that this did not preclude a case where extra-curial punishment might arise from registration pursuant to the *Child Protection (Offenders Registration) Act*.[88]

4.50 In *TMTW v The Queen*[89] the NSWCCA considered registration under the *Child Protection (Offenders Registration) Act* could, in appropriate circumstances, constitute a form of extra curial punishment.

4.51 It is noted however that on 1 January 2009, in response to the Council's report *Penalties Relating to Sexual Assault Offences in NSW*,[90] the *Crimes (Sentencing Procedure) Act* was amended by the introduction of s 24A which provides that the court cannot take into account in mitigation the fact that the offender has or may become a registrable person under the *Child Protection (Offenders Registration) Act* or has or may become subject to an order under the *Child Protection (Offenders Prohibition Orders) Act 2004* (NSW). In order to complete the response provided by the introduction of s 24A and having regard to the need to protect the community and the fact that the legislation is not intended to be punitive, the Council makes a recommendation in relation to this aspect of extra curial punishment in Chapter 8 of this report.

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84. *Ryan v The Queen* (2001) 206 CLR 267, [54] (McHugh J); and *R v Wright (No 2)* [1968] VR 174.
85. *Christodoulou v The Queen* [2008] NSWCCA 102, [43].
86. *R v Chan* [1999] NSWCCA 103, [40] – Although note *R v TR* (Unreported, NSW Court of Criminal Appeal, 1 November 1996) where the voluntary disclosure by the offender and his facilitation in the return of assets from overseas was taken into account.
87. *R v KNL* (2005) 154 A Crim R 268, [49].
88. *R v KNL* (2005) 154 A Crim R 268, [50].
89. *TMTW v The Queen* [2008] NSWCCA 50, [51].
90. NSW Sentencing Council, *Penalties relating to Sexual Assault Offences in New South Wales, Vol 1*, [6.52]–[6.65].

SUBSEQUENT CHANGES IN CIRCUMSTANCES AND EXECUTIVE PREROGATIVE

4.52 Save as noted earlier, the court cannot receive fresh evidence in relation to events arising after an offender's sentence which would render that sentence excessive. The power to consider such circumstances lies with the Executive government in the exercise of its prerogative powers.[91]

4.53 The NSWCCA does not have a continuing supervisory role over the effect of imprisonment on an offender. The power and authority to deal with administrative miscarriages in the working out of a sentence lies with the Executive Government. For example, in *R v Vachalec*[92] the NSWCCA held that the appellant's medical needs impacting upon his imprisonment were matters that were dealt with by the sentencing judge and could not be further reviewed by the NSWCCA, though the Court considered that there could be a rare case where 'significant administrative miscarriage was so plainly foreseeable at the time of sentence as to justify this Court finding error in the sentencing decision of the first instance court'.[93]

91. *R v Cartwright* (1999) 17 NSWLR 243, [257] (Hunt and Badgery-Parker JJ); see also *R v Munday* [1981] 2 NSWLR 177, 178 (Street CJ) and *R v Lanham* [1970] 2 NSWR 217, 218 and statutory recognition of prerogative powers contained in *Crimes Act 1914* (Cth) s 21D; *Crimes (Administration of Sentences) Act 1999* (NSW) s 270.

92. *R v Vachalec* [1981] 1 NSWLR 351.

93. *R v Vachalec* [1981] 1 NSWLR 351, [354]; see also *R v Babic* [1998] 2 VR 79.

CHAPTER 5: APPLYING DISCOUNTING FACTORS IN THE CONTEXT OF THE SENTENCING EXERCISE AS A WHOLE

APPLYING DISCOUNTING FACTORS

5.1 A sentencing judge must weigh up a range of relevant factors, such as the objective seriousness of the offence, the aggravating and mitigating factors, the subjective features of the person to be sentenced, as well as the factors which may warrant a sentencing discount, to arrive at an appropriate sentence.

5.2 Two sentencing approaches have been developed to take into account all of these factors, each of which was considered by the High Court in *Markarian v The Queen.*[1] They are the *two-stage (or two tiered) approach* and the *instinctive synthesis approach*.[2] In that case McHugh J defined the two-tiered approach as:

> the method of sentencing by which a judge first determines a sentence by reference to the "objective circumstances" of the case. This is the first tier of the process. The judge then increases or reduces this hypothetical sentence incrementally or detrimentally by reference to other factors, usually, but not always, personal to the accused. This is the second tier.[3]

5.3 Instinctive synthesis was defined by his Honour as:

> the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.[4]

5.4 The High Court referred to sentencing as a discretionary judgment with no single correct sentence and noted that there is no particular path that a sentencer must take

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1. *Markarian v The Queen* (2005) 228 CLR 357.
2. See also discussion regarding the instinctive synthesis and two-tiered/staged approach to sentencing in NSW Sentencing Council, *Report on Sentencing Trends and Practices 2003–2004* (2004) [26]–[29] and NSW Sentencing Council, *Report on Sentencing Trends and Practices 2004–2005* (2005) [16].
3. *Markarian v The Queen* (2005) 228 CLR 357, [51].
4. *Markarian v The Queen* (2005) 228 CLR 357, [51].

in arriving at the sentence, provided all relevant considerations, and only relevant considerations, are taken into account.[5] The majority observed:

> Following the decision of this Court in *Wong* it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison. That is not to say that in a simple case, in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of "instinctive synthesis", as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression "instinctive synthesis" may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends. This case was not however one of them because of the number and complexity of the considerations which had to be weighed by the trial judge. [6]

QUANTIFYING THE DISCOUNT

5.5 Prior to the NSW guideline judgment of *R v Thomson and Houlton*[7] it had been a well established principle that although an offender who pleads guilty should receive some leniency, it was considered undesirable to quantify a separate discount for a plea as it increased the possibility of error.[8]

5.6 In that case, as noted earlier, the guideline judgment encouraged the quantification of the effect of the plea of guilty on the sentence so far as it was appropriate to do so, and proposed the allowance of a discount in the range of 10 to 25 per cent for the utilitarian value of the plea, depending on the timing of the plea.[9] The guideline noted, however, that where there are other factors, such as assistance to

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5. *Markarian v The Queen* (2005) 228 CLR 357, [27] (Gleeson CJ, and Gummow, Hayne and Callinan JJ).
6. *Markarian v The Queen* (2005) 228 CLR 357, [39], referring to *Wong v The Queen* (2001) 207 CLR 584.
7. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383.
8. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [73]–[78].
9. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [160].

authorities to be taken into account, 'a single combined quantification will often be appropriate'.[10]

5.7 In *R v El Hani*[11] the NSW Court of Criminal Appeal (NSWCCA) confirmed that in circumstances where there is both a plea of guilty and assistance to authorities a single combined discount will often be appropriate.[12] In circumstances, such as were present in this case, where the offender had shown no remorse or acknowledgment of his wrongdoing, and might well have been rehabilitated, the NSWCCA observed that it was not necessarily inappropriate to specify the discount to be given in relation to assistance as separate and distinct from the purely utilitarian value of the plea of guilty.[13]

5.8 The Court in *R v Waqa (No 2)*[14] discussed the question of whether multiple discounts should be calculated successively or as an aggregate. Dunford J said (with the concurrence of Hidden J, Simpson J making additional observations):

> It cannot be said that one method rather than the other is more advantageous to the offender. If the discounts are allowed successively as in *NP* [2003] NSWCCA 195, the offender in fact receives a lesser discount for the future assistance and therefore a longer ultimate sentence ie discount of 25% for the plea followed by a 20% discount of the remaining 75% for the assistance results in an ultimate sentence of 60% of the original notional sentence, but if the two discounts are aggregated, the offender receives a total discount of 45% and an ultimate sentence of only 55% of the original notional sentence.[15]

5.9 His Honour indicated that discounts could be calculated on a successive or on an aggregate basis, but what is important is that the sentencing court makes it clear on what basis the discounts are being calculated.[16]

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10. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [160].
11. *R v El Hani* [2004] NSWCCA 162, [65].
12. *R v El Hani* [2004] NSWCCA 162, [69].
13. *R v El Hani* [2004] NSWCCA 162, [70]. See also *SZ v The Queen* (2007) 168 A Crim R 249 where Buddin J endorsed the comments in *El-Hani* at [66]–[67], [69], [71] to the effect that generally a single combined discount should be given for the plea of guilty and assistance: [43]–[44]. Buddin J was careful to note that a sentencing court should, however, specify the discount for any future assistance, to allow any appellate court to deal with the matter properly should there be any review if the assistance is not forthcoming (see Chapter 3 for further authorities).
14. *R v Waqa (No 2)* (2005) 156 A Crim R 454.
15. *R v Waqa (No 2)* (2005) 156 A Crim R 454, [10].
16. *R v Waqa (No 2)* (2005) 156 A Crim R 454, [12].

ISSUES TO BE CONSIDERED WHEN GIVING A DISCOUNT

Proportionality

5.10 Whatever discounts are given it is necessary that the resulting sentence bears a reasonable relationship to the objective seriousness of the offence.[17]

5.11 In *SZ v The Queen*[18] the Court held that there was 'limited room to discount a sentence without going below the bottom line' and as a result the application of one discount for one purpose will inevitably impact upon the extent to which another discount can be applied to achieve a different purpose.[19]

5.12 The degree to which a sentence is discounted to reflect the utilitarian value of a plea, for example, will affect the sentencer's ability to discount the sentence in recognition of any assistance provided to authorities.[20] The requirement of proportionality in those circumstances may call for a compression of one or both of the discounts which may be available.

5.13 Then, if on appeal, it is held that one of the discounting factors taken into account is no longer available, it may become necessary to adjust the earlier compression. For example, the respondent in *R v Lenati*[21] had been given a combined discount to allow for a number of discounting factors, which had been necessarily compressed and moderated in order to result in a proportionate sentence, one of which related to his agreement to provide future assistance. The Crown brought an appeal when he failed to provide that assistance. The Court dismissed the application on discretionary grounds, Simpson J noting that '[i]t would not be fair, in my opinion, to deprive him of the discount for future assistance without restoring to him that part of the discount for past assistance that he lost by reason of the compression'.[22]

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17. *SZ v The Queen* (2007) 168 A Crim R 249, [3], [11] (Howie J), where it was stated that a combined discount for plea and assistance should not normally exceed 50 per cent and that a combined discount of more than 60 per cent will ordinarily result in a sentence that is manifestly inadequate. See also the comments of Buddin J at [53], *R v El Hani* [2004] NSWCCA 162; *R v Sukkar* (2006) 172 A Crim R 151; *Lewins v The Queen* (2007) 175 A Crim R 40, [19]–[20].
18. *SZ v The Queen* (2007) 168 A Crim R 249.
19. *SZ v The Queen* (2007) 168 A Crim R 249, [6].
20. *SZ v The Queen* (2007) 168 A Crim R 249, [6] (Howie J).
21. *R v Lenati* [2008] NSWCCA 67. Referred to in '*R v Lenati* [2008] NSWCCA 67' (2008) 15(4) *Criminal Law News* [2381].
22. *R v Lenati* [2008] NSWCCA 67, [47].

5.14 In *R v JRD*[23] the NSWCCA confirmed that a combined discount for a plea and assistance of more than 50 per cent would only be appropriate in an unusual case. A discount of between 85 to 95 per cent for both a plea of guilty and assistance to authorities in this case was considered to be in breach of the principle of proportionality.[24]

Double counting to be avoided

5.15 The quantification of a discount for a sentencing factor, such as a plea of guilty or assistance, that may have relevance for other subjective and mitigating factors for example remorse, can lead to the error of double counting.[25]

5.16 The courts have been particularly conscious of this risk since the introduction of s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which requires the court to specifically take into consideration a number of mitigating factors.[26] In *Kite v The Queen*[27] the NSWCCA commented in this context:

> Since the introduction of s 21A the preferable course is not to quantify a discount for remorse and it has been pointed [out] that the simplest way to proceed in sentencing is to arrive at a discount for the utilitarian value of the plea of guilty whether in specific terms or not and then proceed to review what Gleeson CJ in *R v Gallagher* … called the "complex of inter-related considerations" which could in appropriate cases include remorse. Because s 21A makes specific provision for remorse to be considered as a separate mitigating factor, to include it as a factor contributing to the percentage discount for the plea of guilty can give rise to a perception of double counting.[28]

5.17 In *R v Dib*,[29] Barr J observed in his additional remarks to those of Dowd J, with whose remarks Hodgson JA agreed:

> The value to be attributed to a particular feature of a case cannot be assessed without having in mind all the other features in the case, favourable and unfavourable. Sometimes a preponderance of favourable features will result in any

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23. *R v JRD* [2007] NSWCCA 55, [44], referring to *SZ v The Queen* (2007) 168 A Crim R 249.
24. *R v JRD* [2007] NSWCCA 55, [44], referring to *Crimes (Sentencing Procedure) Act 1999* (NSW) s 23(3).
25. The Hon Justice R. Howie, 'Sentencing Discounts—Are They Worth the Effort?' (Paper presented at the Sentencing Conference 2008, National Judicial College of Australia and Australian National University, 10 February 2008) [3].
26. *R v MAK.; R v MSK* (2006) 167 A Crim R 159, [41]–[42]. See also *R v Saleib* [2005] NSWCCA 85.
27. *Kite v The Queen* [2009] NSWCCA 12.
28. *Kite v The Queen* [2009] NSWCCA 12, [12]. Partial extract in '*Kite v R* [2009] NSWCCA 12' (2009) 16(3) *Criminal Law News* [2515].
29. *R v Dib* [2003] NSWCCA 117.

> one of them receiving less weight than it might have received in the absence of the other favourable features. An example is the credit that must be given to an offender who has provided or undertaken to provide assistance to the authorities. The legislation provides, as the common law before it provided, that there is a limit to the value that may be given to such a combination of features. The resulting penalty may not be disproportionate to the nature and circumstances of the offence: *Crimes (Sentencing Procedure Act* s 23(3); *R v Cartwright* (1989) 17 NSWLR 243.
>
> In a similar way different features which each entitle an offender to a less severe sentence may be overlapping effects, with the result that the appropriate total allowance will be less than the sum of the parts: *R v Gallagher* (1991) 23 NSWLR 220 per Gleeson CJ at 230–234.[30]

5.18 Whether or not there is double counting will often depend on the extent to which the relevant factors overlap. For example, in *R v Burnes*[31] the Supreme Court in applying the principle in *SZ v The Queen*, held that a combined discount for both the plea and assistance to authorities was appropriate, having regard to the overlap between the offender's contrition expressed in the plea, his willingness to co-operate with the police, and consequential need for protection. Although the offender was being sentenced for murder, he was given a 50 per cent combined discount.

5.19 Error can occur where discounts for assistance and for a plea are given and the court specifies the amount of discount for one factor but not for the other factor. In *NP v The Queen*,[32] a case dealing with sentencing for a Commonwealth offence, the sentencing judge referred to the utilitarian value of the plea in addition to a demonstration of contrition, and later stated that a discount for assistance, both past and future would amount to 50 per cent but did not specify whether, or to what extent, the applicant was entitled to a discount for the plea. The NSWCCA found that the sentencing judge had erred in referring to the utilitarian value of the plea of guilty without specifying what use was to be made of it. The NSWCCA however dismissed the appeal on the basis that a discount of 50 per cent for assistance alone would have been over generous in the circumstances of the case, although if it had included the plea of guilty it would not have been open to challenge.

5.20 Double counting can also occur where a discount is given for assistance to authorities and then increased to take into account the risks or potential hardship to the offender associated with his assistance. As noted earlier, the discount for assistance

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30. *R v Dib* [2003] NSWCCA 117, [53]–[54].
31. *R v Burnes* [2007] NSWSC 298, [59]–[61].
32. *NP v The Queen* [2008] NSWCCA 205.

has factored into it a recognition of the risk of the additional hardship that informers or those who assist police can suffer at the hands of other prisoners.

Offences in the worst case category

5.21 On occasions the objective criminality of the offence may be such as to place the offence in the worst case category.[33] In circumstances where the court considers the offence to be in the worst case category the court may decline to extend any leniency by way of a discount for assistance or a plea, in recognition that 'there are crimes that so offend the public interest that the maximum sentence, without any discount for any purpose, is appropriate.[34] As Sully J observed in *R v Kalache*:[35]

> there will inevitably be cases where the sheer enormity of the criminal conduct involved is such as to require that the proper protection of the public, and the maintenance in every other proper way of the rule of law, will entail that the utilitarian principle [related to the plea] must, albeit exceptionally, yield to considerations of greater weight.

Different type of sentences given

5.22 In *R v Thomson and Houlton* the Chief Justice observed that the discount in some cases will be appropriately reflected by a 'step down in the hierarchy of sentencing options'. An example of the operation of the discount in this fashion is the case where, what would otherwise have been an indeterminate life sentence is reduced to a determinate sentence. In *R v Lo*[36] the NSWCCA observed:

> The notion of a percentage reduction of an indeterminate sentence is not meaningful. There is no finite figure available to be reduced. A percentage reduction of an unknown figure that is a variable, i.e. dependant on the duration of the life of the person the subject of the sentence, cannot be given effect to. Where an indeterminate sentence would otherwise be appropriate, a plea of guilty or assistance to the authorities or a combination of the two may in an appropriate case

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33. *R v Way* (2004) 60 NSWLR 168, [51].
34. *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, [157]–[158]. See also *R v El-Andouri* [2004] NSWCCA 178.
35. *R v Kalache* (2000) 111 A Crim R 152, [38]. Sully J at [22] also referred to the Attorney General's second reading speech for the Bill for the *Crimes Legislation (Amendment) Act 1990* (NSW), the Act which enacted the then s 439 of the *Crimes Act 1900* (NSW) (now repealed and incorporated into the *Crimes (Sentencing Procedure) Act 1999* (NSW)) with respect to the court having regard to a guilty plea. The Attorney General said: 'There are some cases in which it would be inappropriate to reduce a sentence because of a plea of guilty. It is impossible to predict what sort of cases these will be but one example is where the offence is so serious that it is appropriate for the maximum sentence to be imposed despite a plea of guilty'.
36. *R v Lo* [2003] NSWCCA 313, [31].

have the effect of reducing an indeterminate sentence to a finite sentence, that is a sentence for a term of years.

5.23 Similar reasoning was applied in *Walsh v The Queen*.[37] The applicant had been sentenced in respect of a number of offences, including an offence of supply not less than a large commercial quantity of a prohibited drug, which carried a potential maximum penalty of life imprisonment. The sentencing judge used the plea of guilty, in combination with other factors, to reduce what would have been a sentence of life imprisonment for the supply offence to a determinate sentence; and, to avoid double counting, declined to give any further reduction for the plea in relation to this or the remaining offences for which determinate sentences were available. An appeal was dismissed by the NSWCCA.

37. *Walsh v The Queen; Little v The Queen* (2006) 168 A Crim R 237. Referred to in The Hon Justice R. Howie, 'Sentencing Discounts—Are They Worth the Effort?' (Paper presented at the Sentencing Conference 2008 of the National Judicial College of Australia and the Australian National University, Canberra, 10 February 2008).

CHAPTER 6: CHARGE NEGOTIATIONS

WHAT IS CHARGE NEGOTIATION?

6.1 Charge negotiation, sometimes referred to as plea bargaining, involves negotiation between the prosecution and the defence in criminal court matters with a view to reaching an agreement on charges, the contents of the statement of facts provided to the sentencing court and/or procedural matters such as whether to proceed with a matter in the District Court or Local Court.[1] It can take place at any stage during the course of a matter, and can involve a variety of outcomes including the following:[2]

- in circumstances where a defendant is charged with a multitude of offences relating to differing activities, the negotiation process might result in the withdrawal of certain charges upon plea(s) of guilty to remaining charges;[3]
- a defendant may plead guilty to a less serious offence in lieu of a more serious offence;[4]
- a defendant may plead guilty to a more serious offence in exchange for the withdrawal of simultaneously charged less serious offences relating to the same activity;[5]

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1. NSW Director of Public Prosecutions, 'Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales' (2007) Guideline 20; David Andrew, 'Plea Bargaining' (1994) 68(4) *Law Institute Journal* 236, 236; The Hon Justice Gordon Samuels AC CVO QC, 'Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts', Report (2002) [6.1].
2. NSW Director of Public Prosecutions, 'Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales' (2007) Guideline 20; David Andrew, 'Plea Bargaining' (1994) 68(4) *Law Institute Journal* 236, 236; The Hon Justice Gordon Samuels AC CVO QC, 'Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts', Report (2002) [6.1].
3. The Hon Justice J. Badgery-Parker, 'The Criminal Process in Transition: Balancing Principle and Pragmatism—Part II' (1994–95) 4 *Journal of Judicial Administration* 193, 213; Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199.
4. The Hon Justice J. Badgery-Parker, 'The Criminal Process in Transition: Balancing Principle and Pragmatism—Part II' (1994–95) 4 *Journal of Judicial Administration* 193, 214; Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199.

- the prosecution may agree to have certain charges placed on a Form 1[6] and taken into account when dealing with the offender for the principal offence, in exchange for a plea of guilty to this more serious offence;[7]

- there may be an agreement to omit from the statement facts certain aggravating circumstances of the offence, in exchange for a plea of guilty;[8]

- the prosecution may agree to proceed summarily with a matter, rather than elect to have the matter dealt with on indictment, in exchange for a plea of guilty;[9]

- the prosecution may agree to a reduction or withdrawal of charges in exchange for the defendant assisting the authorities by providing information or giving evidence against a co-accused;[10]

- the prosecution may undertake to support defence submissions as to an appropriate penalty, or not to appeal against the imposition of a particular penalty;[11] or

- the prosecution may agree not to oppose bail after conviction and prior to judgment on sentence.[12]

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5. The Hon Justice J. Badgery-Parker, 'The Criminal Process in Transition: Balancing Principle and Pragmatism—Part II' (1994–95) 4 *Journal of Judicial Administration* 193, 213–4.
6. *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 31–35.
7. Paul Byrne, 'Criminal Law and Justice: Plea Bargaining' (1988) 62(10) *Australian Law Journal* 799; Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 200.
8. Paul Byrne, 'Criminal Law and Justice: Plea Bargaining' (1988) 62(10) *Australian Law Journal* 799, 800; Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199.
9. Paul Byrne, 'Criminal Law and Justice: Plea Bargaining' (1988) 62(10) *Australian Law Journal* 799; Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199.
10. Paul Byrne, 'Criminal Law and Justice: Plea Bargaining' (1988) 62(10) *Australian Law Journal* 799; Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199.
11. Paul Byrne, 'Criminal Law and Justice: Plea Bargaining' (1988) 62(10) *Australian Law Journal* 799, 800; Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199.
12. Paul Byrne, 'Criminal Law and Justice: Plea Bargaining' (1988) 62(10) *Australian Law Journal 799,* 800; Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 200.

6.2 The authority for the Prosecution to accept a plea of guilty to an offence other than that charged in the indictment, on which the accused is arraigned, is conferred by s 153 of the *Criminal Procedure Act 1986* (NSW). Any sentence subsequently imposed must reflect the offence for which the plea is entered, rather than the more serious offences originally charged.[13]

RATIONALE FOR CHARGE NEGOTIATION

6.3 The New South Wales criminal justice system embraces charge negotiation as a means of disposing of matters quickly. The Hon Gordon Samuels authored the *Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts* ('the Samuels Report') in which he stated:

> The optimum outcome of a criminal prosecution is resolution by a plea of guilty to a charge which adequately represents the criminality revealed by facts which the prosecution can prove beyond reasonable doubt, and which give the sentencer an adequate range of penalty. A charge bargain must not compromise the principle—which I will call "the criminality principle"—made up of these three ingredients.[14]

6.4 There are sound reasons for allowing charge negotiation, many of which are regularly reiterated by academics and those within the justice system. Essentially, charge negotiation allows two competing public interests to be satisfied: the community interest in ensuring criminal conduct is justly punished, and the community interest in reducing expenditure of resources and delay in the criminal justice system.[15]

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13. *R v O'Neill* (1979) 2 NSWLR 582.

14. The Hon Justice Gordon Samuels AC CVO QC, 'Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts', Report (2002) [8.1]; referred to in Nick Cowdery AM QC, 'Negotiating with the Director of Public Prosecutions, especially under the Samuels Report' (Paper presented at the Young Lawyers One Day Criminal Seminar, Sydney, 15 March 2003) 4.

15. The Hon Justice Gordon Samuels AC CVO QC, 'Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts', Report (2002) [9.11]; referred to in Nick Cowdery AM QC, 'Negotiating with the Director of Public Prosecutions, especially under the Samuels Report' (Paper presented at the Young Lawyers One Day Criminal Seminar, Sydney, 15 March 2003) 6.

ADVANTAGES OF CHARGE NEGOTIATION

6.5 There are a number of advantages of charge negotiation (and, by extension, pleas of guilty) to both defendants and the prosecuting authorities, as well as to the criminal justice system generally. These include:

- encouraging substantial savings in costs and time, as a result of pleas of guilty, without which the system would not be able to cope;[16]
- mitigating court backlogs through pleas of guilty;[17]
- saving witnesses from giving evidence in court. This is particularly relevant for children and victims of sexual assault who may suffer additional trauma giving evidence;[18]
- saving defendants having to endure the ordeal of a trial;[19]
- reducing the financial cost to defendants and to the legal aid system;[20]
- providing certainty through a plea involving a conclusive determination of guilt;[21]

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16. The Hon Gordon Samuels identified that the majority of matters passing through the courts were disposed of by way of pleas of guilty: The Hon Justice Gordon Samuels AC CVO QC, 'Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts', Report (2002) [7.2]–[7.3]; Nick Cowdery AM QC, *The DPP's decision to Prosecute: Bar Practice Course (online)* (2007) NSW Bar Association <www.nswbar.asn.au>, 4; Paul Byrne, 'Criminal Law and Justice: Plea Bargaining' (1988) 62(10) *Australian Law Journal* 799, 800; Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) 60(4) *Australian Law Journal* 199, 210.
17. Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10/02, NSW Parliamentary Library Research Service, 2002) 52; Paul Byrne, 'Criminal Law and Justice: Plea Bargaining' (1988) 62(10) *Australian Law Journal* 799, 800.
18. The Hon Justice Gordon Samuels AC CVO QC, 'Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts', Report (2002) [7.5]; Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10/02, NSW Parliamentary Library Research Service, 2002) 52.
19. Paul Byrne, 'Criminal Law and Justice: Plea Bargaining' (1988) 62(10) *Australian Law Journal* 799, 800.
20. Paul Byrne, 'Criminal Law and Justice: Plea Bargaining' (1988) 62(10) *Australian Law Journal* 799, 800; Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 210.
21. The Hon Justice Gordon Samuels AC CVO QC, 'Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts', Report (2002) [7.5]; David Andrew, 'Plea Bargaining' (1994) 68(4) *Law Institute Journal* 236, 237; Paul Byrne, 'Criminal Law and Justice: Plea Bargaining' (1988) 62(10) *Australian Law Journal* 799, 800.

- allowing defendants who assist the authorities to be provided with concessions on sentence;[22]

- allowing defendants an opportunity to use the time between entering a plea of guilty and sentence to undertake rehabilitation, the successful outcome of which will benefit both the defendant and the community;[23]

- providing for those prosecutions where there may be a weak Crown case with respect to a more serious charge. In this case a plea of guilty to a lesser but more appropriate charge will reassure the community that an offender is held accountable for his or her actions;[24]

- catering for those victims, particularly victims of sexual assault, who may be in a state of emotional stress, either because of the judicial process or because of the personal circumstances attached to the matter, with the consequence that they would either refuse to give evidence or would be rendered unconvincing if required to give evidence;[25] and

- allowing the police and the prosecuting authorities to devote resources to other matters, particularly where as the result of the negotiations they obtain information from the offender about other more serious offences or secure the offender's assistance in giving evidence against other offenders.[26]

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22. Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 210.

