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Abstract
The recent decision of the High Court in Cameron v The Queen provides a timely opportunity to re-examine the precise rationales behind the policy observed in all Australian criminal courts (whether exercising State or Commonwealth jurisdiction) of 'discounting' an otherwise appropriate sentence in return for a plea of guilty. It also raises important issues regarding the appropriateness of 'utilitarianism' as one of those rationales, the relevance, as a sentencing factor, of the timing of a guilty plea, and the desirability of the sentencing court placing on the record what level of discount has been granted, and on what basis. Controversially, it raises the prospect of future High Court rulings to the effect that a discount for pleading guilty is discriminatory of those who exercise their right to plead not guilty, thereby obliging the Crown to prove its allegations against them. Finally, it reminds us yet again of the fragility of the current regime for providing indigent accused with adequate legal representation.

Keywords
guilty pleas, Cameron v The Queen, discounting sentences, criminal law

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PLEAD GUILTY EARLY AND CONVINCINGLY TO AVOID DISAPPOINTMENT

*David Field**

The recent decision of the High Court in Cameron v The Queen[1] *provides a timely opportunity to re-examine the precise rationales behind the policy observed in all Australian criminal courts (whether exercising State or Commonwealth jurisdiction) of 'discounting' an otherwise appropriate sentence in return for a plea of guilty.*

It also raises important issues regarding the appropriateness of 'utilitarianism' as one of those rationales, the relevance, as a sentencing factor, of the timing of a guilty plea, and the desirability of the sentencing court placing on the record what level of discount has been granted, and on what basis.

Controversially, it raises the prospect of future High Court rulings to the effect that a discount for pleading guilty is discriminatory of those who exercise their right to plead not guilty, thereby obliging the Crown to prove its allegations against them.

Finally, it reminds us yet again of the fragility of the current regime for providing indigent accused with adequate legal representation.

The facts of *Cameron*

The facts of the case were significant in several respects. The Appellant (C) was arrested at Perth Airport in April 1999 in possession of over 5000 tablets which were initially believed by the authorities to be 'Ecstasy'. Although these tablets were found in his travel bag, C originally denied all knowledge of them.

He was charged with what in essence was possession of a prohibited drug with intent to sell or supply same, under s 6(1)(a) of the *Misuse of Drugs Act 1981 (WA),*[2] and was remanded in custody, from where he made eight appearances in

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1 (2002) 76 ALJR 382.

2 This was the result of the operation of various provisions of *the Commonwealth Places (Application of Laws) Act 1970* (Cth) which rendered the state laws applicable to his offence, and invested the WA courts with federal jurisdiction in the matter.

the Perth Magistrates Court between the date of his arrest and 17 November 1999, when his matter was scheduled for a preliminary hearing. Four of these 'appearances' were by way of video link from prison.

C maintained his not guilty plea (and indeed maintained his claim of ignorance of the very existence of the drugs in his travel bag) until 10 November 1999, when his solicitor wrote to the DPP and confirmed that C would be entering a plea of guilty to the charge. However, she also pointed out that the relevant analyst's certificate (dated 28 June 1999) showed that the tablets in question were not 'Ecstasy', but 'Speed', and requested that the charge be re-drafted.

This occurred on 17 November, the day originally set for the preliminary hearing. C entered a plea of guilty there and then, and was further remanded in custody for sentence in the District Court on 12 January 2000.

On the day of sentence, C pleaded guilty on arraignment, and his counsel submitted that he should be sentenced on the basis that his plea had been entered 'at the earliest possible opportunity', and that he should be given the same credit on sentence as if his plea had been a 'fast-track' one.[3]

Although Crown Counsel did not oppose this submission, C received only a 10% 'discount' in sentence (from 10 years to 9 years) in return for his guilty plea. His appeal to the WA Court of Criminal Appeal was argued on the sole ground that this discount was too low by comparison with what might be termed the 'going rate' of between 20% and 30% discount in 'fast track' cases.[4] The Crown opposed the appeal on the ground that while the plea had been an 'early' one, it had not been made at 'the earliest point' at which it could have been made.

In dismissing the appeal, the Court of Criminal Appeal were of the unanimous opinion that the plea had been entered too late to attract a discount any higher than 10% because

> …it would still have been open to the applicant at a much earlier stage to indicate that he did have a prohibited drug but it was methylamphetamine

3 The 'fast-track' system which operates in Western Australia under ss 100 and 101 of the *Justices Act 1902* (WA) allows an accused to plead guilty in the Local Court to an indictable offence which cannot be dealt with summarily, following the provision to him by the prosecution of a minimum amount of evidential material. He is then committed to the higher court for sentence, which may then be 'discounted' by as much as 30% in return for that plea. While it is a procedure claimed as being unique to Western Australia, its effect is not unlike the ex-officio indictment procedure followed at the request of the defence in appropriate indictable matters in Queensland; see *Criminal Code Act 1899* (Qld), s 561.

4 See *Verschuren v The Queen* (1996) 17 WAR 467, 473-5, which confirms this 'range', and in which the 'fast-track' procedure is further explained.

> and not ecstasy . . . . . it did not save the administration of justice to have the number of remands that there were and to have time set aside for the preliminary hearing.[5]

The majority in the High Court,[6] and Kirby J in a separate judgment,[7] were of the opinion that the Order of the Court of Criminal Appeal should be set aside, and that the matter should be remitted to that Court 'for further hearing and determination'. Only McHugh J[8] remained of the opinion that the Court of Criminal Appeal had not erred.

However, the judgments of all their Honours raise (once again) some issues of general but fundamental importance to all sentencing courts being asked to give a discount in sentence to an accused who pleads guilty.

The timeliness of the plea

On the preliminary issue of whether or not C's plea of guilty had been sufficiently timely in the circumstances, the majority began with the observation:[9]

> The question whether it was possible for a person to plead at an earlier time is not one that is answered simply by looking at the charge sheet … the question is when it would first have been reasonable for a plea to be entered … leaving aside remorse and acceptance of responsibility, the operative consideration is willingness to facilitate the course of justice. And a significant consideration on that issue is whether the plea was entered at the first reasonable opportunity.

On the specific issue of whether or not C's plea of guilty *had been* 'reasonable' in terms of its timing, the majority had no difficulty in concluding:[10]

> …[I]t was not reasonable to expect the appellant to plead to an offence which wrongly particularised the substance to which the charge related … The Court of Criminal Appeal was in error in holding that the appellant could have pleaded guilty before the charge was amended to correctly specify the substance which he had in his possession. Moreover, it was in error in stating that there

5 Per Pidgeon J, quoted in Cameron, 384.
6 Gaudron, Gummow and Callinan JJ, ibid, 386.
7 Ibid 400.
8 Ibid 391.
9 Ibid 385-386, quoting with approval the observation of Ipp J in *Atholwood* (1999) 109 A Crim R 465, 468, that 'During the period that the prosecution maintains counts that are ultimately abandoned, there is a strong incentive for a person who recognises his guilt on other counts … to persist in a not guilty plea to all counts'. See also *R v Houghton* [2002] QCA 159, at [15].
10 Ibid 386.
11 Ibid 396-397.

> had been 'no saving in the Magistrates Court', for the appellant's plea of guilty rendered a preliminary hearing unnecessary.

In his separate judgment, Kirby J[11] also quoted *Atholwood* with approval, and agreed with the judgment of the majority, saying:

> The test is not the time when theoretically or physically a prisoner might have pleaded. The test is when it was reasonable, in all the circumstances and as a matter of practicality, to have expected a plea of guilty to be announced … Until the prosecutor sorted out the accurate identity of the particulars of the charge it was presenting against the appellant, it was unreasonable for the prosecutor, or the court, to expect the applicant to plead guilty.

Only McHugh J[12] took the narrower (and perhaps more cynical) view adopted by the Court below, to the effect that until his plea of guilty, C denied knowing that he was carrying drugs at all, and that it was not 'likely that the particulars of the drug were responsible for his original plea and his change of plea'.

Given that the legislative provisions of all the States and territories except South Australia and Tasmania[13] authorise a court, when reducing a sentence in acknowledgment of a guilty plea, to take account of precisely *when* in the history of the matter it was first intimated, this re-affirmation that the essential test is the *reasonableness* of the timing of that intimation (rather than simply its position in the bare chronology of the matter) is reassuring.

Lengthy delays in bringing matters to the point at which an accused, on proper legal advice, intimates a plea of guilty are by no means exclusively the result of a refusal on the part of an accused to 'face reality'. Under-funding in the areas of operational policing, police prosecutions, state and federal prosecution offices and Legal Aid all combine, on many occasions, to seriously frustrate the efforts of the parties to negotiate an indictment into its 'final form'.

