Peter Lowe

Barrister-at-law
ABN 63 027 434 133

SUITE 269, LEVEL 1
398 PITT STREET
SYDNEY NSW 2000
Mob : 0414 796 029
Fax : (02) 9012 0333
Web: www.peterlowe.com
Email: peterlowebarrister@gmail.com

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New South Wales Law Reform Commission
Level 13, Swire House
10 Spring Street
SYDNEY

Att: Sallie McLean

Dear Madam,

PRELIMINARY SUBMISSION: ENCOURAGING APPROPRIATE EARLY GUILTY PLEAS

Please find enclosed a preliminary submission in relation to the above reference.

Yours faithfully

Peter Lowe

PRELIMINARY SUBMISSION: ENCOURAGING APPROPRIATE EARLY GUILTY PLEAS

The following preliminary submission is made following the reference received by the Commission with regard to encouraging appropriate early guilty pleas. As a practicing barrister who works almost exclusively in criminal law I am drawing on my personal experience in making this submission. Needless to say the opinions contained in this submission are my own and do not necessarily represent the views of any professional association I am a member of.

The utility in having any offender plead guilty at an early opportunity cannot be doubted. It represents the most significant advantage open to an offender of controlling aspects of the criminal prosecution process, by enabling agreed statement of facts to be prepared, as well as maximising the potential for limiting the number and type of charges before the court.[1] In New South Wales the utility in encouraging such a plea finds statutory recognition in ss 21A(3)(l) and 22 of the *Crimes (Sentencing Procedure) Act* 1999. Section 22(1) of that Act provides for a lesser penalty than would otherwise have been imposed, but does not require that the quantum of the discount be specified, nor is their provision for any graduated scale of discount depending on the timing of the plea being entered.

The position at common law was much the same, see *R v Winchester* (1992) 58 A Crim R 345. That being said the Court considered that a plea of guilty entered in the Local Court (where a matter is eventually to be dealt with in the District Court) following the making of admissions warranted a substantial reduction in sentence, without specifying what the quantum of the reduction should be.

There is, of course, judicial gloss in this State that the utilitarian value of the plea to the criminal justice system should generally be assessed in the range of 10 to 25% of sentence — the primary consideration for fixing such a discount being the timing of the plea[2].

The position that currently prevails can be usefully compared with other jurisdictions.

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1 The obvious downside to an offender's right to plead guilty on the basis of his own choosing is the lack of transparency and lack of judicial oversight, see Geraldine McKenzie, *"The Guilty Plea Discount: Does Pragmatism Win over Proportionality and Principle?"* (2007) 11 Southern Cross University Law Review 205 at 210-219.

2 *R v Thomson and Houlton* (2000) 49 NSWLR 383- which provided a guideline judgment in relation for discounts for a plea of guilty.

Position in England and Wales

The position in England and Wales would appear to be governed by *R v Buffrey* (1992) 14 Cr. App. R (S) 511 where the Court of Appeal indicated that while there was no absolute rule as to what the discount should be, as general guidance the Court believed that something of the order of one-third would be an appropriate discount. This coincides with the guidance of the Sentencing Guidelines Council (SGC) *Reduction in Sentence for a Guilty Plea – Definitive Guidelines* issued in 2007 and which informs current sentencing practice which recommends (at ¶ 4.2):

- one-third discount for a Guilty plea at the first opportunity;
- one-quarter discount for a Guilty plea after the trial date is set;
- one-tenth discount for a Guilty plea at the door of court/after trial begun.

It would appear that these sentencing guidelines enlarge the power of the Courts to provide for a greater discount than would be otherwise warranted under s 144 of the *Criminal Justice Act* 2003.

Annexure 1 of the Sentencing Guidelines provides that the critical time for determining the reduction for a guilty plea is the first reasonable opportunity for the offender to have indicated a willingness to plead guilty. According to the annexure, this opportunity will vary with a wide range of factors and the Court will need to make a judgement on the particular facts of the case before it. The circumstances under which a plea is entered at the first reasonable opportunity are identified as being:

(a) the first time that an offender appears before the court and has the opportunity to plead guilty;

(b) but the court may consider that it would be reasonable to have expected an indication of willingness even earlier, perhaps whilst under interview;[3]

(c) where an offence triable either way is committed to the Crown Court for trial and the offender pleads guilty at the first hearing in that Court, the reduction will be less than if there had been an indication of a guilty plea given to the magistrates' court (recommended reduction of one third) but more than if the plea had been entered after a trial date had been set (recommended reduction of one quarter), and is likely to be in the region of 30%;

(d) where an offence is triable only on indictment, it may well be that the first reasonable opportunity would have been during the police station stage; where that

[3] Annexure 1 provides that for (a) and (b) to apply, the Court will need to be satisfied that the offender (and any legal adviser) would have had sufficient information about the allegations

is not the case, the first reasonable opportunity is likely to be at the first hearing in the Crown Court;

(e) where the offender is convicted after pleading guilty to an alternative (lesser) charge to that to which the offender had originally pleaded not guilty, the extent of any reduction will be determined by the stage at which the offender first formally indicated to the court willingness to plead guilty to the lesser charge, and the reason why that lesser charge was proceeded with in preference to the original charge.