23. Michael King, 'Therapeutic Jurisprudence and Criminal Practice: A Judicial Perspective' (2007) 31 *Criminal Law Journal* 12, 15.

24. Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10/02, NSW Parliamentary Library Research Service, 2002) 52.

25. The Hon Justice Gordon Samuels AC CVO QC, 'Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts', Report (2002) [9.4]–[9.5]; Nick Cowdery AM QC, *The DPP's Decision to Prosecute: Bar Practice Course (online)* (2009) NSW Bar Association <www.nswbar.asn.au> 4–5; Nick Cowdery AM QC, 'Negotiating with the Director of Public Prosecutions, especially under the Samuels Report' (Paper presented at the Young Lawyers One Day Criminal Seminar, Sydney, 15 March 2003) 4–5; Nick Cowdery AM QC, 'Negotiating with the DPP' (Paper presented at the Legal Aid Commission of NSW Criminal Law Conference, Sydney, 3 August 2006) 3–4; Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 210; Denise Lievore, 'Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study' (Office of the Status of Women, 2004) 10.

26. Paul Byrne, 'Criminal Law and Justice: Plea Bargaining' (1988) 62(10) *Australian Law Journal* 799, 800.

DISADVANTAGES OF CHARGE NEGOTIATION

6.6 A number of arguments can be advanced against charge negotiation which draw attention to perceived disadvantages to defendants and the prosecuting authorities, as well as to the criminal justice system generally:

- it is sometimes regarded as a reward for guilty defendants;[27]
- defendants are likely to be treated more leniently with the result that deterrence, both personal and general, may weigh less heavily;[28]
- offenders are rewarded for the utilitarian value of the plea rather than for remorse, which may be against the offender's rehabilitative interests and also have repercussions with respect to the protection of society;[29]
- it can encourage overcharging which can put extra pressure on a defendant to plead guilty to a lesser charge;[30]
- the existence of the standard non-parole period scheme may also put undue pressure on a defendant to plead guilty to a lesser charge that does not attract a standard non-parole period; [31]
- defendants may be induced to participate in a charge bargain and plead guilty even if they are not in fact guilty in order to secure the possibility of a discount,[32] particularly if they are not robust or well informed;[33]

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27. Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10/02, NSW Parliamentary Library Research Service, 2002) 52, citing Penny Darbyshire, 'The Mischief of Plea Bargaining and Sentence Rewards' [2000] *Criminal Law Review* 895.
28. Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10/02, NSW Parliamentary Library Research Service, 2002) 53, citing Penny Darbyshire, 'The Mischief of Plea Bargaining and Sentence Rewards' [2000] *Criminal Law Review* 895; Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 209.
29. Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 209.
30. Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 209, referring to G. A. Ferguson and D. W. Roberts, 'Plea Bargaining—Directions for Canadian Reform' (1974) 52(4) *Canadian Bar Review* 497, 522.
31. Submission 1: Criminal Law Committee, NSW Young Lawyers.
32. Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10/02, NSW Parliamentary Library Research Service, 2002)

- facts that might be within the public interest may not become evident, for example, allegations of police fabrication of evidence;[34]

- victims may feel that their account has been devalued when facts are edited for the purpose of sentencing;[35]

- the right to silence might be seen to be undermined, it having been argued that the encouragement of a plea of guilty in order to attract a benefit is analogous to an induced confession;[36]

- offenders who contest their charge and are convicted may feel aggrieved in circumstances where their co-offender has pleaded guilty following charge negotiation and received a lesser sentence although as a matter of law this will not be seen as involving a disparity in sentences;[37] and

- charge negotiations take place between the prosecution and defence behind closed doors.[38] This has the potential to attract the following criticisms:

  - negotiations might be conducted solely to save time and resources;[39]

53, citing Penny Darbyshire, 'The Mischief of Plea Bargaining and Sentence Rewards' [2000] *Criminal Law Review* 895; The Hon Justice J. Badgery-Parker, 'The Criminal Process in Transition: Balancing Principle and Pragmatism—Part II' (1994–95) 4 *Journal of Judicial Administration* 193, 214; Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 209.

33. Kathy Mack and Sharyn Roach Anleu, 'Choice, Consent and Autonomy in a Guilty Plea System' in Andrew Goldsmith and Mark Israel (eds) *Criminal Justice in Diverse Communities* (2000) 75, 79.

34. Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 209, referring to Peter Sallmann and John Willis, *Criminal Justice in Australia* (1984) 76.

35. Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10/02, NSW Parliamentary Library Research Service, 2002) 53, citing Penny Darbyshire, 'The Mischief of Plea Bargaining and Sentence Rewards' [2000] *Criminal Law Review* 895.

36. Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10/02, NSW Parliamentary Library Research Service, 2002) 53, citing Penny Darbyshire, 'The Mischief of Plea Bargaining and Sentence Rewards' [2000] *Criminal Law Review* 895; The Hon Justice J. Badgery-Parker, 'The Criminal Process in Transition: Balancing Principle and Pragmatism—Part II' (1994–95) 4 *Journal of Judicial Administration* 193, 214.

37. Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 209, referring to G. A. Ferguson and D. W. Roberts, 'Plea Bargaining Directions for Canadian Reform' (1974) 54 *Canadian Bar Review* 497, 551, and Peter Sallmann, 'The Guilty Plea as an Element in Sentencing' Part II (1980) 54 *Law Institute Journal* 185, 188.

38. Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10/02, NSW Parliamentary Library Research Service, 2002) 53; The Hon Justice J. Badgery-Parker, 'The Criminal Process in Transition: Balancing Principle and Pragmatism—Part II' (1994–95) 4 *Journal of Judicial Administration* 193, 214.

- the prosecutor, through laziness or timidity, might withdraw more serious charges that ought not to have been withdrawn;[40]

- an unprepared or inexperienced defence lawyer might recommend a plea of guilty to his or her client in circumstances where the prospects of an acquittal were good;[41]

- the prior professional relationship between a particular prosecutor and a particular defence lawyer may affect the charge negotiation process and create inequality amongst defendants;[42]

- there is a risk that charge negotiation will more likely be undertaken in cases which do not attract notoriety,[43] with a similar potential for creating inequality amongst defendants.

PROCEDURES TO ENSURE ACCOUNTABILITY IN CHARGE NEGOTIATIONS

6.7 It has been argued that the increased efficiency and fairness that results from charge negotiation is advantageous to the criminal justice system, provided that controls and safeguards exist to enhance visibility and accountability.[44] For this reason the 'formalisation of plea bargaining'[45] has been encouraged.

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39. Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10/02, NSW Parliamentary Library Research Service, 2002) 53.

40. Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 209, referring to Peter Sallmann and John Willis, *Criminal Justice in Australia* (1984) 76.

41. Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 209, referring to Peter Sallmann and John Willis, *Criminal Justice in Australia* (1984) 76.

42. Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 209, referring to William McDonald (ed), *The Prosecutor* (1979) 159–60, and Susan Moody and Jacqueline Tombs, 'Plea Negotiations in Scotland' [1983] *Criminal Law Review* 297, 305–6.

43. Peter Clark, 'The Public Prosecutor and Plea Bargaining' (1986) 60(4) *Australian Law Journal* 199, 209, referring to G. A. Ferguson and D. W. Roberts, 'Plea Bargaining Directions for Canadian Reform' (1974) 54 Can. Bar. Rev. 497, 539;

44. Paul Byrne, 'Criminal Law and Justice: Plea Bargaining' (1988) 62(10) *Australian Law Journal* 799, 803.

45. Asher Flynn, 'Carl Williams: Secret Deals and Bargained Justice—The Underworld of Victoria's Plea Bargaining System' 19(1) (2007) *Current Issues in Criminal Justice* 120.

ODPP Guidelines

6.8 The *Prosecution Guidelines* ('the ODPP Guidelines') of the Office of the Director of Public Prosecutions[46] require charge negotiation to be conducted in accordance with their terms.[47] They allow for a degree of objectivity to be applied, and permit decisions to be justified in accordance with general instructions provided.[48]

Consultation

6.9 The ODPP Guidelines provide for consultation with victims and police officers with respect to various aspects of a prosecution. This is in accordance with legislation such as the *Victims Rights Act 1996* (NSW) which includes the *Charter of Victims Rights*.[49] Where charge negotiations occur between the prosecution and defence, the views of the victim and police are to be sought prior to discontinuing a prosecution or making a decision to accept pleas of guilty to fewer or lesser charges. This consultation should include discussion as to any alternative versions of facts that might be accepted that would omit any substantial and otherwise relevant evidence.[50]

6.10 This consultation process, and the requisite consultation between members of the office as provided for by the ODPP Guidelines, ensures that the views of more than one officer are sought before significant decisions are made, in relation to the charge negotiation process.[51]

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46. *Director of Public Prosecutions Act 1986* (NSW) s 13.
47. NSW Director of Public Prosecutions, 'Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales' (2007), see particularly Guideline 2 'Roles and Duties of the Prosecutor' and Guideline 4 'The Decision to Prosecute', Guideline 20 'Charge Negotiation and Agreement; Agreed Statements of Facts; Form 1'.
48. John McKechnie, 'Directors of Public Prosecutions: Independent and Accountable' (1996–97) 15 *Australian Bar Review* 122, 131.
49. *Victims Rights Act 1996* (NSW) pt 2.
50. NSW Director of Public Prosecutions, 'Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales' (2007) Guideline 7 'Discontinuing Prosecutions', Guideline 19 'Victims of Crime; Vulnerable Witnesses; Conferences', Guideline20 'Charge Negotiation and Agreement; Agreed Statements of Facts; Form 1'. See also Nick Cowdery AM QC, 'Negotiating with the Director of Public Prosecutions, especially under the Samuels Report' (Paper presented at the Young Lawyers One Day Criminal Seminar, Sydney, 15 March 2003) 8–10; 'Negotiating with the DPP' (Paper presented at the Legal Aid Commission of NSW Criminal Law Conference, Sydney, 3 August 2006) 7–10.
51. John McKechnie, 'Directors of Public Prosecutions: Independent and Accountable' (1996–97) 15 *Australian Bar Review* 122, 132.

6.11 The ODPP Guidelines encourage agreed facts for sentence to be drafted and settled. This answers the concern that it is difficult to make a determination as to whether a charge agreement is principled, and adequately reflects the criminality involved, in the absence of an agreed statement of facts.[52] The ODPP Guidelines provide for Crown and defence signatures to an agreed statement of facts where possible.[53]

6.12 Howie J in *R v Palu*[54] stated:

> It behoves the parties, especially after a "plea bargain", to ensure that the sentencing court is made aware from the outset of the proceedings whether there is any dispute as to the factual basis upon which the offender is to be sentenced and identify with particularity what matters are in issue. Disputed facts are to be resolved by accusatorial process upon evidence before the court: *Chow v Director of Public Prosecutions (NSW)* (1992) 28 NSWLR 593 at 604–608; 63 A Crim R 316 at 325–328. If a statement of facts is to be tendered, it should both support the charge for which the offender is to be sentenced and accord with the offence charged. It should not contain facts that would aggravate the offence in breach of the principle in *R v De Simoni* (1981) 147 CLR 383; 5 A Crim R 329. If it purports to be an agreed statement of facts so that it is intended to provide the factual basis upon which the parties wish the court to sentence the offender, the facts should be sufficient to permit the court to exercise its discretion and the Crown should not tender other material which might supplement or contradict the facts set out in the agreed statement. If other material is placed before the court which relates to the facts of the offence, then the parties should understand that the court is not bound by the tendered statement of facts or any agreement made between the parties as to the basis upon which the offender is to be sentenced: *R v Altham* (1992) 62 A Crim R 126; *Chow v Director of Public Prosecutions (NSW)* (at 606; 327). All too frequently, or so it seems to me, uncertainty, confusion and, sometimes, error arises because of the failure of the parties, and in particular the Crown, to clearly identify the material upon which the facts of the matter are to be gleaned by the sentencing court. So it was in the present case.[55]

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52. Nick Cowdery AM QC, 'Negotiating with the Director of Public Prosecutions, especially under the Samuels Report' (Paper presented at the Young Lawyers One Day Criminal Seminar, Sydney, 15 March 2003) 6; Nick Cowdery AM QC, 'Negotiating with the DPP' (Paper presented at the Legal Aid Commission of NSW Criminal Law Conference, Sydney, 3 August 2006) 5; The Hon Justice Gordon Samuels AC CVO QC, 'Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts', Report (2002) [11.13]–[11.14].

53. NSW Director of Public Prosecutions, 'Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales' (2007) Guideline 20 'Charge Negotiation and Agreement; Agreed Statements of Facts; Form 1'.

54. *R v Palu* (2002) 134 A Crim R 174.

55. *R v Palu* (2002) 134 A Crim R 174, [21]; and see *R v H* [2005] NSWCCA 282.

Record of agreement

6.13 The High Court has commented that it is prudent to ensure that plea agreements are recorded in writing where possible. In *GAS; SJK v The Queen*[56] the Court stated:

> It is as well to add some general observations about the way in which the dealings between counsel for the prosecution and counsel for an accused person, on subjects which may later be said to have been relevant to the decision of the accused to plead guilty, should be recorded. In most cases it will be desirable to reduce to writing any agreement that is reached in such discussions. Sometimes, if there is a transcript of argument, it will be sufficient if an agreed statement is made in court and recorded in the transcript as an agreed statement of the position reached. In most cases, however, it will be better to record the agreement in writing and ensure that both prosecution and defence have a copy of that writing before it is acted upon. There may be cases where neither of these courses will be desirable, or, perhaps, possible, but it is to be expected that they would be rare.[57]

6.14 Consistently with these observations the ODPP Guidelines encourage the recording of plea offers and reasons, noting particularly that the content and timing of communications such as these may become important later when a sentencing court might have cause to turn its mind to the discount for a plea of guilty.[58]

Principled charge negotiation

6.15 It is relevant to note Guideline 20, which states, 'Charge negotiations must be based on principle and reason, not on expedience alone'. The guideline notes:

> Where the appropriate authority or delegation has been obtained or is in place, a prosecutor may agree to discontinue a charge or charges upon the promise of an accused person to plead guilty to another or others. A plea of guilty in those circumstances may be accepted if the public interest is satisfied after consideration of the following matters:
>
> (a) the alternative charge adequately reflects the essential criminality of the conduct and the plea provides adequate scope for sentencing; and/or
>
> (b) the evidence available to support the prosecution case is weak in any material respect; and/or
>
> (c) the saving of cost and time weighed against the likely outcome of the matter if it proceeded to trial is substantial; and/or

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56. *GAS v The Queen; SJK v The Queen* (2004) 217 CLR 198.
57. *GAS v The Queen; SJK v The Queen* (2004) 217 CLR 198, [42].
58. NSW Director of Public Prosecutions, 'Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales' (2007) Guideline 20.

(d) it will save a witness, particularly a victim or other vulnerable witness, from the stress of testifying in a trial and/or a victim has expressed a wish not to proceed with the original charge or charges. [59]

Later the guideline notes:

> An alternative plea will not be considered where its acceptance would produce a distortion of the facts and create an artificial basis for sentencing, or where facts essential to establishing the criminality of the conduct would not be able to be relied upon, or where the accused person intimates that he or she is not guilty of any offence.[60]

6.16 The ODPP Guidelines set out what factors should be taken into account by the prosecution when deciding whether to prosecute, which also need to be taken into account when conducting plea negotiations. Guideline 4 for example directs attention to the consideration of whether the elements of the offence can be established and whether there is a reasonable prospect of conviction by a properly instructed jury, as well as whether discretionary factors indicate that it is not in the public interest that a matter proceed. Discretionary factors include:

3.1 the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only;

3.2 the obsolescence or obscurity of the law;

3.3 whether or not the prosecution would be perceived as counter-productive; for example, by bringing the law into disrepute;

3.4 special circumstances that would prevent a fair trial from being conducted;

3.5 whether or not the alleged offence is of considerable general public concern;

3.6 the necessity to maintain public confidence in such basic institutions as the Parliament and the courts;

3.7 the staleness of the alleged offence;

3.8 the prevalence of the alleged offence and any need for deterrence, both personal and general;

3.9 the availability and efficacy of any alternatives to prosecution;

3.10 whether or not the alleges offence is triable only on indictment;

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59. NSW Director of Public Prosecutions, 'Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales' (2007) Guideline 20.

60. NSW Director of Public Prosecutions, 'Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales' (2007) Guideline 20.

3.11 the likely length and expense of a trial;

3.12 whether or not any resulting conviction would necessarily be regarded as unsafe and unsatisfactory;

3.13 the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court;

3.14 whether or not the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive;

3.15 the degree of culpability of the alleged offender in connection with the offence;

3.16 any mitigating or aggravating circumstances;

3.17 the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender, a witness or a victim;

3.18 the alleged offender's antecedents and background, including culture and language ability;

3.19 whether or not the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;

3.20 the attitude of a victim or in some cases a material witness to a prosecution;

3.21 whether or not and in what circumstances it is likely that confiscation order will be made against the offender's property;

3.22 any entitlement or liability of a victim or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken; and/or

3.23 whether or not the Attorney General's or Director's consent is required to prosecute.[61]

6.17 In his report, the Hon Gordon Samuels rejected the idea that charge negotiation involved 'a bargaining, bidding, haggling, horse-trading process' and instead referred to it as a mechanism by which the appropriate charge is established, that is, the charge which can be proved beyond reasonable doubt, which adequately reflects the criminality of the conduct, and which allows sufficient sentencing scope for the court.[62] He stated:

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61. NSW Director of Public Prosecutions, 'Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales' (2007) Guideline 4.

62. The Hon Justice Gordon Samuels AC CVO QC, 'Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts', Report (2002) [6.1]–[6.2], and citing David Andrew, 'Plea Bargaining' (1994) 68(4) *Law Institute Journal* 236, 236.

> The charge bargain is therefore the product of informed and professional discussion between advocates for the prosecution and the defence intended to reach an outcome satisfactory to both (I interpolate that it is rare for an accused to be unrepresented in criminal proceedings in the District or Supreme Courts) by obtaining a plea of guilty to the charge (or charges) ultimately identified.[63]

AGREEMENTS BETWEEN THE PROSECUTION AND DEFENCE WHICH CANNOT BIND THE COURT

6.18 *GAS v The Queen; SJK v The Queen* was an appeal from the Victorian Court of Appeal with respect to sentences for aiding and abetting manslaughter. The offenders submitted that the conduct of the Director's appeal to the Court of Appeal and the consequent increase in sentences involved a departure from a plea agreement. In its consideration of the matter the High Court summarised the fundamental principles of charge negotiation:

> [28] First, it is the prosecutor, alone, who has the responsibility of deciding the charges to be preferred against an accused person. The judge has no role to play in that decision. There is no suggestion, in the present case, that the judge was in any way a party to the "plea agreement" referred to. The appellants, through their counsel, evidently indicated to the prosecutor that, if a charge of manslaughter were to be substituted for the charge of murder, they would plead guilty, and the prosecutor filed a new presentment on that understanding. However, the charging of the appellants was a matter for the prosecutor.
>
> [29] Secondly, it is the accused person, alone, who must decide whether to plead guilty to the charge preferred. That decision must be made freely and, in this case, it was made with the benefit of legal advice. Once again, the judge is not, and in this case was not, involved in the decision. Such a decision is not made with any foreknowledge of the sentence that will be imposed. No doubt it will often be made in the light of professional advice as to what might reasonably be expected to happen, but that advice is the responsibility of the accused's legal representatives.
>
> [30] Thirdly, it is for the sentencing judge, alone, to decide the sentence to be imposed. For that purpose, the judge must find the relevant facts. In the case of a plea of guilty, any facts beyond what is necessarily involved as an element of the offence must be proved by evidence, or admitted formally (as in an agreed statement of facts), or informally (as occurred in the present case by a statement of facts from the bar table which was not contradicted). There may be significant limitations as to a judge's capacity to find potentially relevant facts in a given case. The present appeal provides an example. The limitation arose from the absence of evidence as to who killed the victim, and the absence of any admission

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63. The Hon Justice Gordon Samuels AC CVO QC, 'Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts', Report (2002) [6.2].

> from either appellant that his involvement was more than that of an aider and abettor.
>
> [31] Fourthly, as a corollary to the third principle, there may be an understanding, between the prosecution and the defence, as to evidence that will be led, or admissions that will be made, but that does not bind the judge, except in the practical sense that the judge's capacity to find facts will be affected by the evidence and the admissions. In deciding the sentence, the judge must apply to the facts as found the relevant law and sentencing principles. It is for the judge, assisted by the submissions of counsel, to decide and apply the law. There may be an understanding between counsel as to the submissions of law that they will make, but that does not bind the judge in any sense. The judge's responsibility to find and apply the law is not circumscribed by the conduct of counsel.
>
> [32] Fifthly, an erroneous submission of law may lead a judge into error and, if that occurs, the usual means of correcting the error is through the appeal process. It is the responsibility of the appeal court to apply the law. If a sentencing judge has been led into error by an erroneous legal submission by counsel, that may be a matter to be taken into account in the application of the statutory provisions and principles which govern the exercise of the appeal court's jurisdiction.[64]

6.19 It is clear from these statements of principle that there is no place in the charge negotiation process for agreements on sentence to be made between the prosecution and defence.

6.20 The principles enunciated in *GAS* were applied in *Ahmad v The Queen*.[65] In this matter the prosecution and defence had informed the court at the sentencing hearing that they had agreed that the appropriate discount for the plea of guilty should be 25 per cent, and that the non-parole period should be between four and five years. The NSW Court of Criminal Appeal (NSWCCA) observed:

> when sentencing for crimes in the criminal context the role of the court is fundamental and in my view cannot be displaced or qualified by any agreement of the parties. That agreement can only extend to an understanding of the facts to be placed before the Court and the submissions which will be made by the Crown. Whether the sentence which the Crown submits is appropriate happens to fall within or outside the appropriate range is irrelevant. The Court will consider that submission together with the submission on behalf of the offender but must then determine the appropriate sentence for itself.[66]

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64. *GAS; SJK v The Queen* [2004] 217 CLR 198, [28]–[32].
65. *Ahmad v The Queen* [2006] NSWCCA 177, [6], [21]. See also Nick Cowdery AM QC, 'Recent Developments in Sentencing' (Young Lawyers Criminal Law Day, Bar Association Mini-conference, Sydney, 2007) 10–1.
66. *Ahmad v The Queen* [2006] NSWCCA 177, [25].

6.21 It is however clear from *GAS* that it is for the prosecution to determine the appropriate charges on which to proceed, and it is for the defendant to determine whether or not to plead guilty to any or all of those offences.

6.22 The acceptance of this proposition underpins the process of charge negotiation which leaves that process in the control of the prosecution and defence. In this respect the High Court in *Maxwell v The Queen*[67] confirmed that, other than where necessary to prevent an abuse of process, a trial judge has no power to review the election of a prosecutor to accept a plea of guilty to a lesser offence than that charged (in this instance a plea of guilty to manslaughter in answer to an indictment charging murder), or to reject the plea, notwithstanding any reservations that the judge might hold in relation to the correctness of that decision. The only exception arises where the plea of guilty to the lesser or alternative charge is not genuine or is made in circumstances suggesting that it does not amount to a true admission of guilt.

CRIMINAL CASE CONFERENCING

6.23 In further implementation of the policy behind charge negotiation, a criminal case conferencing trial was established in April 2008 pursuant to the *Criminal Case Conferencing Trial Act 2008* (NSW). The Act provided for a trial scheme of compulsory pre-committal case conferencing for specified proceedings, and for codification of the sentence discounts for pleas entered in those proceedings, which is to vary according to whether the plea is entered before or after committal.

6.24 The trial has been extended and subject to independent evaluation by BOCSAR. As noted previously, it is not taken into account for the purposes of this report.

PUBLIC CRITICISM OF CHARGE NEGOTIATION AND SENTENCE OUTCOMES

6.25 Charge negotiation sometimes attracts criticism on the basis of non-compliance with the ODPP Guidelines.

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

6.26 The Police Association of New South Wales has criticised the process in circumstances where it is alleged that consultation has not occurred with the victim or the police prior to pleas being accepted to lesser charges,[68] or prior to matters being deleted from the agreed statement of facts,[69] or otherwise in the course of the proceedings.[70]

6.27 The media criticism that ensued in relation to *R v AEM Snr*[71] led to the engagement of the Hon Gordon Samuels AC, QC to conduct the review of charge negotiation discussed above (the Samuels Report).[72] This case involved a series of sexual assaults committed against two 16 year-old girls in circumstances where each offender was sentenced for two offences under s 61J of the *Crimes Act 1900* (NSW), as well as having one or more offences under s 61J taken into account on a Form 1. The NSWCCA in *R v AEM Snr* determined that the initial sentences imposed by the sentencing judge were manifestly inadequate and that the sentences for each offender should be increased.[73] The review however found that neither the charge negotiation, nor the statement of agreed facts, inappropriately mitigated the degree of criminality, or limited the exercise of a proper sentencing discretion, and noted:

> As is often the case, it was the inadequacy of the sentence which excited criticism, and this leniency was then incorrectly attributed to the charge bargaining process. However, the charge bargaining procedure left something to be desired,

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68. See, eg, NSW Police, 'Plea Bargaining Campaign Update: Do Sentencing Discounts Deliver Justice?' (2008) 88(5) *New South Wales Police News* 11, 13–4 (Case Study 3): The Police Association of New South Wales directed criticism at the Office of the Director of Public Prosecutions (ODPP) for allegedly accepting a plea of guilty to a lesser charge during the course of the hearing and without any consultation with police or the victim.

69. See, eg, NSW Police, 'Plea Bargaining Campaign Update: Do Sentencing Discounts Deliver Justice?' (2008) 88(5) *New South Wales Police News* 11, 11–2 (Case Study 1): The Police Association of New South Wales directed criticism at the ODPP for allegedly settling on agreed facts which deleted reference to the victim being attacked from behind and 'king hit', without consulting the victim about this deletion.

70. See, eg, NSW Police, 'Plea Bargaining Campaign Update: Do Sentencing Discounts Deliver Justice?' (2008) 88(5) *New South Wales Police News* 11, 12–3 (Case Study 2): The Police Association of New South Wales directed criticism at the ODPP for not advising police (who were also victims) about the progress of a matter after initial consultation about their views in accepting a plea of guilty to a lesser charge. The police victims alleged that they were not advised about the acceptance of any plea, the sentence proceedings, nor any agreed facts if that was the way that the matter proceeded.

71. *R v AEM Snr* [2002] NSWCCA 58.

72. New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 September 2001, 16993 (Bob Debus, Attorney General).

73. The NSW Court of Criminal Appeal increased the sentence of AEM Snr to an overall sentence of 13 years with a non-parole period of nine years; it increased the sentence of KEM to an overall sentence of 14 years with a non-parole period of 10 years; and it increased the sentence of MM to an overall sentence of 13 years with a non-parole period of 10 years: *R v AEM Snr* [2002] NSWCCA 58, [180], [200], [216].