What might be termed 'system-driven' initiatives[14] to speed up this process can have only a limited effect when the root cause of the delay is under-resourcing on both sides. These constraints *must* be factored into the equation when assessing

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12 Ibid 390-391. His Honour was impressed by the consideration that '…nothing before the sentencing judge indicated that his delay in pleading guilty was induced by the particulars of the prohibited drug'. Referring to the letter which C's solicitor finally sent to the DPP, intimating the guilty plea for the first time, His Honour observed that 'The contents of this letter indicate that the identity of the prohibited drug was not a factor which influenced the appellant's plea'.

13 For a full list of these provisions, see below n 44. The Commonwealth has no equivalent legislative provisions.

14 Such as 'fast-tracking', defence-initiated ex-officio indictments and case management by judges.

when it would have been 'reasonable' for an accused to acknowledge that the charges in their final form are a true reflection of his actual criminality.

In searching for the rationale behind the principle that the timing of a guilty plea is a relevant factor in 'discounting' a sentence, it is hard to ignore the obvious one born of 'economic rationalism', namely the saving of time (and therefore resources) within the criminal justice system as a whole.

The argument for the existence of such a rationale is further strengthened by the very existence of a 'range' of discounts which appear to apply according to when, in the history of a matter, the plea was first intimated. As has already been noted (see above n 3), that range is set between 20% and 30% in WA, while an 'early' plea of guilty can attract a 25% discount in South Australia.[15]

The Chief Justice of Queensland,[16] while refusing to set a 'usual' discount period for pleas of guilty because of the number of variables involved, has however, recently indicated that 'Another aspect of course is the timeliness of the plea'.

In *R v Thomson; R v Houlton,*[17] the NSW Court of Appeal set out, at the request of its State DPP and others, to 'promulgate a guideline judgment with respect to the discount for a plea of guilty in relation to State offences'. After reviewing the position under all state, territory and Commonwealth jurisdictions, and by reference to the provisions of s 22(1) of its own *Crimes (Sentencing Procedure) Act 1999*, the Court[18] issued the following guideline:

> Sentencing judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. This effect can encompass any or all of the matters to which the plea may be relevant – contrition, witness vulnerability and utilitarian value – but particular encouragement is given to the quantification of the last mentioned matter … The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25 per cent discount on sentence. The primary consideration determining where in the range a particular case should fall, is the timing of the plea … In some cases a plea will not lead to any discount.

15 See, eg *R v Nixen* [1993] 66 A Crim R 83 at 90.

16 *R v Mulholland* [2001] QCA 480. However, in *R v Houghton* [2002] QCA 159, at Para 31, Fryberg J indicated that 'Normally the sentence will be reduced by 10 per cent to 30 per cent for such a plea'. A survey across jurisdictions conducted in 1995 by the Australian Institute of Judicial Administration (Mack and Anleu, *Pleading Guilty: Issues and Practices* (1995)) showed the range to be potentially as wide as 25% to 50% (op cit, 164).

17 (2000) 115 A Crim R 104.

18 Ibid 138.

It also quoted from the1990 Second Reading debate in the New South Wales State Parliament of the Bill which became the fore-runner of s 22(1), in the course of which the then State Attorney-General[19] observed:

> Even where the Crown case is strong and a guilty plea may be thought to be inevitable, it will usually be appropriate to reduce the sentence to take account of the plea of guilty because the State has been saved the expense of a trial, witnesses have been spared the necessity of attending court and giving evidence, and police have been able to better carry out their duty of protecting the community.

In the course of formulating its guideline, the Court in *Thomson*[20] confirmed:

> The reference in s 22(1)(b) to an obligation to take into account 'when the offender pleaded guilty' is to be construed as indicating that the earlier a plea is made or indicated, the greater the claim that an offender has to the exercise in his or her favour of the discretion to which the Act refers.

Finally, it came down emphatically in favour of economic rationalism as the main basis for rewarding an early plea of guilty, in its conclusion[21] observing:

> The benefits to the criminal justice system as a whole, which flow from a plea of guilty, particularly an early plea of guilty, are not related to the circumstances of the offence or to the conduct of the offender … Rather, they are collateral benefits for the efficiency and effectiveness of the criminal justice system as a whole, which require acknowledgment of some character by way of an incentive, so that the benefits will in fact be derived by the system.

Each of their Honours in *Cameron*[22] took time to consider – as a relevant factor - whether or not C's guilty plea *had* resulted in resource-saving within the WA criminal justice system. This renders all the more confusing what the majority of the Court then went on to say about the potentially discriminatory nature of such a rationale.

The alleged discriminatory effect of a discount for a guilty plea

In acknowledging that a plea of guilty is a matter which a sentencing judge can properly take into account in mitigation of sentence, the majority in *Cameron* revisited their own previous statement of the general rule in *Siganto v The Queen,*[23] where it was said:

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19 Later Dow J; see New South Wales Legislative Assembly, Parliamentary Debates (Hansard) 4 April 1990, 1690.
20 Ibid 107.
21 Ibid 131.
22 op cit, at 386 (majority), 391 (McHugh J) and 397 (Kirby J) respectively.
23 (1998) 194 CLR 656, 663-664.

> A plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case.

They immediately added:[24]

> It should at once be noted that remorse is not necessarily the only subjective matter revealed by a plea of guilty. The plea may also indicate acceptance of responsibility and a willingness to facilitate the course of justice.

Then came the following somewhat surprising retreat from the observation which the same judges in majority had made only four years previously in *Siganto* regarding the validity of resource-saving within the criminal justice system as a ground for a reduction in sentence in recognition of a guilty plea:

> It is difficult to see that a person who has exercised his or her right to trial is not being discriminated against by reason of his or her exercising that right if, in otherwise comparable circumstances, another's plea of guilty results in a reduction of the sentence that would otherwise have been imposed on the pragmatic and objective ground that the plea has saved the community the expense of a trial. However, the same is not true if the plea is seen, subjectively, as the willingness of the offender to facilitate the course of justice.[25]

Nor was *Siganto* by any means the only previous authority on this point being called into question. As McHugh J pointed out[26] in the course of a minority judgment which conceded that this was perhaps not the sort of case in which to create waves for state jurisdictions:

> …[I]n recent years, under the pressure of delayed hearings and ever increasing court lists, Australian courts have indicated that they will regard a plea of guilty as a mitigating factor even when no remorse or contrition is present. They have taken the pragmatic view that giving sentence 'discounts' to those who plead guilty at the earliest available opportunity encourages pleas of

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24 Ibid 384.

25 Ibid.

26 Ibid 388, quoting, among others, *R v Shannon* (1979) SASR 442 at 448, 451; *Winchester* (1992) 58 A Crim R 345, 350, and *Atholwood* (1999) 109 A Crim R 465, 467, in which the WA Court of Criminal Appeal held that 'A bare plea of guilty (that is, a plea that is not accompanied by genuine remorse), even when made at the last moment, is a mitigating factor as it avoids the expense of a defended trial, inconvenience to witnesses and delay to other cases in the list. This is so even when the case of the prosecution is strong …'

27 Ibid 390, considered again below.

> guilty, reduces the expense of the criminal justice system, reduces court delays, avoids inconvenience to witnesses and prevents the misuse of legal aid funds by the guilty.

Given that, in his opinion,[27] it was a matter for the states whether or not to discount sentences in return for guilty pleas, he felt himself entitled, on the facts of the case, to conclude:[28]

> In these circumstances, the sentencing judge was entitled to hold that the public interest in avoiding the expense and inconvenience of a District Court trial warranted a discount of no more than 10%.

It was left to Kirby J to most forcefully re-affirm the pragmatism with which the modern sentencing process is routinely approached. At pp 394-395, he observed:[29]

> The main features of the public interest, relevant to the discount for a plea of guilty, are 'purely utilitarian'[30]. They include the fact that a plea of guilty saves the community the cost and inconvenience of the trial of the prisoner which must otherwise be undertaken. It also involves a saving in costs that must otherwise be expended upon the provision of judicial and court facilities; prosecutorial operations; the supply of legal aid to accused persons; witness fees; and the fees paid, and inconvenience caused, to any jurors summoned to perform jury service. Even a plea at a late stage, indeed even one offered on the day of trial or during a trial, may, to some extent, involve savings of these kinds … it is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt. Doing this helps ease the congestion in the courts that delays the hearing of such trials as must be held.

It was, however, clearly in the minds of the majority that saving the community the cost of a trial is not, of itself, sufficient to warrant a discounted sentence, because to do so would be discriminatory of those who plead not guilty. However, according to the majority, it *is* sufficient if, 'subjectively', the person pleading guilty is seen as expressing 'a willingness to facilitate the course of justice'.

It may immediately be questioned whether or not this is a distinction with a difference. Is it possible for an accused person to tender an early plea of guilty and *not* be said to be 'facilitating the course of justice'? Are there additional factors which will identify the plea as one which facilitates the course of justice, as opposed to merely saving the time, and therefore the resources, of the criminal justice system?

