

Sentencing Discounts – Are they worth the effort?

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A paper presented at the Sentencing Conference 2008 of the National Judicial College of Australia and the Australian Nation University on 10 February 2008

Introduction

- 1 The otherwise appropriate sentence to be imposed for a particular criminal act might be reduced for a number of reasons, many personal to the offender. Although such a reduction may be regarded as a discount of the sentence otherwise warranted by the objective circumstances of the offence, generally speaking and for the purpose of this paper, a sentencing discount refers to a specific reduction, usually quantifiable, relating to a discrete factor and which is applied after all other sentencing considerations have been taken into account.

- 2 Two sentencing discounts have generally been identified both relating to post-offence conduct on the part of the offender. They are, firstly, a reduction derived from a plea of guilty and, secondly, a reduction that recognises assistance given by the offender to the investigating or prosecuting authorities¹. However, there have been occasions where sentencing judges at first instance have purported to apply other sentencing discounts. In *R v Z*² the judge applied a discount of 2 years imprisonment by reason of the offender's mental disability. In *Lewins v R*³ the sentencing judge gave a specific, quantified discount by reason of the offender's disclosure of otherwise unknown offences to the police, often referred to in NSW as an "*Ellis* discount"⁴. In each case the Court of Criminal Appeal held that the judge erred in applying such a discount

¹ These two matters were identified in the joint judgment in *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at [24] as capable of being subject to "some specific numerical or proportional allowance".

² [2006] NSWCCA 342; 167 A Crim R 436.

³ [2007] NSWCCA 189.

⁴ See *R v Ellis* (1986) 6 NSWLR 603 and *Ryan v The Queen* (2001) 206 CLR 267 per McHugh J at 271ff.

notwithstanding that in each case the matter that was the subject of the discount was a relevant mitigating factor.

- 3 The problem of applying a discount to ultimately reduce the sentence that would otherwise have been appropriate is the risk of double counting. It is difficult to isolate a relevant sentencing factor as having only one effect upon the sentence or reflecting a specific aspect of the subjective factors of the offender. For example, a plea of guilty reflects a number of considerations: saving the public the time and expense of a trial, relieving victims from giving evidence in a stressful environment, and indicating that the offender accepts criminal responsibility for the conduct which is some evidence of remorse and hence suggests good prospects of rehabilitation. Similarly giving assistance to the authorities tends to suggest both remorse and a willingness on the part of the offender to redress the wrongful conduct involved in the commission of the offence or, where the assistance is unrelated to the offence committed, an indication of reform⁵. Of course both factors might reflect only self-interest on the part of the offender in seeking to reduce the sentences to be served. But the post-offending conduct of the offender is generally the best evidence of remorse, reform and the prospects of rehabilitation and, therefore, is generally mitigating regardless of any other consideration based upon a distinct public policy.

- 4 A consideration of the appropriateness of sentencing discounts leads to a consideration of the competing views about the proper manner of determining a sentence: the two-step or staged approach versus the instinctive synthesis approach. The difference in these approaches is best seen in the judgments of Kirby J (in support of the former approach) and McHugh J (in support of the latter approach) in *Markarian v The Queen*⁶. However the view expressed in the joint judgment in that decision supported the McHugh approach⁷ but accepted that there may be

⁵ See *R v Gallagher* (1989) 23 NSWLR 220.

⁶ Above at [39].

⁷ Based upon the decision in *Wong v The Queen* [2001] HCA 64; 209 CLR 584.

occasions when “some indulgence in arithmetical process” might be appropriate in order to serve the interests of transparency in sentencing in an uncomplicated matter. One such occasion is where there has been a plea of guilty. However in *R v MAK and MSK*⁸ it was held that the benefit of transparency should give way to the risk of double counting so far as a discount based upon remorse, either solely or in conjunction with a plea of guilty, was concerned.

Discount for plea of guilty

- 5 In *R v Thomson and Houlton*⁹ a five-judge bench of the NSW Court of Criminal Appeal considered the circumstances in which a discount should be applied following a plea of guilty. The Court established a guideline set out in paragraph [161] of the judgment of the Chief Justice. The Court determined that a discrete discount should be given to reflect the utilitarian value of the plea, that is its benefit to the system of justice generally by saving the time and expense of a trial. The discount was not based upon remorse and hence was unconnected with the strength of the prosecution case¹⁰ or the relief of witnesses in not being required to give evidence. The discount was generally to be between 10 and 25 per cent: the amount of the discount determined according to the timing of the plea and the complexity of the prosecution case. However the Court stressed that the amount of the discount was a matter for the exercise of the discretion of the sentencer and that an offender had no right to any particular discount¹¹. The guideline has continued to be applied notwithstanding later decisions of the High Court and applies whether or not the offender intends to facilitate the administration of justice¹².
- 6 The guideline also applies to Commonwealth offences. However even here there is a complication. Even though the strength of the Crown case is not a consideration when applying the guideline to state offences

⁸ [2006] NSWCCA 381 at [45]

⁹ [2000] NSWCCA 309; 49 NSWLR 383.