> in the way of failure to communicate with one of the victims at least, to explain to her clearly what was happening as the matter proceeded, and to consult her about the pleas of guilty which were contemplated and the contents of the statement of facts to be agreed, and the acknowledgments and concessions in Exhibit 1.[74]

6.28 The Council does not have any concerns in principle in relation to the charge negotiation process, and accepts that the advantages earlier noted outweigh its potential disadvantages. It records its view that the ODPP Guidelines are in general terms appropriate and confirms the importance of adherence to those guidelines and of communication with police and victims in accordance with their terms. In order to encourage uniform compliance with the ODPP Guidelines, and to promote transparency in the sentencing process, some recommendations are made in Chapter 8 of this report.

6.29 It also observes that the principle in *R v De Simoni*[75] will necessarily limit the inclusion of some facts in the statement of facts tendered to the court, where the process of charge negotiation has led to a reduction in the charge initially preferred. By reference to this principle the court cannot have regard to facts which would support a conviction for a more serious offence than that for which the offender is to be sentenced. Similarly, the requirement that only those facts that are relevant and that can be proved by admissible evidence, or which are subject to an admission by the accused for the purpose of sentencing, can be placed before the court.

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74. The Hon Justice Gordon Samuels AC CVO QC, 'Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts', Report (2002) Annexure A, 6–7.

75. *R v De Simoni* (1981) 147 CLR 389.

CHAPTER 7: THE TOTALITY PRINCIPLE AND THE USE OF FORM 1

A. THE TOTALITY PRINCIPLE

7.1 The totality principle applies where an offender is sentenced for more than one offence; or where he or she is sentenced for a further offence while subject to an existing sentence. The principle requires that the severity of the aggregate sentence for multiple offences is a just and appropriate measure of the totality of the criminality involved in the offences.[1]

7.2 In *Mill v The Queen*,[2] cited with approval in *Johnson v The Queen*,[3] the High Court adopted the statement of the totality principle described in Thomas, *Principles of Sentencing*:[4]

> The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong[']; 'when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'.[5]

7.3 In *R v Holder*,[6] Street CJ described the totality principle as follows:

> The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or

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1. *Mill v The Queen* (1988) 166 CLR 59, 63; *Pearce v The Queen* (1998) 194 CLR 610; *R v Holder* [1983] 3 NSWLR 245, 260 (Street CJ). See also *Harrison v The Queen* (1990) 48 A Crim R 197, 198–9.
2. *Mill v The Queen* (1988) 166 CLR 59.
3. *Johnson v The Queen* (2004) 205 ALR 346, [18].
4. Thomas, *Principles of Sentencing* (2nd ed, 1979) 56–7.
5. *Mill v The Queen* (1988) 166 CLR 59, 62–3. See also *McL v The Queen* (2000) 203 CLR 452, [15] (Gleeson CJ, Gaudron and Callinan JJ); *R v Harris* [2007] NSWCCA 140, [44]. Cited in LexisNexis Butterworths, *Criminal Practice and Procedure (NSW)* (online), 'General Principles of Sentencing'.
6. *R v Holder* [1983] 3 NSWLR 245.

> more offences. Not infrequently a straight-forward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.[7]

Rationale behind the totality principle

7.4 In *R v MAK; R v MSK*,[8] the NSWCCA citing *Postiglione v the Queen*,[9] identified two reasons behind the totality principle:

> [16] The severity of a sentence is not simply the product of a linear relationship. That is to say severity may increase at a greater rate than an increase in the length of a sentence. …
>
> [17] The second matter that is considered under the totality principle is the proposition that an extremely long total sentence may be "crushing" upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release. This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform. Of course, in many cases of multiple offending, the offender may not be entitled to the element of mercy entailed in adopting such a constraint.[10]

7.5 The Court also observed that in applying the totality principle, care should be taken to avoid diminishing public confidence in the administration of justice, and to avoid the suggestion that the court is applying some kind of discount for multiple offending or the impression, where the offender is already serving a sentence, that no or little penalty is imposed for the additional offences.[11]

7.6 The NSWCCA has often commented on the difficulties which sentencing judges appear to have in applying the totality principle correctly.[12]

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7. *R v Holder* [1983] 3 NSWLR 245, 260, cited in *R v MMK* (2006) 164 A Crim R 481, [12].
8. *R v MAK; R v MSK* (2006) 167 A Crim R 159.
9. *Postiglione v The Queen* (1997) 189 CLR 295, 307–8.
10. *R v MAK; R v MSK* (2006) 167 A Crim R 159, [15]–[17]. See *R v Folbigg* (2005) 152 A Crim R 35, [186] (Sully J, with whom Dunford and Hidden JJ agreed) for an example of a 'crushingly discouraging' sentence.
11. *R v MAK; R v MSK* (2006) 167 A Crim R 159, [18]. See also *R v Wheeler* [2000] NSWCCA 34.
12. See, eg, *R v Knight; R v Biuvanua* (2007) 176 A Crim R 338, [2]; *Nguyen v The Queen* [2007] NSWCCA 14, [12].

Relationship with other sentencing principles

7.7 Although the totality principle operates to avoid the kind of crushing punishment that would result from a simple aggregation of sentence and that could destroy any prospects of rehabilitation and reform for the offender,[13] this does not mean that sentencing principles of deterrence, denunciation and rehabilitation are to be ignored in determining the adequacy of the overall sentence, particularly where the offences relate to multiple victims.[14] It applies to both the non-parole period and the head sentence.[15]

LEGISLATIVE PROVISIONS RELATING TO MULTIPLE SENTENCES OF IMPRISONMENT

Crimes (Sentencing Procedure) Act

Commencement of sentence

7.8 The *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the Act') contains a number of provisions of relevance for the application of the totality principle. Section 47(2) provides that a prison sentence commences on the day on which it is imposed,[16] subject to any direction by the court that it is to be considered to have commenced on an earlier day; or on a later day if the sentence is partly or wholly accumulated with another prison sentence.[17]

7.9 Section 47(4) provides that the commencement date of a cumulative sentence, following a direction pursuant to s 47(2), must not be later than the day on which the offender will become eligible for release from custody or on parole in relation to the pre-existing sentence.[18]

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13. *R v MAK; R v MSK* (2006) 167 A Crim R 159, [17]; *McDonald v The Queen* (1994) 48 FCR 555, 563.
14. *R v KM* [2004] NSWCCA 65, [55], cited with approval in *Vaovasa v The Queen* (2007) 174 A Crim R 116, [18].
15. *Wright v The Queen* (1989) 45 A Crim R 423, 426 (Badgery-Parker J, with whom Mahoney JA and Allen J agreed). See also *McDonald v The Queen* (1994) 48 FCR 555, in which Burchett and Higgins JJ of the Federal Court stated that: '[t]he [totality] principle applies just as much to the effective non-parole period fixed in respect of a series of consecutive sentences as to the total of the sentences': *McDonald v The Queen* (1994) 48 FCR 555, 563.
16. Except periodic detention orders, which must commence between seven and 21 days after the order is made; and sentences which are stayed when the court refers an offender for assessment for home detention: *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 47(1), 70, 80.
17. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47(2).
18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 47(4).

Concurrent and consecutive sentences of imprisonment

7.10 Section 55 of the Act provides:[19]

> (1) In the absence of a direction under this section, a sentence of imprisonment imposed on an offender:
>
> (a) who, when being sentenced, is subject to another sentence of imprisonment that is yet to expire, or
>
> (b) in respect of whom another sentence of imprisonment has been imposed in the same proceedings,
>
> is to be served concurrently with the other sentence of imprisonment and any further sentence of imprisonment that is yet to commence.
>
> (2) The court imposing the sentence of imprisonment may instead direct that the sentence is to be served consecutively (or partly concurrently and partly consecutively) with the other sentence of imprisonment or, if there is a further sentence of imprisonment that is yet to commence, with the further sentence of imprisonment.
>
> …
>
> (4) In this section, a reference to a sentence of imprisonment is taken to be a reference to:
>
> (a) the non-parole period of the sentence, in the case of a sentence for which a non-parole period has been set, or
>
> (b) the term of the sentence, in the case of a sentence for which a non-parole period has not been set.
>
> …

7.11 Where consecutive sentences are imposed and non-parole periods are fixed, the effect of s 55(2) and (4) is that each subsequent sentence must commence when the non-parole period for the previous sentence expires. In *R v Killick*,[20] Smart AJ (with whom O'Keefe J agreed) raised a concern that s 55(2) and (4) can have the effect of markedly reducing the overall length of the head sentences, and suggested that the provisions be reviewed by the legislature.[21] A possible response identified was to permit an addition to the overall head sentence to compensate for the fact that portions of some of the head

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19. This section does not apply to sentences for: escaping from lawful custody, or assault or other offences against the person committed by an inmate of a correctional centre; and assault or other offences against the person committed against a juvenile justice officer while the offender is a person subject to control: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 55(5).

20. *R v Killick* (2002) 127 A Crim R 273.

21. *R v Killick* (2002) 127 A Crim R 273, [68], [79].

sentences will be subsumed as a result of the accelerated commencement of the consecutive sentence, or sentences.

7.12 The presumption for concurrent sentences (unless otherwise directed) arising by reason of s 55(1) is subject to exceptions in the case of sentences for offences involving an assault or any other offence against the person committed by a convicted inmate of a correctional centre, or by a juvenile subject to a control order against a juvenile justice officer;[22] and in the case of sentences for offences involving escape by inmates of a correctional centre.[23]

7.13 A question has arisen in relation to cases where an escapee has committed offences while at large, as to the correct sequence in which the offender should be sentenced for those offences and for the offence of escape. In *R v Dickson*,[24] Meagher JA, with whom Simpson and Howie JJ agreed, observed:

> It has customarily been regarded by this Court that the effects of s 57 are to impose the penalty for the offence of escape after the penalties on the main offences, and cumulative upon their determination. Learned senior counsel for [the offender] has suggested that it is equally possible to read into the Act a determination that the first sentence ought be a sentence in relation to the escape and the other sentences should be added as cumulative to that.[25]

The Court agreed that either interpretation was available.[26]

7.14 The Council considers that the objective of the provision is best served by requiring the sentence for the non-escape offences to be set first and for the escape sentence to be imposed consecutively upon them, and recommends amendment of s 57 to achieve that outcome.

7.15 The Department of Corrective Services has drawn to the notice of the Council a possible problem when an offender is convicted of and sentenced for a serious sexual assault, as well as for unrelated non sexual offences, so far as the sequence of the

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22. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 56.
23. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 57.
24. *R v Dickson* (2002) 132 A Crim R 137.
25. *R v Dickson* (2002) 132 A Crim R 137, [18]–[19] (Meagher JA).
26. *R v Dickson* (2002) 132 A Crim R 137, [25]–[26] (Simpson J), Meagher JA and Howie J agreeing with these additional observations. The court in *R v Pham* [2005] NSWCCA 94, [95] (Wood CJ at CL, with whom Hislop and Johnson JJ agreed) noted the problems identified in *R v Dickson* and suggested that s 57 requires legislative review.

sentence can have a relevance for the application of the *Crimes (Serious Sex Offenders) Act 2006* (NSW), or for decisions concerning his classification or release on parole.

7.16 The case of *McCallum v Parole Board of NSW*[27] and earlier proceedings including the same offender[28] illustrate the problem. This was a case in which the offender received sentences for some armed robbery offences which were directed to be served cumulatively upon sentences for some sexual offences, and in which it was made clear that, in applying the totality principle, each sentence had been reduced. The offender declined to participate in the CUBIT program, and by the time he became eligible for release on parole, he had served the sexual assault sentences. As a consequence he asserted, unsuccessfully (on 'public interest grounds') that he should not be required to undertake that course as a pre-condition of parole. By reference to a similar argument he had earlier sought, again unsuccessfully, to secure an administrative review of certain classification decisions based on his non participation in that program.

7.17 While he failed in these arguments, Burchett AJ finding, in the classification case, that the application of the totality principle meant that the total period of his incarceration was related to the total criminality that resulted in the aggregate imprisonment, the sequence in which the sentences were required to be served made no difference. It may, however have a bearing on the ability of the State to obtain an extended supervision order (ESO) or a continuing detention order (CDO).

7.18 In such a case, it would be open to the offender to contend that by the time an application could be make for an ESO or CDO he was no longer serving a sentence for a 'serious sex offence' or an 'offence of a sexual nature',[29] and as a consequence that the *Crimes (Serious Sex Offenders) Act* was inapplicable.

7.19 The Council considers that this needs to be addressed, and a recommendation is made in Chapter 8 of this report.

Limitation on consecutive sentences imposed by Local Courts

7.20 Section 58 of the Act provides a limitation on the imposition of consecutive sentences of imprisonment by Local Courts. In general, a Local Court cannot impose a

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27. *McCallum v Parole Board of NSW* [2003] NSWCCA 294.
28. *McCallum v The Commissioner of Corrective Services* (2002) 129 A Crim R 590.
29. As required by s 6(1)(a) or s 14(1)(a) of the *Crimes (Serious Sex Offenders) Act 2006* (NSW).

new consecutive (or partly consecutive) prison sentence if the date on which the new sentence would end is more than five years after the commencement of the existing sentence.[30] This does not apply where: (a) the new sentence involves an escape from lawful custody, or an assault or other offence against the person committed by a detainee against a correctional officer or a juvenile justice officer; and (b) either the existing sentence was imposed by a court other than a Local Court or Children's Court, or the existing sentence was imposed by a Local Court or Children's Court and the date on which the new sentence would end is not more than five and a half years after the commencement of the existing sentence.[31]

Commonwealth offences

7.21 The totality principle is reflected in s 16B of the *Crimes Act 1914* (Cth), which provides:

> **16B Court to have regard to other periods of imprisonment required to be served**
>
> In sentencing a person convicted of a federal offence, a court must have regard to:
>
> (a) any sentence already imposed on the person by the court or another court for any other federal offence or for any State or Territory offence, being a sentence that the person has not served; and
>
> (b) any sentence that the person is liable to serve because of the revocation of a parole order made, or licence granted, under this Part or under a law of a State or Territory.[32]

7.22 A NSW court sentencing an offender for a State offence may direct that the sentence be served cumulatively with a pre-existing sentence for a Commonwealth offence passed by a State court exercising federal jurisdiction.[33] In accumulating NSW and Commonwealth sentences, the court must take into account the effect of the totality principle on both sentences.[34]

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30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 58(1).
31. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 58(3).
32. *Crimes Act 1914* (Cth) s 16B. See *Postiglione v The Queen* (1996) 189 CLR 295, 308 (McHugh J), 321 (Gummow J), 339 (Kirby J).
33. *Derriman v Slattery* [1982] 1 NSWLR 214.
34. *Longley v The Queen* (Unreported, NSW Court of Criminal Appeal, 21 April 1994).

APPLICATION OF THE TOTALITY PRINCIPLE

Permissible approaches

7.23 Two approaches have been identified by which the totality principle can be implemented when sentencing for more than one offence.

7.24 In *Pearce v The Queen*,[35] McHugh, Hayne and Callinan JJ stated that:

> [45] To an offender, the only relevant question may be "how long", and that may suggest that a sentencing judge or appellate court should have regard only to the total effective sentence that is to be or has been imposed on the offender. Such an approach is likely to mask error. A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality.
>
> …
>
> [48] Further, the need to ensure proper sentencing on each count is reinforced when it is recalled that a failure to do so may give rise to artificial claims of disparity between co-offenders or otherwise distort general sentencing practices in relation to particular offences.[36]

7.25 Earlier, in *Mill v The Queen* the High Court, stated that:

> Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred.[37]

7.26 In *Johnson v The Queen*, Gummow, Callinan and Heydon JJ noted that the approach in *Pearce* does not preclude that in *Mill*:

> The joint judgment in *Mill* expresses a preference for what should be regarded as the orthodox, but not necessarily immutable, practice of fixing a sentence for each offence and aggregating them before taking the next step of determining concurrency. *Pearce* does not decree that a sentencing judge may never lower each sentence and then aggregate them for determining the time to be served. To do that, is not to do what the joint judgment in *Pearce* holds to be undesirable, that is, to have regard only to the total effective sentence to be imposed on an offender. The preferable course will usually be the one which both cases commend but neither absolutely commands. Judges of first instance should be allowed as much

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35. *Pearce v The Queen* (1998) 194 CLR 610.
36. *Pearce v The Queen* (1998) 194 CLR 610, [45]–[48] (McHugh, Hayne and Callinan JJ) (citations omitted).
37. *Mill v The Queen* (1988) 166 CLR 59, 63.

flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime under which the sentencing is effected.[38]

Cumulation and concurrency of sentences

7.27 Questions of cumulation and concurrency are not to be considered separately from totality.[39] In *R v MMK*,[40] the NSWCCA stated that:

> … It is the application of the totality principle that will generally determine the extent to which a particular sentence is to be served concurrently or cumulatively with an existing sentence in accordance with statements of the High Court as to the operation of the principle in *Mill v The Queen* (1988) 166 CLR 59; 36 A Crim R 468; *Pearce v The Queen* (1998) 194 CLR 610; 103 A Crim R 372 and *Johnson v The Queen* (2004) 78 ALJR 616.[41]

7.28 It also stated:

> In some cases the fact that a sentence for a particular offence is to be served completely concurrently with another sentence for a different offence will result in a sentence that is erroneously inadequate because it does not reflect the totality of the criminality for which the offender was to be punished for the two acts of offending: see for example *R v Brown* [1999] NSWCCA 323. This may be so even if the two offences arise from the same precise criminal act, such as the dangerous driving of a motor vehicle on the one occasion: *R v Janceski* (2005) 44 MVR 328. The same principle has been applied to sexual assault offences arising from a single incident of sexual assault: *R v Gorman* (2002) 137 A Crim R 326. Although, it has been held that a determination of the extent, if any, that a sentence is to be served cumulatively with another sentence is an exercise of discretion on which minds might differ, *R v Hammoud* (2000) 118 A Crim R 66, that discretion is generally circumscribed by a proper application of the principle of totality.[42]

7.29 In *Cahyadi v The Queen*,[43] Howie J explained:

> …there is no general rule that determines whether sentences ought to be imposed concurrently or consecutively. The issue is determined by the application of the principle of totality of criminality: can the sentence for one offence comprehend and reflect the criminality for the other offence? If it can, the sentences ought to be concurrent otherwise there is a risk that the combined sentences will exceed

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38. *Johnson v The Queen* (2004) 205 ALR 346, [26].
39. *Miletic v The Queen* (2008) 183 A Crim R 72, Hoeben J with whom Mason J and James J agreed disagreed with the decision of *R v Myers* [2002] NSWCCA 162 on this point.
40. *R v MMK* (2006) 164 A Crim R 481.
41. *R v MMK* (2006) 164 A Crim R 481, [11]. See also *R v Merrin*, in which Howie J stated: 'This Court has been at pains to make it clear that sentences for multiple offences are not made concurrent simply because they arise from a single incident of criminality or because they are of a similar nature and committed in similar circumstances. The statement of Simpson J in *R v Hammoud* (2000) 118 A Crim R 66 concerning the discretion of a sentencing judge in respect of the structuring of offences has to be read subject to what is required in a particular case to reflect the totality of the criminality before the Court': *R v Merrin* (2007) 174 A Crim R 100, [36].
42. *R v MMK* (2006) 164 A Crim R 481, [13], quoted with approval in *Thorne v The Queen* [2007] NSWCCA 10, [88] (Howie J, with whom Sully and Hall JJ agreed).
43. *Cahyadi v The Queen* (2007) 168 A Crim R 41.

> that which is warranted to reflect the total criminality of the two offences. If not, the sentences should be at least partly cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality. Of course it is more likely that, where the offences are discrete and independent criminal acts, the sentence for one offence cannot comprehend the criminality of the other. Similarly, where they are part of a single episode of criminality with common factors, it is more likely that the sentence for one of the offences will reflect the criminality of both.[44]

7.30 In imposing cumulative sentences, the court must consider the appropriateness of each individual sentence in the context of the aggregate sentence.[45] Additionally, in applying the totality principle to multiple offences, the sentence for any individual offence should be proportionate to the seriousness of that offence.[46] In *AB v The Queen*,[47] Hayne J said:

> [121] If an offender is sentenced for a number of offences it is necessary to examine both the particular sentences imposed for each offence and the overall effective sentence reached as a result of orders for cumulation or concurrence. It is in both the individual sentences and the overall sentence that the considerations relevant to sentencing must find their reflection.
>
> [122] Considering only the individual sentences or confining attention to the overall effective sentence will distort the inquiry. Subject to the qualification that may be required where an offender pleads guilty to what is often called a representative count, the offender is to be punished for each particular offence that has been proved or admitted and only for those offences. And, subject to the consideration of questions of totality, a just sentence must be imposed for each of those offences. Totality may lead to the moderation of the overall sentence and may require some tailoring of the individual sentence to achieve a proper result. But that is not to deny the importance of imposing a just sentence in respect of each offence.[48]

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44. *Cahyadi v The Queen* (2007) 168 A Crim R 41, [27], cited with approval in *Vaovasa v The Queen* (2007) 174 A Crim R 116, [15].
45. *R v Visconti* [1982] 2 NSWLR 104, 114 (Street CJ, with whom Lee and Maxwell JJ agreed).
46. *AB v The Queen* (1999) 198 CLR 111, [121]–[122]. See also *R v A*, in which the NSWCCA stated that: 'While there is frequently a degree of artificiality injected into the end result when sentences are passed for multiple offences and the principle of totality applied, it is undesirable that the sentence in respect of any individual offence be disproportionate to the seriousness of that offence. It is true that practical justice can be achieved in this way, but this was an occasion on which, if proper assessment of the whole of the circumstances required the applicant to serve a sentence of that length, consideration might have been given to the accumulation of some sentences, rather than the imposition of a sentence in respect to one charge that carried such a high proportion to the maximum available': *R v A* [1999] NSWCCA 61, [32].
47. *AB v The Queen* (1999) 198 CLR 111.
48. *AB v The Queen* (1999) 198 CLR 111, [121]–[122] (citations omitted).

7.31 In imposing an aggregate sentence for multiple offences the court is not bound by the maximum penalty for any one of the offences involved.[49]

7.32 A sentencing court is not required to impose concurrent sentences if the series of offences indicates a long course of conduct.[50]

7.33 A court cannot order that further sentences of imprisonment be accumulated upon a life sentence.[51] However, where the offender is serving a determinate sentence concurrently with a life sentence, the court may impose further sentences of imprisonment to be served cumulatively with the determinate sentence.[52]

Offences committed in the course of a single episode

7.34 The principle of totality applies to offences committed in the course of a single episode of criminal conduct and to a contemporaneous series of offences.[53] Although 'substantially contemporaneous and connected' offences often result in concurrent sentences,[54] there is no rule that such sentences should be imposed.[55] Whether this is appropriate or not will turn upon the extent to which the criminality of one offence can be encompassed in the criminality of the other offence.

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49. *R v Vickers* (Unreported, NSW Court of Criminal Appeal, 17 October 1996) As McInerney J (with whom Abadee and Hulme JJ agreed) stated in *R v Vickers*: There is no sentencing principle that where an offender has committed multiple offences the sentencing Court is bound by the maximum penalty for any one of the offences involved. There was no requirement on the sentencing judge to impose concurrent sentences. The applicant's conduct continued over a period of time, and it was well within his Honour's sentencing discretion to impose cumulative sentences: *Wilkins v The Queen* (1988) 38 A Crim R 445, 450. In *Wilkins v The Queen*, Lee CJ at CL (with whom Carruthers and Allen JJ agreed) held that: 'Where the maximum penalty for any one offence is insufficient to reflect the gravity of the crime committed the court not only may but ought to impose cumulative sentences': *Wilkins v The Queen* (1988) 38 A Crim R 445, 450.
50. See, eg, *R v Bustos* (Unreported, NSW Court of Criminal Appeal, 27 June 1995).
51. *R v Farlow* [1980] 2 NSWLR 166.
52. *R v Denning* (Unreported, NSW Court of Criminal Appeal, 15 May 1992) per Grove J.
53. *Harrison v The Queen* (1990) 48 A Crim R 197; *L Vogel & Son Pty Ltd v Anderson* (1967) 120 CLR 157.
54. *R v Lansdell* (Unreported, NSW Court of Criminal Appeal, 22 May 1995); *R v Weldon* (2002) 136 A Crim R 55, [48].
55. *Nguyen v The Queen* [2007] NSWCCA 14, [12]. See also *Vaovasa v The Queen* (2007) 174 A Crim R 116, [15], and *Cahyadi v The Queen* (2007) 168 A Crim R 41, [27].

7.35 The court is permitted to take into account any differences in the conduct constituting separate offences in an episode of criminality.[56] In *Harrigan v The Queen*,[57] James J said:

> even if the two offences were to be regarded as parts of one continuing criminal episode, the conduct which was to be the subject of punishment on each count was different from the conduct which was to be the subject of punishment on the other count and this difference in the conduct to be punished required at least some separate punishment for each offence and hence at least some cumulation of the sentences, in order that the aggregate sentence should adequately reflect the total criminality of the applicant's conduct.[58]

Overlapping elements of the charges

7.36 Where an offender is to be sentenced for several offences, the totality principle requires that he not be punished twice where there are common elements between those offences.[59] In *Pearce v The Queen*, the offender pleaded guilty to, among other offences, two offences against the same victim that arose out of a single incident: (a) maliciously inflicting grievous bodily harm with intent to do grievous bodily harm;[60] and (b) breaking and entering the dwelling-house and inflicting grievous bodily harm.[61] The Court observed:

> To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.[62]

7.37 In *Johnson v The Queen*, this principle was applied in a case where an offender was convicted and sentenced in relation to two drug importation offences: one

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56. *R v Weldon* (2002) 136 A Crim R 55, [48]; *Pearce v The Queen* (1998) 194 CLR 610; *Harrigan v The Queen* [2005] NSWCCA 449, [44] (James J, with whom Grove and Simpson JJ agreed). See also *R v VAA* [2006] NSWCCA 44, [52] (Buddin J, with whom James and Hall JJ agreed).
57. *Harrigan v The Queen* [2005] NSWCCA 449.
58. *Harrigan v The Queen* [2005] NSWCCA 449, [44] (James J, with whom Grove and Simpson JJ agreed).
59. *Pearce v The Queen* (1998) 194 CLR 610, [40]; *Johnson v The Queen* (2004) 205 ALR 346, [33].
60. *Crimes Act 1900* (NSW) s 33.
61. *Crimes Act 1900* (NSW) s 110.
62. *Pearce v The Queen* (1998) 194 CLR 610, [40] (McHugh, Hayne and Callinan JJ).

concerning cocaine and the other concerning ecstasy that arose out of a single transaction, it being held that there was much in common between the offences.[63]

7.38 The principle against double punishment was applied in *R v Hilton*,[64] in which the offender was convicted of 11 counts of obtaining benefit from child prostitution,[65] and eight counts of having control over premises in which child prostitution took place.[66] He was sentenced to concurrent terms of imprisonment for two years with a non-parole period of 12 months for the second group of offences, and to imprisonment for three years with a non-parole period of 12 months for the second group of offences. The second group of sentences were directed to commence on the expiry of the non-parole period for the first group of offences, and as a result the non-parole periods were completely accumulated. The NSWCCA found that the second group of offences, in point of criminality, were almost entirely subsumed in the first group of offences,[67] and that:

> [13] Even complete concurrency would not have adequately dealt with this problem, since the sentences in each group "were flawed because they doubly punished ... for a single act" namely the collection of money by a person involved in the management and ownership of a brothel that was the proceeds of child prostitution: cf *Pearce v The Queen* at [49]. The mere fact … that the effect of the sentences imposed on the applicant was not disproportionate to the overall criminality of his conduct does overcome this fundamental problem. The situation in this case is to be distinguished from the situation where successive separate offences are committed where problems of overlapping are much less likely to arise. In such cases the problem is to ensure that arithmetical accumulation does not lead to an inappropriately harsh sentence. In the circumstances here the learned sentencing judge overcame this problem by making each offence against each section wholly concurrent. The question is whether making each group of concurrent sentences partially cumulative offended the principle against double punishment.[68]

That question was answered in the affirmative.[69]

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63. *Johnson v The Queen* (2004) 205 ALR 346, [33]–[34].
64. *R v Hilton* (2005) 157 A Crim R 504.
65. *Crimes Act 1900* (NSW) s 91E.
66. *Crimes Act 1900* (NSW) s 91F.
67. *R v Hilton* (2005) 157 A Crim R 504, [8] (Adams J, with whom Bell and Hall JJ agreed).
68. *R v Hilton* (2005) 157 A Crim R 504, [13] (Adams J, with whom Bell and Hall JJ agreed).
69. *R v Hilton* (2005) 157 A Crim R 504, [19].

