

COMMUNITY LEGAL CENTRES TASMANIA

1 June 2018

Sentencing Advisory Council
GPO Box 825
Hobart TAS 7001

via email: sac@justice.tas.gov.au

To the Sentencing Advisory Council,
Re: *Statutory Sentencing Discounts for Pleas of Guilty: Consultation Paper*

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Statutory Sentencing Discounts for Pleas of Guilty: Consultation Paper*.¹

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

In summary, we strongly believe that there should not be any legislative change for early pleas of guilty without also introducing reforms around disclosure. Further, we support the creation of a statutory provision in the *Sentencing Act 1997* (Tas) as a means of clarifying the sentencing discount for a guilty plea as a mitigating factor. Finally, we do not support a statutory scheme setting out the extent of the discount as a percentage reduction.

1. To what extent do systemic factors contribute to delay in Tasmania?

There are a number of systemic factors that contribute to delay in Tasmania's justice system including, most significantly, a lack of free legal assistance. The Productivity Commission in 2014 reported that despite fourteen per cent of the Australian population living under the poverty line, free legal assistance representation was

¹ CLC Tas would like to acknowledge Lena Lashin and an anonymous referee who assisted in the preparation of this response.

only available to eight per cent of this cohort.² As former High Court Chief Justice Gleeson has previously noted, delay is a real and substantial cost of inadequate government funding:³

The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.

Other factors that contribute to delay include the State's failure to provide disclosure in a timely fashion, the lack of judicial officers and the setting of the criminal law lists by the Director of Public Prosecutions. Nevertheless, the lack of timely legal assistance is the most significant factor contributing to delay in Tasmania's justice system.

2. What are the features of the pre-trial process in Tasmania that may create obstacles to early guilty pleas?

The most significant obstacle to early guilty pleas in the pre-trial process in Tasmania is the lack of evidence, including sufficient details of the charges, that is made available to the accused. Anecdotally, we are aware of a number of cases where the accused has had access to either no or insufficient evidence to confidently enter a plea, particularly in circumstances in which elements of the crime include a mental element or a legal defence is available.

The failure in both legislation and policy to prescribe timeframes for the provision of disclosure means that defence counsel is regularly unable to provide good advice in a timely manner. In some cases, counsel may only have the complaint and the 'Facts for the Prosecutor' for multiple court appearances.

It would be grossly unfair if legislative discounts were introduced for early pleas of guilty without also introducing reforms around the provision of disclosure. A model that should be considered is section 123(1) of the *Criminal Procedure Act 1921 (SA)* which stipulates that six weeks prior to the accused's arraignment in a higher court a 'prosecution case statement' must be provided to the accused or their counsel:

123 Case statements

(1) Subject to section 122, where the Magistrates Court commits a defendant charged with an indictable offence to a superior court for trial, the prosecution—

² Productivity Commission, *Access to Justice Arrangements*, (Inquiry Report 72, 2014) Annexure H at 1021-2.

³ Productivity Commission, *Access to Justice Arrangements*, (Inquiry Report 72, 2014) 665 at 739 quoting Chief Justice Murray Gleeson, 'State of the Judicature' (Speech delivered at the Australian Legal Convention, Canberra, 10 October 1999).

(a) must present, or cause to be presented, an information against that person; and

(b) must, not less than 6 weeks before the date fixed for the defendant's arraignment in the superior court—

(i) file in that court; and

(ii) give to the defendant or a legal practitioner representing the defendant, a prosecution case statement.

Section 123(2) of the *Criminal Procedure Act 1921* (SA) then sets out what the 'prosecution case statement' must contain:

(2) A prosecution case statement must include (in accordance with prosecution duties of disclosure) the following:

(a) a summary of the alleged facts;

(b) a description of evidence that may be led by the prosecution in relation to each element of the offence;

(c) a list of the witnesses the prosecution intends to call at trial;

(d) details of each expert witness the prosecution intends to call at trial;

(e) details of any additional witness statement that the prosecution is aware will be obtained, but which has not yet been obtained;

(f) whether the prosecution intends to lead discreditable conduct evidence (within the meaning of section 34P of the *Evidence Act 1929*) and, if so, details of that evidence;

(g) whether the prosecution intends to make any pre-trial applications under the *Evidence Act 1929* and, if so, a copy of any such application;

(h) whether the trial is one that is to be given priority under section 50B of the *District Court Act 1991*;

(i) an estimate of the length of the prosecution case;

(j) whether any interpreter will be required for the prosecution case (and if so, the language that the interpreter will be required to interpret).