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28 Ibid 391.

29 Relying on all the authorities listed in Note 26 above, plus *R v Perry* [1969] QWN 17, *R v Gray* [1977] VR 225, *Verschuren v The Queen* at 473 and *R v Thomson and Houlton*, at 112, 113.

30 Quoting *Winchester*, at 350.

Does it not facilitate the course of justice when, in the words of Kirby J 'Doing this helps ease the congestion in the courts'?[31] If, as the old saying goes, 'Justice delayed is justice denied', then surely assisting in the reduction of a court backlog must be characterised as 'facilitating the course of justice'.[32]

If it becomes the general rule that cost-saving alone is not enough to earn a discount in sentence, then future courts will face the difficulty of distinguishing between those guilty pleas which somehow facilitate the course of justice from those which merely save money.

Nor will this be the only difficulty arising from the majority opinion that sentence discounting for guilty pleas is potentially discriminatory if the only motive for it is one of economic rationalism.

The next obvious ones are (a) the distinction between discounting for a guilty plea and penalising a not guilty plea, and (b) the fact that a guilty plea is not, in any event, an automatic guarantee of a reduced sentence

Distinguishing between a discount for a plea of guilty and a penalty for going to trial

In *Siganto v The Queen,*[33] the Appellant (S) had been convicted after trial of a particularly unpleasant rape. The trial (in a Northern Territory court) had necessitated the complainant testifying, an experience which she had understandably found very distressing. During the history of the matter, S had twice failed to appear for listed committal proceedings. In sentencing him to nine years imprisonment, with a non-parole period of 6 years 4 months, the trial judge made the following sentencing remarks:[34]

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31 See note 29

32 See also *R v Thomson and Houlton*, above, in which the observation was made that 'The leniency is afforded in order to encourage early pleas of guilty so that the criminal list is more expeditiously disposed of and so that other cases, in which there is a genuine issue to be determined, will be brought on for hearing without delay'. In *R v Shannon* (1979) 21 SASR 442 at 452, King CJ referred to '… a willingness to co-operate in the administration of justice by saving the expense and inconvenience of a trial, or the necessity of witnesses giving evidence, or … some other consideration which is in the public interest'.

33 See note 23. The extent to which *Siganto* is authority for the validity of a discount for a guilty plea on purely economic grounds may now of course require to be reconsidered in the light of *Cameron*.

34 Quoted in *Siganto*, 663.

35 Ibid 665.

> You pleaded not guilty, having always denied the charge, and have shown no remorse whatsoever. The jury took but a short time to find you guilty, an inevitable finding on the evidence. The jury were satisfied that you lied on oath in denying the crime, and that you lied to police during the record of interview … Your victim … was greatly distressed by your crime. Her distress was evident to police officers who attended … [her] distress was aggravated by having to give evidence against you, both at the committal and at trial.

The majority ruling of the High Court (Gleeson, Gummow, Hayne and CallinanJJ, with Gaudron J concurring in this aspect of the judgment, but dissenting on unrelated grounds) was that the subsequent appeal against sentence should be allowed because

> … it is difficult to avoid the conclusion that [the sentencing judge] treated the distress of the victim at having to give evidence in the criminal proceedings as a matter of aggravation.[35]

The correct approach was stated[36] to be as follows:

> A person charged with a criminal offence is entitled to plead guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious that would otherwise have been imposed … It is proper for a sentencing judge to observe, in a particular case, that circumstances which might otherwise attract leniency are absent. A trial judge's reference to the absence from the case of a matter of mitigation does not mean that the judge is indicating the presence of a circumstance of aggravation.

Among the reasons given by their Honours[37] for the necessity of such a rule were that

> … even an innocent person may be deterred from seeking to defend himself or herself if it were the case that rejection of the defence case by a jury may result in an increased sentence. Similar considerations apply to the argument presently under consideration. A sentencing judge is punishing an offender for the crime, not for the conduct of the defence case … The very denial of guilt by a person charged may be distressing to a victim, especially if, as not infrequently occurs, it is accompanied by a version of events which is offensive. Distinguishing between a plea of not guilty and the manner of conduct of the defence case is difficult, both in terms of principle and in a practical sense.

However, they also acknowledged[38] that

> To some, it may appear a matter of semantics to distinguish between denying the existence of circumstances of mitigation and asserting the existence of

36 Ibid 663.
37 Ibid 666.
38 Ibid 667.

> circumstances of aggravation; and judicial statements intended as the former may sometimes be misunderstood as intending the latter. However, the distinction can be important.

In re-affirming this aspect of their previous ruling in *Siganto*, the majority in *Cameron* also acknowledged:[39]

> The distinction between allowing a reduction for a plea of guilty and not penalising a person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction, albeit one the rationale for which may need some refinement in expression if the distinction is to be seen as non-discriminatory.

McHugh J, in his dissenting judgment, was less diplomatic, observing:[40]

> The subtlety of this scholastic argument has not escaped criticism from those who see legal issues in terms of substance rather than form.

It was left to Kirby J to formulate a general rule which in his opinion adequately reflected the important distinction being made between an absolute ban on the imposition of a *higher* sentence following a plea of not guilty and the possibility of a *reduced* sentence following a plea of guilty tendered for what be termed 'the right reasons'. He observed:[41]

> The true foundation for the discount for a plea of guilty is not a reward for remorse or its anticipated consequences but acceptance that it is in the public interest to provide the discount.

The 'public interest' which he thereby identified is the one he went on to describe[42] as having as its 'main features' the 'purely utilitarian' benefits, consisting largely of cost-saving within the criminal justice system.

For Kirby J, if for no-one else, this cost-saving is the main basis for the distinction between a 'no discount' plea of not guilty and a 'discount' for a guilty plea. The person who pleads guilty may be said to be furthering the 'public interest', for which read 'the public purse'.

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39 Ibid 384.

40 Ibid 389, quoting, similar observations in *R v Shannon* (1979) 21 SASR 442, 458-459, per Cox J, and the complaint by Pincus J in 'Court Involvement in Pre-trial Procedures' (1987) 61 *Australian Law Journal* 471, 477, that '… people are being punished for insisting on a trial, at least in the sense that they may receive a longer sentence if they plead not guilty than they would if they pleaded guilty'.

41 Ibid 393.

42 See above n 29.

43 See above n 25.

The unanswered question (considered above) is whether or not this may also be said to constitute 'a willingness to facilitate the course of justice',[43] which is what the majority of the Court clearly require an accused to demonstrate before he qualifies for a discount.

No guarantee of a discount for a guilty plea

When assessing the extent to which an accused person may be said to be prejudiced in terms of his/her ultimate sentence by the decision to plead not guilty and take the charges against him to trial, it must be acknowledged that not all pleas of guilty can be *guaranteed* to result in a reduced sentence, however much such a policy may be the 'norm'.

While all state and territory legislative schemes[44] apart from Tasmania, and their Commonwealth counterpart,[45] make provision for the sentence imposed on an accused to take into account the fact that he has elected to plead guilty, in none of these jurisdictions is a reduced sentence a *mandatory* outcome of a guilty plea.

As Kirby J noted in *Cameron:*[46]

> In a prisoner who has been caught red-handed, the plea of guilty may indicate regret at being caught and charged, rather than regret for involvement in the crime.

In addition, there are some grounds for believing that in appropriate cases, an accused person may gain nothing from pleading guilty, if the other factors which feed into 'the complex task of imposing criminal punishment'[47] are sufficiently strong against him.

In *Thomson and Houlton,*[48] it will be recalled, the NSW Court of Appeal, in formulating a guideline for sentencing discounts in its own state, acknowledged[49] that, 'In some cases a plea of guilty will not lead to any discount'.

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44 *Sentencing Act 1995*(WA), s 8(2); *Crimes (Sentencing Procedure) Act 1999* (NSW), s 22(1); *Sentencing Act 1991* (Vic), s 5(2)(e); *Sentencing Act* (NT), s 5(2)(j); *Penalties and Sentences Act 1992* (Qld), s 13(1); *Criminal Law (Sentencing) Act 1998* (SA), s 10(g); *Crimes Act 1900* (ACT), s 29A(1)(u).

45 *Crimes Act 1914* (Cth), s 16A(2)(g)

46 at 394

47 Per Kirby J, ibid 393

48 See above n 17.

49 Ibid 138.

50 New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 4 April 1990, 1689. See also de Jersey CJ in *R v Ruhland* [1999] QCA 430, [6], Phillips JA in *R v Hilton* [2001] VSCA 134, [14], Cox CJ in *Hyland v R* (1994) Tas CCA 98/1994, [11] and *Murphy v R* [2000] TASSC 169, [2].