¹⁰ See *R v Carter* [2001] NSWCCA 245 at [13]ff.

¹¹ *R v Scott* [2003] NSWCCA 286.

¹² See *R v Sharma* (2002) 54 NSWLR 300 at [52].

because the discount is based upon the utilitarian value of the plea¹³, the strength of the Crown case is relevant in Commonwealth offences because the discount is based upon a willingness to facilitate the course of justice¹⁴.

7 Since the statement of the guideline in relation to the discount for the plea of guilty there has been some fine-tuning of the position. The Chief Justice accepted in **Thomson and Houlton** that a discount for all aspects of the plea of guilty, including remorse and relief to witnesses, might be in the vicinity of 30 per cent¹⁵. However in **R v MAK and MSK**¹⁶ it was held that the discount for the plea of guilty should not include any aspect of remorse nor should any specific discount be granted by reason of remorse alone. The view was expressed that, if the presence of remorse did not lead to a finding of good prospects of rehabilitation or the likelihood of reform or did not indicate the personal deterrence was not required, then it had no particular relevance and certainly did not justify a discrete discount of the sentence¹⁷. Before that decision combined discounts for both the utilitarian value of the plea and remorse could be as high as 40 per cent. The maximum discount applicable will therefore be 25 per cent unless the case is one of the earliest plea in a very complex and difficult case. In some cases the plea of guilty might result in a more lenient sentencing order rather than in a discount of the length of the sentence¹⁸.

8 There are cases that hold that remorse itself may give rise to a reduction in sentence. It is a particular matter mentioned as a mitigating factor in the NSW **Crimes (Sentencing Procedure) Act 1999**¹⁹. Very often the plea of guilty itself is seen as evidence of remorse. But remorse alone is not

¹³ See above at note 10.

¹⁴ **Tyler v R** [2007] NSWCCA 247; **Danial v R** [2008] NSWCCA 15

¹⁵ Op cit at [162].

¹⁶ Op cit at [44].

¹⁷ Ibid at [42].

¹⁸ For example see **Walsh v R** [2006] NSWCCA 406 where a determinate sentence was given rather than a life sentence.

¹⁹ See s 21A(3)(i). A recent amendment to the section limits the power of court to take into account remorse to a situation where the offender has provided evidence of accepting responsibility for his or her actions and has acknowledged any injury loss or damage as a result of his or her actions.

necessarily a mitigating factor. For example, a drug-addict or a mentally disturbed person may be contrite for a particular act of criminality yet lack the willpower or ability to address the problem causing the criminal conduct. In such a situation, if there is no finding of the likelihood of reform or rehabilitation, why should the sentence be reduced simply because the offender regrets the particular activity bringing him or her before the court? Rather, in such a case public protection would indicate that the sentence should be at a higher level in reflecting the objective gravity of the criminal conduct.

- 9 There is one limitation on the discount for the utilitarian value of the plea of guilty that has been identified: where the offence is of the utmost seriousness²⁰. In other words the maximum penalty for an offence can be applicable notwithstanding that there has been a plea of guilty to an offence in the worst possible category.²¹ This is because the discount is based upon a specific public policy that must in some cases give way to other policies such as the protection of the public, which is after all the whole purpose of sentencing. In some cases the competing public policies of encouraging pleas of guilty, on the one hand, and yet of protecting the public from an individual or a type of offender, on the other, requires that the protection of the public be paramount. The only cases where to my knowledge the discount has not been given are sentences for murder²², but then s 61 of the **Crimes (Sentencing Procedure) Act 1999** provides for mandatory life sentences for murder and some other offences in the worst cases.
- 10 An anomalous situation that has arisen since **Thomson and Houlton** is where there was in effect no utilitarian value in the plea of guilty because the Crown did not accept it. This has arisen principally in cases of murder where the Crown has refused to accept a plea of guilty to manslaughter and yet after trial the offender is convicted of that offence. Of course in

²⁰ *Thomson and Houlton* op cit at [158]

²¹ *R v Kalache* [2000] NSWCCA 2; (2000) 111 A Crim R 152 cf *R v El-Andouri* [2004] NSWCCA 178.