...

We strongly support statutory requirements on disclosure, which will in turn allow for appropriate consideration before a plea is entered and importantly will ensure that a plea is not entered before all relevant evidence has been received.

Another significant feature that creates an obstacle to an early guilty plea is inadequate funding -particularly in the early stages- which means that underpaid and inexperienced lawyers are required to act in cases that require more experienced counsel. Defence counsel often work at pay rates that are not

commensurate with the experience required. For example, there is next to no financial incentive for legal counsel to spend 10-12 hours taking instructions, trawling through materials and considering legal arguments all within the first hours or days of being charged, when at that point the standard "investigate and report" fee is a paltry \$240.00.

3. In your view, what factors influence plea decisions of offenders in Tasmania?

In broadly descending order of importance:

- Is the accused actually guilty of the charge
- Can the state prove the accused is guilty of a charge
- Legal advice provided to the accused
- Is the accused likely to be imprisoned
- The personality type of that client – some accused will not plead guilty regardless of the evidence or the advice.

There are other considerations that influence plea decisions, but the factors listed above are the most common.

4. In your experience, how many guilty pleas are to different charges than original charges or occur because of plea negotiations?

In our experience the 'plea deal' operates in summary jurisdictions in circumstances where the State will not proceed with matters that are contestable in exchange for pleas to those charges where the evidence is strong. Generally, this is easier to achieve if the accused has been charged with a large number of offences.

However, there is less negotiation in summary courts where the accused is charged with indictable offences. This is because the Director of Public Prosecutions is reluctant to negotiate. Anecdotally, we are aware of a large number of indictable matters may be resolved through an 'alternative verdict' with one senior criminal lawyer observing that 10 of his last 13 trials ended with an alternative verdict, 2 not guilty verdicts and 1 guilty verdict on the primary indictment charge. If these observations are representative, then clearly reform is needed.

5. In Tasmania, do you consider that there is a sentencing benefit to an offender from entering a plea of guilty and/or from entering an early plea of guilty compared to a late plea of guilty?

There is a sentencing benefit for an offender to enter an early plea of guilty compared to a late plea of guilty. We are aware of very few judicial officers who give any weight to late pleas of guilty, even in circumstances in which those pleas are the result of late disclosure of new material by the State.

6. Should the *Sentencing Act 1997 (Tas)* be amended to provide that a guilty plea is a mitigating factor relevant to the sentence imposed?

We strongly support the creation of a statutory provision in the *Sentencing Act 1997 (Tas)* as a means of clarifying the sentencing discount for a guilty plea as a mitigating factor. We believe that such a reform will create certainty for offenders and their counsel as well as enshrining the judicial view that there is a utilitarian value in a guilty plea.

7. Should the statutory scheme set out the extent of the discount as a percentage reduction in sentence?

We do not support a statutory scheme setting out the extent of the discount as a percentage reduction. In our opinion it is likely to amount to a blunt instrument. The amount of the discount may be counterproductive either because it is set too low and result in accused persons choosing to take the risk of a finding of guilt and imprisonment or because it is set too high and innocent persons plead guilty to avoid the possibility of a longer sentence.

- 8. (a) Should the court be required to state how much weight has been given to the guilty plea and its effect on the sentence imposed?**
(b) Or should the court be permitted (but not obligated) to state how much weight has been given to the guilty plea and its effect on the sentence imposed?
(c) Or should there be a different position that applies to different sentence types to only impose the obligation on the court to state how much weight has been given to the guilty plea and its effect on the sentence imposed for more serious offences? If so, how should this be defined?