In the NSW parliamentary debate on the forerunner to S.22(1) of that state's *Crimes (Sentencing Procedure)Act 1999* (part of which has already been quoted; see note 19 above), the then Attorney-General observed:[50]

> 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.

The very reason for the request for the guideline issued for NSW in *Thomson and Houlton* was said[51] to have been

> …that there was significant doubt amongst practitioners that a substantial discount was in fact given by all sentencing judges and that there was particular scepticism as to whether an early plea was being appropriately recognised.

The Court in that case, while declining to place any great reliance on statistics from its own District and Local Courts which suggested that there was no regular identifiable discount for the fact of a guilty plea, did draw, from the Weatherburn and Baker survey (see note 51, supra) the conclusion that there was some indication ' … there is no benefit from an *early* plea'[52] (the Court's emphasis).

Other postulated valid grounds for a discount

In raising the possibility that it is discriminatory of those who exercise their right to trial for a court to give a sentencing discount for a plea of guilty on the sole ground that the accused has saved the community the cost of a trial, the majority in *Cameron* were prepared to accept that such a process is *not* discriminatory when the plea of guilty arises from other motivations. These were identified in the following passage from the majority judgment:

> Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.[53]

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51 Ibid 109, an observation apparently supported by a research study undertaken by the NSW Bureau of Crime Statistics and Research under the short title of Weatherburn and Baker, Managing Trial Court Delay (2000).

52 Ibid 112.

53 See *Cameron* at 385.

As has already been argued, there may well be no distinction in reality between 'facilitating the course of justice' and 'saving the community the expense of a contested hearing'. Nor, with the greatest respect, do either of the other quoted justifications for a discounted sentence fare any better when they are considered against the reality of contemporary criminal practice.

Remorse

In *Siganto,*[54] the majority of the Court (two of whom were later to form part of the majority in *Cameron*) expressed the traditional view that a plea of guilty '… is usually evidence of some remorse on the part of the offender', and in *Cameron* they went on to impliedly confirm their opinion in *Siganto* that a plea of guilty born of remorse was deserving of a reduction in sentence.

The reality is that for a number of years now, courts throughout Australia have come to entertain serious doubts regarding the genuineness of many professed expressions of remorse, and have certainly ceased regarding a plea of guilty as automatic proof of such.

In *R v Shannon,*[55] King CJ in the South Australian Court of Appeal took great care to distinguish between, on the one hand 'genuine remorse, repentance or contrition' and, on the other hand 'a recognition of the inevitable', or a plea '… entered as the means of inducing the prosecution not to proceed with a more serious charge', both of which he regarded as 'not of itself a matter of mitigation".

In *Heferen,*[56] Anderson J in the WA Court of Criminal Appeal observed that 'Where the prosecution case is strong and a conviction is inevitable, a plea of guilty is not generally regarded as a significant indication of remorse'. In *R v Porter and McQuire (No 2),*[57] McMurdo P, of the Queensland Court of Appeal, observed that 'The criminal justice system recognises that a plea of guilty is a mitigating factor even when not accompanied by remorse'.

In *R v Jones,*[58] Davies JA in the same Court offered this more cynical observation:

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54 at 663-664, per Gummow, Hayne and Callinan JJ, with Gleeson CJ.

55 at 452-453.

56 (1999) 106 A Crim R 89, at 93. A year previously, in *Heryadi and Ors v The Queen* (1998) 98 A Crim R 578, at 584, Ipp J said of a drug courier 'The applicant's plea of guilty, however, has little mitigatory effect. He was, after all, caught red-handed'.

57 (2000) 110 A Crim R 348, 363, quoting *Corrigan* [1994] 2 Qd R 415, 416, 419, and *Penalties and Sentences Act 1992* (Qld) s 13.

58 [2000] QCA 84.

59 at 131.

> I would doubt whether at least in this State a guilty plea is usually evidence of remorse. More likely in most cases, it is evidence of an expectation on the part of an offender usually as a result of legal advice that a guilty plea will probably result in a reduced sentence … I doubt whether the guilty plea was evidence of remorse at all. The case was as I have already indicated an overwhelming one against the applicant and he must have realised that.

A similar sentiment would appear to prevail at the highest level in New South Wales. In *R v Thomson; R v Houlton,*[59] Spigelman CJ, in delivering the judgment of that state's Court of Criminal Appeal, noted:

> A plea may be entered as an acceptance of the inevitable or in order to obtain such advantage as may be afforded in the circumstances. In such a case a plea does not indicate genuine remorse or contrition . . . . . Much greater weight may be accorded to the conduct and statements of an accused over a period of time, which confirm a position of genuine and deeply felt contrition. When such contrition is taken into account by a sentencing judge, then the diminution of sentence is given for contrition, not for the plea of guilty . . . . . it is not desirable to sepeaate out the factor of a plea as an indication of remorse from other manifestations of remorse.

Similar expressions of doubt regarding the reliability of a plea of guilty as an indicator of true remorse may be found in the Court of Appeal reports of Victoria,[60] Northern Territory[61] and Tasmania.[62]

These all demonstrate clearly that while remorse may well be one of the ingredients of a plea of guilty, and may indeed in some cases be its primary motivation, a plea of guilty is by no means an automatic barometer of remorse, and remorse may indeed exist independently of a plea of guilty being entered.

It is no doubt for this reason that some Australian legislatures have chosen to separate remorse from the mere *fact* of a plea of guilty, and have afforded them separate status in the list of factors which a sentencing judge is required to consider when selecting an appropriate penalty.[63] In fact, every legislative

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60 *R v Gillick* [2000] VSCA at [12] and [13].

61 *R v Jabaltjari* (1989) 64 NTR 1.

62 *Murphy v R*, at [2].

63 See *Penalties and Sentences Act 1992* (Qld), ss 9(4)(i) and 13; *Crimes Act 1900* (ACT) S.429A (i)(u) and (v); *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 21(A) and 22; *Sentencing Act 1991* (VIC), ss 5(2)(e) and 5(2C); *Crimes Act 1914* (Cth), s 16(A)(2)(f), (g).

64 [1995] QCA 374. See also *The Queen v Jabaltjari*, per Asche CJ, Para 61, who observed of an accused that 'If his defence involves a complete denial of the offence for which he is charged, and if nevertheless it is established beyond reasonable doubt that

provision which makes reference to 'remorse' or 'contrition' keeps it separate from the provision which deals with a mere entry of a plea of guilty, which is clearly regarded as a distinct and discrete factor to be added to the equation. Nowhere in the sentencing provisions of any Australian state or territory is a plea of guilty directly equated with a demonstration of remorse.

It is also at least arguable that an accused who pleads not guilty – thereby requiring his alleged victim to testify both at committal and trial – disqualifies himself from any discounted sentence based on remorse. While it is not yet being suggested that anyone taking this path should receive a higher sentence, it is certainly unlikely that he could expect what might be termed a 'remorse-based' discount.

In *R v Solway,*[64] for example, Pincus JA in the Queensland Court of Appeal observed:

> The orthodox theory is that Solway is not to be given extra punishment for his apparent lack of remorse and for having put the victim through the traumatic experience of being publicly questioned about all these matters at committal and trial; but he is not entitled to any substantial leniency which the cases show can often be justified in such cases, where there is an admission of guilt … What may be said to mark this case out from others in which, in comparable circumstances, non-custodial sentences have been imposed is principally the denial of the offences and lack of remorse.

It is difficult to construe these remarks in any other way than as indicating that demonstrating lack of remorse by going to trial will result in a higher sentence than pleading guilty and sparing the victim the trauma of trial. Obviously, one would not look for remorse from someone who regards himself as innocent of the alleged offences, but is he then to be penalised for *not* showing remorse if the jury subsequently finds him guilty?

If that is to be the policy, then with the greatest of respect this is just as discriminatory of someone who elects to plead not guilty as imposing a higher sentence on an accused simply because he thereby incurs the public cost of a trial. Indeed, a strong case could be made out for being *more* severe on someone who has put the victim through the ordeal of a trial than one who has simply 'wasted' public money.

The cynicism with which expressions of remorse have come to be regarded in recent years also highlights the practical difficulty of distinguishing between genuine remorse and what might be termed the tactically appropriate public expression of it. Without some test for identifying 'objective remorse' (one example

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he committed it, the obvious comment would normally be that he has shown no remorse or self-realisation and he should get no consideration for those factors'.

of which might be sparing the victim the trauma of trial), it may well become the case that discounts are in reality given for what amount to no more than cost-saving exercises in which counsel for the defendant has the presence of mind to include the word 'remorse' in his sentencing submissions.