²² See for example *R v Miles* [2002] NSWCCA 276; *Knight v R* [2006] NSWCCA 292; 164 A Crim R 126.

such a situation there was no utilitarian value in the plea of guilty but it was not the fault of the offender. The discount has been awarded in such a case depending upon when the plea was offered²³. There has been some criticism of this situation²⁴ but it should be seen as exceptional and arising from the requirement of fairness to the offender otherwise the Crown could deprive the offender of the benefit simply by refusing the plea.

- 11 This scenario should be compared with a situation where, because of negotiations with the Crown or for some other reason, such as the lack of legal advice for the offender, the plea of guilty has been delayed. I have expressed the view that, if a plea of guilty does not come until late in the proceedings whatever be the reason, the offender cannot receive the full value of the utilitarian discount²⁵. There is no right to a discount and it is a reward for saving the time and cost of preparation for a trial. If the plea of guilty is delayed so that the utilitarian value of the plea is less, it follows that the reward must be less. The Court cannot enter into an inquiry as to why a plea of guilty was not given earlier to ascertain whether there was any “fault” on the part of the offender for the delay. That issue is irrelevant: the plea either has utilitarian value to some degree or it does not. The fact that the offender cannot plead guilty because he or she is unfit to be tried does not permit a discount to be given when the court is imposing a limiting term²⁶. The utilitarian value of the plea is unaffected by the existence or otherwise of remorse or other post-offending conduct²⁷.
- 12 A question of continuing difficulty is the case where the plea of guilty comes late in the proceedings because of negotiations between the offender and the Crown. In such a case the offender receives the benefit of an offence of reduced seriousness as well as a discount for the plea.

²³ *R v Oinonen* [1999] NSWCCA 310 and *R v Cardoso* [2003] NSWCCA 15; 137 A Crim R 535 but cf *R v Curry* [2002] NSWCCA 109.

²⁴ See *R v Hamouche* [2005] NSWCCA 398; 158 A Crim R 357 at [44] per Hulme J and *R v FD and JD* [2006] NSWCCA 31; 160 A Crim R 392 where it was held that a full discount was not justified in such a case.

²⁵ *R v Stambolis* [2006] NSWCCA 56; 160 A Crim R 510 at [11].

²⁶ *R v Mitchell* [1999] NSWCCA 120; 108 A Crim R 105.

²⁷ See for example *R v Perry* [2006] NSWCCA 351; 166 A Crim R 383 where the discount was halved due to matter stated by the offender to police when interviewed.

The amount of the discount is determined by whether it came “at the first reasonable opportunity”. This is to be answered in a realistic and commonsense way²⁸. Unfortunately the resolution of this issue has often been made more difficult by inappropriate concessions by the prosecutor, usually as part of the plea bargain struck with the offender. There are a number of cases criticising such concessions by the Crown even though the court is entitled to reject them and should do so if they appear to lack substance²⁹.

- 13 An example is *Ahmad v R*³⁰. There the accused pleaded guilty to manslaughter on an indictment for murder some 18 months after committal. Yet the prosecutor conceded that the full discount should be given for the plea because the Crown had indicated until just before the sentencing proceedings that it would not accept a plea of guilty to manslaughter. The Crown’s submission was rightly rejected on the basis that it was open to the accused to indicate a preparedness to plead guilty to manslaughter notwithstanding that the plea would not be accepted by the Crown and had he done so it could in no way jeopardise him if the charge of murder proceeded to trial. The Court held that it would be a “rare case” in which a discount of 25 per cent would be appropriate in the circumstances of that case.
- 14 It has been held that, although the discount for the plea of guilty should not be reduced because it follows a plea negotiation, the fact that the plea is delayed is still a relevant consideration³¹.
- 15 One of the reasons for the *Thomson and Houlton* guideline was to encourage consistency in sentencing judges in giving discounts for a plea of guilty both as to the amount given and the basis for the discount. But it was only a guideline and did not bind the sentencing judge’s discretion. Although encouraging judges to announce the discount, it did not require

²⁸ *Cameron v The Queen* (2002) 209 CLR 339

²⁹ For example see *R v McNaughton* [2006] NSWCCA 242; 163 A Crim R 381.

³⁰ [2006] NSWCCA 177.

them to do so. The result is that there are judges who refuse to nominate the amount of the discount notwithstanding that they have been encouraged to do so by subsequent decisions at least in the straightforward case³². Further, the sentence specified often does not apparently disclose that any discount, or the discount nominated, has been given because the actual sentences imposed do not appear to reflect such a mathematical approach³³.