We strongly believe that the court should be required to state the weight that has been given to the guilty plea and its effect on the sentence imposed and believe that the Victorian approach provides a good model.⁴ In our opinion, the introduction of a legislative provision requiring the court to state the weight attached to the guilty plea and its effect on the sentence imposed will lead to greater transparency, accountability and clarity and may well result in a reduction in appeals before the Court of Criminal Appeals. This is because defence counsel will have the confidence to advise clients of the likely reduction in sentence if there is an early guilty plea. The other advantage of the Victorian approach is that judicial officers retain some discretion.

- 9. (a) Should there be a cap on the amount by which a sentence can be reduced by a guilty plea specified in legislation? If so, what should that cap be? When should it apply?**

⁴ Section 6AAA(1) of the *Sentencing Act 1991 (Vic)*.

(b) Or should a range be included in the legislation that sets out the minimum and maximum reduction for a guilty plea? If so, what should the range be? When should it apply?

(c) Or should a sliding scale be introduced relating to particular reductions? If so, should this be tied to specific pre-trial stages or should it relate to a plea entered at the 'first reasonable opportunity'? If it is tied to specific time frames/stages, what should these be and what exceptions should apply? What should the reductions be? What information should be made available to a defendant to allow an informed decision to enter a guilty plea and obtain the maximum discount?

There should be no cap, range or sliding scale introduced. There will always be cases where an early plea of guilty is of truly enormous benefit and ought to be rewarded as such. On the other hand, there will be cases for similar crimes where an early plea of guilty is of less benefit. Both the defence and prosecution need to be able to make their case for a sentencing discount on the plea of guilty and provide the judicial officer with the discretion they need to arrive at an appropriate sentence, rather than have the sentencing discount prescribed in legislation.

10. Should all offenders who plead guilty be given a reduction in sentence for their guilty plea or should the court have the discretion to decide whether or not a guilty plea merits a reduction in sentence?

In short, discretion should remain. There is always some benefit to a plea, even at the door of the court or even mid-trial although in practice the weight that is attached should diminish the longer the proceedings are allowed to continue. Anecdotally, it is extremely rare for a judicial officer to refuse to give any benefit for a plea. Whilst some lawyers we have spoken to felt that there had been no benefit, or very little benefit, attached to their client's early plea of guilty, they also recognised that sentences have been increasing over the last decade.

11. Should any category of offender or offence be automatically ineligible for sentencing reduction for a guilty plea? If so, what nature or type of offences or offenders should be excluded?

There should not be any automatic ineligibility attached to particular categories of offender. Any restriction is likely to result in an increase in not guilty pleas as accused persons believe that they have nothing to lose. An increase in not guilty pleas will result in more hearings and will mean that more victims are likely to be cross-examined.

12. Should there be a different sentencing discount scheme applicable to summary and indictable offences? If so, what should be the elements of the different schemes?

We strongly believe that discretion should be available to judicial officers for both summary and indictable offences. There is no good policy reason for applying a different sentencing discount to summary and indictable offences. In many instances

the difference is one of degree. For example, an opportunistic break and enter where the offender is charged summarily for goods worth less than \$5,000, the charge is electable if between \$5,000-\$20,000 and indictable if over \$20,000. These small differences are also applicable to charges of assault and some driving offences.

13. Should the seriousness of the offence be a matter relevant to the sentencing discount for a guilty plea?

We do not believe the seriousness of the offence should be a matter relevant to the sentencing discount for a guilty plea. Currently, the seriousness is taken into account in a very limited sense; murder charges receive a significantly smaller discount. The smaller discount for a plea of guilty to murder means they invariably go to trial. Reducing the benefit for other serious crimes is likely to see a similar effect.

14. Should the strength of the prosecution case be a matter relevant to the sentencing discount for a guilty plea?

We agree that the strength of the prosecution case should be a matter relevant to the sentencing discount for a guilty plea. In our experience, the value of a plea of guilty rests in three main aspects:

- Demonstration of remorse;
- Ease of mind on victims and their families;
- Financial savings to the judicial system

Of the three, the offender's demonstration of remorse is of most importance, as it is an important step towards rehabilitation.

Pleading guilty to a charge where the State's case is weaker is indicative of considerable remorse, and should be recognised as such. The current scheme also makes allowances for circumstances in which the conviction is inevitable, and this can lead to a lowering of the value of the plea.