Recently there was an attempt to increase the level of reduction for a plea of guilty in the United Kingdom, with the proposal to increase the quantum of discount from one third to one half.[4] In June 2011 the proposal was abandoned on the basis of criticism that a reduction by that quantum would be too lenient and send the wrong message to offenders and public confidence in the system would be eroded.[5]

Position in States and Territories in Australia

Throughout Australia individual states/territories and courts have taken divergent paths in assessing the weight to be given to a guilty plea. As of 2007, the following was the quantum of discount afforded such pleas in Australia where the quantum depended on the timing of the plea being entered: NSW (10 to 25%), WA and Tasmania (25 to 35%).[6] The position in Queensland is that a discount of 30% is ordinarily granted where the plea is entered or indicated at an early stage of the proceedings.[7] NSW, Queensland, Western Australia and the ACT have enacted statutory provisions which specifically permits the Court to reduce the sentence otherwise to have been imposed save for the plea of guilty.[8]

Until 2012 there was no model provision that specified the reduction of sentence where a plea of guilty was entered but such a provision now exists. In South Australia, by way of amendment to the *Criminal Law (Sentencing) Act* 1988[9] a regime was introduced to provide a sliding scale for reduction of penalty. By virtue of those amendments it is possible for Courts

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4 Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (December 2010)

5 See http://www.parliament.uk/briefing-papers/SN05974 retrieved 26 June 2013.

6 Victorian Sentencing Advisory's *Sentence Indication and Specified Sentence Discounts – Final Report* released September 2007, table 6. The situation in Western Australia may now differ from the nominated 25 to 35% as indicated in the table, although the practice was to allow such a discount under that state's 'fast track scheme' – see *Radebe v The Queen* [2001] WASCA 254, *Sinagra-Brisca v The Queen* [2004] WASCA 68 at [17], and *Ma v The Queen* (2001) 125A Crim R 349 at [101]-[103]. The situation in that state would appear to be that since 20 December 2012 a court cannot reduce a fixed term by more than 25%, see s 9AA(4) of *Sentencing Act* 1995 (WA) introduced by *Sentencing Amendment Act* 2012 (WA) which came into effect on that date.

7 Geraldine McKenzie, *"Consistency in sentencing and discounts for guilty pleas"- http://eprints.usq.edu.au/3055/2/Mackenzie_ISRCL_2006_VoR.pdf* retrieved 26 June 2013, see also by the same author, *"The Guilty Plea Discount: Does Pragmatism Win over Proportionality and Principle?"* (2007) 11 Southern Cross University Law Review 205 at 210-211.

8 *Crimes (Sentencing Procedure) Act* 1999 (NSW), s. 22(1); *Penalties and Sentences Act* 1992 (Qld), s. 13; *Sentencing Act* 1991 (Vic), s 6AAA(1)(a); *Crimes (Sentencing) Act* 2005 (ACT), s 35(3); *Sentencing Act* 1995 (WA), s 9AA.

9 *Criminal Law (Sentencing)(Guilty Pleas) Amendment Act* 2012, ss 10B and 10C. Those amendments came into effect on 11 March 2013.

in that State to reduce sentences where an early plea of guilty is entered by up to 40%. The amendments introduce a sliding scale regarding the maximum discounts for entering a plea. The maximum of 40% is available if a plea is entered within 4 weeks of a first court appearance. In practice, this would mean entering a plea without having obtained a copy of the brief of evidence. A 30% discount is available if the plea is entered after the first 4 weeks of the first court appearance but prior to committal for trial. A similar discount is available where the offender is committed for trial and it is the offender's first and earliest opportunity to enter a plea. A discount of 15% is available where a plea is entered by an offender within 5 weeks of trial. And a discount of 10% is available in any other circumstances as the Court sees fit.[10]

