Sentence Indication and Specified Sentence Discounts

Final Report

Sentencing Advisory Council
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Preface

Background to the inquiry

In August 2005, the Attorney-General, the Honourable Rob Hulls MP, asked the Sentencing Advisory Council for advice on whether a sentence indication scheme should be adopted in Victoria. The Council was asked to examine the advantages and disadvantages of such a scheme, having particular regard to the likely impact on the courts, victims of crime and the community in general. If the Council concluded that Victoria should introduce sentence indication, it was to advise on the form that such a scheme should take and whether it should incorporate a specified sentence discount for a guilty plea.

Both sentence indication and a specified sentence discount are designed to put defendants who may ultimately plead guilty in a better position to make this decision early in the proceedings. While sentence indication schemes have generally provided some form of sentence discount for pleading guilty at an early stage of proceedings, specified sentence discounts can apply independently of sentence indication schemes. For this reason, the Council dealt with these two issues independently.

Interest in the potential value of a sentence indication scheme for Victoria arose in the context of two very different Victorian Government initiatives: the Victorian sexual assault reform project and the Victorian Government's Justice Statement released in May 2004.

The sexual assault reform project was established following recommendations made by the Victorian Law Reform Commission concerning reforms to ensure that the criminal justice system is responsive to the needs of complainants in sexual offence cases. Stakeholders consulted by the project team identified sentence indication as holding particular promise as a means of encouraging offenders charged with sexual offences to plead guilty, thereby sparing victims and witnesses the trauma of a trial.

The relevance of sentence indication to the Victorian Government's Justice Statement priorities was in the context of increasing court efficiencies. An important objective identified in the Justice Statement was to modernise and streamline criminal procedure, to increase the efficiency of the administration of justice, and specifically, to address the problem of delay, that is, the high proportion of proceedings that fail to proceed when they should.

The Council's approach

The Council released a Discussion Paper in February 2007, called for submissions and convened discussions with interested stakeholders, including victims of crime, the courts, members of the legal profession and the broader community on the issues and options for reform canvassed in the Discussion Paper. As both sentence indication and specified sentence discounts aim to change the plea behaviour of defendants, we also considered it important to gauge the views of those at whom such schemes are primarily directed—offenders. Three focus groups were convened with offenders at Dhurringile and Tarrengower prisons, and at the Victorian Association for the Care and Resettlement of Offenders (VACRO). The Council wishes to extend its sincere thanks to both Corrections Victoria and VACRO without which this would not have been possible.

Specified sentence discounts

Views on the merits of prescribing a specific reduction in sentence for a guilty plea varied considerably. Some consulted favoured the flexibility that a discretionary regime provides, because it ensures that the reduction is determined according to the particular circumstances of the case. Others favoured a regime that provided a clear and rigid framework, believing that it was preferable to have a consistent approach, even if this gave rise to the risk of disproportionate sentences being imposed in some cases.

In the light of experience in other jurisdictions and the views expressed by participants in this inquiry, the Council formed the view that a specified reduction in sentence could have two undesirable consequences: it might improperly induce guilty pleas and give rise to disproportionate and unduly lenient sentencing. Prescribing the value to be given to one mitigating factor, the guilty plea, was also viewed as potentially problematic when the weight given to other sentencing factors is still left to the court to determine at its discretion.

We further were concerned that a specified reduction in sentence may not deliver the anticipated benefits within the current sentencing framework. In Victoria, the sentencing range applicable for any given offence is broad. Even if the maximum reduction allowable for a guilty plea were specified or a sliding scale prescribed, the courts would be able to adjust the starting point to ensure that the reduction did not result in the imposition of a disproportionate sentence.

In these circumstances, the Council has concluded that providing explicit guidance on the reduction available for a guilty plea would not provide the degree of certainty and consistency needed to justify confining the court's discretion at sentencing. However, we believe there is value in making this aspect of the sentencing process more transparent and for this reason recommend legislating to require Victorian courts to state, when passing sentence, what effect if any, the guilty plea has had on the sentence.