Where the offender is serving a term of imprisonment for unrelated offences

7.39 As noted earlier, the totality principle also applies where the court is sentencing an offender who is serving a term of imprisonment for another offence.[70] The High Court in *Mill v The Queen* stated that 'the proper approach …was to ask what would be likely to have been the effective head sentence imposed if the applicant had committed all three offences of armed robbery in one jurisdiction and had been sentenced at one time'.[71]

7.40 In *R v Brown*,[72] the NSWCCA noted the inappropriateness of setting a sentence for an unrelated offence that would be entirely subsumed within an existing sentence.[73]

7.41 In *R v MAK; R v MSK*, the NSWCCA held that:

> where a judge is sentencing for offences in a situation where another judge has already sentenced the offender for other offences, the second judge must regard the first sentence as an appropriate exercise of the first judge's discretion and not seek to reduce or increase it by the sentences the second judge imposes. … we note the difficulty that confronts the second judge in trying to determine what the overall sentence would have been had a single judge been sentencing the offender for all offences for which he is, and has been, punished. That is in effect part of what an application of the principle of totality requires.[74]

7.42 However, in some cases the severity of the existing term of imprisonment may leave little or no room for any additional punishment for further offences. In *R v MMK*, the offender was serving a total term of 22 years imprisonment for nine counts of aggravated sexual assault in company, when he was sentenced to 12 months imprisonment for a child sexual assault offence to run wholly concurrently with the earlier sentences. The NSWCCA dismissed the Crown's appeal against sentence and stated that:

> There will be cases … where the criminality of offences committed by an offender is so great and the punishment imposed for those sentences is justifiably so harsh in order to reflect that criminality that there is little, or no, room for a further

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70. *R v Hajjo* (Unreported, NSW Court of Criminal Appeal, 31 August 1992). See also *R v Gordon* (1994) 71 A Crim R 459, 466.
71. *Mill v The Queen* (1988) 166 CLR 59, 66.
72. *R v Brown* [1999] NSWCCA 323.
73. *R v Brown* [1999] NSWCCA 323, [36].
74. *R v MAK; R v MSK* (2006) 167 A Crim R 159, [99]. And see *Choi v The Queen* [2007] NSWCCA 150, [159].

penalty to be imposed upon the offender to achieve an appropriate purpose of punishment in the circumstances of the particular case. [75]

Offences in different jurisdictions

7.43 In *R v Todd*,[76] Street CJ observed that it was relevant to take into account the substantial period of imprisonment the offender had served in another jurisdiction in relation to offences committed that were closely related to offences for which he was to be sentenced in the present jurisdiction, including a consideration of whether to adjust the non-parole period[77] as well as the head sentence.[78]

7.44 The High Court in *Mill v The Queen* observed:

> The long deferment of the trial or punishment of an offender, with the consequent uncertainty as to what will happen to him, raise considerations of fairness to an offender which must be taken into consideration when the second court is determining an appropriate head sentence. The intervention of a State boundary denies to an offender the opportunity of having the series of offences dealt with together by a sentencing court which can avail itself of the flexibility in sentencing provided by concurrent sentences.[79]

7.45 Hunt J, in *Harrison v The Queen*,[80] said:

> The duty of the court in the second State which is sentencing a prisoner in those circumstances is to consider what sentence should be imposed for the local offences additional to that already imposed in the other State as if all the offences had been committed in the one State, bearing in mind the principle of totality. But, because there is no power to backdate any new sentence to a time when the prisoner was in custody serving the sentence earlier imposed in the other State, the new sentence should be reduced in order to reflect properly the totality of the prisoner's criminal behaviour, notwithstanding that the reduced sentence by itself will not reflect adequately the seriousness of the local crime in respect of which it

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75. *R v MMK* (2006) 164 A Crim R 481, [14]. See also *R v WC* [2008] NSWCCA 268, [61].
76. *R v Todd* [1982] 2 NSWLR 517.
77. *R v Todd* [1982] 2 NSWLR 517, 519. See also *Harrison v The Queen* (1990) 48 A Crim R 197, 198–9; *Mathews v The Queen* (1991) 56 A Crim R 23, 26–7.
78. In *Mill v The Queen*, the High Court stated: 'The principle is not confined in its operation to the fixing of a non-parole period. It applies also to the fixing of a head sentence which, when considered in association with the head sentence imposed by the first sentencing court, must be seen to be appropriate in all the circumstances. In the absence of statutory provisions enabling the new sentence to be backdated to a time when the offender was in custody serving the earlier sentence in the other State, it is not correct for the second sentencing court to determine the head sentence by reference to the normal tariff applicable to the offence for which he is then being sentenced, leaving the fixing of a non-parole period alone to reflect the principles laid down in *Todd*: *Mill v The Queen* (1988) 166 CLR 59, 66.
79. *Mill v The Queen* (1988) 166 CLR 59, 66.
80. *Harrison v The Queen* (1990) 48 A Crim R 197.

> is imposed (and notwithstanding that it may indeed appear by itself to be quite unduly lenient when that crime is viewed alone).[81]

7.46 The totality principle applies even when offences committed in different jurisdictions are not closely related in time.[82]

Multiple victims

7.47 Some accumulation of sentences is generally required where there is more than one victim,[83] even if the offences were committed as part of the same event.[84]

Application to fines

7.48 The totality principle also applies to fines but may not have the same impact as in the case for its application to sentences of imprisonment.[85] In *Environment Protection Authority v Barnes*,[86] Kirby J (with whom Mason P and Hoeben J agreed) stated that:

> [49] …the totality principle clearly had application. Her Honour was sentencing for two offences. It was not simply a matter of fixing a fine for each offence. Her Honour was obliged to review the aggregate and consider whether it was just and appropriate, as a reflection of the criminality overall. That may require some moderation of the sentences imposed in respect of each offence.
>
> [50] …Where there are multiple offences, each punishable by a custodial sentence, the totality principle may find expression through the complete or partial accumulation of sentences, or through making all or some of the sentences concurrent (cf *Pearce v The Queen* (1998) 194 CLR 610, per McHugh, Hayne and Callinan JJ at 624 (para 45)). However, there is obviously no room for partial accumulation or concurrence in the case of fines. If the sentencing Judge believed that the totality principle required an adjustment to the fines which may otherwise be appropriate, the amount of each fine had to be altered, applying the sentencing principles suggested in *Johnson v The Queen* (2004) 205 ALR 346.[87]

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81. *Harrison v The Queen* (1990) 48 A Crim R 197, 198. See also *MacDonald v The Queen* (1990) 52 A Crim R 349, 351.
82. *Larsen v The Queen* (1989) 44 A Crim R 121.
83. *Vaovasa v The Queen* (2007) 174 A Crim R 116, [16] (Howie J, with whom McClellan CJ at CL and Harrison JJ agreed); *R v Wilson* [2005] NSWCCA 219, [38] (Simpson J, with whom Barr and Latham JJ agreed); *R v KM* [2004] NSWCCA 65.
84. *R v Wilson* [2005] NSWCCA 219; *R v KM* [2004] NSWCCA 65, [56].
85. *Camilleri's Stock Feeds Pty Ltd v Environment Protection Authority* [1993] NSWLR 683, 704 (Kirby J, with whom Campbell and James JJ agreed); *Environment Protection Authority v Barnes* [2006] NSWCCA 246, [49]–[50].
86. *Environment Protection Authority v Barnes* [2006] NSWCCA 246.
87. *Environment Protection Authority v Barnes* [2006] NSWCCA 246, [49]–[50].

Totality and parity

7.49 The principle of parity requires that there should not be a marked disparity between sentences imposed on co-offenders. If other factors are equal then sentencing error will occur if there is such a degree of disparity as would 'give rise to a justifiable sense of grievance, or in other words as would give the appearance that justice has not been done'.[88] In *Postiglione v The Queen*, two offenders were sentenced in relation to offences committed while in custody. New sentences were imposed which extended the effective periods in custody of each offender by different amounts. The offender whose effective sentence was extended for a longer period brought an appeal on the basis of disparity. Dawson, Gaudron and Gummow JJ confirmed that, in making an assessment, all components of the sentence needed to be taken into account, not just the head sentences, and that it was the total effect of the sentence that was to be considered.

7.50 There is no strict rule, however, that the question of totality should be addressed before the parity principle.[89] Gummow J said in *Postiglione v The Queen*:

> The Crown initially suggested that totality should be addressed before parity but eventually conceded that a rigid formulation was undesirable. That concession was rightly made. If the parity principle is applied last as a strict rule, the result could be a sentence in excess of what is justified taking into account the totality of the accused's criminality. [90]

EXAMPLES OF THE APPLICATION OF THESE PRINCIPLES

7.51 In this section the Council identifies several offences where questions have arisen on appeal concerning the application of the totality principle.

Sexual assault offences

7.52 In *R v Gorman*,[91] the NSWCCA held that the mere fact that several sexual assault offences were committed during the course of a single episode did not necessarily justify wholly concurrent sentences:

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88. *Lowe v The Queen* (1984) 154 CLR 606, [609] – [610] (Gibbs CJ). See also *Postiglione v The Queen* (1997) 189 CLR 295; *Siganto v The Queen* (1998) 194 CLR 656.
89. *Postiglione v The Queen* (1997) 189 CLR 295, 321.
90. *Postiglione v The Queen* (1997) 189 CLR 295, 321.
91. *R v Gorman* (2002) 137 A Crim R 326.

> Relevantly, the offences in the present case were committed in the course of the same episode. … However, each offence contributed to the total criminality involved and care had to be taken to ensure that the overall effective sentence was appropriate having regard to the offences which were committed in the course of that episode.[92]

7.53 In *R v Smith*,[93] the sentencing judge imposed wholly concurrent sentences for six sexual assault offences taking into account three further offences on a Form 1 in relation to one count committed over a period of eight years against the same victim. The NSWCCA held that the sentencing judge erred in imposing wholly concurrent sentences as the offences were a series of discrete incidents.

7.54 In *R v BWS*,[94] the sentencing judge imposed wholly concurrent sentences on an offender who was convicted of three sexual assault offences against his 16-year-old niece. Sully J (with whom other members of the Court agreed) observed that the correct application of the sentencing principle set out in *Pearce* requires that, where an offender commits separate, distinct aggravated sexual assaults, the total effective sentence should be at least partially cumulative.[95]

7.55 In *R v Abboud*,[96] the NSWCCA held that the sentencing judge erred in imposing wholly concurrent sentences for six assault offences committed against the same victim within a two-week period, four of which occurred in the same evening. Rothman J observed that whilst the two offences committed on the same evening could have been likened to a course of conduct it was inappropriate to deal with a series of offences

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92. *R v Gorman* (2002) 137 A Crim R 326, [57] (Sperling J, with whom Carruthers AJ agreed). Bealzey JA agreed with the principle but did not consider that the offences in that case was part of the same episode of criminality: 'In the present case, the three offences had to be considered separately. There was no common element in any of the offences, in the sense that notion is explained in *Pearce*. To characterise the offences, therefore, as his Honour did as "one episode of criminality" misapplied *Pearce* and failed to have regard to the specific circumstances of each individual offence. In my opinion, his Honour's categorisation also led him into error in that he then failed to deal adequately with the totality of the criminality involved. I should add that, although I have expressed my reasoning in different terms, I do not see that it necessarily involves a different approach to that taken by Sperling J, except to eschew the characterisation of these offences as being "part of the same" criminal enterprise or being "one episode of criminality": *R v Gorman* (2002) 137 A Crim R 326, [9].
93. *R v Smith* [2006] NSWCCA 353.
94. *R v BWS* [2007] NSWCCA 59.
95. *R v BWS* [2007] NSWCCA 59, [17]–[18].
96. *R v Abboud* [2005] NSWCCA 251.

spanning two weeks, with separate acts of violence and intention, as if they were one act.[97]

Break, enter and steal offences

7.56 In *R v Harris*,[98] the sentencing judge imposed wholly concurrent sentences for two aggravated break, enter and steal offences, for one of which two Form 1 offences were taken into account. On appeal, the NSWCCA held that error was established in that the offender received no effective punishment for the second and subsequent offences, thereby sending the message that those offenders who chose to live by breaking and entering into homes receive virtual impunity.[99] Similar error was found in *R v Merrin*.[100]

7.57 In *Tazelaar v The Queen*,[101] the offender was sentenced in relation to nine counts of break, enter and steal offences in the same building. The NSWCCA rejected the appellant's argument that the sentences for four of the offences should have been concurrent, on the basis that, although they were committed in the same building at about the same time, they were separate crimes committed in separate medical suites.[102]

Drug supply offences

7.58 In *McKibben v The Queen*,[103] the offender received fully cumulative sentences for a series of drug supply and ongoing drug supply offences all occurring from one involvement with an undercover police officer. The NSWCCA held that the sentencing judge was not in error in fully accumulating the sentence as it reflected the total

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97. *R v Abboud* [2005] NSWCCA 251, [36] (Rothman J, with whom Grove and Howie JJ agreed), quoted with approval in *R v TWP* [2006] NSWCCA 141, [24] (Rothman J, with whom Beazley JA and Simpson J agreed).
98. *R v Harris* (2007) 171 A Crim R 267.
99. *R v Harris* (2007) 171 A Crim R 267, [37]–[42].
100. *R v Merrin* (2007) 174 A Crim R 100, [38], [41].
101. *Tazelaar v The Queen* [2009] NSWCCA 119.
102. *Tazelaar v The Queen* [2009] NSWCCA 119, [19]–[22].
103. *McKibben v The Queen* [2007] NSWCCA 89.

criminality of the offender and was justified on the basis of the seriousness of the offences and the offender's criminal history.[104]

7.59 In *Luu v The Queen*,[105] the offender received sentences that were partially concurrent and partially cumulative for two separate offences of deemed supply of different drugs and two firearm offences. The NSWCCA held that the two deemed supply offences did not form one episode of criminality, since there would have been at least two actual supplies if the drugs had been sold to two (or more) purchasers. The Court also found that the criminality involved in the possession of firearms was not reflected in the sentences for the drug offences because the offender did not need to carry firearms to engage in drug dealing.[106]

Firearm offences

7.60 In *Rickaby v The Queen*,[107] the offender was sentenced, for the offences of firing a firearm in a public place and possession of an unregistered firearm, to partially cumulative terms of imprisonment. The NSWCCA rejected a submission that the sentences should have been concurrent on the basis that the offences did not have common elements or form a single criminal episode, and that the firing offence added to the total criminality of the two offences.[108]

Dangerous driving causing death or injury

7.61 The NSWCCA has held that where a single incident of dangerous driving within this category involves multiple victims, with separate offences in relation to each victim, it is appropriate that the resulting sentences should be partly concurrent and partially cumulative, with the degree of accumulation dependent on the total criminality of the offender in that one incident.[109] This is especially the case for the offence of dangerous driving causing death or injury.

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104. *McKibben v The Queen* [2007] NSWCCA 89, [18]–[19] (Howie J, with whom Simpson and Hislop JJ agreed).
105. *Luu v The Queen* [2008] NSWCCA 285.
106. *Luu v The Queen* [2008] NSWCCA 285, [32]. See also *Miletic v The Queen* (2008) 183 A Crim R 72.
107. *Rickaby v The Queen* [2007] NSWCCA 288.
108. *Rickaby v The Queen* [2007] NSWCCA 288, [20] (Giles JA, with whom Hulme and Hislop JJ agreed).
109. *R v Price* [2004] NSWCCA 186, [48]–[50]; *R v Janceski (No 2)* [2005] NSWCCA 288, [23]. *Wilkins v The Queen* (1988) 38 A Crim R 445, 450; *R v Skrill* [2002] NSWCCA 484, [71] (Carruthers AJ, with

7.62 In *R v Janceski*, the NSWCCA held that:

> separate sentences should usually be fixed which are made partly concurrent and partly cumulative, each such sentence being appropriate to the existence of only one victim and the aggregate of the sentences reflecting the fact that there are multiple victims resulting from the same action by the offender. The extent to which there should be an overlap in the partial accumulation will depend on what is required to represent the totality of the criminality involved in the one act of the offender. This, it seems to me, follows naturally from *Pearce* at [45]–[48]—and cases such as *R v Weldon* (2002) 136 A Crim R 55; [2002] NSWCCA 475 at [46]–[53] and *R v Price* [2004] NSWCCA 186 at [38]—when applying the general principles relating to the aggregation of sentences to this particular sub-category.[110]

Assault/wounding offences

7.63 In *R v Dunn*,[111] the NSWCCA held that the fact that the offender injured two victims during a single break-and-enter episode did not justify wholly concurrent sentences. The Court observed that the assaults were two attacks with distinct and separate instances of considerable violence requiring distinct punishment.[112]

7.64 In *R v Wilson*,[113] the NSWCCA also held that the sentencing judge had rightly imposed partially cumulative sentences for four assault and wounding offences against three victims during the same course of events. Simpson J said 'To fail to accumulate, at least partially, may well be seen as a failure to acknowledge the harm done to those individual victims'.[114]

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whom Hulme J agreed; Heydon JA dissented); *R v Plumb* [2003] NSWCCA 359, [13]–[21] (Wood CJ at CL, with whom Smart AJ agreed); *R v Price* [2004] NSWCCA 186, [38] (Hulme J); *R v Janceski (No 2)* [2005] NSWCCA 288, [23]. See also *Richards v The Queen* [2006] NSWCCA 262, [78] (McColl JA, with whom Adams and Latham JJ agreed): 'It was also … an error on the sentencing judge's part to impose concurrent sentences in relation to the three s 52A(3)(c) offences. His Honour's failure to accumulate those sentences, at least partially, appears to have been a failure to acknowledge the harm done to the individual victims'.

110. *R v Janceski (No 2)* [2005] NSWCCA 288, [23].

111. *R v Dunn* (2004) 144 A Crim R 180, [50].

112. *R v Dunn* (2004) 144 A Crim R 180, [50] (Adams J, with whom Ipp JA and Sully J agreed).

113. *R v Wilson* [2005] NSWCCA 219.

114. *R v Wilson* [2005] NSWCCA 219, [38] (Simpson J, with whom Latham J agreed; Barr J agreed with Simpson J on the issue of accumulation of sentences but dissented on a different point).

B. THE USE OF FORM 1 TO DEAL WITH ADDITIONAL OFFENCES

STATUTORY BASIS

7.65 Pursuant to the *Crimes (Sentencing Procedure) Act* provision exists for a sentencing court, when imposing sentence for an offence to which an offender has pleaded guilty, or has been convicted, to take into account in relation to that offence, further offences of which the offender has not been convicted.[115] In order for this to occur it is necessary for the prosecution to file in court a document (Form 1) listing these other offences, being offences for which the offender has admitted his guilt and indicated are offences that he wants the court to take into account when dealing with the principal offence.[116] It is also necessary for the court to consider that it is appropriate to take the other offence or offences into account.[117]

7.66 Where a further offence is taken into account, the penalty imposed for the principal offence may be increased to reflect that fact, (or the nature of the sentence may be altered), but the penalty then imposed must not exceed the maximum penalty available for the principal offence.[118]

7.67 While the court cannot impose a separate penalty for the further offence or offences on the Form 1, it can make such ancillary orders (eg for restitution, compensation, forfeiture etc) as it could have made had it convicted the offender of the further offence or offences.[119]

7.68 An offence cannot be included on a Form 1 if it is 'of a kind for which the court has no jurisdiction to impose a penalty',[120] for example where it was committed in another jurisdiction.[121] The NSW Supreme Court, the Court of Criminal Appeal and the District Court may however take into account summary offences.[122] Indictable offences

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115. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(2).
116. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 32(1).
117. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 32(2)(b).
118. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(3).
119. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 34(1).
120. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(4)(a).
121. *R v Warn* [1994] 4 All ER 327.
122. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(6).

that are punishable by imprisonment for life cannot be taken into account on a Form 1.[123]

7.69 It is necessary where there are multiple counts on the indictment that a specific count be selected as the count in respect of which offences on the Form 1 are taken into account. In cases including a large number of counts or counts of a different kind, it may be appropriate for a separate Form 1 to be prepared and taken into account for individual counts, but what is important is that each Form 1 be related to a particular count.

7.70 Once the further offences are taken into account on a Form 1, no proceedings may be taken or continued in respect of those offences unless the principal offence is quashed or set aside.[124] However in subsequent criminal proceedings reference may lawfully be made to the fact that an offence or offences were taken into account on a Form 1 in relation to a sentence for a particular offence included in the offender's antecedents.[125]

GUIDELINE JUDGMENT

7.71 In *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* ('the Guideline Judgment'),[126] NSWCCA provided a guideline judgment with respect to the proper administration of Div 3 of Pt 3 of the Act. The CCA noted the two reasons for the Form 1 procedure:

> [63] First, the opportunity for an offender to emerge from the sentence for the primary offence with a clean slate promotes the objective of rehabilitation. …
>
> [64] Secondly, there is a utilitarian value in the admission of guilt which may save resources for law enforcement agencies, particularly where investigations are continuing. …[127]

7.72 In the Guideline Judgment the NSWCCA confirmed the 'bottom up' approach to sentencing where Form 1 offences are taken into account. This entails imposing a

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123. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(4)(b); *R v Issa* [2002] NSWCCA 206.
124. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35(1)(b)
125. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35(5)
126. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146.
127. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [62]–[66] (Spigelman CJ, with whom Wood CJ at CL, Grove, Sully, and James JJ agreed).

sentence for the principal offence, taking into account the Form 1 matters, with no requirement to determine appropriate sentences for the additional offences on the Form 1, or to determine an overall sentence that would be appropriate for all the offences followed by the application of a discount for the use of the procedure.[128] The process does however normally involve increasing the penalty, or imposing a different sentence, for the principal offence than that which would otherwise have been imposed if that offence stood alone, sometimes to a substantial extent.[129]

7.73 The NSWCCA observed that in this process the Court gives greater weight to the need for 'personal deterrence in light of the course of conduct for which the offender is before the court, and to the community's entitlement to extract retribution for serious offences for which no punishment has been imposed.[130]

7.74 Spigelman CJ (with whom the remainder of the Court agreed) observed:

> The manner and degree to which the Form 1 offences can impinge upon elements relevant to sentencing for the principal offence will depend on a range of other factors pertinent to those elements and the weight to be given to them in the overall sentencing task. For that reason it will rarely be appropriate for a sentencing judge to attempt to quantify the effect on the sentence of taking into account Form 1 offences. [131]

7.75 The NSWCCA noted that while there are no statutory criteria for selecting offences to be placed on a Form 1, s 33(2)(b) of the Act gives the court an overriding discretion to refuse to accede to the wishes of the prosecution and defence, to take into account offences on the Form 1.[132] The Court noted the width of this discretion, as well as the existence of a number of authorities containing expressions of opinion about

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128. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [39]

129. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [18].

130. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [42].

131. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [44].

132. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [47] (Spigelman CJ, with whom Wood CJ at CL, Grove, Sully, and James JJ agreed).

when the Form 1 procedure is not appropriate or which suggest circumstances in which the discretion to employ it should not be exercised.[133]

7.76 Spigelman CJ observed:

> As long as the most serious offences or, in the case of similar offences, an appropriate range of offences, are included on the indictment, there is no objection to the inclusion of some offences on a Form 1. It would normally be inappropriate to include more serious offences on a Form 1, where the maximum sentence available for the offence on an indictment would be insufficient to allow for the total criminality revealed by the whole course of the offender's conduct to be appropriately reflected in the sentence.[134]

7.77 Reference was made to several judgments which discouraged the taking into account, on a Form 1, offences of a kind which are not of a similar kind or gravity to the principal offence;[135] and to the need for a balance to be struck between the number and gravity of the charges on an indictment and on the Form 1, so as to ensure that the sentencing exercise reflects the total criminality of the whole course of the offender's criminal conduct as revealed by the indictments and the Form 1.[136]

7.78 While posing for consideration the provision of guidance explicitly directed to elaborating the suitability of offences for inclusion on a Form 1,[137] the Court did not embark upon any such exercise in the judgment beyond observing that:

- any such consideration would need to have in mind the court's discretion to take into account Form 1 offences, notwithstanding any agreement between the prosecution and defence to that course;[138]
- there will be cases where the administration of justice could be brought into disrepute by the court proceeding to sentence an offender on a manifestly inadequate, unduly narrow or artificial basis;[139]

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133. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [48].
134. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [50].
135. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [51]–[56].
136. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [57].
137. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [61].
138. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [61].

- the Court's role in the exercise of its discretion to refuse to take an additional offence into account must be constrained to ensure that its independence in an adversarial system is protected.[140]

SOME SUBSEQUENT DECISIONS

7.79 In *R v BB*,[141] the NSWCCA confirmed that the offence or offences on the Form 1 are not to be taken into account as 'aggravating' the objective criminality of the principal offence. It stands on its own facts, and the relevance of the Form 1 offence in setting a sentence, in relation to it, is confined to considering whether there should be an increase in the sentence for the principal offence by reference to the analysis in the Guideline Judgment.[142]

7.80 In *R v Lemene*,[143] Simpson J found that it was 'questionable' to attach to a single count of armed robbery a further 29 offences of the same or similar kind, by way of the Form 1 procedure:

> [4] In my view the procedure adopted in this case was questionable. It is difficult to imagine how an "appropriate" sentence can be fixed in relation to a single count of armed robbery, which has attached to it a further 29 offences of the same or similar kind.
>
> …
>
> [7] The procedure so afforded is not a procedure whereby an offender can admit to the commission of offences, and wipe the slate clean without incurring any additional penalty. Nor is it a procedure which necessarily results in only a small penalty additional to that which would otherwise have been imposed in relation to the principal offence: *Morgan* at 372. In saying this, I recognise that an offender who adopts the procedure is entitled to expect that the additional penalty will be significantly less than would have been imposed had separate charges been prosecuted. If that were not so, the section would provide no incentive for the use of the procedure, which is administratively convenient both to the prosecution and to the courts. For it to be attractive to an offender, it must afford some benefit to him or her also.[144]

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139. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [67].
140. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [67].
141. *R v BB* [2005] NSWCCA 215. See also *R v Dowd* [2005] NSWCCA 113, [45].
142. *R v BB* [2005] NSWCCA 215, [16]–[25].
143. *R v Lemene* (2001) 118 A Crim R 131.
144. *R v Lemene* (2001) 118 A Crim R 131, [4], [7].