16 There has been in some cases a lack of precision stating the discount given or the reason for it. In one case the judge was criticised for a lack of precision in indicating a discount, which was said to be at the bottom of the range, of “something in the vicinity of 10-15 per cent”³⁴. When the range of the discount is only between 10 and 25 per cent, there is a significant difference between a discount of 10 per cent and one of 15 per cent. If the judge does not know what discount is being given, there can be little confidence by either the offender or the appeal court in accepting that a discount has been given. In another case the judge referred to “the normal discount” without disclosing what it was.³⁵ A discount of 15 per cent given after an aborted trial in which the complainant had given evidence and had been cross-examined was criticised as overly generous³⁶.

17 It has also been plain since *Thomson and Houlton* that different judges have very different views about what the extent of the discount for the utilitarian plea of guilty should be and the rationale for the discount³⁷. This is perhaps as a result of a view by some that a discount of 25 per cent solely based upon the utilitarian value of a plea of guilty is overly generous. In any case the Court of Criminal Appeal has faced the situation of a discount of as low as 15 per cent being given for a plea of guilty at the Local Court notwithstanding the guideline judgment that would suggest

³¹ *R v Dib* [2003] NSWCCA 117.

³² See for example *R v Shenton* [2003] NSWCCA 346, *R v Sutton* [2004] NSWCCA 225.

³³ See for example *R v Ghazi* [2006] NSWCCA 320.

³⁴ *R v Knight* [2007] NSWCCA 283.

³⁵ *R v Kilpatrick* [2005] NSWCCA 351; 156 A Crim R 478.

³⁶ *R v MAK*, above at [46].

³⁷ For example see the discussion particularly by Sully J in *R v Otto* [2005] NSWCCA 333.

that 25 per cent would be appropriate³⁸. On the other hand some judges are giving discounts of 25 per cent for very late pleas often at the urging of the Crown. Yet the guideline is not binding and the offender has no right to a particular discount.

- 18 The problem is that although the amount of discount is a matter of discretion, the basis upon which the discretion is exercised is very limited: in the vast majority of cases it is merely the timing of the plea³⁹. Whenever the judge departs from the guideline or does not state the value of the discount this is almost inevitably a ground of appeal and the Court of Criminal Appeal is faced with the difficult task of determining either what the discount might have been or the discretionary reasons that may have existed for departing from the guideline. In the absence of reasons, which is normally the case, the offender will find it difficult to understand why a discount in accordance with the guideline was not given in his or her particular case.
- 19 Other Australian jurisdictions have not generally followed the NSW approach by distinguishing one part of the effect of the plea of guilty and treating it as a separate matter of mitigation. In Western Australia the Court maintains an instinctive synthesis approach to sentencing so that “attempts to specify the extent of the discount for a plea of guilty should be addressed with care”⁴⁰. But it is accepted that the court must take into account the plea even where there is an absence of remorse⁴¹. In a simple case it is not an error to state the discount given for the plea of guilty but nor is it an error not to specify the discount⁴². It has been held that the public interest would benefit from the judge identifying the amount of the discount and the reasons for it⁴³. If a discount is given, that fact must be stated⁴⁴. The discount for a fast-track plea of guilty will be between 20 and

³⁸ *McKibben v R* [2007] NSWCCA 89.

³⁹ *R v Forbes* [2005] NSWCCA 377; 160 A Crim R 1 at [117].

⁴⁰ *Harding v Moreland* [2006] WASC 8; 159 A Crim R 370 at [23].

⁴¹ *Stapelton v R* [2004] WASCA 130 at [34].

⁴² *Chivers v Western Australia* [2005] WASCA 97 and see *WA Sentencing Act 1995* s 8(2).

⁴³ *Fullgrave v Western Australia* [2006] WASCA138 at [29].

⁴⁴ *WA Sentencing Act 1995* s 8(4).

35 per cent but the discount takes into account all aspects of the plea including remorse and an acceptance of responsibility⁴⁵.