Sentence indication

Whether sentence indication can operate fairly rests on two main issues: to what extent the process compromises the traditional roles of judicial officers and the prosecution; and whether it promotes informal and inappropriate discussions or bargains between the parties.

Sentence indication has been available in contest mention hearings in the Magistrates' Court of Victoria since 1993, when it commenced as a pilot scheme in the Broadmeadows Magistrates' Court. It has operated under the Chief Magistrate's general authority to give directions for the conduct of proceedings and to make rules of court for matters relating to the practice and procedure of the Court in criminal proceedings. Data showing the proportion of cases resolved at or after a contest mention hearing attest to effectiveness of this process in resolving contested summary matters. Many consulted identified sentence indication in this jurisdiction as having been a useful and in fact a vital tool in the early identification of cases that could resolve with a guilty plea, due to its ability to address defendants' concerns about the type of sentence likely to be imposed.

The Council found strong support for formalising this successful scheme, to optimise and extend its use. In line with this, the Council has recommend that the *Magistrates' Court Act 1989* (Vic) be amended to provide magistrates with explicit statutory authority to give an indicative sentence, and to authorise the Chief Magistrate to make any rules or directions needed to administer this process.

Sentence indication has been used only rarely, and then with limited success, in indictable proceedings in the higher courts. A pilot scheme operating in the New South Wales District Court in 1993 was abandoned in 1995 due to concerns about sentencing disparities, and a failure to deliver the promised gains in efficiency. English courts have been permitted to provide sentence indication in indictable matters since 2005, but it is still too early to assess its impact.

The real challenge in deciding the value of sentence indication in the indictable jurisdiction is to devise a workable scheme that preserves the informality and flexibility of the summary process without diminishing the fairness and transparency of the proceedings. Indictable matters involve more complex charges and evidence and are punishable by more severe sentences. They are therefore subject to more complex and stringent procedural and evidentiary rules and conventions.

The Council, while noting the pitfalls encountered during the operation of the NSW sentence indication scheme and the procedural issues that would be faced in adapting sentence indication to the requirements of indictable proceedings, believes it is possible to devise a scheme with the appropriate safeguards that operates fairly and transparently, and that over time may assist in the earlier resolution of matters. However, in light of the experience of other jurisdictions, we recommend that the scheme be piloted in the County Court, before consideration is given to making it more broadly available. We consider sentence indication would be unlikely to have a significant impact on the timing of defendants' plea decisions in the Supreme Court or that court's case load and for this reason, have recommended against the introduction of such a scheme in that court.

Under the Council's proposed scheme, the indication would be restricted to whether an immediately servable term of imprisonment would be likely to be imposed on a guilty plea entered at that stage of the proceedings. In the rare case when a sentence of life imprisonment was likely to be imposed, the court may indicate whether a non-parole period would be set if a guilty plea was entered at that stage of the proceedings.

A court would only be permitted to provide a sentence indication if all the relevant parties agree that its provision is appropriate: the defence could only seek sentence indication with the consent of the prosecution and the court could refuse to provide it. The prosecution would be required to consult with the victim before responding to a request. One of the advantages of this approach is that this limited form of indication could be provided without the preparation of any additional material or the introduction of a designated sentence indication hearing.

While recommending against any formal restrictions on the types of cases in which sentence indication can be made available, in view of the particular sensitivity of proceedings relating to sexual offences, the Council cautions against the inclusion of sexual offence proceedings in a pilot sentence indication process. We have identified proceedings in relation to fraud, other property offences and illicit drug matters may be particularly suitable for inclusion for inclusion in a pilot project.

The Council's proposals recognise that the provision of sentence indication and the law governing the reduction in sentence available for a guilty plea serve distinct but complementary purposes.

If courts articulate the weight given to a guilty plea and defendants are able, in appropriate cases, to obtain sentence indication, defendants will be in a better position to make an early plea decision. However, other factors, such as the readiness of the prosecution case, access to legal advice and a defendant's personal circumstances also affect the defendant's capacity to make an early plea decision.