As was also pointed out in this case, it is the Crown that bears the onus of ensuring that the Form 1 procedure is not misused.[145]

7.81 Howie J (with whom Sully J agreed) observed that care should be taken by the prosecution in having serious traffic matters taken into account on a Form 1, particularly where the offender has a poor driving record, as the absence of any conviction for these matters will preclude the offender from being declared an habitual traffic offender under the *Road Transport (General) Act 2005* (NSW).[146]

7.82 In *SGJ v The Queen*,[147] the NSWCCA observed that where there are multiple victims, a separate Form 1 should be filed for each victim. Kirby J said:

> [26] Of course, it is permissible to have unrelated offences on a Form 1 … But where the offence to which the Form 1 attaches (Count 4, second indictment) related to Victim C, it was illogical to include crimes relating to Victim A. It made it difficult for the sentencing Judge, without double counting, to give such offences any real weight when sentencing on the count relevant to the Form 1 (Count 4).
>
> [27] Related conduct amounting to a crime may be dealt with either by separate charges or on a Form 1. Where there are separate charges, and they form part of the same episode, the sentencing Judge will determine issues of accumulation and concurrence in the context of the principle of totality …
>
> …
>
> [29] Here, if the prosecution wished to limit the charges against [the offender], and place some on a Form 1, there ought to have been a separate Form 1 for each victim, drawing together lesser offences relevant to that victim. The Form 1 relating to the most serious offence, Count 4 in the second indictment, could then have collected the miscellaneous additional offences (such as [the offender's] drug offences and the offences against the unidentified victims) which did not concern complainants who were the subject of specific counts.[148]

7.83 Where serious Form 1 offences are taken into account, the sentence must not only note those offences but must reflect the totality of the criminality involved.[149] For example in *R v Harris*,[150] the sentencing judge imposed the same sentence for two aggravated break, enter and steal offences, even though one of those offences had two

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145. *R v Lemene* (2001) 118 A Crim R 131, [5].
146. *R v Felton* (2002) 135 A Crim R 328, [42] (Howie J, with whom Sully J agreed); *Road Transport (General) Act 2005* (NSW) s 199 (formerly s 28).
147. *SGJ v The Queen* [2008] NSWCCA 258.
148. *SGJ v The Queen* [2008] NSWCCA 258, [26]–[27], [29] (Kirby J, with whom Hodgson JA and Hislop J agreed).
149. *R v Morgan* (1993) 70 A Crim R 368, 371–2 (Hunt CJ at CL, with whom Allen J generally agreed and Lovejoy AJ agreed).
150. *R v Harris* (2007) 171 A Crim R 267.

Form 1 offences taken into account. On appeal, the NSWCCA held that the sentencing judge erred in imposing identical sentences in those circumstances.

ADDITIONAL PENALTIES TO BE IMPOSED

7.84 Where Form 1 offences are taken into account, the only restriction on the additional penalty to be imposed is that the sentence for the principal offence must not exceed the 'maximum penalty' for that offence.[151]

7.85 Taking into account Form 1 offences should result in a lengthier sentence than dealing with the principal offence alone. In *R v Barton*,[152] as Spigelman CJ explained:

> [64] although a court is sentencing for a particular offence, it takes into account the matters for which guilt has been admitted, with a view to increasing the penalty that would otherwise be appropriate for the particular offence. The court does so by giving greater weight to two elements which are always material in the sentencing process. The first is the need for personal deterrence, which the commission of the other offences will frequently indicate, ought to be given greater weight by reason of the course of conduct in which the accused has engaged. The second is the community's entitlement to extract retribution for serious offences when there are offences for which no punishment has in fact been imposed. These elements are entitled to greater weight than they may otherwise be given when sentencing for the primary offence.[153]

7.86 An offender is however entitled to expect that the penalty, as a result of the Form 1 offences being added, will be significantly less than would have been imposed had separate charges been prosecuted.[154]

7.87 In *R v Grube*,[155] the NSWCCA rejected the offender's argument that where matters are taken into account on a Form 1, the penalty for the principal offence is limited by the appropriate range for that offence. Hall J, (with whom Grove J and Howie JJ agreed) observed:

> Whilst the *focus* must be on sentencing for the primary or principal offence which in turn will require attention to be given to a number of factors, including the objective seriousness of the offence, that particular *focus* does not necessarily act as a limiting or constraining factor or device to prevent the imposition of a penalty that is above what might be considered to be *the appropriate range* for

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151. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(3); *R v Harris* (2001) 125 A Crim R 27, [31] .
152. *R v Barton* (2001) 121 A Crim R 185.
153. *R v Barton* (2001) 121 A Crim R 185, [64].
154. *R v Lemene* (2001) 118 A Crim R 131, [7], cited with approval in *R v AEM Snr* [2002] NSWCCA 58, [82]. See also *R v Kay* (2002) 132 A Crim R 72, [53]–[55]; *R v Harris* (2001) 125 A Crim R 27.
155. *R v Grube* [2005] NSWCCA 140.

> the principal offence. Thus in the hypothetical example posed by Howie, J. in argument, taking into account matters on a Form 1 may well put the appropriate penalty above the range of 3 to 5 years that would otherwise apply to the principal offence. An appeal to notions of proportionality or relativity is then neither supported by the terms of Division 3 of Part 3 nor by the principles as stated by the Chief Justice in the guideline judgment.[156]

QUANTIFICATION OF PENALTIES FOR FORM 1 OFFENCES

7.88 A sentencing judge should rarely try to quantify the effect on the sentence, of taking into account Form 1 offences.[157] However, the High Court observed in *Markarian v The Queen*[158] that, on occasions it would not be inappropriate for the sentencing court to make clear the extent to which the penalty for the principal offence has been increased on account of the Form 1 offences.[159] This does not amount to imposing a separate penalty for those other offences in contravention of s 34(1) of the Act.

7.89 An example of when such quantification may be appropriate is where the court needs to have regard to sentences already imposed on co-offenders involved in the same criminal enterprise so as to demonstrate compliance with parity principles. In *R v Mangano*,[160] Basten JA (with whom Howie and Hall JJ agreed) stated that:

> That is in part because it is important for the Court to give consideration to sentences already imposed on other participants in the same criminal enterprises and because, in this Court, it is necessary to explain why the Court is differing from the conclusions reached by the sentencing judge.[161]

PROSECUTION GUIDELINES

7.90 In light of several decisions of the Court, the New South Wales Director of Public Prosecutions has issued guidelines on the use of Form 1.[162] Guideline 20 makes provisions as follows:

- The decision to place offences on a Form 1 should be based on principle and reasons not on administrative convenience or expedience alone.

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156. *R v Grube* [2005] NSWCCA 140, [32] (emphasis in original).
157. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146, [44] (Spigelman CJ, with whom Wood CJ at CL, Grove, Sully, and James JJ agreed). See also *R v Kay* (2002) 132 A Crim R 73, [69].
158. *Markarian v The Queen* (2005) 228 CLR 357.
159. *Markarian v The Queen* (2005) 228 CLR 357, [43] (Gleeson CJ, Gummow, Hayne and Callinan JJ).
160. *R v Mangano* (2006) 160 A Crim R 480.
161. *R v Mangano* (2006) 160 A Crim R 480, [36].
162. NSW Director of Public Prosecutions, 'Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales' (2007) Guideline 20.

- The counts on indictment should reflect matters such as the individual victims, the range of dates during which the offences occurred, the value of property involved and any aggravating factors.

- A balance is to be struck between the number of counts on the indictment and on the Form 1.

- Preparatory or lesser offences can be placed on a Form 1 in cases where several offences were committed in a single episode of criminality.

- Generally, the maximum penalty for Form 1 offences should be less than the maximum penalty for the principal offence.[163]

- Aggravated forms of an offence should not be included on a Form 1 if the principal offence is a non aggravated offence of the same general type.

- Generally, certain offences should not be included on a Form 1 because they should be recorded as convictions—for example, failure to appear, firearms offences (although some may be included on a Form 1 where multiple firearms offences are charged), serious offences against police officers, breaches of apprehended domestic violence orders, offences committed while on bail or on probation or parole, offences in relation to the administration of justice, or traffic offences committed by an offender with a poor traffic record.

- The views of the police officer-in-charge and of the victim must be sought and recorded before placing any offences on a Form 1.

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163. NSW Director of Public Prosecutions, 'Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales' (2007) Guideline 20.

CHAPTER 8: ADVICE OF THE COUNCIL

8.1 In this chapter the Council gives consideration to the submissions received in relation to this reference, in the light of the foregoing analysis of sentencing law and practice.

DISCOUNT FOR PLEA OF GUILTY

8.2 The Council observes that there is strong support for the awarding of discounts on sentence for pleas of guilty, for the reasons earlier noted,[1] and as confirmed by prior inquiries and the submissions received in response to this reference.[2]

8.3 While some commentators have raised philosophical objections[3] to the provision of a discount in return for pleas of guilty, on the basis that it can improperly coerce the accused to plead guilty (particularly in cases within the standard non-parole period regime), regardless of actual guilt; or that it places a premium on administrative convenience at the expense of just punishment; or that it punishes those who exercise their right to a trial; or that it can lead to disparity between co-offenders; or that it

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1. See [2.4] above.

2. See, eg, Standing Committee of Attorneys-General, *Working Group on Criminal Trial Procedure Report* (1999), 36–7, Recommendation 21; Standing Committee of Attorneys-General, *Deliberative Forum on Criminal Trial Reform* (2000) Recommendation 51; New South Wales Law Reform Commission, *Criminal Procedure: Procedure from Charge to Trial: Specific Problems and Proposals*, Discussion Paper No 14 (1987) vol 2, 497; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) [11.38]. A majority of the members of the Australian Law Reform Commission came to the same view in its previous report on sentencing: Australian Law Reform Commission, *Sentencing*, Report No 44 (1988) [173]–[174]; Submission 1: Criminal Law Committee, NSW Young Lawyers, 2–3; Submission 8: Illawarra Legal Centre Inc, 2; Submission 9: Office of the Director of Public Prosecutions New South Wales, 2.

3. Kathy Mack and Sharyn Roach Anleu, 'Choice, Consent and Autonomy in a Guilty Plea System' in Andrew Goldsmith and Mark Israel (eds) *Criminal Justice in Diverse Communities* (2000) 75; Kathy Mack and Sharyn Roach Anleu, 'Criminal Justice Reform' (Paper presented at the Australasian Institute of Judicial Administration Conference on Reform of Court Rules and Procedures in Criminal Cases, Brisbane, 3–4 July 1998); Kathy Mack and Sharyn Roach Anleu, 'Reform of Pre-trial Criminal Procedure: Guilty Pleas (1998) 22(5) *Criminal Law Journal* 263; Kathy Mack and Sharyn Roach Anleu, 'Guilty Pleas: Discussion and Agreement' (1996) 6(1) *Journal of Judicial Administration* 8; Geraldine Mackenzie, 'The Guilty Plea Discount: Does Pragmatism Win Over Proportionality and Principle?' (2007) 22 *Southern Cross University Law Review* 205; John Willis, 'The Sentencing Discounts for Guilty Pleas: Are We Paying Too Much for Efficiency?' (1985) 18(3) *Australian and New Zealand Journal of Criminology* 131; David Field 'Plead Guilty Early and Convincingly to Avoid Disappointment' (2002) 14 *Bond Law Review* 251.

overlooks other root causes for delay in the criminal justice system; the Council is not satisfied that any of these objections, whether considered individually or in combination, provide cause for any re-appraisal in principle of the system.

8.4 Such problems as do occur in practice appear to relate to the misapplication of the sentencing principles as articulated in the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('the Act') and case law, most particularly in quantifying the level of discount for a plea by reference to a value judgment as to whether it is a late plea, and as to its utilitarian worth, or when allowing the offender the benefit of multiple discounting factors.

8.5 Some options were identified in the submissions, or otherwise, that might assist in reducing the incidence of appellable error associated with the application of the discounting factor.

Encouraging the offer of an early plea

8.6 Of critical importance for the criminal case conferencing trial, and for the quantification of discounts for pleas of guilty in cases dealt with outside the trial, is the timing of the offer of a plea. In some cases the capacity of an accused to offer an early plea may be out of his or her hands, for example where the indictment is overloaded, or where the prosecution delays the delivery of a comprehensive brief, or where the accused is not provided at an appropriately early time with sufficiently experienced defence representation, or where the accused offers a plea to an alternative charge or charges which is not accepted by the prosecution until the approach of the trial date.

8.7 These are matters into which the Court, and the Act, can have little input and are best addressed at a practical level, as has been suggested by a number of commentators[4] who have advocated, for example:

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4. It should be noted that measures of this kind are generally supported by recommendations in Standing Committee of Attorneys-General, *Deliberative Forum on Criminal Trial Reform* (2000); and see Standing Committee of Attorneys-General, *Working Group on Criminal Trial Procedure Report* (1999) Recommendations 9–10, 12–17; Kathy Mack and Sharyn Roach Anleu, 'Criminal Justice Reform' (Paper presented at the Australasian Institute of Judicial Administration Conference on Reform of Court Rules and Procedures in Criminal Cases, Brisbane, 3–4 July 1998); Kathy Mack and Sharyn Roach Anleu, 'Guilty Pleas: Discussion and Agreement' (1996) 6(1) *Journal of Judicial Administration* 8; Kathy Mack and Sharyn Roach Anleu, 'Reform of Pre-trial Criminal Procedure: Guilty Pleas' (1998) 22(5) *Criminal Law Journal* 263; Don Weatherburn and

- requiring the early involvement of experienced Crown prosecutors and defence counsel to allow for adequate case preparation by counsel on both sides;
- ensuring that prosecutors lay more accurate charges, instead of including every major and minor offence;
- requiring full disclosure of the Crown's case well before the committal;
- guaranteeing legal aid for eligible persons before and at committal to ensure that they receive early legal advice;
- ensuring continuous legal representation from committal to trial, by:
    - assigning more experienced counsel to deal with charge negotiations and less experienced counsel to trials;
    - creating regular solicitor/counsel teams within the prosecutor's office to ensure that solicitors are more aware of the predicted trial outcomes and of the trial counsel's opinion;
- encouraging active negotiations for the resolution of a matter before committal;
- convening an early pre-trial conference supervised by a judge—preferably the trial judge.

8.8 The Council acknowledges the validity of these suggestions. It encourages their adoption in practice but does not see any basis for legislative intervention, pending evaluation of the criminal case conferencing trial.

8.9 It does however see merit in adding to the matters which are to be taken into account in s 22(1) of the Act, an additional factor (c) 'the circumstances in which the offender indicated an intention to plead guilty'. This would allow consideration to be given to whether the plea resulted from a charge negotiation, or from a decision by the

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Joanne Baker, 'Delay in Trial Case Processing: An Empirical Analysis of Delay in the NSW District Criminal Court' (2000) 10(1) *Journal of Judicial Administration* 5.

prosecution post-committal to proceed on a lesser charge, and to any other factor which may have affected the timeliness of the offender's offer or willingness to plead guilty.[5]

8.10 Although the NSW Young Lawyers Criminal Law Committee proposed an amendment that would specifically provide for the case where an offender is convicted at trial of a less serious offence after an offer to plead guilty to that offence is rejected by the prosecution,[6] the Council considers that existing case law adequately caters for this position,[7] that is provided the defence makes clear the basis on which the offer is made.

Recommendation 1

The Council recommends that consideration be given to amending s 22(1) of the *Crimes (Sentencing Procedure) Act* (NSW) so as to include the circumstances in which the offender indicated an intention to plead guilty as a further matter to be taken into account when sentencing an offender who has pleaded guilty.

Legislative prescription of the quantum of the discount

8.11 The Office of the Director of Public Prosecutions New South Wales (ODPP) submitted that,[8] in the interests of transparency, certainty and consistency, the Act should expressly provide for a set discount of 25 per cent for a guilty plea made at the Local Court before committal, on the basis that this would:

- alter charge negotiation practices by shifting the onus from the Crown to the defence to ensure that the accused is appropriately advised of the importance of the timing of the plea; and
- provide certainty as to what is involved in the concept of the 'first reasonable opportunity'.

8.12 The ODPP also submitted that the Act should mandate that judges quantify the discount given for the utilitarian value of the plea alone in order to avoid the risk of

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5. Provision is made in the *Crimes (Sentencing) Act 2005* (ACT) s 35(2)(c), and in the Guideline published in relation to the *Criminal Justice Act 2003* (UK) s 144(1)(b) to factors of this kind.
6. Submission 1: Criminal Law Committee, NSW Young Lawyers, 3.
7. See [2.33]–[2.35] above.
8. Submission 9: Office of the Director of Public Prosecutions New South Wales, 3–4.

double counting that can arise where the plea is treated additionally as an indicator of remorse or contrition.[9]

8.13 There is support for the practice of encouraging the specification of the quantum of the discount for a plea of guilty,[10] but less support for its legislative prescription, on the basis that it might:

- fetter judicial discretion, and result in injustices by preventing any consideration of the factors that may have prevented the accused from entering an early plea (such as erroneous legal advice) or the late delivery of a brief;
- undermine the notion of individualised justice, in particular, by providing the same discount for complex cases as for straight forward cases; and
- disadvantage offenders with a mental illness or intellectual disability, or those who are illiterate or whose first language is not English.[11]

8.14 The Revised Guideline published by the Sentencing Guidelines Council (UK) has adopted a sliding scale ranging from

> a recommended one third (where the guilty plea was entered at the first reasonable opportunity in relation to the offence for which sentence is being imposed), reducing to a recommended one quarter (where a trial date has been set) and to a recommended one tenth (for a guilty plea entered at the 'door of the court' or after the trial has begun).[12]

8.15 On the other hand, the Victorian Sentencing Advisory Council opposed the prescription of a specific reduction in sentence for a guilty plea, mainly because it may coerce an accused to plead guilty, and may result in disproportionate and excessively lenient sentences.[13] The Sentencing Advisory Council noted that prescribing the value to be given to the guilty plea as a mitigating factor is problematic in circumstances where

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9. Submission 9: Office of the Director of Public Prosecutions New South Wales, 4.
10. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) [11.42].
11. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) [11.40]; Dennis Miralis, 'Tougher Sentences for NSW Offenders Pleading Guilty' (2008) 46(7) *Law Society Journal* 69, 70–1; Standing Committee of Attorneys-General, *Working Group on Criminal Trial Procedure Report* (1999) 36–7.
12. United Kingdom Sentencing Guidelines Council, 'Reduction in Sentence for a Guilty Plea: Definitive Guideline' (2007) [4.2] (emphasis in original).
13. Sentencing Advisory Council (Victoria), 'Sentence Indication and Specified Sentence Discounts: Final Report' (2007) viii.

the court would retain a discretion with respect to other mitigating factors.[14] It concluded that it was preferable for the determination as to whether there would be a reduction in sentence for the guilty plea, and if so, its application, to remain within the courts' discretion and decided on a case-by-case basis.[15] However, in the interest of transparency, it did recommend that Victorian courts be required to state the effect, if any, of a guilty plea on sentence:

> The *Sentencing Act 1991* (Vic) should be amended to require the court, in passing sentence on an offender who has pleaded guilty, to state whether the sentence has been reduced for that reason, and if so, the sentence that would have been imposed but for the guilty plea.[16]

8.16 The Council does not consider legislative prescription is necessary at this time, pending evaluation of the criminal case conferencing trial, although if it were to be introduced as a general measure, it would seem appropriate to provide for a graduated scale of discounts by reference to the critical stages of arrest to committal, committal to arraignment, arraignment to listing for trial, and trial commencement, that is for cases dealt with in the District Court and Supreme Court.

8.17 It does see some merit in an amendment of s 22 of the Act to require the discount for the plea to be extended solely for its utilitarian value, and to be expressly quantified by the Court. This might help to reduce the incidence of appellate error in the application of the sentencing principles summarised earlier in this Report, and encourage transparency both for the offender and for appellate review.[17]

8.18 The Council notes that the Guideline published by the Sentencing Guidelines Council (UK) requires the issue of remorse and any other mitigating factors to be addressed *separately and before* calculating the reduction for the guilty plea.[18] Similarly

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14 Sentencing Advisory Council (Victoria), 'Sentence Indication and Specified Sentence Discounts: Final Report' (2007) viii.

15. Sentencing Advisory Council (Victoria), 'Sentence Indication and Specified Sentence Discounts: Final Report: Summary and Recommendations' (2007) 3.

16. Sentencing Advisory Council (Victoria), 'Sentence Indication and Specified Sentence Discounts: Final Report' (2007) Recommendation 1.

17. The Hon Justice R.Howie, 'Sentencing Discounts—Are They Worth the Effort?' (Paper presented at the Sentencing 2008 Conference, Canberra, 10 February 2008) [16], referring to *R v Knight; R v Biuvanua* (2007) 176 A Crim R 338 and *R v Kilpatrick* (2005) 156 A Crim R 478. Justice Howie's views were endorsed in Submission 2: The Hon Justice Peter McClellan, Chief Judge at Common Law, Supreme Court of New South Wales, 1.

18. United Kingdom Sentencing Guidelines Council, 'Reduction in Sentence for a Guilty Plea: Definitive Guideline' (2007) [2.4].

it requires the implications of other offences that are taken into account to be reflected in the sentence *before* the reduction for the plea has been applied.[19]

8.19 The Council agrees that this approach is appropriate, so long as sentencers understand that remorse, cooperation with the authorities, and the other subjective considerations are separate factors that do not gain extra weight from the fact of the plea, and that double counting is to be avoided.

Prescribing the factors of relevance for quantification of the discount

8.20 In its 2006 report on the sentencing of federal offenders, the Australian Law Reform Commission (ALRC) made the following recommendation:

> Federal sentencing legislation should provide that in determining whether to discount the sentence of a federal offender for pleading guilty, and the extent of any discount, the court must consider the following matters:
>
> (a) the degree to which the plea of guilty facilitates the administration of the federal criminal justice system; and
>
> (b) the objective circumstances in which the plea of guilty was made, including whether the offender pleaded guilty at the first reasonable opportunity to do so, and whether the offender had legal representation.[20]

8.21 This was seen to be a way of enhancing a consistent and clear approach to determining an appropriate discount, although factor (a) needs to be understood in the light of the difference between the manner in which a plea of guilty is to have relevance in relation to federal offenders in accordance with the decision in *Cameron v The Queen*[21] and state offenders sentenced in accordance with the NSW Act.

8.22 While most of the Australian jurisdictions identify the timing of the plea as a relevant factor in determining the discount,[22] the ACT legislation alone identifies several additional factors which must be taken into account, including whether the

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19. United Kingdom Sentencing Guidelines Council, 'Reduction in Sentence for a Guilty Plea: Definitive Guideline' (2007) [2.5].

20. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) Recommendation 11–2.

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

22. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1)(b); *Sentencing Act 1991* (Vic) s 5(2)(e); *Penalties and Sentences Act 1992* (Qld) s 13(2); *Sentencing Act 1995* (WA) s 8(2); *Crimes (Sentencing) Act 2005* (ACT) s 35(2)(b); *Sentencing Act* (NT) s 5(2)(j)—as discussed in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) [11.45].

guilty plea was related to charge negotiations, the gravity of the offence, and the impact of the offence on victims and their families.[23]

8.23 It specifically requires that any lesser sentence must not be 'unreasonably disproportionate to the nature and circumstances of the offence'.[24] It also provides that in deciding to impose a lesser penalty, the 'court must not make any significant reduction for the fact that the offender pleaded guilty if, based on established facts, the court considers that the prosecution's case for the offence was overwhelmingly strong'.[25]

8.24 The Council notes that the Guideline published by the Sentencing Guidelines Council (UK) provides:

> 5.3 Where the prosecution case is overwhelming, it may not be appropriate to give the full reduction that would otherwise be given. Whilst there is a presumption in favour of the full reduction being given where a plea has been indicated at the first reasonable opportunity, the fact that the prosecution case is overwhelming without relying on admissions from the defendant may be a reason justifying departure from the guideline.
>
> 5.4 Where a court is satisfied that a lower reduction should be given for this reason, a recommended reduction of 20% is likely to be appropriate where the guilty plea was indicated at the first reasonable opportunity.[26]

8.25 Two matters arise for consideration by reference to these precedents. First, unlike s 22A (discount for pre-trial disclosure) and s 23 (discount for assistance), there is no direction in s 22 to the effect that any lesser sentence imposed under that section (for a plea) 'must not be unreasonably disproportionate to the nature and circumstances of the offence'. While existing sentencing practice might import such a limitation, the Council considers that for more abundant caution, s 22 should be amended to introduce a requirement to this effect.

8.26 Secondly, in circumstances where the guideline decision, and subsequent decisions, have rejected the relevance of the strength of the prosecution case for the quantification of the guilty plea, on the basis that s 22 is concerned with its utilitarian value, the adoption of the approach taken in the ACT legislation, and in the Guideline of

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23. *Crimes (Sentencing) Act 2005* (ACT) s 35(2)(c)–(e).
24. *Crimes (Sentencing) Act 2005* (ACT) s 35(6).
25. *Crimes (Sentencing) Act 2005* (ACT) s 35(4). The expression 'established facts' is given further definition in s 35(7).
26. United Kingdom Sentencing Guidelines Council, 'Reduction in Sentence for a Guilty Plea: Definitive Guideline' (2007) [5.3]–[5.4].

the Sentencing Guidelines Council (UK), at this time, would only serve to unsettle the law and risk an increase in appeals.

8.27 While the Council recognises the reasons for providing a lesser discount where the prosecution case is overwhelming and a conviction is inevitable without the admissions provided by a plea (for example, so as to avoid unmeritorious offenders receiving an undeserved discount), it does not recommend the statutory adoption of any such requirement. In this respect a requirement of proportionality between the sentence and the nature and circumstances of the offence, and respect for the principle that offenders should not be additionally punished for exercising their right to trial, provide an answer to any such proposal.

Recommendation 2

The Council recommends that consideration be given to amending s 22 of the *Crimes (Sentencing Procedure) Act 1999* so as to include a provision that stipulates where a lesser penalty is imposed it must not be unreasonably disproportionate to the nature and circumstances of the offence.

Other options

8.28 In its 2006 report, the ALRC recommended that federal sentencing legislation provide for a sentence indication scheme for federal criminal matters, on the basis that it would: resolve matters in a timely fashion; minimise the trauma to victims of court appearances; save time and costs by reducing late guilty pleas and unnecessary trials; and reduce the burden on accused persons through quick resolution of the matter.[27] The ALRC noted that, despite the lack of success of the pilot scheme in New South Wales, sentence indication schemes in other jurisdictions appeared to have worked well.[28]

8.29 The ALRC recommended that the scheme be subject to national consistent Rules of Court or Practice Directions, and that a number of safeguards be put in place, as follows:

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27. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) Recommendations [15–1], [15.65]–[15.66].

28. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) [15.65].