In Victoria s 6AAA of the *Sentencing Act* 1981 requires that the Court quantify a specific sentencing discount for a plea of guilty when imposing certain sentences being "custodial sentencing orders". The Court is required when sentencing an offender who pleads guilty to an offence to state the sentence that would otherwise have been imposed if the offender had pleaded not guilty. The section in its terms does not apply when a person is convicted of a lesser offence following a rejected plea offer. Where the ultimate conviction reflects a previously rejected plea offer, the offender should have a discount which would have been available had the offender's plea offer been accepted, see *R v Heaney* [1992] 2 VR 531 at 558, and *R v Ramage* [2004] VSC 508 at [44].[11] Judicial exegesis of s 6AAA reveals that the 'notional' sentence imposed by the Court is not capable of constituting a ground of appeal as it does not form part of the sentence that is passed.[12] No specific discount on sentence is required to be passed when reference is made to the sentence that would otherwise have been imposed and the only ground of appeal that is entertained in relation to this issue is whether the sentence was manifestly excessive. The question for the Victorian Court of Appeal is whether, taking into account all the relevant sentencing considerations, the sentence imposed was within range.[13] One obvious benefit of this approach is that, unlike the situation that current prevails before the NSW Court of Criminal Appeal, less time is taken in determining the issue of whether sufficient weight was given to the plea of guilty during the sentencing process.

In Queensland, it is also noteworthy that there is an alternative method of encouraging early guilty pleas. It is open is that state for an offender to bypass committal proceedings in strictly indictable matters and consent to the presentation of an indictment in either the District or

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[10] I have attached a flow chart prepared by the Law Society of South Australia regarding the early plea of guilty scheme.
[11] Section 6AAA implement recommendations found in the Victorian Sentencing Advisory's *Sentence Indication and Specified Sentence Discounts -- Final Report* released September 2007.
[12] *R v Burke* [2009] VSCA 60 at [30].
[13] Ibid. at [31]

Supreme Courts.[14] This novel use of the ex officio process apparently enables the Court to significantly reduce the sentence passed.[15]

Conclusions with regard to comparative jurisdictions

In consideration of the above, it is this author's considered opinion that:

- There should be a mandated discount for a plea of guilty based on timeliness of entry of the plea of guilty, or indication of a plea to the charge ultimately the subject of sentence proceedings.
- That the current s 22 of the *Crimes (Sentencing Procedure) Act* 199 be amended to reflect the proposed requirement that the sentence has been discounted by a particular quantum.
- That the amendments reflect the sliding scale of reduction of penalty as has been enacted in South Australia.
- That the maximum discount for plea of guilty be set at 40% (the author recognizes that the discount of 50% proposed in the United Kingdom had to be abandoned for cogent reasons articulated above)
- That the proposed maximum discount of 40% is justified on a comparative and/or comity basis with like jurisdictions- South Australia and Tasmania.
- That failing the enactment of such a sliding scale of reduction of penalties that consideration be given to enacting legislation in similar terms to the notional sentence provisions under s 6AAA of the *Sentencing Act* 1991 (Vic) such that the discounted sentence is not to be regarded as part of the sentence as passed so that there is less scope for appeal to the Court of Criminal Appeal on the issue of failure to give appropriate discount for a plea of guilty.
- That an ex officio process of enabling pleas in strictly indictable matters be introduced such as currently exists in Queensland and that, furthermore, specific provision be made for reducing the sentence to reflect utilization of that process by an offender.

General reflections on the sentencing process

In preparing this submission I am mindful that where an offender pleads guilty (and even where he or she does not) and receives a sentence which is commensurate with the offending conduct, that there is a greater acceptance of the penalty imposed. What has always concerned many offenders is the penalty which they can only glean from the maximum penalty or standard non-parole period for particular offences.

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[14] *Criminal Code Act* 1899 (Qld), s 561.

[15] David Field, *"Plead Guilty Early and Convincingly to Avoid Disappointment,"* (2002) 14 Bond Law Review 252 at 252.

A few years ago I participated in sentence proceedings in Townsville which could not have happened under current NSW sentencing practice. The prosecutor indicated that my client would receive 3 months gaol if he pleaded guilty within 4 months of the trial date and 4 months gaol if he pleaded guilty within 3 months of the trial date and so on the sliding scale continued. Remarkably, it didn't take my client long to realise the value attached to a plea of guilty. But what about the Sentencing Judge I asked, how could anyone ensure a sentence of that duration would ever be passed. Sentence proceedings in Queensland are a very different creature to those in NSW- the Crown Prosecutor has the ability to nominate a range of penalties and the Sentencing Judge appears to accept the situation. There is much to commend the practice in Queensland: I do hope it hasn't changed. The point of this story is that if the Crown had the ability to indicate what the penalty was, then much of the problems associated with pleas of guilty might be alleviated. It would also ensure that many current appeals to the NSW CCA may not be brought- because the offender got exactly what he bargained for. There would be greater respect for the sentences imposed and greater acceptance that any appeal was doomed to fail.