While these two proposals may resolve some of the concerns that cause defendants to defer entering a guilty plea, they should not be regarded as a panacea for expediting criminal proceedings and tackling the problem of delay.

The Council wishes to extend its sincere thanks to the people and organisations who made submissions, attended focus groups and consultative meetings, and otherwise gave of their time. Thanks must also go to Sue Kaufmann, who was the principal author of this report and had primary responsibility for the carriage of this project, and to Andrea David who made a valuable contribution in the final stages of this reference, including authoring sections of the report and assisting with the planning and conduct of the consultation process.

Finally, I thank my fellow Council members who have been actively and constructively engaged throughout this reference in identifying the number of challenges that sentence indication and specified discounts raise. We are confident that the approach we have advocated strikes the appropriate balance between the legitimate public interest in matters being resolved as efficiently and expeditiously as possible, and the need to preserve the rights of victims and offenders, and to serve the interests of justice.

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The Council wishes to acknowledge the contribution made by all the participants in this inquiry, whose interest and opinions have brought the issues raised in this inquiry to life. We would like to give special thanks to the following members of the Victorian legal community: the Chief Justice of the Supreme Court of Victoria and members of the Criminal Division of that Court, the President and Court of Appeal, the Chief Judge, judges and staff of the County Court, the Chief Magistrate, magistrates and administrative staff of the Magistrates' Court, Tom Danos and Aaron Schwartz of the Criminal Bar Association, the Director and Office of Public Prosecutions, and especially Darryl Annett and Adrian Castle, and Inspector Tony Ryan of the Legal Risk Unit, Victoria Police.

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We also thank the staff of the Council secretariat who assisted in the conduct of the inquiry and the preparation of this report, especially Jenni Coady, Alana Hodgins, Prue Boughey and Sarah Lappin.

Abbreviations

A Crim R	Australian Criminal Reports
ACT	Australian Capital Territory
AIC	Australian Institute of Criminology
AJA	Acting Justice of Appeal
ALJR	Australian Law Journal Reports
All ER	All England Law Reports
ALR	Australian Law Reports
ALRC	Australian Law Reform Commission
ASOC	Australian Standard Offence Classification
BOCSAR	Bureau of Crime Statistics and Research
CASA	Centres Against Sexual Assault
CBA	Criminal Bar Association
CBO	Community Based Order
CLC	Community Legal Centre
CLR	Commonwealth Law Reports
CPS	Crown Prosecution Service (UK)
DPP	Director of Public Prosecutions
ESO	Extended Supervision Order
EWCA	England & Wales Court of Appeal
FCLC	Federation of Community Legal Centres
ICO	Intensive Corrections Order
J	Justice (JJ plural)
JA	Justice of Appeal (JJA plural)
PPO	Principal Proven Offence
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal
NSWLR	New South Wales Law Reports
NSWSC	New South Wales Supreme Court
NT	Northern Territory
NZ	New Zealand
OPP	Office of Public Prosecutions
P	President (judicial office)
QC	Queens Counsel
Qld	Queensland
s	Section (ss plural)
SA	South Australia
SASC	South Australian Supreme Court
SASR	South Australian State Reports
SECASA	South Eastern Centre Against Sexual Assault
SGC	Sentencing Guidelines Council (UK)
UK	United Kingdom
VACRO	Victorian Association for the Care and Re-Settlement of Offenders
Vic	Victoria
VLA	Victoria Legal Aid
VR	Victorian Reports
VOCAL	Victims of Crime Assistance League
VSC	Supreme Court of Victoria
VSCA	Supreme Court of Victoria Court of Appeal
WA	Western Australia
WAR	Western Australian Reports
WSS	Wholly Suspended Sentence

Recommendations

Recommendation 1: Courts to state the effect of the guilty plea on the sentence

The *Sentencing Act 1991 (Vic)* should be amended to require the court, in passing sentence on an offender who has pleaded guilty, to state whether the sentence has been reduced for that reason, and if so, the sentence that would have been imposed but for the guilty plea.