20 In Tasmania the principles were set out in *Pavlic v R*⁴⁶. Green CJ at 16 stated:

“The appellant's remorse, the fact that he pleaded guilty and the fact that he volunteered information which would not otherwise have been known to the police were mitigating factors. However I do not accept the submissions made by counsel for the applicant that this Court should endorse a formalised approach whereby considerations of this kind should be reflected by applying a nominated percentage "discount" to the "head sentence". Considerations of this kind are no different in kind from and should be treated in the same way as all the other considerations which are relevant to the exercise of the sentencing discretion. It is not regarded as appropriate to reflect the other aggravating and mitigating circumstances relevant to sentence in a list of premiums or discounts each expressed as a percentage and I can see no reason why mitigating circumstances arising out of remorse, a plea of guilty or assistance given to the police should be treated differently.”

21 This has remained the approach and it was not an error for a judge merely to indicate that “some credit” was given for a plea of guilty⁴⁷. However, where the plea of guilty is a cogent factor, there is no error in identifying it as a component in the sentencing synthesis and analysing its weight⁴⁸.

22 In South Australia a five-judge bench considered the discount for the plea of guilty in *R v Place*⁴⁹. The Court saw no difficulty in continuing the practice that had existed in that State by indicating a discount for the plea of guilty. However, the discount includes all aspects of the plea including remorse and contrition and active assistance to the police⁵⁰. There is a statutory requirement that the court take into account the plea of guilty but

⁴⁵ See generally *McDonald v White* [2007] WASC 138.

⁴⁶ (1995) 5 Tas R 186; 83 A Crim R 13

⁴⁷ *W v Tasmania* [2007] TASSC 24.

⁴⁸ *Dennison v Tasmania* [2005] TASSC 54; 15 Tas R 50.

⁴⁹ [2002] SASC 101; 81 SASR 395.

⁵⁰ *R v Simpson* [2004] SASC 307; 89 SASR 515

it does not indicate the manner in which it is to do so⁵¹. The Court held that the discount for the plea of guilty should be identified but it was not an error if it were not. The plea of guilty is only mitigatory if it results from genuine remorse or if it results from a willingness to co-operate with the administration of justice or some other public interest⁵².

23 In the Northern Territory the discount for the plea of guilty encompasses all aspects of the plea but no tariff has been determined⁵³. Where there was a plea of guilty at the earliest opportunity accompanied by true remorse a discount of 15 per cent was inadequate⁵⁴. A discount of 10 per cent was held to be appropriate for a late plea after the complainant gave evidence in chief⁵⁵. The court is to have regard to an offer made to plead guilty including any terms attached to the offer⁵⁶. An offer to plead guilty to manslaughter was given little weight where it was “self-interested manoeuvring”⁵⁷.

24 In Queensland there is a statutory requirement that a plea of guilty be taken into account and if a sentence is not reduced the court must state its reasons⁵⁸. There should be a reduction in the sentence even though there is no remorse⁵⁹. It has been held that a court should indicate how it is reducing the sentence if it is doing so because of the plea⁶⁰. A reduction may be achieved by making a recommendation for early parole⁶¹. An unaccepted offer to plead guilty is a relevant fact in determining sentence for that offence⁶².

⁵¹ *SA Criminal Law (Sentencing) Act 1988* s 10.

⁵² *R v Davey* [2006] SASC 177; 95 SASR 63.

⁵³ *Kelly v R* (2000) 10 NTLR 39.

⁵⁴ *Wright v R* [2007] NTCCA 5; 19 NTLR 123.

⁵⁵ *Gilligan v R* [2007] NTCCA 8.

⁵⁶ *DF v R* [2006] NTCCA 13.

⁵⁷ *Spencer v R* [2005] NTCCA 3.

⁵⁸ *QLD Penalties and Sentences Act 1992* s 13

⁵⁹ *R v Bates* [2002] QCA 174.

⁶⁰ *Corrigan v R* [1994] 2 Qd R 415

⁶¹ *R v Maxfield* [2000] QCA 320; [2002] 1 Qd R 316.