This lowering of the value of the plea ought to be, and is, used sparingly – it should be limited to those cases where an absence of remorse is demonstrated through other factors.

15. Should the actual benefit derived from a guilty plea in terms of time saving and the sparing of witnesses be a matter relevant to the sentencing discount for a guilty plea? Or should the narrow view be adopted, where the discount reflects the notional benefit to the system?

Time saving and the sparing of witnesses from cross-examination are factors already taken into account and should continue to be the case. Despite legislative reform having been introduced with the intention of making the giving of evidence easier on victims,⁵ it remains a traumatic experience for many, including many non-

⁵ See, for example the *Evidence (Children and Special Witnesses) Act 2001 (Tas)*.

victim witnesses. Additionally, pleas of guilty invariably save courts, defence and prosecution time and resources. We do not believe there is any benefit in attempting to quantify these savings with any degree of precision.

16. Should the circumstances of the plea be included as a matter relevant to the sentencing discount for a guilty plea?

In our opinion, the circumstances of the plea should be considered. However, discretion should remain with the judicial officer and not prescribed in legislation.

17. Should the existence of a plea bargain be recognised as a matter relevant to the sentencing discount for a guilty plea? What should be the effect of a plea bargain?

The existence of a plea bargain should not be recognised as a matter relevant to the sentencing discount for a guilty plea. The ability of defence counsel and prosecuting authorities to negotiate outcomes ought not be fettered in any way, particularly as it is unlikely to achieve better outcomes.

18. Should these factors be defined in statute (English approach), left to the discretion of the court with legislative clarification (as in NSW, South Australia and the ACT) or left completely to the court's discretion other than the timing of the plea (as in Victoria, Queensland, NT, Western Australia)? If some factors are set out in legislation, which ones should be included?

We believe that it should be left entirely to the discretion of the courts.

19. Should there be a statutory provision that allows the court to impose a sentence that is less than a mandatory minimum sentence in cases where an offender enters a plea of guilty?

We are strongly opposed to mandatory penalties. Where there are, those mandatory penalties should only be deviated from in exceptional circumstances. Making exceptional circumstances effectively conditional upon a plea of guilty will lead to further injustice.

20. If so, should it apply to all mandatory minimum sentences or should it only apply to mandatory minimum sentences that apply to indictable offences or some other category of offences or specific offence?

See above

21. Should there be any additional conditions that restrict the availability of the sentencing discount?

No.

22. If the court is able to provide a sentencing discount if an offender enters a plea of guilty to an offence attracting a mandatory minimum penalty

with the result that the sentence would be below the mandatory minimum penalty, should an offender be entitled to the same discount as if the mandatory minimum penalty did not exist (that is, the usual discount scheme) or should it be a reduced discount?

See answer to question 20

23. What issues do you see in relation to the imposition of a global sentence arising from the introduction of a statutory discount for a guilty plea?

The introduction of a statutory discount for a guilty plea may be problematic in circumstances in which:

- A global penalty includes pleas of guilty but also findings of guilt;
- A global penalty includes early and late pleas of guilty;
- A global penalty includes some matters that were adjourned sine die without plea prior to the hearing of a more serious matter

A model providing for a statutory discount for a guilty plea at fixed points in the court process may be exploited. For example, an accused may plead guilty at an early stage to minor charges but take more serious charges to hearing and then claim the early plea benefit for all charges.

A model in which different sentences are required for an accused's pleas of guilty and not guilty but where they are ultimately found guilty may serve to undermine the purpose of global sentencing.

Appropriate resourcing of alternative sentencing options

Finally, if legislative discounts are introduced for early pleas of guilty it is important that alternative sentencing reforms such as drug treatment orders, home detention and community correction orders are appropriately resourced. There will be a significant incentive to pleading guilty, particularly at an early stage, if an accused is aware that alternative sentences are available. There may well be less enthusiasm for a plea of guilty in circumstances in which the alternative sentence is not available due to under resourcing and the only incentive to pleading guilty is a reduction in the length of imprisonment.

If we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl
Policy Officer

Community Legal Centres Tasmania