(a) an indication should be given only at the defendant's request, with judicial discretion to refuse an indication;

(b) the timing of a sentence indication should be flexible, and Rules of Court or Practice Directions should specify the earliest point at which an indication can be sought;

(c) the defendant should be entitled to one sentence indication only;

(d) the court should issue standard advice before any indication is given, to the effect that the indication does not derogate from the defendant's right to require the prosecution to prove its case beyond reasonable doubt;

(e) the indication should occur in the presence of the defendant and in open court, but if the indicated sentence is not accepted those proceedings must not be reported until the conclusion of the matter;

(f) the proceedings of the sentence indication hearing must be transcribed or otherwise placed on the court record;

(g) the indication must be based on the same purposes, principles and factors relevant to sentencing and the same factors relevant to the administration of the criminal justice system that would apply to the passing of sentence;

(h) the indication should be limited to the choice of sentencing option and a general indication of severity or sentencing range;

(i) the indication should be given only if there is adequate information before the court, and should not be given if the choice of sentencing option is likely to be materially affected by the contents of a pre-sentence report;

(j) in giving the indication, the court must take into account but must not specify the quantum of any discount that would be given to the defendant for pleading guilty at that stage of the proceedings;

(k) the defendant should be given a reasonable opportunity to consult with his or her legal representative before deciding whether to enter a guilty plea on the basis of the indicative sentence;

(l) where the defendant accepts the indicative sentence, the judicial officer who gave the indication should be the one who passes sentence;

(m) where the defendant rejects the indicative sentence, the matter should be set for hearing or trial before another judicial officer, who should have no regard to the indicative sentence in passing any subsequent sentence; and

(n) the sentence indication should not be appellable but the rights of the prosecution and the defence to appeal against sentence, if one is imposed, should be retained.[29]

8.30 In Victoria, a sentence indication scheme has been operating in contest mention hearings in the Magistrates' Court since 1992–93.[30] In its 2007 report, the Victorian

29. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) Recommendation 15–1.

Sentencing Advisory Council noted that the scheme has been effective in the early resolution of matters and was generally supported by stakeholders. It also concluded that the main problem of forum-shopping was partly caused by the lack of explicit statutory authority of a Victorian magistrate to provide a sentence indication.[31] It therefore recommended the formalisation of this scheme in the Magistrates' Court,[32] along with a requirement that, when providing an indication, the court state what effect the guilty plea has had on the indicative sentence.

8.31 The Sentencing Advisory Council also proposed a trial of the scheme in the County Court,[33] which would be underpinned by legislative authority, and be available only with the consent of the defence and prosecution (although subject to court veto), and confined to an indication of whether an immediately servable term of imprisonment would be likely to be imposed if a guilty plea were entered at that stage of the proceedings. It recommended the following safeguards:

> The County Court should adopt a sentence indication procedure that incorporates the following elements:
>
> 1. The defence should be permitted to request an indication during proceedings in the County Court, subject to the agreement of the prosecution.
>
> 2. There should be a requirement for the victim to be consulted if a request for sentence indication is made.

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30. Sentencing Advisory Council (Victoria), 'Sentence Indication and Specified Sentence Discounts: Final Report' (2007) 83.

31. Sentencing Advisory Council (Victoria), 'Sentence Indication and Specified Sentence Discounts: Final Report' (2007) 88.

32. Sentencing Advisory Council (Victoria), 'Sentence Indication and Specified Sentence Discounts: Final Report' (2007) Recommendation 2. It also recommended that the Chief Magistrate be empowered under legislation to give any directions or make any rules as are necessary (Recommendation 2), and that the Chief Magistrate issue a note or direction requiring magistrates to state whether an indicative sentence would have been more severe but for a guilty plea entered at that stage of the proceedings (Recommendation 3).

33. These included: what constitutes a proper discretionary basis for refusing an application for a sentence indication hearing; the potential prejudicial effect to the defence of evidence given at such a hearing; departures from the indicative sentence after receiving materials in mitigation at the sentencing hearing; prosecution and defence appeals against an accepted sentence indication; an obligation imposed on the prosecution to advise the sentence indication judge of the appropriate sentencing range, which represented a departure from the prosecution's traditional role; inadequate guidance on the discount on sentence for a guilty plea entered at or immediately after a sentence indication hearing; and marked disparity between the sentences for offenders convicted of a similar offences, which raised concerns about overly lenient sentences and inappropriate inducement to an accused to plead guilty: Sentencing Advisory Council (Victoria), 'Sentence Indication and Specified Sentence Discounts: Final Report' (2007) 105–10.

3. The defence should only be permitted to seek an indicative sentence once during the proceedings, unless the Director of Public Prosecutions agrees otherwise.

4. The indication should state whether an immediately servable term of imprisonment would be imposed on a guilty plea entered at that stage of the proceedings or, in the event that a term of life imprisonment would be likely to be imposed, whether a non-parole period would be set.

5. The judge should have the discretion to refuse to provide an indication. The judge should not provide an indicative sentence unless he or she is satisfied that the material available is sufficient to provide a binding indication.

6. If the judge indicates that an immediately servable term of imprisonment is not likely to be imposed (or a non-parole period set in relation to a term of life imprisonment), and the defendant pleads guilty at that stage of the proceedings, the court should not be permitted to impose an immediately servable term of imprisonment (or life without parole).

7. (i) If the judge indicates that an immediately servable term of imprisonment will not be imposed, he or she should be required to state whether, but for a guilty plea being entered at that stage of the proceedings, a more severe type of sentence would have been imposed.

   (ii) If the judge indicates that a non-parole period will be set in relation to a sentence of life imprisonment, he or she should be required to state whether, but for the guilty plea being entered at that stage of the proceedings, life imprisonment without parole would have been imposed.

8. The sentence indicated should be binding on the sentencing court only if the defendant pleads guilty at the time when the sentence indication is provided.

9. A refusal by a judge to give an indication should not be reviewable. However, the prosecution and defence should retain their rights to appeal the sentence ultimately imposed.[34]

8.32 The Victorian Sentencing Advisory Council recommendations were essentially adopted by the Victorian Government. The *Criminal Procedure Legislation Amendment Act 2008* (Vic)[35] was introduced and made legislative amendments to formalise the

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34. Sentencing Advisory Council (Victoria), 'Sentence Indication and Specified Sentence Discounts: Final Report' (2007) Recommendation 6.

35. *Criminal Procedure Legislation Amendment Act 2008* (Vic); Explanatory Memorandum, Criminal Procedure Legislation Amendment Bill 2007 (NSW); Victoria, *Parliamentary Debates,* Legislative Assembly, 22 November 2007, 4099–102 (Rob Hulls, Attorney-General).

process in the Magistrates' Court and introduce the process in the County and Supreme courts until 2010. Section 50A to the *Magistrates' Court Act 1989* (Vic)[36] now provides:

> **Sentence indication**
>
> (1) At any time during a proceeding for a summary offence or an indictable offence that may be heard and determined summarily, the Court may indicate that, if the defendant pleads guilty to the charge for the offence at that time, the Court would be likely to impose on the defendant—
>
> (a) a sentence of imprisonment that commences immediately; or
>
> (b) a sentence of a specified type.
>
> (2) If—
>
> (a) the Court gives a sentence indication under subsection (1); and
>
> (b) the defendant pleads guilty to the charge for the offence at the first available opportunity—
>
> the Court, when sentencing the defendant for the offence, must not impose a more severe type of sentence than the type of sentence indicated.
>
> (3) If—
>
> (a) the Court gives a sentence indication under subsection (1); and
>
> (b) the defendant does not plead guilty to the charge for the offence at the first available opportunity—
>
> the Court that hears and determines the charge must be constituted by a different magistrate, unless all the parties otherwise agree.
>
> **Note**
>
> Section 126 enables the Court to close a proceeding to the public.
>
> (4) A sentence indication does not bind the Court on any hearing before the Court constituted by a different magistrate.
>
> (5) A decision to give or not to give a sentence indication is final and conclusive.
>
> (6) An application for a sentence indication and the determination of the application are not admissible in evidence against the defendant in any proceeding.
>
> (7) This section does not affect any right to appeal against sentence.

With respect to the County Court and the Supreme Court, s 23A of the *Crimes (Criminal Trials) Act 1999* (Vic)[37] provides:

> **Sentence indication**

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36. *Magistrates' Court Act 1989* (Vic) s 50A. See also s 16(1A) which gives the Magistrates' Court specific power to make rules of the court with respect to sentence indications under s 50A.

37. *Crimes (Criminal Trials) Act 1999* (Vic).s 23A. See also *Supreme Court Act 1986* (Vic) s 25(1)(ed) and *Country Court Act 1958* (Vic) s 78(1)(hh) which give these courts respectively the specific power to make rules of court with respect to sentence indications in criminal proceedings. Note *Criminal Procedure Legislation Amendment Act 2008* (Vic) s 12 which provides for the repeal of provisions concerning sentence indications in the Supreme Court and County Court, and the date of commencement for this is 1 July 2010.

(1) At any time after the filing of the presentment, the court may indicate that, if the accused pleads guilty to the charge on the presentment at that time or another charge, the court would or would not (as the case may be) be likely to impose on the accused a sentence of imprisonment that commences immediately.

(2) A sentence indication under subsection (1)—

(a) may be given only on the application of the accused; and

(b) may be given only once during the proceeding, unless the prosecutor otherwise consents.

(3) An application under subsection (2)(a) may be made only with the consent of the prosecutor.

(4) If an application under subsection (2)(a) is made in respect of a charge that is not on the presentment, the accused must specify the charge in the application.

(5) The court may refuse to give a sentence indication under subsection (1).

(6) If—

(a) the court indicates that it would not be likely to impose on the accused a sentence of imprisonment that commences immediately; and

(b) the accused pleads guilty to the charge for the offence at the first available opportunity—

the court, when sentencing the accused for the offence, must not impose a sentence of imprisonment that commences immediately.

(7) If—

(a) the court gives a sentence indication under subsection (1); and

(b) the accused does not plead guilty to the charge for the offence at the first available opportunity—

at trial the court must be constituted by a different judge, unless all the parties otherwise agree.

Note

Section 18 of the *Supreme Court Act 1986* and section 80 of the *County Court Act 1958* enable the court to close a proceeding to the public.

(8) A sentence indication does not bind the court on any hearing before the court constituted by a different judge.

(9) A decision to give or not to give a sentence indication is final and conclusive.

(10) An application for a sentence indication and the determination of the application are not admissible in evidence against the accused in any proceeding.

(11) This section does not affect any right to appeal against sentence.

8.33 The Council does not at this stage support a return to the sentence indication pilot scheme that was introduced in the NSW District Court between February 1993 and

January 1996 in light of the evaluation that suggested that it had not been shown to have significantly increased the number of guilty pleas or the number of early pleas,[38] and in light of several other concerns, including suggested inconsistencies in outcomes; the need for appellate intervention in a number of cases; the risk of judge shopping; and the creation of ethical dilemmas for defence counsel.[39] However this position may need to change in the event of the *Crimes Act 1914* (Cth), or some codification of federal sentencing law, adopting the ALRC recommendation followed by implementation of similar provisions in other jurisdictions.

8.34 Similarly the Council does not, at this stage, recommend adoption or trial of the Western Australian fast track plea system, although it recognises that there has been some support for it so far as it might encourage the entry of a plea in the Local Court.[40] It considers that, subject to evaluation, similar benefits could be provided by the current Criminal Case Conferencing Pilot and sees little point in its duplication.

DISCOUNTS FOR ASSISTANCE TO THE AUTHORITIES

8.35 Again, while the Council notes the existence of objections in principle to the grant of a discount for assistance to law enforcement authorities, by reference to considerations such as the potential for corruption and for encouraging disclosures of dubious reliability, lack of transparency or accountability, as well as concerns in allowing serious offenders, who are most likely to take advantage of the discount, to escape full punishment for their crimes,[41] the Council is satisfied that the discount should be preserved on the basis of the clear benefits identified earlier in this report.[42] However, some areas for reform were identified in the course of the Council's inquiry, which are examined in this section of the report.

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38. Don Weatherburn, Elizabeth Matka and Bronwyn Lind, *Sentence Indication Scheme Evaluation: Final Report* (1995).
39. See John Willis, 'The Sentence Indication Hearing' (1997) 7 *Journal of Judicial Administration* 98.
40. Standing Committee of Attorneys-General, *Working Group on Criminal Trial Procedure Report* (1999) 36–9, Recommendations 19–20; Standing Committee of Attorneys-General, *Deliberative Forum On Criminal Trial Reform* (2000) Recommendations 21–22. See also Submission 12: Ministry for Police (NSW), 1–2.
41. George Zdenkowski, 'Contemporary Sentencing Issues' in Duncan Chapell and Paul Wilson (eds) *The Australian Criminal Justice System: The Mid 1990s* (1994), 171.
42. Chapter 3, [3.3].

Hardship in custody - s 23(2)(g)

8.36 As noted earlier[43] it is no longer necessarily the case that an offender, who provides assistance to law enforcement agencies, will serve a sentence in more arduous conditions or be exposed to a risk of violence. The Council notes that current case law recognises this and provides sufficient guidance such that sentencing judges should not fall into the error of assuming that assistance will inevitably require strict protection and hardship.

8.37 However the Department of Corrective Services continues to find it necessary for its officers to be called to give substantially the same evidence in relation to the forms of protective custody which are available, which is only slightly modified to suit the circumstances of individual offenders.[44] Its assessment is that since only 3.7 per cent of protective custody inmates are designated 'protective non-association' there should no longer be a presumption that those who assist law enforcement should receive any discount for the consequence of this assistance.

8.38 The Council agrees, and notes that where a discount is given for the utilitarian value of the offenders' assistance there is a risk of double counting if an additional discount is given for the potential hardship of serving a sentence on protection, or for any remorse or contrition said to be evidenced by the offender's co-operation.

8.39 Additionally, the Council agrees that it is not part of the function of the courts to supervise sentences once they are imposed. Whether an offender can be safely managed within the correctional system and the form of protection provided should remain a matter for DCS, particularly as it is impossible to make any informed judgment as to the manner in which an offender will move through the corrections system, which will depend in part upon his own behaviour.

8.40 As a consequence the Council is of the view that any discount attributable to hardship should be included within, and not be additional to, the discount for assistance. Evidence in relation to hardship should only be received in those cases where DCS certifies, in a pre-sentence report, that the offender would be expected to serve the

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43. Chapter 3, [3.42]–[3.43].
44. Submission 7: NSW Department of Corrective Services, 5.

sentence in a protection non-association area, or under conditions similar to those applicable where a protective custody direction has been made of that kind.

8.41 The Department of Corrective Services submitted that s 23(2)(g) should be repealed, or at least amended to make it clear that it should only apply where the Court finds that the fact of the assistance will cause the offender to suffer 'significantly or exceptionally harder' conditions of custody.

8.42 The Council does not consider either amendment necessary. In accordance with general principles at common law any circumstance of custody that will cause hardship to a particular offender in excess of that occasioned to the general population of prisoners, eg serious illness, can be taken into account. The Council does not see any reason to exclude the fact of assistance from this principle.

8.43 There is a need to apply sentencing principles without discrimination; such an exception could act as a disincentive to the supply of assistance to law enforcement; and in any event, it is unlikely that in practice anything other than a significant increase in hardship resulting from the fact of custody would lead to a sentence discount, whatever the reason for it.

Recommendation 3

The Council confirms its view that where a discount is given for an offender's provision of assistance to authorities there should be no presumption that the offender will necessarily suffer harsher custodial conditions, and it recommends that any evidence of hardship consequent upon the provision of assistance to be addressed in a pre-sentence report. It also recommends, as noted later, that the Department of Corrective Services provide information in relation to its facilities and the programs available in the course of judicial training and education programs.

Other s 23 factors of relevance

8.44 The Council is satisfied that it is appropriate for the court to take into account, when calculating a discount for assistance, each of the factors identified in s 23(2)(b)–(f) and (i).

8.45 It has concerns however as to the relevance of the matter identified in s 23(2)(a), namely the effect of the offence on the victim or victims of the offence and their families.

The existence and nature of any injury or loss occasioned by the offence has a greater relevance as a factor to be taken into account when determining the objective criminality of the offending,[45] than it could have in assessing the worth of the assistance.

8.46 The Council is accordingly of the view that s 23(2)(a) serves no useful purpose and should be repealed.

8.47 Similarly it has concerns as to the relevance of the matters identified in s 23(2)(j) in relation to assessing a discount for assistance, that is the likelihood of the offender re - offending on release. This has a clear relevance for an assessment of the offender's prospects of rehabilitation, which will be separately taken into account. However it does not appear to have any relevance in weighing the entitlement of the offender to a discount for his assistance. Depending on whether he is assessed as likely or unlikely to offend, bringing it to account in relation to assistance as a discounting factor, may give rise to double counting. Upon the basis that it serves no useful purpose in the present context, and is otherwise catered for as a mitigating factor,[46] or in accordance with the principles in *Veen v The Queen (No 2)*,[47] the Council considers it should be repealed.

Recommendation 4

The Council recommends that consideration be given to repealing s 23(2)(a) of the *Crimes (Sentencing Procedure) Act 1999*.

Recommendation 5

The Council recommends that consideration be given to repealing s 23(2)(j) of the *Crimes (Sentencing Procedure) Act 1999*.

Discount for future assistance

8.48 Unlike the *Crimes Act 1914* (Cth),[48] the *Crimes (Sentencing Procedure) Act* does not expressly require the court to identify the extent of the discount given for any

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45. And possibly as an aggravating factor under the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).
46. Under *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3).
47. *Veen v The Queen (No. 2)* (1988) 164 CLR 465.
48. *Crimes Act 1914* (Cth) s 21E(1).

undertaking to provide future assistance. In order to deal with the situation where the offender reneges on such an undertaking, and so as to encourage transparency, and to facilitate appellate review, the Council considers that s 23 should be amended, so as to require the court to specify that the sentence has been discounted for that reason, and to state the sentence that would otherwise have been imposed.

8.49 Expressed in this form a provision of this kind would cater for the situation mentioned earlier[49] where the need to extend a discount for future assistance had involved a degree of compression of the discount for past assistance. In such a case appellate intervention to correct the reduction for future assistance may need to restore such part of the reduction for past assistance as had been compressed.

8.50 While sentencing practice as declared by the courts notes the importance of nominating the discount for future assistance,[50] the introduction of a statutory requirement would encourage certainty as well as fairness where appellate intervention becomes necessary.

Recommendation 6

The Council recommends that consideration be given to amending s 23 of the *Crimes (Sentencing Procedure) Act 1999* so as to include a provision that requires the court to specify that the sentence is being reduced because of the assistance provided and to state the sentence that would have been imposed but for that reduction.

Quantifying the discount

8.51 Although there has been no guideline judgment in NSW in relation to the quantification of the discount there is now abundant authority for a range of between 20 and 50 per cent, with any discount for all discounting factors, when combined, in excess of 50 per cent being reserved for an exceptional case.[51]

8.52 The Council does not consider that there is any occasion for the legislative prescription of either a range for this discounting factor, or for guidance as to where any given case should fit within it. The principles identified by the court seem to the Council

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49. Chapter 5, [5.13].
50. Chapter 3, [3.30].
51. Chapter 3, [3.24] J[3.30].

to be clear and appropriate, and any attempt at legislative quantification could give rise to undue rigidity and difficulty in making appropriate allowance where multiple discounting factors are available.

Post-sentence assistance to authorities

8.53 The Police Minister has raised for consideration the possibility of legislative amendment that would:

- allow an offender who provides assistance to law enforcement authorities at some time after having been sentenced, to apply to the Court, during their non-parole period, to have the sentence varied (reduced) in order to take that assistance into account; and

- make it explicit that assistance provided to law enforcement is a matter that is to be taken into account by the NSW Parole Authority when considering to release an offender on parole.

8.54 The rationale for the suggestion is said to lie in the fact that in recent times there have been some offenders who have offered post sentence assistance, who in accordance with current sentencing principle[52] have no entitlement to seek any adjustment of their sentence, save by way of an exercise of the executive prerogative.

8.55 The introduction of a system of this kind, it was argued, may flush out valuable information from prisoners who were not prepared to offer assistance pre-trial in the hope of securing an acquittal, as well as those for whom the experience of incarceration has weakened their resolve to protect co-offenders or other criminals.

8.56 The Council recognises the possibility that the availability of a post sentence reduction may provide a powerful incentive for inmates to provide assistance to law enforcement. However it maintains serious concerns as to whether the availability of such a provision would lead to a reduction in the number of persons facing trial who might otherwise provide assistance pre-trial. It also has concerns that such a system would encourage the provision of false or unreliable information, although it recognises that such concern could be addresses, at least in part, by deferring any application for a

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52. *R v Moreno* (Unreported, NSW Court of Criminal Appeal, 4 November 1994); *R v Cartwright* (1989) 17 NSWLR 243, 257; *R v Willard* (2001) 120 A Crim R 450 [24]–[27].

variation of the sentence, until after the assistance has been given and validated as important and reliable.

8.57 The Council considers that the established sentencing principle in relation to post sentence events is correct, and should not be subject to any exception. It does however support the second suggestion that would make the provision of post sentence assistance explicitly a matter for possible consideration by the NSW Parole Authority when determining whether or not to grant parole, particularly insofar as that may be relevant to an assessment of the offender's progress towards rehabilitation.

8.58 In rejecting the first limb of the suggestion, the Council notes the existence of the executive prerogative, and also draws to attention the fact that a prisoner does have a window of opportunity between trial, or plea, and sentencing in which to provide or to offer assistance. This might well provide a greater incentive, than that which is suggested, for those who are minded to cooperate by reason of their fear of imprisonment. It also accepts that knowledge that assistance given by a prisoner, during his or her detention, may be relevant, when the time for consideration of a release on parole arrives, could act as an incentive for cooperation. That would, however, need to be subject to an evaluation of the assistance and acceptance of its reliability and worth.

Recommendation 7

The Council recommends that consideration be given to amending s 135(2) of the *Crimes (Administration of Sentences) Act 1999* so as to explicitly identify the provision of post sentence assistance to law enforcement as a matter to which the NSW Parole Authority may have regard when determining whether or not to grant parole, subject to the acceptance of such assistance as reliable and of value.

OTHER DISCOUNTING FACTORS

8.59 The Council has given consideration to the possible advantage of extending legislative direction in relation to the other discounting factors considered in Chapter 5, some of which are not identified as mitigating factors in s 21A(3) of the *Crimes (Sentencing Procedure) Act*.

Facilitating the administration of justice at trial

8.60 Currently the statutory requirements for pre-trial defence disclosure, apart from those that require notice to be given of any intention to call alibi evidence,[53] or to adduce evidence of substantial impairment by abnormality of mind[54] in murder trials, are confined to complex trials.

8.61 In response to a report of the New South Wales Law Reform Commission in 2000[55] the *Criminal Procedure Act* was amended[56] to enable the Supreme Court and District Court to impose pre-trial disclosure requirements on the defence and prosecution, on a case by case basis, but only in complex trials.[57] Where pursuant to the provisions a defence response is required, it extends to giving notice of the accused's intention of calling evidence in relation to issues such as insanity, self-defence, provocation and so on; to providing copies of reports of experts to be called in the defence case; to identifying the character witnesses who are to be called; as well as a response to particulars raised in the prosecution case statement including the identification of matters which are either in issue or not in issue, and of proposed prosecution evidence whose admissibility will be disputed.[58]

8.62 Section 22A of the Act, which permits the court to impose a lesser sentence where the defence has made pre-trial disclosures for the purposes of the trial, depending on the degree to which that occurred, is of general application, that is, it is not confined to complex cases. In one sense, it is perhaps questionable whether an accused should be provided with a lesser penalty in a case of this kind, where pre-trial disclosure is mandated by order of the court, and where non-compliance with that order may attract the sanctions which are available under the *Criminal Procedure Act*, including possible exclusion of the evidence, dispensation with formal proof or comment to the jury.[59] However the Council accepts that the potential availability of a discount is acceptable having regard to the fact that the pre-trial disclosure regime leaves the defence with an

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53. *Criminal Procedure Act 1986* (NSW) s 150.
54. *Criminal Procedure Act 1986* (NSW) s 151.
55. New South Wales Law Reform Commission, *The Right to Silence*, Report No 95 (2000).
56. By the *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001* (NSW), and by the *Criminal Legislation Amendment Act 2007* (NSW).
57. *Criminal Procedure Act 1986* (NSW) ss 134, 137.
58. *Criminal Procedure Act 1986* (NSW) s 139.
59. *Criminal Procedure Act 1986* (NSW) s 148.

opportunity to provide a variable degree of co-operation in narrowing issues and in shortening the trial.

8.63 Notwithstanding the criticisms sometimes offered of pre-trial defence disclosure requirements, which are mainly centred on the assertion that they infringe on the right to silence,[60] the Council is satisfied that such objections are answered by the need to secure an efficient and cost effective justice system, and also by the fact that defence disclosure follows upon prosecution disclosure.[61] In those circumstances it supports preservation of the existing sanctions and of the availability of a discount for pre-trial disclosure.

8.64 The Council notes that, pursuant to the *Sentencing Act 1991* (Vic), the effective sanction for non-compliance with pre-trial disclosure requirements is to regard it as indicative of a lack of remorse, and as a consequence potentially to deprive the offender of any leniency that would otherwise be attracted on that account.[62]

8.65 The *Report of the Trial Efficiency Working Group* ('the CLRD Report')[63] recommended, in 2009, amendment of the *Criminal Procedure Act* to provide for three tiers of case management:

- compulsory prosecution and defence disclosure of specified matters in all criminal trials;
- the establishment of a system of pre-trial case conferences which may take place on the application of the parties or by initiation of the court; and
- intensive pre-trial case management on the application of the parties or by the initiation of the court,

accompanied by the conferral of statutory powers on the courts to make directions concerning the conduct and management of the trial, and to require the parties in all criminal trials to identify the issues for determination in the trial.

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60. The Hon Justice J. Badgery-Parker, 'The Criminal Process in Transition: Balancing Principle and Pragmatism—Part II' (1994–95) 4 *Journal of Judicial Administration* 193, [202].
61. The Hon Justice L. T. Olsson, 'To How Much Silence Ought an Accused be Entitled?' (Presented at the Law Society of South Australian Criminal Law Seminar, 11–13 September 1998).
62. *Sentencing Act 1991* (Vic) s 5(2C),(2D).
63. Criminal Law Review Division, NSW Attorney General's Department, *Report of the Trial Efficiency Working Group* (2009).

8.66 These recommendations followed upon an extensive review of pre-trial disclosure obligations and sanctions in other Australian and overseas jurisdictions, and if implemented would extend the potential reach of pre-trial disclosure to trials other than complex trials, and possibly increase the number of cases in which consideration needs to be given to s 22A. The working group did not support retention of the adverse comment sanction for a failure to comply with disclosure requirements,[64] but did not identify any new strategy for encouraging defence co-operation. The Council agrees with these recommendations, and with deletion of the comment sanction.

8.67 It is the fact that, apart from the statutory requirement for pre-trial disclosure, steps have been taken in some courts to introduce less formal procedures for case management, including that noted earlier in place in the District Court at Parramatta, and in that court's Circuit Trial Practice Note; as well as that applied, on a case by case basis, following arraignment, in the Supreme Court. These procedures have had a capacity to narrow issues and to provide for greater efficiency in trial management. Even where they are not used it is not unknown for experienced trial counsel to make admissions during the trial or otherwise to conduct the defence in an economic and efficient manner.[65]

8.68 The Council considers that there is no point of difference in principle between defence disclosure and co-operation pre-trial, and co-operation during the trial. On one view the latter may be more meritorious than disclosure or co-operation that is mandated. While there are decisions, as noted earlier, where this form of co-operation and assistance to the administration of justice has led to a sentencing discount, the Council considers that this should be given a legislative basis and s 22A amended accordingly. This would provide greater certainty in the sentencing process, and could serve as an encouragement for defence co-operation at trial in those cases where pre-trial management has not been required, thereby meeting the concerns expressed in *R v Abou-Chabake* noted earlier in this report.[66]

Recommendation 8

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64. Criminal Law Review Division, NSW Attorney General's Department, *Report of the Trial Efficiency Working Group* (2009) 88.
65. As noted in Chapter 4, [4.5]–[4.8].
66. Chapter 4, [4.4].