⁶² *R v Marshall* [1994] QCA 161; [1995] 1 Qd R 673

- 25 The courts in Victoria take into account the plea of guilty in all its aspects including remorse but are reluctant to specify the discount⁶³. Credit is given for the plea as part of the general synthesis of factors relevant to the sentence⁶⁴. The plea of guilty is a mitigating factor even if it is a result of self-interest in receiving a lesser sentence, although the value would be limited⁶⁵. A plea of guilty to murder will not necessarily avoid a life sentence⁶⁶.
- 26 In the Australian Capital Territory the effect of the plea of guilty is set out in s 35 of the **Crimes (Sentencing) Act 2005** which requires the court to take into account various factors including whether the plea of guilty was related to negotiations between the offender and the prosecutor.
- 27 It seems that generally the discount for a plea of guilty in NSW is higher than that in other jurisdictions because the discount is related to the utilitarian value of the plea and for that alone can be as high as 25 per cent. The Chief Justice in **Thomson and Houlton** appreciated this fact. It is a discount that is routinely given for an early plea and is a reduction that is applied once other sentencing factors are taken into account, including remorse and the consequences of such a finding which itself is a facet of the plea of guilty. There has been some criticism of the approach of taking one aspect of the plea and elevating it to a discrete discount⁶⁷.
- 28 It can hardly be said that the decision has added to transparency in sentencing in New South Wales when a judge is not required to nominate the discount and judges frequently do not do so. Nor does it seem to have much assisted consistency when the discount is discretionary despite the very limited factors upon which it is based and there are variations discernable in the discounts given even when the discounts are disclosed. There are cases where the sentence imposed appears to be inconsistent

⁶³ **R v Low** [2002] VSCA 167, 135 A Crim R 79 at [30].

⁶⁴ **R v Rosenow** [2007] VSCA 265.

⁶⁵ **R v RND** [2002] VSCA 192.

⁶⁶ **R v Quarry** [2005] VSCA 65; 11 VR 337.

⁶⁷ **Wong v The Queen** [2001] HCA 64; 207 CLR 584 at [76].

with the stated discount notwithstanding that there will be a degree of rounding out of the numbers.

- 29 The decision in *Thomson and Houlton*, despite its aim at increased transparency and consistency in sentencing in relation to an important factor in sentencing, has in my opinion resulted in added complication to a sentencing regime that was, and has become, increasingly more complex with the addition of standard non-parole periods. Whether the decision has added to the rate of pleas of guilty or the earlier identification of pleas of guilty as compared with the approach in other jurisdictions is impossible to determine. There still appears to be a very significant number of pleas coming late in proceedings and usually after negotiations between the parties. In many, if not most, of those cases, discounts of about 25 per cent are still given.
- 30 Any one reading sentencing decisions in NSW or the Court of Criminal Appeal judgments upon the topic would immediately appreciate the difference between the approach in NSW and other jurisdictions to sentencing generally, at least some of which is due to the intervention of the Parliament in that State. The assessment of a sentence in NSW is almost as complicated as the determination of common law damages. It is a very fertile ground upon which to seek the intervention of the Court of Criminal Appeal.

Assistance to the authorities

- 31 It is recognised throughout Australian jurisdictions that assistance given by an offender to investigating or prosecuting agencies is mitigatory and is to be taken into account when determining the sentence to be imposed. In NSW and other jurisdictions there are provisions relating to assistance to authorities⁶⁸. Assistance may be taken into account whether it relates to the particular offence for which the offender is to be sentenced or

⁶⁸ NSW *Crimes (Sentencing Procedure) Act* s 23; Qld *Penalties and Sentencing Act 1992* s 13A; WA *Sentencing Act 1995* s 8(5); SA *Criminal Law (Sentencing) Act* s 10(1)(h); Vic *Sentencing Act 1991* s

otherwise. It is a matter of public policy that offenders should be encouraged to assist the police in relation to co-offenders or criminal activity generally⁶⁹. This policy has been emphasised in drug importation offences⁷⁰. There is also a need to compensate the informer from any harshness of the custodial regime arising from protection offered to the offender because of the assistance given⁷¹.

- 32 The assistance given can range from general intelligence information, participation in the investigatory process, such as the wearing of a listening device, or an undertaking to give evidence for the prosecution. Although there was initially a view that the effectiveness of the assistance was not a relevant factor, legislation in NSW requires the court to take this factor into account⁷². It has been held to be relevant in sentencing for Commonwealth offences⁷³.
- 33 Assistance can also arise from the voluntary admission of unknown criminality committed by the offender, but in NSW this does not result in a particular discount and is often seen as part of the effect of the plea of guilty⁷⁴. In South Australia it has been held that a discount of about a third would be appropriate where the offender would not have been prosecuted but for having voluntarily confessed the crime to police⁷⁵.
- 34 In sentencing for Federal offenders, the court is required to indicate the amount of the discount given for future assistance⁷⁶. Courts in NSW have been encouraged to do the same when sentencing for State offences⁷⁷.

5(2AB); ACT *Crimes (Sentencing) Act 2005* s 36; NT *Sentencing Act* s 5(2)(h); Cth *Crimes Act 1914* s 16A(2)(h).

⁶⁹ *R v Golding* (1980) 24 SASR 161; 3 A Crim R 26; *R v Heaney* [1992] VR 531; 61 A Crim R 241.