Given these difficulties, it is hardly surprising that, McHugh J noted in *Cameron,*[65]

> …[I]n recent years, under the pressure of delayed hearings and ever increasing court lists, Australian courts have indicated that they will regard a plea of guilty as a mitigating factor even when no remorse or contrition is present

The essential distinction between what might be termed 'genuine' and 'tactical' remorse was further highlighted by Kirby J in this observation:[66]

> The discount for a plea of guilty to the charge brought against the accused is to be distinguished from a discount for a spontaneous and immediate expression of remorse conducive to reform and or immediate cooperation with investigating police. The latter has always been treated as deserving of such recognition in the sentencing of an accused . . . . . However, judges have lately expressed doubt as to the extent to which pleas of guilty really proceed from such motives. In a prisoner who has been caught red-handed, the plea of guilty may indicate regret at being caught and charged, rather than regret for involvement in the crime.[67]

With respect, this is surely the correct way to view the current role of remorse in the overall sentencing equation. It is an *additional* factor which may attract a *further* discount – it is not the pre-requisite for a discount in the first place. This pre-requisite is to be found in the 'other features of the public interest' referred to by His Honour, which he went on to describe as 'purely utilitarian'.

In conclusion, he noted:[68]

> …[T]here are other considerations of the public interest that warrant a discount. Remorse, when present, is icing on the cake.

Acceptance of responsibility

In practice, it is likely to be extremely difficult to distinguish between a guilty plea born of an 'acceptance of responsibility' by the accused, and one which is not. Is it possible, in reality, for a person to plead guilty without at least by implication

65 at 388-389, quoting *Winchester*, at 350.
66 at 393-394.
67 In such a case, of course, however, the plea may thereby cease to be 'utilitarian'.
68 Ibid 397.

accepting that he was responsible for the criminal actions of which he stands accused? Posed in reverse, would someone (or at least, someone properly advised legally) plead guilty to offences for which he did not regard himself as being responsible?

Acceptance of responsibility is clearly not the same thing as remorse, although on many occasions the two may accompany each other. One may accept responsibility with a dull resignation without at the same time experiencing an ounce of contrition; by the same process, one may feel the greatest remorse for what ultimately happened to the victim without accepting criminal responsibility for it, particularly after taking dispassionate legal advice.

This distinction is implicit in all the cases referred to above in which the courts have come to dissociate the presence of remorse from the plea of guilty. Even though that plea may be merely the product of a desire for a lower sentence, it must surely be accompanied (in all but the most exceptional cases) by an acceptance of criminal responsibility.

If all that is required for a discount is an 'acceptance of responsibility' (which even the majority in *Cameron* distinguished from an expression of remorse[69]), then it may well be the case that the concerns expressed by the majority regarding unwarranted discounts in sentencing being discriminatory of those who plead not guilty will turn out to be groundless, since the vast majority of those entering guilty pleas may be said to be accepting their responsibility, a ground identified by the majority themselves as meriting such a discount.

A division between State and Commonwealth?

The strongest implied criticism of the state and territory court policy of discounting sentences in exchange for guilty pleas came from McHugh J, who at the same time was at pains to dissociate the federal courts from such a practice. At p 390, he issued the following ringing re-affirmation of those principles of equity which he maintained should underlie the sentencing process:

> It is … one thing for courts, exercising State jurisdiction, to give a discount for a bare plea of guilty even though it results in persons who plead guilty receiving shorter sentences than persons in similar circumstances who plead not guilty. But it is another matter whether, consistently with the exercise of the judicial power of the Commonwealth, courts exercising federal jurisdiction can give 'discounts' in such cases. If there is one principle that lies at the heart of the judicial power of the Commonwealth, it is that courts, exercising federal jurisdiction, cannot act in a way that is relevantly discriminatory. To deny that proposition is to deny that equal justice under the law is one of the central concerns of the judicial power of the Commonwealth. And it is at least arguable

69 See above n 24.

> that it is relevantly discriminatory to treat convicted persons differently when the only difference in their circumstances is that one group has been convicted on pleas of guilty and the other group has been convicted after pleas of not guilty.

In support of this proposition, McHugh J quoted the majority ruling in *Wong v The Queen,*[70] to the effect that

> Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect.

He then converted that broad principle into the following practical application:[71]

> Where the facts and circumstances of crimes and the subjective factors of those who commit them are the same, arguably equal justice requires that there be an identity of, and not different, outcomes in the punishment that they receive. That the State and others may be advantaged by a plea of guilty is arguably not a relevant difference in cases where the plea of guilty throws no light on the contrition, remorse or future behaviour of the defendant.

This, it is submitted, cuts to the very heart of the debate, and highlights the core issue over which opinion seems to divide in the final analysis. Should a person be sentenced *solely* on the basis of factors arising within the case itself, plus the personal circumstances of that accused (one of which *may* be a genuine expression of remorse, which in turn *may* have led to the guilty plea), or should a discount in sentence be allowed on the *extrinsic* ground that the accused has pleaded guilty (without remorse), and thereby saved the public purse the cost of a trial, in circumstances in which it *cannot* be said that he has accepted his responsibility, and it *cannot* be said that he has evinced a willingness to facilitate the course of justice?

For the reasons advanced above, it is arguable that such a specific specimen of a plea of guilty will in practice be rare. However, it will present itself from time to time, and will divide opinion between the states and territories on the one hand, and the Commonwealth on the other.

Factors such as remorse, acceptance of responsibility etc. identified by the majority in *Cameron* as deserving of a discount are presumably to be regarded in the Commonwealth jurisdiction as among the 'relevantly' differentiating factors referred to in *Wong*, leaving the purely pragmatic ground of cost-saving out on its own as not deserving of a distinction between two cases which are otherwise indistinguishable. For the states and territories, on the other hand, economic

70 (2001) 76 ALJR 79 at 92. McHugh J's emphasis.
71 at 390.

rationalism will almost certainly rule the day, even in the limited number of cases in which the defendant cannot even be said to have displayed a 'willingness to assist the course of justice'.

Quite apart from the fact that we may have to wait a long time for an appropriate sentencing appeal in which the only mitigating factor which can be argued on behalf of an accused is that 'he saved the cost of a trial' (such is the ingenuity of defence counsel in placing their clients in whatever category of virtue is relevant under the sentencing regime which obtains at any given time), it may well take a considerable time for the correct combination of factors to manifest themselves at a federal level for this issue to be advanced further.

In acknowledging that his remarks in relation to discrimination against those who opt for trial was *obiter* of the essential issues before the Court in *Cameron*, McHugh J was obliged to concede:[72]

> …[I]n Western Australia a person who pleads guilty as soon as practicable is entitled to have the otherwise appropriate sentence substantially discounted. Determining whether the discount principle applies in federal jurisdiction must therefore be left for another day. Given the advantages that the prosecution authorities see in the discount system, a challenge to the applicability of that system in federal jurisdiction will probably have to come from a person who has been sentenced after being convicted on a plea of not guilty. If such a person has been denied the discount received by those pleading guilty, the sentence may be arguably discriminatory in a relevant sense.

In short, the storm-clouds may be gathering, but the first drops of rain have yet to fall. When and if they do, it is difficult to visualise the states and territories voluntarily abandoning a policy which in the end-result has proved so economically beneficial to the criminal justice system. Nor is it easy to imagine their respective electorates being willing to finance the alternative.

Should the rules eventually change in respect of Commonwealth matters only, then in those state and territory courts exercising Commonwealth jurisdiction alongside its state and territory equivalent, there may in time erupt a very real argument involving alleged discrimination – against offenders going to trial under local criminal law (who allegedly 'lose out' by pleading not guilty), as compared with their counterparts under the Commonwealth regime, who may in future receive the same sentence regardless of whether or not they plead guilty.

The most appropriate last word on this issue is probably that of Kirby J, who, referring to the policy of discounting sentences in return for guilty pleas, observed:[73]

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72 Ibid. See also Kirby J at 399.
73 Ibid 399-400.

> …[T]he principle is uniformly accepted. In practice, the amount of the discount and the rules applied in arriving at it, do not appear to vary greatly. This is not the occasion to explore this question further.

The need for transparency in discounting

A further issue raised by Kirby J is, however, in more urgent need of response, since it is in practice a frequent source of appeals against sentence. It concerns the 'transparency' with which discounts for guilty pleas are granted.

By this is meant a practice under which, at the end of the sentencing process, the accused is advised of the sentence he *would have* received had it not been for the mitigating factors which were taken into account, at the same time that he is advised of the sentence which he *is* to receive. Such a process has at least two advantages.

The first is that the person being sentenced can clearly grasp what 'discount' he has received, and in respect of what mitigating factors. The second is that a body of 'discount comparatives' may be added to the growing libraries of sentencing precedents, Australia-wide. These in turn are extremely valuable in ensuring 'parity of sentence' between cases in which the factors upon which the sentence falls to be determined are similar.