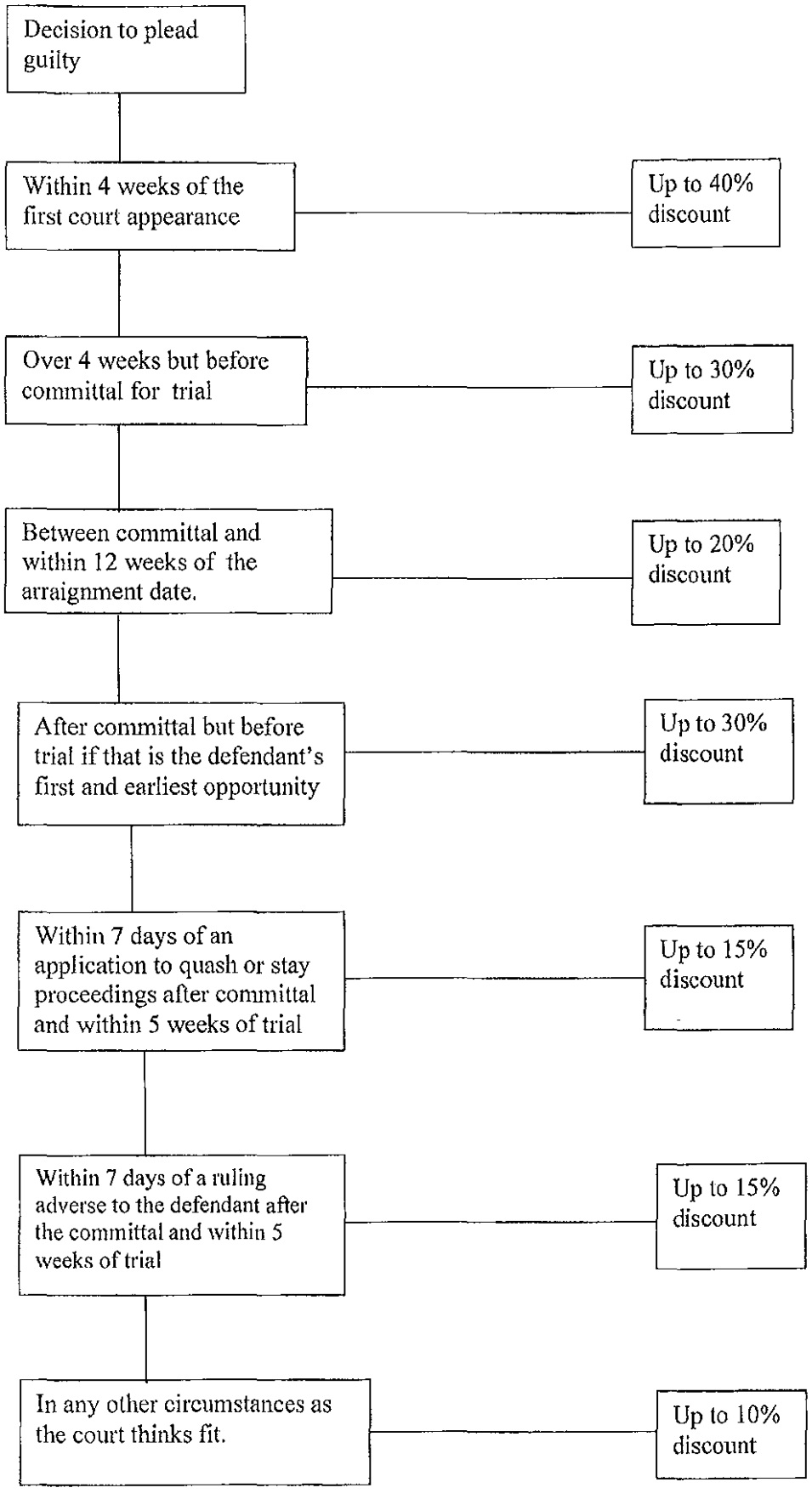
It is also worth considering the issue of the significance of a plea of guilty on an extra curial basis. Many prisoners face an uncertain future with the current practices and procedures of the NSW State Parole Authority. Release on parole following the expiry of the non-parole period is never automatic and, in many cases known to this author, is substantially delayed. Perhaps consideration could be given to requiring the Authority to give substantial weight to a guilty plea in determining whether or not to grant parole. Such a change to administrative procedures would provide proof to an offender of the enduing benefits that flow from an timely acknowledgement of guilt.

Needless to say that in order to implement the above changes to sentencing procedure would require a more thorough review of sentencing than the current reference, but I believe that such a review is warranted.

Yours faithfully

Peter Lowe
Barrister

Pleading Guilty in Higher Courts : Sentence Discounts



Pleading Guilty in the Magistrates Court: Sentence Discounts