⁷⁰ *R v Perrier (No 1)* [1991] VR 697; 50 A Crim R 122.

⁷¹ *R v Cartwright* (1989) 17 NSWLR 243 at 250.

⁷² *Crimes (Sentencing Procedure) Act 1999* s 23(2)(b).

⁷³ *R v El Hani* [2004] NSWCCA 162 at [75].

⁷⁴ See *R v Lewins*, above and the discussion generally on the discount for the plea of guilty.

⁷⁵ *R v Simpson* [2004] SASC 307; 89 SASR 515.

⁷⁶ Cth *Crimes Act* s 21E.

⁷⁷ *SZ v R* [2007] NSWCCA 19; 168 A Crim R 249 at [51].

This is because the prosecutor can appeal to the Court of Criminal Appeal where the undertaking to give assistance has not been met⁷⁸.

35 In NSW it has been considered that the discount for assistance would fall generally within the range of 20 to 50 per cent⁷⁹. But that range was established before *Thomson and Houlton* determined that the discount for the utilitarian value of the plea might be as high as 25 per cent. Notwithstanding that the guideline judgment appreciated that it might not be appropriate to give separate discounts for the plea and assistance⁸⁰, the practice quickly arose of giving two discounts, notwithstanding reservations expressed in the Court of Criminal Appeal⁸¹. Where two discounts were given, the question arose as how the discounts should be combined⁸² and the Court of Criminal Appeal endorsed discounts as high as 60 per cent⁸³. The situation reached the stage that a judge gave discounts totally over 80 per cent without a Crown appeal⁸⁴. However, there were attempts to restrict the discount to a combined total of 50 per cent⁸⁵.

36 To a significant degree, particularly in the District Court of NSW, the discount for assistance took on a life of its own with little apparent regard in many cases to the rationale for the discount or the statutory limitation that the discount not result in a sentence that was unreasonably disproportionate to the object seriousness of the offence⁸⁶. To some degree this occurred because of joint submissions by the defence and Crown⁸⁷. Some of the matters to be taken into account in determining the discount as set out in the particular section have never, to my knowledge,

⁷⁸ See for example NSW *Criminal Appeal Act* s 5DA.

⁷⁹ See *R v Chu* (unreported NSWCCA, 16 October 1998).

⁸⁰ See *Thomson and Houlton* above at [160(ii)]

⁸¹ See for example *R v M* [2005] NSWCCA 224

⁸² See *R v NP* [2003] NSWCCA 195 and *R v Wacqa (No 2)* [2005] NSWCCA 33; 156 A Crim R 454

⁸³ *R v AMT* [2005] NSWCCA 151

⁸⁴ See *R v Lewins*, above, where the Court of Criminal Appeal felt obliged to reduce the sentence of a co-offender as a consequence.

⁸⁵ See for example *R v El Hani* above.

⁸⁶ *Crimes (Sentencing Procedure) Act* s 23(3).

⁸⁷ See *R v Chaaban* [2006] NSWCCA 107.

been acknowledged in sentencing remarks⁸⁸. Other matters were often ignored, for example discounts in the range of 50 per cent were given even though the offender was not being held in protective custody or was not, by reason of having given assistance, experiencing harsher custodial conditions⁸⁹. In *R v Sukkar*⁹⁰ it was held that a combined discount for assistance and plea should not normally exceed 40 per cent unless there was evidence that the offender would serve the sentence in harsher conditions. It is for the offender to indicate the actual nature of the conditions in which the sentence is to be served.

37 But there was a persisting argument that sometimes found favour that the discount for assistance was additional to that for the plea of guilty and in an appropriate case the discount could be as high as 75 per cent. This argument was ultimately rejected in *R v SZ*⁹¹ where it was held that the discounts should be combined and should not normally exceed 50 per cent. It was stressed that there was a limit to the degree that a sentence could be reduced by discounts before it became inadequate either as a breach of s 23(3) of the *Crimes (Sentencing Procedure) Act 1999* or under the common law. When the discount for the guilty plea is as high as 25 per cent, there is correspondingly less scope to reduce the sentence for any other factor including assistance. With the concurrence of Simpson J, I wrote⁹²:

There is in my opinion nothing unfair about this result nor is the public policy in encouraging assistance necessarily reduced. There is still on offer, even after an early plea, a discount of somewhere in the vicinity of 25 per cent, or more in an exceptional case. The simple fact is that it is more important to the administration of justice to encourage and reward early pleas of guilty. If the pursuit of that policy diminishes the ability to encourage and reward assistance, so be it. There is a greater public policy at stake and that is public confidence in the courts to impose sentences that are just and reasonable to all concerned.