To these, Kirby J added[74] a third, and closely related, justification for transparency in discounting, observing:

> …[I]f the prisoner and the prisoner's legal advisers do not know the measure of the discount, it cannot be expected that pleas of guilty will be encouraged in appropriate cases, although this is in the public interest … Knowing that such a discount will be made represents one purpose of such discounts. Unless it is known it may not be possible for an appellate court to compare the sentence imposed with other sentences for like offences or to check disputed questions of parity.

This is particularly true at High Court level, in view of the different 'discount levels' which seem to apply in different states and territories (see above n 16).

Given the obvious advantages of transparent discounting (which Kirby J also refers to as the 'two-stage approach' – see below), it is surprising to find that it is by no means generally practised, or even acknowledged, across the jurisdictions, the majority of which prefer to employ a process generally known as the 'instinctive synthesis of factors' (see below), leading to a single declared sentence.

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74 Ibid 395.

One of the dangers of such a practice was highlighted by Kirby J, by reference to the very circumstances which led to the appeal in *Cameron* itself, in the following passage from his judgment:

> …[I]t is appropriate to observe that, effectively, this appeal would not have been possible (and a miscarriage of justice might have been irreparably masked) had the sentencing judge contented himself with stating generally that he had taken the plea of guilty into account and simply announced his 'instinctive synthesis' represented by the sentence … The appeal would have been without redress[75]

This in itself, of course, is a further reason for the encouragement of 'transparent' or 'two-stage' sentencing, namely that it identifies grounds for appeal against sentence which might otherwise remain only as a suspicion that the process has somehow miscarried.

His Honour left no-one in any doubt regarding his views on the matter. At p.395 he declared:

> I remain of the opinion that where a 'discount' for a particular consideration relevant to sentencing is appropriate, it is desirable that the fact and measure of the discount should be expressly identified. Unless this happens, there will be a danger that the lack of transparency, effectively concealed by judicial 'instinct' will render it impossible to know whether proper sentencing principles have been applied.

Of all the state and territory jurisdictions, one aspect of Queensland's sentencing procedure comes the closest to imposing a statutorily-mandated 'two-stage' sentencing process. Under the *Penalties and Sentences Act 1992 (Qld)*, s 13A(7), a judge reducing a sentence on the ground that the defendant has undertaken to co-operate with law enforcement agencies must announce, in open court, the actual sentence being imposed, then close the court and announce (a) that the sentence has been reduced under the subsection (and such a reduction appears to be mandatory), and (b) the sentence which would otherwise have been imposed.

A similar provision is to be found in the *Crimes Act* (Cth), s 21E, for federal offences.

However, s 13(4) of the Queensland Act, while requiring a sentencing judge to 'take into account' a guilty plea, requires only that a judge who does *not* reduce a sentence in return for a guilty plea state that fact in open court, and the reasons for it. When a sentence *is* being so reduced, subsection (3) requires simply that the judge state in open court that the guilty plea was taken into account when passing

75 Ibid 396.

sentence. This is a long way from the 'transparent' two-tier process advocated by Kirby J, which would require the extent of the discount to be quantified.

Similarly, s 16A(2)(g) of the Commonwealth Act requires only that a judge sentencing for a federal offence 'have regard' to a plea of guilty, and does not even require the judge to state in open court his/her reason for not discounting a sentence in return for a guilty plea.

The *Sentencing Act 1995 (WA)*, s 8(4), requires that if a court reduces a sentence because of a 'mitigating factor' (including a plea of guilty), then it must state that fact in open court. There is no requirement to quantify the discount, but in subsection (5) there *is* such a requirement in those cases in which the discount is being given in return for the offender assisting law enforcement authorities.

The provisions of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*, s 23, provide for a *discretionary* discount in cases in which the offender has undertaken to assist law enforcement authorities, but contains no provision equivalent to that under s 13A(7) of the Queensland Act, requiring a statement in open court of the quantum of the discount.

Section 22 of the same Act (like s 13 of its Queensland counterpart) contains a provision [in subsection (1)] which requires a sentencing court to 'take into account' a plea of guilty. While it would seem that the sentencing judge is not required to state formally in open court that he has done so (and even less does he appear to be required to quantify any discount), subsection (2) does require him to record his reasons for *not* reducing a sentence in return for a plea of guilty.

In Victoria, the provisions of the *Sentencing Act 1991 (VIC),* s 5(2AB) are to the limited effect that if a court imposes a less severe sentence than it would otherwise have done following an undertaking to assist law enforcement officers, then the court must announce that it is doing so. Once again, there appears to be no requirement to quantify the discount.

There are no equivalent, or otherwise relevant, provisions to be found in the sentencing legislation of South Australia, Tasmania, the Northern Territory, or the ACT.

It is clear from this brief survey that hitherto, the only context in which it has been deemed sufficiently important for a sentencing court to quantify the discount it is giving in return for some mitigating factor is that in which the offender has agreed to co-operate with law-enforcement authorities. In no jurisdiction anywhere in Australia has this been considered appropriate when the reason for the discount is a plea of guilty, and it is presumably this policy which Kirby J was seeking to reverse in *Cameron*.

He had previously espoused this proposal in *AB v The Queen*[76] and *Wong v The Queen,*[77] and on both occasions had found himself in a minority, with the majority court in *Wong* (Gaudron, Gummow and Hayne JJ)[78] preferring the alternative methodology of weighing up all the factors to be taken into account when passing a particular sentence, and from them arriving at an 'instinctive synethis' of factors.

Almost defensively, they went on to explain:[79]

> This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion (narcotics importation contrary to Commonwealth provisions) balances many different and conflicting features.

They quoted, in support of their position, the review carried out by Spigelman CJ in the New South Wales case of *R v Thomson*[80] which revealed that the preponderance of appeal court authority at state and territory level[81] was against the 'two stage' approach to sentencing. As indicated above, with the limited exceptions outlined above, the legislation of the states reveals the same disinclination to encourage sentencing judges to begin with an 'objective' sentence and then discount it by a given proportion, according to the mitigating factors which can be identified.

In *AB v The Queen,*[82] McHugh and Hayne JJ had also opposed the suggestion that sentencing be performed on a 'two tiered' basis. McHugh J there said:

> …[I]t is in conflict with the discretionary nature of the sentencing process. Discretionary judgments require the weighing of elements, not the formulation of adjustable rules or benchmarks.

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76 (1999) 198 CLR 111, 148-149, in which the issue was the failure of the sentencing judge, when passing sentence on a serial child sex offender, to publicly acknowledge the granting of a discount in sentence in return for the offender waiving a privilege relating to his extradition from the USA, as the result of which it was possible for a further 39 offences to be disposed of on sentence.

77 (2001) 76 ALJR 79, 99-100, in which he observed that 'Greater transparency and honesty are the hallmarks of modern public administration and the administration of justice. In sentencing, we should not turn our backs on these advances'.

78 Ibid 93.

79 Ibid 93.

80 (2000) 49 NSWLR 383, 396-411. See also above n 17.

81 Specifically, in NSW, Victoria, Queensland, Tasmania, South Australia and Western Australia.

82 at 121-122 and 156 respectively.

83 (1998) 164 CLR 465, 476-477.

He also considered that it was in conflict with the broad statement of principle in *Veen v The* Queen,[83] to the effect that the various 'purposes' of criminal punishment ' … overlap, and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case'

Hayne J had observed in *AB:*

> No calculus will reveal some mathematical relationship between the appellant's remorse, the harm he has inflicted on his victims and society's denunciation of what he did to them … Remorse, harm, denunciation, retribution and deterrence – in the end, all these and more must be expressed by a sentencing judge in units of time. That is a discretionary judgment. It is not a task that is to be performed by calculation.

With the greatest of respect to his Honour, how else is it to be done? And of even more importance, how are defence lawyers to advise their clients fully on the consequences of pleading guilty at an early stage in the proceedings, as opposed to taking their chances in the lottery of jury trial, without some quantitative yardstick with which to express the likely benefits of an early plea in terms which the client can understand?

It is a fundamental requirement of all law that it be both accessible and intelligible to those who are bound by it. If the sentencing process is allowed to take on the appearance of the alchemist's potion, compiled from exotic ingredients combined by means of a formula known only to adepts, then few will respect it, and even fewer will be convinced that the sentences handed down by the courts are appropriate.

The appeal in *Cameron* arose from a perception on the part of the appellant and his legal team that he had been, in the vernacular, 'short-changed' in respect of his guilty plea. That perception arose by reference to 'the going rate' for pleading guilty by way of the 'fast-track' system which is available in Western Australia. It had been promoted by the government of that state in order to encourage 'utilitarian' pleas of guilty. Without a prior expectation that his guilty plea would result in a discounted sentence, the appellant might well not have chosen to plead guilty. Had the judge not indicated the level of discount which he was applying, the appeal (which in the event was successful) could not have been contemplated.