The Council recommends that consideration be given to amending s 22A of the *Crimes (Sentencing Procedure) Act 1999* so as to allow the court to have regard to the degree of defence co-operation before and during the trial and impose a lesser penalty on that basis where appropriate.

Illness

8.69 The Council considers that the existing principles and practice in relation to the manner in which illness, including the discovery post-sentence of life threatening conditions, are adequately settled and do not require legislative intervention.

Age

8.70 A similar view is held by the Council in relation to the circumstances in which the age of the offender might be taken into account in reaching a lesser sentence.

Foreign citizens

8.71 The Council has earlier noted the incongruity in setting a non-parole period in the case of foreign citizens, in circumstances where their probable and in some cases inevitable deportation will effectively terminate their involvement with the criminal justice system in Australia.

8.72 The unjustified windfall associated with this fact risks being compounded if the court has already discounted their sentence by reference to any hardship occasioned to them, or to their families, by reason of their incarceration in this country, over and above that occasioned to Australian citizens or residents in custody.

8.73 However, in view of the combined circumstances that the law has been settled[67] in that the possibility of deportation does not debar the fixing of a NPP, that decisions for release on parole rest with the Parole Authority,[68] and that decisions to deport a non - citizen rest with the Department of Immigration and Citizenship, the Council does not consider it appropriate to make any recommendation to cater for this class of offender.

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67. Both in case decisions, and by legislation in relation to federal offenders.
68. At least in relation to sentences of imprisonment in excess of three years.

8.74 It does however consider it to be a matter worthy of further consideration by SCAG, particularly in the light of the fact that offenders who fall into this category are likely to be involved in serious offences with an international flavour, including drug importation, people smuggling, child pornography, identity theft, money laundering and terrorist activities.

Hardship to family or dependants

8.75 As noted earlier, the Council is satisfied that existing sentencing principles and practice in the area are sufficient, and no recommendation is made.

Entrapment

8.76 The Council is of a similar view in relation to this potential ground for a discount.

Extra curial punishment

8.77 In general the Council considers that the existing law is settled and that in suitable cases some discount can be given for extra curial punishment. However it considers that specific legislative provision is required in two respects.

Prohibited Persons

8.78 First, it is of the view that the Act should be further amended to provide that the fact that, following conviction, a child sex offender or a person convicted of the murder of a child or a child related personal violence offence may become ineligible to work with children as a prohibited person under the *Commission for Children and Young People Act 1998* (NSW);[69] should not be taken into account as involving a form of extra curial punishment and for this reason result in any lessening of the sentence that would otherwise be appropriate. This would complete the response provided following the introduction of s 24A of the *Crimes (Sentencing Procedure) Act* which provides that the court cannot take into account in mitigation that the offender has or may become a registrable person under the *Child Protection (Offender's Registration) Act 2000* (NSW),

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69. *Commission for Children and Young People Act 1988* (NSW) ss 33B, 33C.

or has or may become subject to an order under the *Child Protection (Offenders Prohibition) Act 2004* (NSW).[70]

8.79 The Council notes that provisions dealing with these consequences for sentencing purposes are contained in the legislation of some of the other states.[71]

8.80 In respect of each potential consequence, their possible application to the offender and any consequent impact cannot be known with any degree of certainty when the sentence is first pronounced, such that the extension of any discount may result in an unjustified reduction of the sentence. Additionally the rationale for such consequence is primarily directed at the safety of the community, and in circumstances where the offender should have no expectation of any possibility of working with or pursuing a close association with children.

Recommendation 9

The Council recommends that consideration be given to amending the *Crimes (Sentencing Procedure) Act 1999* so as to include a provision that where an offender is a 'prohibited person' under the *Commission for Children and Young People Act 1998* (NSW) and accordingly may become ineligible to work with children, the court is precluded from regarding such exclusion as extra curial punishment.

Forfeiture

8.81 Secondly, while there is existing case law to suggest that the forfeiture of property derived or realised, directly or indirectly, as the result of the commission of an offence, will not be taken into account as a form of extra curial punishment,[72] the Council considers it advisable, in order to provide more specific guidance, to specifically legislate that regard is not to be had when sentencing an offender to orders made under

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70. This section commenced on 1 January 2009 as a result of amendments pursuant to the *Crimes Amendment (Sexual Offences) Act 2008* (NSW) in response to the report of the Council, *Penalties Relating to Sexual Assault Offences in NSW* (2008–09) Vol 1, [6.52]–[6.65].

71. *Sentencing Act 1991* (Vic) s 5(2BA), (2BC). See also *Sentencing Act 1995* (WA) ss 123(2), 124A; *Community Protection (Offender Reporting) Act 2004* (WA) s 13; *Criminal Law (Sentencing) Act 1988* (SA) s 10(4)(a); *Child Sex Offenders Registration Act 2006* (SA).

72. Chapter 4, [4.48].

state or federal legislation providing for the confiscation of assets or for the forfeiture of the proceeds of crimes.[73]

8.82 In each case these represent the unjustifiably obtained fruits of a crime, and their loss cannot be considered to involve any form of extra curial punishment that should lead to a sentence discount. It is noted that legislation to this effect, with some qualifications, is contained in the *Sentencing Act 1991* (Vic).[74]

Recommendation 10

The Council recommends that consideration be given to amending the *Crimes (Sentencing Procedure) Act 1999* so as to include a provision that where an offender is subject to orders made under state or federal legislation providing for the confiscation of assets or for the forfeiture of the proceeds of crimes, the court is precluded from regarding such confiscation or forfeiture as extra curial punishment.

CHARGE NEGOTIATIONS

8.83 The rationale for charge negotiation, and the in principle objections to that process which have been identified[75] are summarised earlier in this report. The Council considers that the objections are capable of being answered in full so long as the process is undertaken ethically, and in accordance with the ODPP guidelines. It accepts that charge negotiation is not only essential to the efficient operation of the criminal justice system, but it is also fair to offenders who may benefit from being dealt with for less serious offences than those charged or for representative charges, where their objective or subjective circumstances warrant.

8.84 The submissions identified various issues in relation to charge negotiation and suggestions were made to improve the process, including the following:

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73. *Confiscation of Proceeds of Crime Act 1989* (NSW); *Criminal Assets Recovery Act 1900* (NSW); *Proceeds of Crime Act 1987* (Cth).

74. *Sentencing Act 1991* (Vic) ss 5(2A) and 5(2B).

75. See also Kathy Mack and Sharyn Roach Anleu, 'Guilty Pleas: Discussion and Agreement' (1996) 6(1) *Journal of Judicial Administration* 8; Geraldine Mackenzie, 'The Guilty Plea Discount: Does Pragmatism Win Over Proportionality and Principle?' (2007) 22 *Southern Cross University Law Review* 205.

Ensuring prompt provision of information and advice

8.85 Consistent with the existence of a system that encourages the entry of an early plea, it is clearly desirable that both the prosecution and defence have sufficient material concerning the case and any possible answer to individual charges, as soon as possible, so that they can assess the merits of the case and engage in informed negotiations. In this respect Legal Aid NSW identified a potential imbalance in the bargaining power of the defence unless they have prompt and complete disclosure by the Crown, particularly in circumstances where they have the practical burden of identifying any weaknesses in the prosecution case and of persuading their client to accept any offer from the prosecution or to make an offer.[76]

8.86 The Council accepts the force of this submission and would encourage early disclosure by the ODPP, as well as its acceptance of the confidentiality of any disclosure made by the defence, on a without prejudice basis, for the purpose of advancing charge negotiations as had been suggested in some academic reviews.[77]

8.87 The earlier recommendation by the Council as to the desirability of amending s 22 of the Act to allow the circumstances in which a plea is offered to be taken into account,[78] would help address the concerns expressed by Legal Aid NSW. Preserving confidentiality of without prejudice disclosures would appear to be protected by the general law, and by professional ethics, and would not seem to warrant legislative prescription unless there was evidence of its abuse. As noted earlier similar protection has been recognised in relation to the use of information provided in the course of offender assistance.[79]

Application of the ODPP guidelines

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76. Submission 10: Legal Aid (NSW), 9.

77. Kathy Mack and Sharyn Roach Anleu, 'Criminal Justice Reform' (Paper presented at the Australasian Institute of Judicial Administration Conference on Reform of Court Rules and Procedures in Criminal Cases, Brisbane, 3–4 July 1998) 114–5; Kathy Mack and Sharyn Roach Anleu, 'Guilty Pleas: Discussion and Agreement' (1996) 6(1) *Journal of Judicial Administration* 8, 17; Kathy Mack and Sharyn Roach Anleu, 'Reform of Pre-trial Criminal Procedure: Guilty Pleas (1998) 22(5) *Criminal Law Journal* 263, 274.

78. Chapter 8, Recommendation 1.

79. Chapter 3, [3.16].

8.88 Some concerns were expressed as to whether the guidelines while appropriate, are being followed in practice.[80]

8.89 These concerns related to reduced pleas not adequately reflecting the criminality involved, in particular where the offence involved violence against police, the withholding of relevant information, and insufficient consultation with police and victims. Among the suggested solutions were the possible enshrinement of elements of the guidelines in legislation, and the introduction of a process of review for those cases where the victim or family (if the victim is deceased) or the police officer in charge of the case disagrees with any decision to proceed on a lesser charge or to an editing of the statement of facts where that might present an incomplete or inaccurate representation of the offending behaviour.

8.90 The Council does not consider that legislation is warranted, or that it would cure any of the reported problems. It does however strongly support timely consultation with police and victims, and the recording of reasons for any decision to accept a lesser plea. This would help to ensure accountability and transparency, thereby enhancing community and victim satisfaction. It recognises that the prosecution is limited to including in the statement of facts matters that are admissible in law and relevant to the offence for which the offender is to be sentenced, and that those preconditions may not always be readily understood by lay persons, unless there has been an informed consultation process.

8.91 The Council has been advised that there is in place an informal review process to ensure the police and victims can be heard where they are dissatisfied with the course proposed in consultations including both selection of a lesser charge and any editing of the facts. The Council is satisfied that it is not something which should be formalised by legislation, or an area into which the courts should venture, or one which should involve a third party moderator or mediator, as has been proposed by two commentators.[81]

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80. Submission 6: The Police Association of New South Wales; Submission 12: Ministry for Police (NSW).

81. Kathy Mack and Sharyn Roach Anleu, 'Criminal Justice Reform' (Paper presented at the Australasian Institute of Judicial Administration Conference on Reform of Court Rules and Procedures in Criminal Cases, Brisbane, 3–4 July 1998) 107–8; Kathy Mack and Sharyn Roach Anleu, 'Guilty Pleas: Discussion and Agreement' (1996) 6(1) *Journal of Judicial Administration* 8, 15.

8.92 While the Council is satisfied that the ODPP Guidelines adequately reflect the principles applicable where an offender is to be sentenced following a plea of guilty and also where additional offences are taken into account on a Form 1, it considers that some additional procedural safeguards would be appropriate.

8.93 In this regard it recommends that the *Crimes (Sentencing Procedure) Act* should be made subject to a provision, that would require, in circumstances where a charge negotiation has occurred:

- any statement of facts tendered to the court for the purpose of sentencing, to be accompanied by a certificate, signed by the Crown Prosecutor or other officer of the ODPP responsible for the case, or by a police prosecutor or equivalent officer in any case presented otherwise than by the ODPP, to the effect that so far as that has been possible the statement of facts has been the subject of consultation with the victim (or his or her immediate family where the victim is deceased) and the police officer-in-charge of the case, and that, in the opinion of the signatory, the statement constitutes a fair and accurate account of the objective criminality of the offender having regard to the relevant and provable facts;

- any Form 1 listing additional matters to be taken into account on sentencing similarly bear a certificate signed by a responsible officer (as identified above) to the effect that there has been consultation with the victim who was the subject of the offence for which the offender is to be sentenced, and with the police officer-in-charge of the case, so far as that has been possible, that the terms thereof have been recorded, and that in the opinion of the signatory, the inclusion of each matter in the Form 1 is in accordance with ODPP Guidelines; and

- where in either case, it has not been possible or practicable to engage in such consultation the relevant certificate should note the reasons why that did not occur.

8.94 The Council notes that the while the Commonwealth Director of Public Prosecutions (CDPP) has recently developed a Victims of Crime Policy and revised its Prosecution Policy to incorporate guidelines relating to victims of crime, in relation to victim consultation and plea negotiation the amended guidelines do not go as far as the proposal set out above. The Council acknowledges that the nature of Commonwealth criminal offences are such that for the most part the CDPP is not concerned with crimes

directed at individual victims and for this reason confines its recommendation to those matters which fall within the Charter of Victims Rights.

8.95 The Council notes however that with the expansion of Commonwealth criminal law to include offences such as terrorism, child sex tourism and people trafficking, the CDPP is prosecuting an increasing number of matters that involve identifiable victims of crime. On that basis the Council is of the view that it would be desirable for the CDPP to give consideration to developing and introducing similar guidelines to those set out in order to bring into alignment the treatment of victims of crime participating in the criminal justice process.

8.96 Similarly, the Council is of the view that it would be desirable for the Commonwealth to give consideration to the development and adoption of a federal charter of victim's rights, particularly in light of the review that is taking place in NSW.

Recommendation 11

The Council recommends that consideration be given to amending the *Crimes (Sentencing Procedure) Act 1999* so as to include a provision that would require, in circumstances where a charge negotiation has occurred:

(i) any statement of facts tendered to the court on sentence to be accompanied by a certificate signed by an appropriate responsible officer to the effect that the statement of facts has been the subject of consultation with the victim (or his or her family where the victim is deceased), and with the police officer-in-charge of the case and that the statement constitutes a fair and accurate account of the of the objective criminality of the offender having regard to the relevant and provable facts. Where there has been no such consultation, the certificate should record the reasons why that has not occurred.

(ii) any Form 1 listing additional matters to be taken into account on sentence to be accompanied by a certificate signed by an appropriate responsible officer to the effect that there has been consultation with the victim the subject of the charge in respect of which the Form 1 matters have been taken into account, and with the police officer-in-charge of the case, so far as that has been possible, that the terms thereof have been recorded, and that the inclusion of each matter in the

Form 1 is in accordance with ODPP Guidelines. Where there has been no such consultation the certificate should record the reasons why that has not occurred.

Jurisdiction shopping

8.97 The Council recognises that an important consequence of the charge bargaining process can be the sentencing of an offender in the Local Court rather than the District Court, in which event the jurisdictional limits of the former will apply.[82] The Council notes that separate consideration is being given to a possible increase in the Local Court's jurisdiction which would overcome any concerns as to the process[83] arising by reason of this limitation.[84] It also notes the discretion of the ODPP in relation to ensuring that the sentencing proceeds in the appropriate tribunal. Until the extent to which magistrates are in fact prevented, by the jurisdictional limit, from imposing appropriate sentences can be determined, and until wide consultation with stakeholders is conducted, the Council does not wish to express any concluded view on this topic.

TOTALITY PRINCIPLE AND FORM 1

8.98 In different ways the totality principle, and the Form 1 procedure, seek to achieve an appropriate outcome for an offender who has been involved in multiple offences. Each has an eye to ensuring that the offender serves an appropriate period in custody, without resulting in a crushing sentence, while recognising that there are some very serious cases in which the sentencing exercise must be constructed so as to require each of the available offences to be dealt with separately resulting in an accumulation of sentences. In other cases, it will be appropriate to proceed on a Form 1, resulting in some increase in the sentence that would have otherwise been passed for the principal

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82. Two years imprisonment for a Table 1 offence or five years imprisonment for multiple offences by way of accumulation.

83. Submission 5: His Honour Graeme Henson, Chief Magistrate of the Local Courts of New South Wales, 5–6.

84. See NSW Sentencing Council, 'Sentencing for Alcohol Related Violence' (2009), Executive Summary, [5.3]–[5.5], [7.45]–[7.46], [7.58]–[7.61], [7.71] where this issue was identified.

offence, although less than that which would have followed had all of the offences been dealt with as separate counts by sentences which were wholly or partly cumulative.

TOTALITY PRINCIPLE

8.99 The Council notes the concerns which have been expressed in relation to the apparent difficulty which courts have in applying the totality principle;[85] and the complications which can arise where there are a number of sentencing options available for multiple offending,[86] particularly where the court has before it a mixture of indictable, summary and regulatory offences.

8.100 These concerns were such as to invite consideration to requesting a guideline judgment in relation to the proper application of the totality principle, that would complement the guideline on the use of Form 1.[87]

8.101 Some of the difficulties in this area have been associated with the need for value judgments in determining the extent of the total criminality involved where an offender has committed a number of offences, and in deciding whether several offences should be regarded as separate matters, or part of a 'single episode of criminality', so far as totality is concerned; and in selecting matters to be appropriately included on a Form 1.

Possible alternative approaches

A mathematical formula

8.102 The Council notes that a 2001 study in Victoria of multiple offenders[88] proposed a somewhat complex decision sequence for sentencing an offender convicted of multiple

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85. Submission 2: The Hon Justice Peter McClellan, Chief Judge at Common Law, Supreme Court of New South Wales, 2—referring to *R v Knight; R v Biuvanua* (2007) 176 A Crim R 338, [2] (Howie J, with whom McClellan CJ at CL and Hidden J agreed). See also *Nguyen v The Queen* [2007] NSWCCA 14, [12] (Howie J, with whom Sully and Price JJ agreed). Submission 9: Office of the Director of Public Prosecutions New South Wales, 4–5. Submission 12: Ministry for Police (NSW), 3.

86. Submission 5: His Honour Graeme Henson, Chief Magistrate of the Local Courts of New South Wales, 5.

87. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146.

88. The study involved an analysis of sentencing data on multiple offenders whose principal offences were rape, armed robbery or burglary and whose sentence was passed in 1995 or 1996 in the Victorian County Court or Supreme Court: Austin Lovegrove, 'Sentencing the Multiple Offender: Judicial Practice and Legal Principle' (Research and Public Policy Series No 59, Australian Institute of Criminology 2002).

offences, each of which would, individually, warrant a sentence of imprisonment, with the following steps:

1. identify proportionate and appropriate sentences for each of the offences involved;

2. identify those offences (or groups of offences) that should be regarded as separate;

3. of those offences (or groups of offences) treated as separate, determine quantitatively their degrees of connectedness;

4. identify the principal offence and the secondary offences; the sentence for the former is the sentence on which the sentences for the latter are cumulated, and is usually the highest sentence (or one of the equal highest sentences);

5. sum the contributions of the sentences for the comprising separate secondary offences, having regard to their degrees of connectedness, to determine their total seriousness;

6. calculate the proportionate degree of cumulation for the secondary offences, having regard to this sum and the average (mean) sentence of these individual separate secondary offences;

7. add the proportionate degree (quantum) of cumulation to the sentence for the principal offence, to determine the (proportionate) effective sentence;

8. determine whether this proportionate sentence is crushing, having regard to the offender's circumstances;

9. if the proportionate sentence is crushing, reduce it so as to achieve the appropriate balance between proportionality and the matters of rehabilitation and mercy;

10. if this appropriate sentence is greater than the sentence for the principal offence, determine the cumulation orders so as broadly to reflect the separateness and the relative seriousness and connectedness of the secondary offences.

8.103 The following rules were proposed when deciding the separateness and connectedness of the offences:

- single acts represent separate transactions;

- if a second act is committed at the same time and location as the first, then it represents a separate transaction only if it clearly added to any victim's trauma, or was otherwise serious, or (potentially) had additional

consequences, or could not be regarded as blending with the other criminal behaviour; and

- time and location are the principal determinants of the connectedness of separate acts; acts committed at the same time and location are highly connected, and will be seen as less connected with the passage of time and change of location (the exception to this being acts done in support of a principal offence but at a different time and location).

8.104 The Council does not advocate the adoption of this, or any similar numerical framework. Sentencing cannot, in its view, be reduced to a mathematical formula, and any such approach would be bound to generate appeals.

A general sentence

8.105 The Council is also aware that there has been precedent for a general sentence to cover multiple counts in an indictment, both in early English authorities and under former Tasmanian and Commonwealth case law.[89] The advantages of such an approach are of simplicity in avoiding any need for consideration of questions of concurrency and accumulation, and in facilitating the assessment of the offender's total criminality. However there are disadvantages in determining whether the sentence is in range, and in ensuring consistency,[90] as well in gauging parity between co-offenders and in adjustment of the sentences if on appeal any of the convictions taken into account are quashed.

8.106 For these reasons, and also because any such system would not fit well with the current sentencing regime established by the *Crimes (Sentencing Procedure) Act 1999*, or accommodate the situation where the offender is serving a pre-existing sentence, the Council does not recommend a return to any such system.

Three areas for reform

8.107 In summary the Council considers that sufficient guidance has been given in the decisions earlier reviewed in this report, and if there is a difficulty in their application then the answer lies in judicial training and appropriate reference to the Sentencing Bench Book. It intends, however, to monitor appellate decisions concerned with a proper application of the totality principle, with a view to recommending a request for a

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89. For example, the repealed s 389(7) Criminal Code (Tas): see Kate Warner, 'General Sentences' (1987) 11 *Criminal Law Journal* 335.

90. Kate Warner, 'General Sentences' (1987) 11 *Criminal Law Journal* 335, 341–4.

guideline judgment if it appears to give rise to an unacceptably high incidence of appeals or to represent an intractable problem.

8.108 Three matters do however arise for consideration.

8.109 The first concerns the fact that s 55 of the Act effectively requires that sentences which are directed to be served cumulatively on pre-existing, or further sentences, must commence no later than the date which is specified as the expiry of such a sentence if it is for a fixed term, or on a date which represents the expiry of the non-parole period of a sentence where a non-parole period has been set. This has the consequence that the anticipated balance of term for each of those sentences becomes progressively absorbed in the subsequently accumulated sentences. The last accumulated sentence, effectively fixes the earliest possible parole release eligibility date, and the expiry date for the total sentence. As was noted in *R v Killick*,[91] the net result may involve an unjustified reduction on the overall head sentence. The Council observes that there is a logical necessity to commence a cumulative term on the expiry of a fixed term or of the non-parole period for the pre-existing sentence, to avoid any interruption in the anticipated custodial period, and also to facilitate the appellate variation of subsequent sentences if any intermediate sentence is quashed or varied.[92] However this does not overcome the problem identified in *Killick*.

8.110 A possible solution identified in that case was to amend the section to allow for an extension of the balance of term for the last sentence in the sequence, to compensate for this consequence, although this would have to be subject to the constraints of the maximum available sentence for the offence the subject of that sentence.

8.111 In the absence of legislative intervention, the Council believes that the problem can be partially resolved by imposing sentences for the less serious offences first, and by reserving the last sentence for the most serious offence, and/or by imposing fixed terms for the first offences dealt with in the sentencing order, regardless of the chronological sequence of their occurrence. This would not however be an answer for those cases where the new sentences are to be imposed on pre-existing sentences.

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91. *R v Killick* (2002) 127 A Crim R 273.
92. Pursuant to *Criminal Appeal Act 1912* (NSW) s 7(1A).

8.112 The Council considers that the practical difficulty presented in the type of case noted in Chapter 7[93] requires attention to ensure that an application of the totality principle to an offender convicted of and sentenced for sexual offences and unrelated non sexual offences does not preclude an application under the *Crimes (Serious Sex Offenders) Act 2006.*

8.113 A simple solution, so long as it occurs to the sentence judge, would be to ensure that the sentence for the sexual offence was the last in any sequence of cumulative sentences. This would not necessarily provide a solution however where the sentences for the non sexual offences were made cumulative on existing sentences for sexual offences, as would be the case where the first mentioned sentences were imposed at a later date.

8.114 The Council accordingly considers that the *Crimes (Serious Sex Offenders) Act 2006* should be amended so as to allow an application to be made in the case of an offender serving cumulative sentences, where any one of those sentences was imposed for a serious sex offence, or for an offence of a sexual nature, irrespective of their position in the continuum of the overall sentence.

8.115 Secondly, there is the question discussed earlier in this report[94] of amending the Act to provide for the situation where an offender is to be sentenced for an escape and for offences committed by him while at large. The Council is of the view that s 57 should be amended to require the sentences for the non-escape offences to be set first and for the sentence for the escape offence to be made cumulative upon it.

Recommendation 12

The Council recommends that consideration be given to amending the *Crimes (Serious Sex Offenders) Act 2006* so as to include a provision that where an offender is serving cumulative sentences, any one or more of which is in relation to a serious sex offence or an offence of a sexual nature, an application may be made under the *Crimes (Serious Sex Offenders) Act* regardless of the sequence in which the cumulative sentences were imposed.

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93. Chapter 7, [7.16] – [7.18].
94. Chapter 7, [7.13]–[7.14].

Recommendation 13

The Council recommends that consideration be given to amending s 57 of the *Crimes (Sentencing Procedure) Act 1999* so as to require the court to first set the sentences for the non-escape offences, with the sentence for the escape to be made cumulative upon it.

FORM 1

8.116 The Council accepts that the Form 1 procedure has operated successfully for a lengthy period, and presents numerous advantages in allowing an offender to clear the slate; in enabling the police to close more files, to improve their clear up rate and save their time and effort in investigating crimes that would otherwise remain unsolved; and in saving court time and unnecessary attendances by witnesses. It received considerable support in the submissions received by the Council[95] and has been supported by several inquiries and academic commentaries.[96]

8.117 It is subject to the several safeguards provided by ss 33(2)(b) and 33(4) of the *Crimes (Sentencing Procedure) Act 1999*, the guideline judgment[97] and the ODPP guidelines, noted earlier.

8.118 The Council has given consideration to several possibilities for reform which were identified in the course of the submissions or its inquiries.

Procedural errors

8.119 The ODPP noted that most appeals relating to Form 1 involved procedural errors—for example, where the wrong offence is nominated as the principal offence to

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95. Submission 2: The Hon Justice Peter McClellan, Chief Judge at Common Law, Supreme Court of New South Wales; Submission 9: Office of the Director of Public Prosecutions New South Wales, 5; Submission 12: Ministry for Police (NSW).

96. Queensland Law Reform Commission, *Proposals to Amend the Practice of Criminal Courts in Certain Particulars*, Report No 27 (1978); Michael Wilkinson, 'Taking Other Offences into Consideration in Hong Kong' (1991) 21(1) *Hong Kong Law Journal* 19; S. White, M. Newark and A. Samuels, 'Offences Taken into Consideration' [1970] *Criminal Law Review* 311; F. McGuire, 'Plea Bargaining: Its Significance in the Australian Criminal Justice System' (1981) 6(2–3) *Queensland Lawyer* 47; Law Reform Commissioner (Victoria), *Criminal Procedure (Miscellaneous Reforms)*, Report No 2 (1974).

97. *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146.

which the Form 1 matters attach,[98] or where Form 1 matters are taken into account on two offences.[99] It suggested that the problem could be ameliorated either by a provision that such procedural errors do not invalidate the sentence; or by amending the approved form pursuant to regulation 4 of the *Crimes (Sentencing Procedure) Regulation 2005* (NSW) to provide a recommendation, rather than a requirement, that a single offence be nominated as the principal offence.[100]

8.120 The Council supports the former recommendation, noting that it would be consistent with other provisions of the Act which effectively prevent procedural error from invalidating the sentence,[101] and that it would not exclude appeal where the error resulted in a sentence that was either manifestly lenient or excessive.