⁸⁸ For example the likelihood that the offender will commit further offences when released, or the effect of the offence on the victim.

⁸⁹ See *R v Mostyn* (2004) 145 A Crim R 304 cf s 23(2)(g).

⁹⁰ [2006] NSWCCA 92; 172 A Crim R 151

⁹¹ [2007] NSWCCA 19; 168 A Crim R 249.

⁹² *Ibid* at [10].

- 38 Of course there will be cases where, because of the particular circumstances of the assistance given and the offender's circumstances, the sentence might on its face appear to be inadequate, for example where the offender's life might be at risk in custody⁹³.
- 39 In South Australia the relevance of assistance was recently considered in *Director of Public Prosecutions (Cth) v AB*⁹⁴. It was emphasised that the nature of the assistance and the relevant factors can vary so that it would be wrong to be exhaustive about the matters that can be taken into account⁹⁵. The view was expressed that it was preferable to give a combined discount for the plea and assistance because of the risk of double counting by combining the two discounts⁹⁶. There it was held that a discount totalling 65 per cent was manifestly excessive and a 40 per cent discount was substituted notwithstanding threats made to the offender and his family.
- 40 In *R v Webber*⁹⁷ The Queensland Court of Appeal commented upon the difficulty of striking a balance between encouraging assistance to authorities and yet imposing a sentence that reflected the seriousness of the offence. Under the legislation of that State the court is required to indicate in closed court the sentence it would have given but for the future assistance offered and a failure to do so will vitiate the sentence.
- 41 In Victoria a discount of up to 50 per cent may be appropriate in cases such as drug matters where the assistance is of particular significance and comes at very great risk to the offender⁹⁸. Otherwise there is a wide discretion in the discount to be given. The fact that the offender is in protective custody as a result of information is a matter to be taken into

⁹³ See for example *York v The Queen* [2005] HCA 60; 225 CLR 466.

⁹⁴ [2006] SASC 84; 94 SASR 316

⁹⁵ Per Perry J at [31].

⁹⁶ Ibid at [66].

⁹⁷ [2000] QCA 316; 114 A Crim R 381.

⁹⁸ *R v KFC* [2006] VSCA 270; 167 A Crim R 475.

account⁹⁹. An offender who has given assistance before the commission of the offence does not receive the discount although the fact that he or she is in protection because of that assistance is relevant¹⁰⁰. As is the situation now in NSW, the offender is to lead evidence as to the hardship suffered¹⁰¹. Generally the court considers the effectiveness of the assistance as irrelevant¹⁰².

- 42 In Western Australia a discount for assistance of up to 50 per cent can be given¹⁰³. Where the offender delayed in giving information and the police considered it to be of little value, the reduction of a sentence of 14 years by 2 years for the assistance, plea and other subjective matters was not inadequate¹⁰⁴. The court will take into account conditions of imprisonment but the court should have information as to the nature of the conditions¹⁰⁵.
- 43 In NSW after *Thomson and Houlton* discounts for assistance resulted in a large number of appeals and on one view gave rise to a further complication of the sentencing practice in that State by the consideration of the utilitarian value of the plea separately from the assistance otherwise provided by the offender. There was to a degree inconsistency in the approach adopted to the matter in the Court of Criminal Appeal, with some courts considering independent discounts and how they were to be combined and other courts advocating a single discount for both forms of assistance. The issue now seems to have been settled by the decision in **SZ**, but whether there will now follow a simpler and more consistent approach remains to be seen. **SZ** has been applied both at the sentencing level¹⁰⁶, and by the Court of Criminal Appeal¹⁰⁷ to limit the discount given to the offender.

⁹⁹ *R v Bangard* [2005] VSCA 313; 13 VR 146.

¹⁰⁰ *R v ZMN* [2002] VSCA 140; 4 VR 537.

¹⁰¹ *R v Males* [2007] VSCA 302.

¹⁰² *R v Su* [1997] 1 VR 1

¹⁰³ *Voong v R* [2000] WASC 220.

¹⁰⁴ *Duffy v R* (1996) 85 A Crim R 456.

¹⁰⁵ *De La Espriella-Valesco v R* [2006] WASC 31; 31 WAR 291 at [139] and [442].

¹⁰⁶ See for example *R v Burns* [2007] NSWSC 298.

¹⁰⁷ *T v R* [2007] NSWCCA 62; *HVN v R* [2007] NSWCCA 207