Kirby J does not suggest that the entire sentencing process be converted into a mathematical formula, simply that judges indicate, when passing sentence, what degree of discount (if any) has been allowed in respect of the 'mix' of mitigating factors which presented themselves. Without such a process, sentencing

84 at 395.

precedents (so important in ensuring 'parity' of sentence between cases) will become meaningless.

It is probably the case that such a proposition would be supported even by those members of the Court who favour the 'instinctive synthesis' approach, and that the real issue is whether or not sentencing judges should give more detailed reasons for their choice of sentence. Kirby J acknowledged this much in the following passage of his judgment in *Cameron*:

> The difference that has emerged in this Court on this question may be one of semantics rather than of substance. However that may be, in my view it is desirable, and certainly permissible, by the common law, for a judge to identify the measure of the discount which he or she has allowed for a plea of guilty. If that means that a 'two-stage approach' is involved, including identification of the primary and then the discounted sentence, I regard it as inherent in the provision of an identifiable discount for such a plea. No such discount can be reduced to a set formula. Elements of intuition and judgment remain to be given weight in arriving at the aggregate sentence finally imposed.[84]

At the end of the day, if issues such as those raised in the instant case are to be fully ventilated by reference to current practice, it is imperative that the bases upon which sentences have been arrived at are at least fully identified, if not quantified.

Adequate appellate legal representation: the limitations of *Dietrich*

One final issue arising from the *Cameron* case, to which the attention of the Court was drawn by Kirby J, concerns the right of an appellant to legal representation on appeal. Noting that the special leave application against the original decision of the Western Australia Court of Criminal Appeal had been made by the applicant in person,[85] and that the state authorities had made arrangements to bring him to court for that purpose, his Honour voiced the following concern:[86]

> There is a risk that, but for his appearance and oral argument, the error of the Court of Criminal Appeal that is now exposed might not have been detected. The limitations on the resources of Legal Aid in Western Australia, as elsewhere, make it inevitable that cases occur where legal representation before this Court is not provided. This Court cannot forfeit its judicial responsibilities to the decisions of legal aid bodies constrained by resource allocations of the Executive Government … The appellant's success in this appeal does not demonstrate that improved arrangements are unnecessary. On the contrary, it demonstrates the opposite. In my opinion, this Court should not

85 Although he was provided by Legal Aid with counsel for the hearing of the appeal itself, once leave had been granted.

86 Ibid 400.

> be content with the present unequal arrangements for prisoner applications. Equal justice before the law is not a principle confined to trials.

In calling for a broadening of the principle which underlay the decision in *Dietrich v The* Queen,[87] his Honour complained:[88]

> Appellate courts, including this Court, are sometimes forced to rely on their own resources or voluntary assistance occasionally provided by legal professional bodies. Yet if Dietrich rests, as I think it does, on a broader, and possibly a constitutional, foundation, whether generally or at least in cases within federal jurisdiction, improved arrangements for the presentation of applications by indigent prisoners in custody may be required.

It is difficult not to sympathise with the suggestion that at appeal level, and certainly before the High Court, all applicants should be legally represented, and that those without the means to pay for such representation, and who are in custody, should have it provided free of charge. However, with the greatest respect to His Honour, such a worthy aim both ignores the reality of life 'at the coal face', and elevates the *Dietrich* principle higher than it was ever intended to go.

Dietrich itself involved a successful appeal against conviction in the Melbourne County Court on three of four original indictment counts alleging serious Commonwealth narcotics charges. The appeal was on the sole ground of miscarriage of justice arising from the fact that the trial judge declined to either stay the indictment or adjourn the trial in order that D might obtain adequate representation by counsel. The subsequent trial lasted 40 days, during the whole of which D was required to represent himself.

It is of some significance that although he was eventually found not guilty of one of the original four charges (in circumstances which cast some doubt on the reliability of the guilty findings in respect of the other three), the Victorian Legal Aid Commission had taken the initial view that D was only entitled to Legal Aid representation for a guilty plea. This only further serves to promote pleas of guilty over pleas of not guilty, and is arguably even more discriminatory than 'discounting' sentences in return for guilty pleas. It certainly sits uncomfortably with the majority approach in *Cameron*.

The precise ratio of *Dietrich* emerges from the following extract from the joint judgment of Mason CJ and McHugh J:[89]

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87 (1992) 177 CLR 292, which, as pointed out by His Honour at p 400, '…does not, in its terms, apply to appeals or applications for leave or special leave to appeal to this Court'.

88 Ibid.

89 at 311, Deane, Toohey and Gaudron JJ. Agreeing in broad principle with this aspect of the joint judgment.

> … Australian law does not recognise that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial. Such a finding is, however, inextricably linked to the facts of the case and the background of the accused.

In short, the 'foundation' of *Dietrich* extends no further than the possibility, in appropriate cases, of staying *trial* proceedings while an accused obtains counsel, who may or may not be supplied at public expense. It is drawing an extremely long bow to seek to extend this authority to one which requires the provision of counsel free of charge to all accused in custody who may feel that they have grounds for appeal. Almost by definition, such persons will be 'indigent', at least by the time that they have been sentenced.

Nor was the principle which emerged in *Dietrich* extended in any meaningful way by its application by the New South Wales Court of Criminal Appeal (of which Kirby J was at that time the President) in Milat,[90] in which the unanimous judgment of the Court, in rejecting an appeal by Ivan Milat against what was in effect the level of remuneration being offered to his legal team by the New South Wales Legal Aid Commission, contained the following passage

> The principle in *Dietrich* concerns persons being, or about to be, tried for serious criminal offences … It does not concern an accused person's supposed right to competent counsel; the existence of such a right was denied by the decision in Dietrich.[91]

In practice, only the most senior and experienced counsel appear at any appellate level, and the High Court is the almost exclusive preserve of the QC and SC strata of the profession. It is not easy to envisage the Legal Aid Commissions of the various states committing vast resources to additional appeal funding at this level. Nor would there seem to be any immediate case authority to support such a policy.[92]

The ultimate irony may be that the possibility of future additional funding for such a worthwhile purpose may (given finite budgets) rely heavily on a corresponding improvement in the trial/plea ratio of matters which the various Commissions are required to fund at first instance. Put another way, the greater

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90 (1995) 37 NSWLR 370.

91 Ibid 375.

92 Although Kirby J in Cameron suggested a possible 'constitutional foundation' for it under the broad canopy of the decision in *Leeth v The Commonwealth* (1992) 174 CLR 455, 483-489 and 502-503. See, in particular, 400.

the number of guilty pleas, the greater the potential source of re-allocated funds for appellate representation.

That in turn may well require an increase, rather than a decrease, in the number of 'purely utilitarian' pleas of guilty, whose only apparent merit is that they save public resources for other purposes. One of these 'other purposes' might well be improved appellate representation.

The first responses to Cameron

At the time of writing (September 2002), there have been at least two appeals at state Court of criminal Appeal level (in South Australia and New South Wales) in which the respective Courts have been afforded an opportunity to respond to *Cameron*. They have both proved to be unimpressed, and economic rationalism in sentencing remains alive and well.

The first of these two cases chronologically was *R v Place*[93], an appeal against a 'head sentence' of eleven and a half years for six armed robberies and four bail breaches, discounted from an original head sentence of 22 years (itself reduced from 32 years under the 'totality' principle), by means of what the South Australian Court of Criminal Appeal[94] described as a 'two-stage approach' in which the appellant had been given a 40 per cent reduction in sentence to reflect his early confession, his guilty plea, his contrition and his saving of 'significant police and court time'.

The grounds of appeal were (a) the allegedly 'excessive' sentence, and (b) the alleged 'errors of principle' involved in employing the two-stage approach. With regard to the second ground, the Court[95] said that its task was:

> . . . . to determine whether it is an error for a sentencing judge to identify a specific reduction for a plea of guilty and whether this Court has been in error in encouraging sentencing courts to do so'

At the same time as re-assessing South Australian sentencing discount policy in the light of *Cameron*, the Court supplied a unanimous response to the earlier High Court ruling in *Wong*[96], which as indicated *supra* had principally been concerned with the legitimacy of a process by which the NSW Court of Criminal Appeal had issued a 'guideline' judgment indicating appropriate penalties for a whole range of drug trafficking offences, but which had also dealt with the competing claims of

93 [2002] SASC 101, heard on 12.2.02, with the judgment delivered on 26.3.02, some six weeks after the delivery of the judgment in Cameron.
94 Ibid [2].
95 Ibid [6].
96 Considered above – see text to note 77.

'two-tier' and 'instinctive synthesis' sentencing processes, and had issued a majority opinion in favour of the latter.

Noting that the South Australian Court of Criminal Appeal had never issued guideline judgments such as those criticised in *Wong*, and had no intention of doing so, the Court proceeded to the issue of 'two-tier' sentencing, and concluded that the process observed in South Australia did not fall within the category of a 'mathematical approach', which was the aspect of it which had incurred the criticism in *Wong*.