Recommendation 2: Statutory support for sentence indication in summary cases

The *Magistrates' Court Act 1989 (Vic)* should be amended to provide explicit statutory authority for magistrates to indicate the sentence likely to be imposed on a guilty plea entered at that stage of the proceedings, and for the Chief Magistrate to give any directions and make any rules required for this purpose.

Recommendation 3: The effect of the guilty plea on the indication

The Chief Magistrate should issue a note or direction to require a magistrate, when providing an indication of the sentence likely to be imposed on a guilty plea entered at that stage of the proceedings, to state whether, but for such a guilty plea, a more severe sentence would be indicated.

Recommendation 4: A pilot sentence indication project in the County Court

(i) A pilot process for the provision of sentence indication should be established in the County Court in accordance with the framework set out in Recommendation 6; and

(ii) The Department of Justice, in collaboration with the County Court, the Office of Public Prosecutions, Victoria Legal Aid and the Sentencing Advisory Council, should monitor its impact on case flow, on sentencing, and on the resources and operation of the key participating agencies.

Recommendation 5: Statutory support for sentence indication in the County Court

The *Crimes (Criminal Trials) Act 1999 (Vic)* should be amended to authorise judicial officers to provide a sentence indication as outlined in Recommendation 6 and to allow the Chief Judge to give any direction and make such rules as are required for this purpose.

Recommendation 6: Framework for a pilot sentence indication scheme in the County Court

The County Court should adopt a sentence indication procedure that incorporates the following elements:

1. The defence should be permitted to request an indication during proceedings in the County Court, subject to the agreement of the prosecution.
2. There should be a requirement for the victim to be consulted if a request for sentence indication is made.
3. The defence should only be permitted to seek an indicative sentence once during the proceedings, unless the Director of Public Prosecutions agrees otherwise.
4. The indication should state whether an immediately servable term of imprisonment would be imposed on a guilty plea entered at that stage of the proceedings or, in the event that a term of life imprisonment would be likely to be imposed, whether a non-parole period would be set.
5. The judge should have the discretion to refuse to provide an indication. The judge should not provide an indicative sentence unless he or she is satisfied that the material available is sufficient to provide a binding indication.
6. If the judge indicates that an immediately servable term of imprisonment is not likely to be imposed (or a non-parole period set in relation to a term of life imprisonment), and the defendant pleads guilty at that stage of the proceedings, the court should not be permitted to impose an immediately servable term of imprisonment (or life without parole).

7. (i) If the judge indicates that an immediately servable term of imprisonment will not be imposed, he or she should be required to state whether, but for a guilty plea being entered at that stage of the proceedings, a more severe type of sentence would have been imposed.
   (ii) If the judge indicates that a non-parole period will be set in relation to a sentence of life imprisonment, he or she should be required to state whether, but for the guilty plea being entered at that stage of the proceedings, life imprisonment without parole would have been imposed.
8. The sentence indicated should be binding on the sentencing court only if the defendant pleads guilty at the time when the sentence indication is provided.
9. A refusal by a judge to give an indication should not be reviewable. However, the prosecution and defence should retain their rights to appeal the sentence ultimately imposed.

Recommendation 7: Victims' rights in the sentence indication process

The Victorian Government should review whether the current statutory provisions governing the involvement of victims in criminal proceedings are adequate to ensure that victims will be consulted if a defendant requests sentence indication, and enact any amendments required to achieve this effect.

Recommendation 8: The effect of the guilty plea on the indication

The Chief Judge should issue a note or direction to require a judicial officer, when providing a sentence indication, to state whether, but for a guilty plea being entered at that stage of the proceedings, a more severe sentence (an immediate term of imprisonment) would be indicated.

Recommendation 9: Eligibility criteria

There should be no formal restrictions on the types of cases in which sentence indication can be made available.

The Council cautions against the inclusion of sexual offence proceedings in a pilot sentence indication scheme and suggests that proceedings in relation to fraud, other property and illicit drug offences may be particularly suitable for inclusion in a pilot project.