Recommendation 14

The Council recommends that consideration be given to amending s 33 of the *Crimes (Sentencing Procedure) Act 1999* to include a provision that where the court falls into procedural error in the application of the section, any sentence imposed by the court is not invalidated.

Facts accompanying the Form 1

8.121 The Council notes that in some instances the facts of the offences shown on the Form 1 are brief in the extreme, such that it is difficult for a sentencing judge to make an informed assessment of the overall criminality involved. It would encourage greater explanation of the facts although it does not consider amendment of the Act or regulation necessary.

Offences taken into account

8.122 When delivering the guideline judgment, the NSW Court of Criminal Appeal (NSWCCA) did not develop any comprehensive directions in relation to the suitability of

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98. *R v Street* [2005] NSWCCA 139, [15].
99. *R v Dowd* [2005] NSWCCA 113, [39].
100. Submission 9: Office of the Director of Public Prosecutions New South Wales, 5.
101. See, eg, the *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 22(4), 45(4), 48(3), 50(3), 54B(5), 54C(2).

offences for inclusion in a Form 1, although subsequent decisions have provided a degree of refinement, as noted earlier.[102]

8.123 In this regard the Council accepts that it would generally be inappropriate to:

- include in a Form 1 an offence where it carries a maximum sentence that is higher than that for the principal offence, or where its objective criminality is greater;
- include in a Form 1 an inordinate number of like offences where only one principal offence is included in the indictment;
- include in a Form 1 offences of a like kind involving the serious physical or sexual assault of a victim or victims other than the victim identified in the principal offence;
- include in a Form 1 offences which are not of a similar kind or gravity to the principal offence;
- include in a Form 1 offences in relation to the administration of justice, or serious offences against law enforcement, justice or correctional officers.

8.124 The Council is concerned however that legislative codification of considerations such as these into sentence principles beyond the limitations for which provision is currently made in s 33(4) of the Act, could stultify the use of the Form 1 procedure, and charge bargaining process. It prefers that the selection of offences be left to the discretion of the prosecuting authorities, subject to the overriding discretion of the court, contained in s 33(2), to decline to take offences into account where it does not consider it appropriate to do so.

8.125 The Council is of the opinion that interstate legislation dealing with taking offences into account and the limitations as to which offences can be taken into account does not provide further significant guidance than the New South Wales provisions.[103]

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102. Chapter 7, [7.74]–[7.78].

103. See *Sentencing Act 1991* (Vic) s 100; *Sentencing Act 1995* (NT) s 107; *Crimes (Sentencing) Act 2005* (ACT) ss 54–60; *Penalties and Sentences Act 1992* (Qld) s 189; *Sentencing Act 1997* (Tas) s 89; *Sentencing Act 1995* (WA) ss 31–33. In South Australia there is legislation recognising the practice of taking offences into account, but there is no statutory procedure in place: LexisNexis, *Halsbury's*

The most significant guidance is provided by the legislation of Victoria and the Northern Territory, which both state that neither the substantive offence, nor any of the offences to be taken into account, can be treason or murder.[104] Similar to New South Wales, the ACT provisions do not apply to offences punishable by life imprisonment.[105] Many of the interstate acts specify that the court must consider it appropriate for the offences to be taken into account,[106] and deal with jurisdictional limitations,[107] as do the New South Wales provisions.

CONCLUSION

8.126 The overall conclusion of the Council is that the existing laws and sentencing practice provide an appropriate response in relation to the several matters that might justify a lessening of the sentence that would otherwise be appropriate. In some relatively minor aspects, recommendations have been made for legislative amendment, either to remove anomalies or to deal with matters that might be overlooked without legislative guidance.

8.127 Although the issue of the correct approach to determining the ultimate sentence, after allowance is made for the discounting factors, remains unresolved, having regard to the argument respectively in favour of, and critical of, the instinctive synthesis and two stage processes,[108] the Council does not consider that this could be resolved by legislative intervention. Each has its own place, and no one approach can be said to be

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Laws of Australia, 130 'Criminal Law', Chapter VIII 'Sentencing', 3 'Sentencing Procedure', 'Taking into account other offences' [130-17175]

104. *Sentencing Act 1991* (Vic) s 100(1)(a); *Sentencing Act 1995* (NT) s 107(1)(a).

105. *Crimes (Sentencing) Act 2005* (ACT) s 55(2).

106. The phrase 'if it thinks fit' appears in *Sentencing Act 1991* (Vic) s 100(3), and *Sentencing Act 1995* (NT) s 107(3); the phrase 'in all the circumstances of the case it is proper to do so' appears in *Penalties and Sentences Act 1992* (Qld) s 189(1)(b)(iii); the phrases ' in all the circumstances it is proper to do so' and 'if it thinks fit' appear in *Sentencing Act 1997* (Tas) ss 89(1)(c), 89(3); the phrase 'considers that it is just to do so' appears in *Sentencing Act 1995* (WA) s 33(2).

107. *Sentencing Act 1991* (Vic) s 100(6); *Sentencing Act 1995* (NT) s 107(6); *Sentencing Act 1997* (Tas) s 89(6); *Crimes (Sentencing) Act 2005* (ACT) ss 57(4), 57(5), 57(6) and *Sentencing Act 1995* (WA) ss 32(3), 32(4).

108. Austin Lovegrove, 'Intuition, Structure and Sentencing: An Evaluation of Guideline Judgments' (2002) 14 *Current Issues in Criminal Justice* 182; Mirko Bagaric and Richard Edney, 'What's Instinct Got to Do with It? A Blueprint for Coherent Approach to Punishing Criminals' (2003) 27 *Criminal Law Journal* 119; Kate Warner, 'Sentencing Review 2004–2005' (2005) 29 *Criminal Law Journal* 355, 359; the Hon Justice D. Mildren, 'Intuitive Synthesis or the Structured Approach' (Paper presented at the Sentencing: Principles, Perspectives and Possibilities Conference, Canberra, 10–12 February 2006).

superior for every possible sentencing scenario. Ultimately the only test of whether a sentence involves a proper exercise of sentencing discretion, is whether it is one that is proportionate to the offender's objective criminality after making due allowance for his subjective circumstances.

8.128 Similarly the Council does not consider it appropriate to prescribe by legislation any maximum level of discount after taking into account all of the discounting factors. To do so would risk fettering the judicial discretion and the need to recognise, as has the case law, the existence of exceptional cases.

8.129 The Council recognises that transparency of the process remains important, and it encourages the provision by judges of reasons that will indicate that account has been taken of the principles settled by the courts as summarised in this report, and that will explain how the sentence was reached.

8.130 A number of specific complaints were received by the Council concerning the application of the discounting factors, for example relating to their use by judges in finding special circumstances resulting in a variation of the ratio between the NPP and the balance of the term;[109] or relating to the disparity in outcome where co-offenders have been sentenced by different judges, or where the difference in individual circumstances has not been satisfactorily explained;[110] or in relation to the use of intoxication as a factor justifying a reduction in the sentence.[111]

8.131 The Council regards these matters as adequately catered for in existing law, and in the case of intoxication addressed in its report on alcohol-related violence.[112] In relation to the disparity argument it agrees that best practice would require co-offenders to be sentenced by the same judge, and for care to be taken in the reasons for sentence to explain any apparent disparity in the sentencing outcomes.

8.132 Finally, the Council acknowledges the submission of the ODPP[113] that despite the considerable guidance provided by the NSWCCA there are still instances where the

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109. Submission 12: Ministry of Police (NSW).

110. Submission 9: Office of the Director of Public Prosecutions New South Wales, referring to *Browne v The Queen* [2006] NSWCCA 62, [15] (Sully J).

111. Submission 12: Ministry of Police (NSW), 2–3.

112. NSW Sentencing Council, *Sentencing for Alcohol-Related Violence* (2009).

113. Submission 9: Office of the Director of Public Prosecutions New South Wales, 2.

sentencing discounts have been misapplied. The Council accepts this to be so and notes, additionally, that error regularly occurs in relation to the application of the totality principle.

8.133 It agrees that these problems cannot be cured by legislation alone, and that the answer lies in improved judicial education on sentencing principles, and careful attention to the decisions of the NSWCCA. Additionally it considers it important that judicial officers be kept informed as to the facilities, programs and procedures available or in force within adult and juvenile justice correctional systems, including those provided by Justice Health.

Recommendation 15

The Council recommends that a formalised program be developed by the NSW Judicial Commission, the Department of Corrective Services, Juvenile Justice and Justice Health, to keep judicial officers informed of the facilities, programs and procedures available or in place for the detention and management of adult and juvenile offenders, including the provision of visits to the centres in which such persons may be detained or services provided.

ANNEXURE A: Case study—Murder in NSW

STUDY

A.1 At the request of the Sentencing Council, the Public Defenders undertook a review of sentences for the offence of murder, where the murders were committed after 1 February 2003 and sentencing occurred prior to May 2008, and where discounts were allowed for pleas of guilty or for assistance.

A.2 The Council notes the limitations of the study owing to the small number of cases in the study sample and the inevitable differences in the objective and subjective circumstances in each case, and it does not offer the following analysis as meeting any statistically valid standard. The Council also notes that an assessment of the adequacy of judicial reasoning in applying discounts and in taking into account mitigating factors as part of the sentencing process in these cases has not been undertaken. Taking heed of these qualifications, and of the additional qualification that in some cases[1] the offenders admitted responsibility for the killing and went to trial only on the issue of substantial impairment by abnormality of mind, or self defence, or provocation, some very general observations can be made.

PENALTIES FOR MURDER

A.3 The offence of murder carries a maximum penalty of life imprisonment.[2] Where the offence is committed after 1 February 2003 it attracts a standard non-parole period. Where the victim falls into a particular category nominated within the Table, the standard non-parole period is 25 years. In all other cases, the standard non-parole period is 20 years.[3]

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1. See *R v Azar* [2004] NSWSC 797; *R v Disano* [2006] NSWCCA 125; *R v Malcolm Gordon East* [2007] NSWSC 1051.
2. *Crimes Act 1900* (NSW) s 19A.
3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D 'Table Standard non-parole periods: Items 1A and 1B of the Table specify what categories of murder attract a standard non-parole period of 25 years: where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker,

PLEAS OF GUILTY AS COMPARED WITH CONVICTION AFTER TRIAL

A.4 67 offenders were sentenced for murder in the study period. 27 of these (including two (2) juveniles), or 40.3 per cent of the sample, entered pleas of guilty to the offence, and 40 of these, or 59.7 per cent of the sample, pleaded not guilty but were convicted at trial (including two (2) juveniles).

A.5 Whether it be 20 years or 25 years, the standard non-parole period attached to the offence of murder is quite significant in length. Similarly, the maximum penalty of life imprisonment is the highest maximum penalty found in the criminal calendar. These penalties can be compared with other standard non-parole period offences contained in the Table. For instance:

- The offence of reckless wounding under s 35(4) of the *Crimes Act 1900* (NSW) and the offence of assault police officer occasioning bodily harm under s 60(2) of the *Crimes Act* each attract a standard non-parole period of three (3) years in the context of maximum penalties of imprisonment for seven (7) years. These standard non-parole periods are, comparative to the standard non-parole periods for murder, quite short in length, although they represent a significant proportion, approximately 42.9 per cent, of the maximum head sentences available for these offences.

- The offence of breaking into any house and committing a serious indictable offence in circumstances of aggravation, under s 112(2) of the *Crimes Act*, attracts a standard non-parole period of five (5) years in the context of a maximum penalty of 20 years. This is only 25 per cent of the available maximum head sentence for this offence.

A.6 Noting then, that there are offences contained in the Table which attract smaller maximum penalties, and that there are offences which attract standard non-parole periods which represent a relatively small percentage of the maximum head sentence, the Council notes that it would be useful for a future study to be conducted to contrast the statistics comparing pleas of guilty with convictions after trial for murder, with statistics for some of these other offences, to ascertain if there is a difference in the

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or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work; or where the victim was a child under 18 years of age.

frequency of pleas of guilty. It would also be relevant to compare the statistics for murder offences with statistics for those offences which do not attract a standard non-parole period, again to ascertain if there is a difference in the frequency of pleas of guilty. A comparison of this nature might shed some light on whether the standard non-parole period scheme, and/or the length of standard non-parole periods, including the lengths of standard non-parole periods as a proportion of the maximum penalty, has had any impact on the frequency of guilty pleas.

REGULARITY OF EARLY PLEAS OF GUILTY COMPARED WITH LATE PLEAS OF GUILTY

A.7 Of the 27 offenders who pleaded guilty, 17, or 63 per cent of the sample, entered an early plea (prior to the date fixed for trial) and 10, or 37 per cent of the sample, entered a late plea (at the commencement of the trial or later).

A.8 It can be generally observed that offenders in the sample were more inclined to enter early pleas than late pleas in this category of offence. Noting the authorities which point to the timing of the plea as one of the predominant factors relevant to measuring the value of the discount, it can be surmised that this principle is acting as an incentive for offenders to enter early, rather than late, pleas of guilty.

DISCOUNT RANGES

A.9 Sixteen (16) adult offenders entered early pleas of guilty, and nine (9) adult offenders entered late pleas of guilty. A comparison of these two groups reveals little difference in the average discounts awarded. However, there was a small increase in the average discount for early pleas of guilty (16 per cent, as compared with 13 per cent for late pleas of guilty). An increase in the discount is consistent with what would be expected if the Courts were looking to the timing of the plea as one of the prevailing considerations in determining the utilitarian value of the discount. The study did note however, that in some cases where pleas might be considered to have been entered late, offenders were given the full 25 per cent discount. The study noted the case of *R v Colb*[4]

4. *R v Colb* [2006] NSWSC 811.

where it was held that the prisoner had been entitled to determine if there were any partial defences available to him prior to entering a plea.

PENALTY RANGES

Early pleas of guilty as compared with late pleas of guilty

A.10 A comparison of the adult offenders who entered early pleas of guilty with the adult offenders who entered late pleas of guilty, shows that while two (2) offenders who entered early pleas of guilty received no discount owing to the very serious nature of the offences, and were sentenced to 'life imprisonment', none of the 10 offenders who entered late pleas of guilty received life imprisonment. Comparison in this respect, it is acknowledged, is of limited value, having regard to the degree of culpability which needs to be present to justify a mandatory sentence of life imprisonment.[5]

A.11 A comparison of the average sentences of adult offenders who entered early and late pleas reveals little difference between these groups: offenders who entered early pleas and who were not sentenced to life imprisonment received an average non-parole period (NPP) of 15 years and 6 months and an average additional term of 5 years and 6 months, and offenders who entered late pleas received an average NPP of 16 years and 7 months and an average additional term of 5 years and 4 months. This represents a very slight decrease in the average penalty for those who entered early pleas of guilty.

A.12 Interestingly, the longest penalties were awarded to offenders within the category of early pleas of guilty. In this category, 2 offenders received life sentences, and the next longest sentence was one of 35 years imprisonment with a NPP of 25 years. This can be compared with the longest sentence in the group of offenders who entered late pleas of guilty, which was 27 years imprisonment with a NPP of 21 years and 6 months (this being the effective and part cumulative sentence for an offender sentenced for a double murder). The shortest sentences in both groups were comparable, although slightly longer for a late plea of guilty: the shortest sentence for those within the early plea category was 16 years with a NPP of 10 years, while the shortest sentence

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5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(1).

for those within the late plea of guilty category was 17 years and 11 months with a NPP of 13 years and 6 months.

Pleas of guilty as compared with verdicts of guilty at trial

A.13 There was a noticeable difference in the penalties awarded between those adult offenders who entered pleas of guilty and those who were found guilty after trial. Of the 38 adult offenders who were found guilty after trial, seven (7) offenders were sentenced to life imprisonment. The average sentence for the remaining offenders was a NPP of 18 years and 10 months and an additional term of 6 years and 2 months. This represents a NPP that is 2 years and 11 months longer than the average sentence for offenders who entered pleas of guilty. The longest sentence after life imprisonment for an offender found guilty after trial was 36 years with a NPP of 26 years. This is a noticeable increase in length when compared with the highest sentences after life for pleas of guilty. The increase in average sentence length for those found guilty after trial as compared with those who pleaded guilty is consistent with what would be expected if offenders were being awarded discounts for pleas of guilty.

A.14 The shortest sentence in this group was comparable with the shortest sentences in the guilty plea groups: a sentence of 16 years with a NPP of 11 years 6 months.

A.15 The study made the observation that some offenders who pleaded not guilty received NPPs that were shorter than the average NPP received by offenders who pleaded guilty. This goes against the trend that would be expected if offenders were being awarded discounts for pleas of guilty. The study noted that in those cases defences such as 'self defence', 'provocation' and 'substantial impairment by abnormality of the mind' were raised unsuccessfully. It may, however be that, while not reaching the threshold of a 'defence' that might reduce murder to manslaughter, the circumstances relied on were regarded as reducing the offender's objective criminality.

Juveniles

A.16 The study concluded that juvenile offenders sentenced for murder generally received NPPs that were lower than adult offenders, as might be expected having regard to the sentencing principles applicable to young offenders.[6]

ASSISTANCE TO THE AUTHORITIES

A.17 The study showed that four (4) offenders received discounts for assistance. The maximum discount comprised an aggregate discount for the plea of guilty and assistance of 50 per cent, in a matter where the court found that the assistance was crucial to the conviction of the co-accused.[7] This included a discount of 25 per cent attributable to future assistance.

A.18 Of the three remaining matters, one juvenile offender received an aggregate discount described as approaching but falling short of 50 per cent including a discount for future assistance of 20 per cent,[8] another offender received a discount of 15 per cent[9] and the final offender received 'some discount' for assistance.[10]

A.19 It can be observed that all four (4) offenders received combined discounts which were within the acceptable range promulgated by the authorities.

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6. One juvenile offender entered an early plea of guilty, and received an aggregate discount described as approaching but falling short of 50% resulting in a head sentence of 12 years and 8 months with a NPP of 9 years and 6 months: *R v A* [2006] NSWSC 1035; 1 juvenile offender entered a late plea and received a 15% discount for the plea, resulting in head sentence of 14 years with a NPP of 9 years with 6 months: *R v AB* [2005] NSWSC 521; 2 juveniles were found guilty after trial, one offender being sentenced to a head sentence of 22 years with a NPP of 15 years and 6 months, and the other offender being sentenced to a head sentence of 18 years with a NPP of 13 years: *R v MB* [2006] NSWSC 1164; *R v SSA* [2007] NSWSC 1202.
7. *R v Burnes* [2007] NSWSC 298, [59]–[61]. The offender was sentenced to imprisonment for 18 years with a NPP of 13 years and 6 months.
8. *R v A* [2006] NSWSC 1035, [68]. The Court nominated the discount for future assistance as 20%, and the sentence imposed was one of 12 years and 8 months with a NPP of 9 years and 6 months.
9. *R v CB* [2006] NSWSC 261 the discount for future assistance was assessed as 15%. The offender was sentenced to 18 years with a NPP of 13 years (partially cumulative with another offence).
10. *R v Parkes* [2006] NSWSC 331, [121]. The offender also received a 20% discount for the utilitarian value of the early plea of guilty: [117]. The offender was sentenced to a NPP of 13 years and an additional term of 5 years.

STANDARD NON-PAROLE PERIODS AND JUDICIAL INFORMATION RESEARCH SYSTEM (JIRS) STATISTICS

A.20 It is relevant to consider how many murder cases attracted a NPP at the standard non-parole period (SNPP) level, and whether pleas of guilty had an impact on this. It is also relevant to consider how many cases involved victims who fell within the 'special categories' in items 1A and 1B of the Table, attracting the higher SNPP of 25 years.

A.21 The Judicial Information Research System (JIRS) statistics for the offence of murder under s 19A have been used for this analysis.

Length of terms

A.22 84 offenders were subject to the 20 year SNPP specified in item 1 of the Table.[11] The statistics do not show a breakdown of offenders subject to the greater 25 year SNPP so it is assumed that there have been no matters reported where the victims fell into these 'special categories'.

A.23 All 84 offenders received sentences of full time imprisonment. A comparison of the sentences for those offenders who pleaded guilty with the sentences of those offenders who pleaded not guilty, shows a slight decrease in the midpoint of the length of sentences for those who pleaded guilty. The decrease in the midpoint of the sentences for those who pleaded guilty as compared with those who pleaded not guilty and went to trial is consistent with what would be expected if offenders were being awarded discounts for pleas of guilty.

A.24 29 of the 40 offenders who pleaded guilty received non-consecutive terms. The midpoint for the term of sentence for this group was 20 years.

A.25 34 of the 44 offenders who pleaded not guilty received non-consecutive terms. The midpoint for the term of sentence for this group was 24 years.

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11. Judicial Commission of New South Wales statistics have been obtained for the Higher Courts for the period February 2003 to June 2008 (s 19A—subject to SNPP item 1).

Non-parole periods

A.26 For the purposes of JIRS statistics only non-consecutive terms are analysed in terms of the NPP/fixed term.

A.27 Of the 29 offenders in this group analysed who pleaded guilty, the midpoint for the NPP/fixed term was 15 years (6 offenders or 21 per cent). One (1) offender (3 per cent) received a NPP/fixed term at the SNPP level of 20 years, and three (3) offenders (10 per cent) received a NPP/fixed term over 20 years in length.

A.28 Of the 34 offenders in this group analysed who pleaded not guilty, the midpoint for the NPP/fixed term was 18 years (5 offenders or 15 per cent). Four (4) offenders (12 per cent) received a NPP/fixed term at the SNPP level of 20 years, and nine (9) offenders (27 per cent) received a NPP/fixed term over 20 years in length.

A.29 Again, the decrease in the midpoint of the NPPs for those who pleaded guilty as compared with those who pleaded not guilty and went to trial is consistent with what would be expected if offenders were being awarded discounts for pleas of guilty.

Tables provided by the Public Defenders

A.30 The Public Defenders provided the Sentencing Council with the details of those cases studied where offenders received non-parole periods of equal to or greater than the SNPP of 20 years. These cases were grouped into those offenders who were found guilty after trial (Table 1), and those offenders who pleaded guilty (Table 2). The Public Defenders were not able to advise whether any of those cases involved victims of the kind listed in item 1A or 1B of the Table at s 54D of the *Crimes (Sentencing Procedure) Act 1999* (NSW), and therefore subject to the greater SNPP of 25 years. However, given that the JIRS statistics do not show a breakdown of offenders subject to the 25 year SNPP, it might be assumed that none of the cases studied by the Public Defenders were subject to the 25 year SNPP.

TABLE 1: ADULTS – PLEA OF NOT GUILTY (OFFENCES COMMITTED AFTER 01/02/03)

CASE	OFFENCE AND RELEVANT ISSUES	COMMENTS
R v Barton [2007] NSWSC 651 37 y 30 y NPP (total for all offences – 42 y and 35 y NPP)	s 19A x 1 (+ manslaughter and attempted murder) Shooting of one victim and burning down house with victim's children inside (after shooting)	Unsuccessful defence of self defence
R v Darwiche & Ors [2006] NSWSC 1167 1 offender 2x 27 y 22 y NPP	s 19A x 2 (+ attempted murder etc) Dispute between drug families	
R v Holland [2004] NSWSC 653 30 y 23 y NPP	s 19A x 1 Escaped prisoners Worst category offence	
R v Imnetu [2006] NSWCCA 203 27 y 8 m 20 y NPP	s 19A x 1 Joint criminal enterprise Circumstantial case Co-offender left country and was never charged	Appeal against conviction and sentence dismissed
R v McCall [2007] NSWSC 1269 29 y 4 m 22 y NPP	s 19A x 1 Conspired to kidnap and extort money from the victim	
R v Mencarious [2006] NSWSC 719 26 y 8 m 20 y NPP	s 19A x 1 Husband killed his estranged wife	Unsuccessful defence of provocation and duress
R v Nguyen & Ors [2007] NSWCCA 363 *Duong Nguyen*: 31 y, 23 y NPP (++) (on appeal 27 y 4 m, 20 y NPP)	s 19A x 1 (+maliciously inflict grievous bodily harm) 4 co-offenders Same charges for each co-accused	

CASE	OFFENCE AND RELEVANT ISSUES	COMMENTS
R v Norman; R v Olivieri [2007] NSWSC 142 *Norman*: 35 y 29 y NPP *Olivieri*: 33 y 28 y NPP	s 19A x 1 (+ defrauding as a director) Norman planned a contract killing and was held more culpable	
R v RHB [2007] NSWSC 1466 30 y 20 y NPP (+manslaughter effective sentence: 30 y, 24 y NPP)	s 19A x 1 (+manslaughter) Killed two babies (cousins) 10 years apart	
R v Steer [2006] NSWSC 1198 29 y 4 m NPP 22 y (++) Effective NPP 24 y	s19A x 1 (+armed robbery)	Unsuccessful defence of provocation
R v Verslyus [2006] NSWSC 188 26 y 8 m 20 y NPP Appeal against conviction and sentence dismissed	s 19A x 1 Drug affected man strangled his wife after argument Offence high middle range of seriousness	*Note: CCA appeal dismissed
R v Willard [2005] NSWSC 402 36 y 26 y NPP	s 19A x 1 Wife killed husband after taking out insurance policy Level of criminality involved was not far short of that required for “life”	
R v Wilson [2008] NSWSC 238 26 y 6 m 20 y NPP	s 19A x 1 Drug dealing that went wrong Co-accused got manslaughter Just higher than midrange in seriousness	Unsuccessfully argued manslaughter

TABLE 2: ADULTS—PLEA OF GUILTY AND/OR ASSISTANCE (OFFENCES COMMITTED AFTER 01/02/03)

CASE	OFFENCE AND RELEVANT ISSUES	TIMING OF PLEA AND/OR ASSISTANCE	DISCOUNT ALLOWED	COMMENTS ON DISCOUNT
Aslett v The Queen [2006] NSWCCA 360 28 y 22 y NPP	s 19A x 1 (18 other serious charges in three other indictments – Form 1) Extensive record Drug use etc	Early plea No assistance	0%	Murder sentence adjusted for reasons other than early plea discount
R v Galante [2008] NSWSC 319 27 y 20 y NPP	s 19A x 1 Killed wife and tried to conceal as disappearance	Late plea	10%	
R v Goodwin [2004] NSWSC 757 22 y x 2 16 y 6 m NPP (effective sentence: 27 y, 21 y 6 m NPP)	s 19A x 2 Killed ex-partner and her new partner	Late plea	17.5%	
R v O'Connell [2004] NSWSC 1120 35 y 25 y NPP (CCA appeal dismissed)	s 19A x 1 Worst category of murder but subjective matters persuaded judge to impose a sentence less than life	Early plea	20%	

ANNEXURE B: Submissions

Submission 1 – Criminal Law Committee, NSW Young Lawyers

Submission 2 – The Hon Justice Peter McClellan, Chief Judge at Common Law, Supreme Court of New South Wales

Submission 3 – Mr Harry RJ Bremner

Submission 4 – Mr Harry RJ Bremner (supplementary)

Submission 5 – His Honour Graeme Henson, Chief Magistrate of the Local Courts of New South Wales

Submission 6 – The Police Association of NSW

Submission 7 – NSW Department of Corrective Services

Submission 8 – Illawarra Legal Centre Inc

Submission 9 – Office of the Director of Public Prosecutions New South Wales

Submission 10 – Legal Aid (NSW)

Submission 11 – Brave Hearts

Submission 12 – The Ministry for Police (NSW)

Submission 13 – The Public Defender's office (NSW)

Submission 14 – Mr Ian Pike AM, Chairperson of the NSW Parole Authority

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