They went on to observe [97] that nothing said by the majority Court in either *Wong* or *AB v The Queen*[98]

> …dealt specifically with the practice in South Australia of nominating a specific reduction for a plea of guilty, as part of a process in which all relevant factors are considered, but the effect of one factor on the sentence is quantified.

Instead, even the Federal Court[99], in addition to interstate Courts of Criminal Appeal including that in NSW, had approved the policy adopted and consistently followed in South Australia as the result of the landmark judgment of its then Chief Justice, King CJ, in *R v Shannon*[100], in which he identified in advance those factors to which sentencing judges in South Australia were entitled to give weight in mitigation of sentence following a plea of guilty.

Noting that whereas initially, sentencing judges applying the *Shannon* principles, while confirming that they had given weight to a guilty plea in passing sentence, did not actually quantify the precise discount given, the Court added that in a series of cases beginning in 1991[101] it had embarked on a policy of encouraging judges to quantify the discount. They further noted:[102]

> As a consequence of the encouragement, for a number of years the vast majority of sentencing judges and magistrates have consistently identified the extent of the reduction given for a plea of guilty and co-operation with authorities.

97 Ibid [38].
98 Considered above – see text to note 76.
99 In, eg *R v Schumacher* (1981) 3 A Crim R 441 at 448.
100 See, in particular, note 32.
101 Of which *R v Harris and Simmonds* (1992) 59 SASR 300 is a particularly clear example.
102 Ibid [46].

After reviewing the interstate case-law on whether or not a sentencing judge should quantify the level of discount for a plea of guilty[103], the Court confirmed that this would continue to be the practice in South Australia. In a further reference to certain observations made in *Cameron* and *Wong*, they added:[104]

> In observations with which we respectfully agree, Kirby J[in *Cameron*] repeated his views about the need for transparency and for identification of the extent of a reduction for a plea of guilty … There is no suggestion in the joint judgment or the judgment of McHugh J that the practice or the approach of the sentencing judge [in *Cameron*] was wrong in principle or undesirable … In our opinion this Court is not constrained by authority to hold that the existing practice in this State is wrong … The fears expressed by McHugh J in *AB* and in the joint judgment in *Wong* have not come to fruition in the 10 years that the practice has existed in this State … the public policy objectives are not achieved unless the specific reduction is identified … The initial scepticism that accompanied the general recognition that a plea of guilty entitled an offender to a degree of mitigation has disappeared … It would be very difficult to explain to offenders and the community why the court has departed from its present practice. An explanation for the departure based on describing the sentencing process as an instinctive synthesis would be greeted with scepticism

Finally, on the issue of the 'utilitarian' ground for discounting sentences in return for a plea of guilty, the Court observed:[105]

> The remarks of Kirby J concerning the public interest served by facilitating pleas of guilty echo the theme of the judgment of King CJ in *Shannon* . . . . .The issue of the rationale was not the subject of submissions. We tend to favour the views expressed by Kirby J and King CJ that, in the absence of subjective criteria such as contrition, a sufficient rationale is found in the public interest based on 'purely utilitarian' considerations. The considerations to which Kirby J and King CJ referred are compelling.

Barely a month later, the NSW Court of Criminal Appeal, in the case of *R v Sharma,*[106] had an opportunity to assess the implications of both *Cameron* and *Wong*, in the light of the South Australian response in *Place*. The NSW response was even more defiant than its South Australian counterpart.

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103 and laying particular emphasis on the similar review by Spigelman CJ in Thomson which led to His Honour's conclusion that 'The preponderant, but not unanimous view, in the Australian authorities is that it is always permissible and sometimes desirable for a trial judge to quantify the discount accorded for a plea of guilty'.

104 Ibid [79] – [82].

105 Ibid [70] and [78], pointing out in [77] that the various judgments on this point in Cameron were obiter anyway.

106 [2002] NSWCCA 142.

The case itself was a Crown appeal against the leniency of an 18 month sentence imposed in a District Court on a 19 year old who pleaded guilty to one count of robbery in company, and undertook to supply evidence against a co-offender, without which that person would probably have escaped prosecution.

The sentencing judge approached his task in the classic 'two-tier' manner, with the following sentencing remarks[107]

> The appropriate starting point, it seems to me, for calculating the appropriate sentence in this case . . . . . is four years in prison. There has been a plea of guilty, it is an early plea, and he is to have the benefit of that. The contrition which he shows by the plea, and which he has exhibited by giving evidence in the witness box, and from the utilitarian component of avoiding the necessity for a trial, these things combined cause me to allow a discount of some twenty-five per cent on sentence.

The resulting 3 year head sentence was then halved to take into account S's co-operation with the investigating authorities. The Court of Criminal Appeal noted[108] its task as being that of considering '. . . . . whether a sentencing judge is permitted, when taking into account a plea of guilty, to quantify a discount to be given for the plea and, in any event, to give weight to the utilitarian value of the plea'.

There are of course two separate issues involved in that consideration. So far as concerned what the sentencing judge had referred to as 'the utilitarian component', the Court confirmed[109] that since its own 5-judge decision in *Thomson*[110], it had become the norm to discount sentences 'in the range of ten to twenty-five per cent for that component alone', and that[111] 'This Court should not reconsider a recent decision of a five judge bench unless it is required to do so by the doctrine of precedent. It is not so required'.

The justification for this remained that originally enunciated by Spigelman in *Thomson:*[112]

> The instinctive synthesis approach is the correct general approach to sentencing. This does not, however, necessarily mean that there is no element which can be taken out and treated separately, although such elements ought to be few in number and narrowly confined. As long as they are such, their separate treatment will not compromise the intuitive or instinctive character of the sentencing process considered as a whole.

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107 Reproduced, ibid [17].
108 Ibid [20].
109 Ibid [21].
110 Above n 17.
111 Ibid [27].
112 at [57] thereof. The Court in the instant case was also led by Spigelman CJ.

So far as concerned the rationale behind discounting purely for the utilitarian value of a guilty plea, the Court, while noting that the majority judgment in *Cameron* was binding on it, expressed its concern[113] thus:

> If the reasoning in *Cameron* is applicable in this State, then the foundation of the judgment in *Thomson* is swept away. For purposes of the instant case, his Honour will have erred in taking into consideration a utilitarian component in the objective sense, without focusing his attention exclusively on the subjective aspect. The discount range of ten to twenty-five per cent established by *Thomson* was based on the utilitarian value of the plea understood in an objective sense. There is no reason to accept that a discount of this order of magnitude would be appropriate as a separate element, if the courts' consideration were confined to the subjective factor of preparedness to facilitate the administration of justice.

However, the Court went on to conclude that all courts in NSW continued, notwithstanding *Cameron*, to be bound by the provisions of S.22 of the *Crimes (Sentencing Procedure) Act 1999,*[114] which states that a sentencing judge must take into account both the fact of a plea of guilty, and when it was made, and must give reasons if not discounting a sentence as a result. None of these provisions has any reference to 'the subjective intention of the person pleading guilty'.[115] The Court added:

> The mandatory language of s22 must be followed whether or not by doing so the Court can be seen to 'discriminate', in the sense that word was used in the joint judgment in *Cameron*, against those who put the crown to proof. The Court must take the plea into account even if there is no subjective intention to facilitate the administration of justice. However, viewed objectively, there will always be actual, as distinct from intended, facilitation of the administration of justice by reason of 'the fact' of the plea. The use of the word 'must' and the relevance to 'the fact' of the plea, strongly suggest that the Parliament was not concerned only with subjective elements. The actual facilitation of the administration of justice was to be regarded as relevant by sentencing judges.

In case anyone remained in any doubt as to the ongoing commitment of the Court to discounting on purely utilitarian grounds, Spigelman CJ continued:[117]

> On the proper construction of s22 of the New South Wales Act, courts in this State are . . . . permitted to take into account the objective utilitarian value of the plea . . . . I do not understand the joint judgment in *Cameron* to have called into question the ability of a State Parliament to adopt a form of

113 Ibid [36] and [37].
114 Above n 17.
115 Ibid [51].
117 Ibid [62], [67] and [68].

> differentiation which may be, or at least may appear to be, discriminatory in the sense that word was used in the joint judgment. Insofar as that is the consequence of accepting that s22 . . . . empowers the Courts of this State to give significant weight to the objective utilitarian value of a plea of guilty, then that consequence must be accepted is that is what the New South Wales Parliament has done. In my opinion, that is the case . . . . . the reasoning in the joint judgment in *Cameron* does not apply in this State. *Thomson* should still be followed.

It was argued earlier in this article that State governments are unlikely, without a struggle, to relinquish the financial and other 'purely utilitarian' benefits which flow into their criminal justice systems as a result of early pleas of guilty. These first responses from South Australia and New South Wales give some early indication of the support they are likely to receive from their own courts.