Chapter 1 The Inquiry Process

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1.1 Background

The Terms of Reference

On 22 August 2005, the Attorney-General, the Hon Rob Hulls MP, asked the Council to advise the Government on whether Victoria should introduce a sentence indication scheme. The Council was asked to consider the advantages and disadvantages of a sentence indication scheme, having particular regard to its likely impact on the courts, victims of crime, and the general Victorian community. In examining the merits and potential of such a scheme, the Council was to consider what role, if any, a specified sentence discount might play.

The impetus for this inquiry

In referring this matter to the Council, the Attorney-General observed that sentence indication had been identified as a potentially useful strategy in two discrete projects. The Attorney-General also noted that support for such a scheme became evident during consultation on the sexual assault reform project. It was hoped that if sentence indication encouraged guilty pleas in sexual offence cases, victims and witnesses could be spared the trauma of the trial.

In May 2004 the Victorian Attorney-General, the Honourable Rob Hulls, MP, released the Victorian Government's Justice Statement, which set out the Government's long-term goals, strategies and priorities for the justice system.[1] An important objective was to modernise and streamline criminal procedure, to increase the efficiency of the administration of justice, and specifically, to address the problem of delay, that is, the high proportion of proceedings that fail to proceed when they should.[2]

The expected benefits

Both sentence indication and a specified sentence discount are designed to put defendants who may ultimately plead guilty in a better position to make this decision early in the proceedings.

Sentence indication is a process that permits a judicial officer to give a defendant a general indication of the sentence that would be likely to be imposed if the defendant pleaded guilty at that stage of the proceedings. A sentence indication process should resolve some concerns about the likely sentence that may be causing the defendant to defer entering a guilty plea or to elect to proceed to trial.

A specified sentence discount provides an incentive, by way of a reduction in sentence, for pleading guilty at an early stage of the proceedings. A 'specified sentence discount' is a law or guideline that specifies the reduction allowed for a guilty plea. There is no standard provision that creates a 'specified sentence discount'. In fact, there are many ways in which more explicit guidance on the relevance and 'sentencing value' of a guilty plea could be provided. The Discussion Paper on Sentence Indication and Specified Sentence Discounts ('the Discussion Paper') described the approaches adopted in other jurisdictions to specify when a reduction in sentence for a guilty plea should be permitted, how it should be determined, and by how much a sentence can be reduced.

1 State Government of Victoria, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (27 May 2004).

2 This definition of delay is taken from Jason Payne, *Criminal Trial Delays in Australia: Trial Listing Outcomes*, Research and Public Policy Series No. 74 (Australian Institute of Criminology, 2007), 7.

Outline of the report

Chapter 2 provides background information on the use of the guilty plea, and its importance in criminal proceedings. Chapter 3 canvasses the arguments for and against reforming Victorian law to make more explicit the reduction in sentence given for a guilty plea and presents the Council's findings and recommendations on this matter.

Chapter 4 examines whether a sentence indication process is compatible with the principles of criminal justice, discussing the similarities and differences between sentence indication and plea-bargaining, and exploring the implications for judicial officers, the prosecution, victims and defendants. Chapter 5 examines the use of sentence indication in summary proceedings in the Magistrates' Court and presents the Councils findings on how the use of this process might be optimised. Chapter 6 reviews the limited use made of sentence indication in other jurisdictions and examines the implications of extending its use in Victoria to indictable matters dealt with in the higher courts. It presents the Council's findings on the potential for sentence indication to be made available in indictable proceedings.

Chapter 7 sets out the Council's vision of the way forward, identifying some of the implementation issues and requirements that the proposed reforms would entail.

1.2 Refining the Terms of Reference

Matters beyond the scope of the inquiry

Child defendants

In Victoria, adults are sentenced in accordance with the *Sentencing Act 1991* (Vic), while child offenders are sentenced under the *Children, Youth and Families Act 2005* (Vic). The principles underpinning the sentencing of child offenders differ in some important respects from those that apply when passing sentence on adult offenders. In sentencing a child offender, the child's rehabilitation is a primary consideration, whereas in sentencing an adult offender, rehabilitation is merely one of five sentencing principles that the court must take into account.

After consulting with the then President of the Children's Court, Her Honour Judge Jennifer Coate, the Council concluded that this inquiry should not extend to the potential use of sentence indication or a specified sentence discount in Children's Court proceedings. The Council formed the view that, in those cases, the focus of both sentencing law and criminal procedure was appropriately on a resolution of the matter that fostered the child offender's rehabilitation and diversion from the justice system. In this context, measures that could encourage a vulnerable child defendant to waive his or her legal right to put the prosecution to proof could run counter to the priorities of the Court. The Council therefore decided to confine its inquiry to criminal law and procedure in relation to adults sentenced under the *Sentencing Act 1991* (Vic).

Federal offences

The Council has not considered the use of sentence indication or a specified sentence discount regime in Commonwealth matters that are heard in Victorian courts, because these matters proceed under the relevant Commonwealth legislation. The Australian Law Reform Commission (ALRC) examined proposals for specified sentence discounts and sentence indication for Commonwealth proceedings in its review of federal sentencing law, which concluded with the release of the report, *Same Crime, Same Time* in May 2006.[3] Its findings are discussed in Chapters 3 and 6 of this report.[4]

Sentence discount as a stand-alone option

Under the Terms of Reference, the merit of introducing a sentence indication process was to be the prime focus of this inquiry. However, the Council was asked, in inquiring into the advantages and disadvantages of such a scheme, to consider whether it should incorporate a specified sentence discount for a guilty plea.

During informal consultation at the beginning of this inquiry, members of the Victorian legal community observed that, to be effective in resolving contested cases with a guilty plea, the sentence indication process would have to provide an incentive for defendants to plead guilty.[5] All past and present sentence indication processes seem to have operated on the assumption that the indicative sentence would incorporate a substantial, even if unspecified, reduction in sentence for pleading guilty after a sentence indication hearing.

However, some researchers and stakeholders regarded sentence indication as an alternative to a specified sentence discount regime.[6] They had concerns about the provision of either a specified or unspecified reduction in sentence for a guilty plea, and saw value in a sentence indication process that addresses a defendant's uncertainty as to the likely sentence without offering an explicit incentive to plead guilty. Thus, it became apparent that views on the appropriateness of a specified sentence discount were likely to polarise, and that differences of opinion on this issue were likely to affect stakeholders' assessments of the merits of a sentence indication process.

It also became apparent that incorporating a specified sentence discount within a sentence indication process would have wider implications for the sentencing of all offenders, not only those whose matters were dealt with through the sentence indication process. The Council therefore saw merit in considering whether there should be more explicit guidance on the reduction in sentence allowed for a plea of guilty, regardless of whether a formal sentence indication scheme was introduced. Several Australian jurisdictions that do not currently offer sentence indication provide more explicit guidance than Victorian law on the reduction in sentence available to offenders who plead guilty.[7]

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3 Australian Law Reform Commission, *The Sentencing of Federal Offenders: Same Crime, Same Time*, Report 103 (2006).

4 The ALRC supported the use of sentence indication in federal criminal proceedings and recommended legislation to enable courts sentencing offenders under federal law to state whether an offender's sentence has been reduced because of his or her guilty plea and to specify how the reduction has been applied.

5 This approach was supported by the Magistrates' Court (Submission 12) and the Law Institute of Victoria (Submission 17).

6 Cf Kathy Mack and Sharyn Roach Anleu, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995) and Submission 9. They envisaged that the sentence indication would be based on the offence with no suggestion of additional leniency. The ALRC recommended the introduction of sentence indication in federal criminal proceedings, but recommended against the introduction of a specified sentence discount for a guilty plea. It recommended that the judge consider the guilty plea when determining the indicative sentence but eschewed the provision of a specified sentence discount.

7 New South Wales, South Australia and Western Australia.

Accordingly, the Discussion Paper examined the arguments for and against specifying, as an amendment to sentencing law, the reduction in sentence available to defendants who enter a timely plea of guilty. It reviewed the approaches adopted in New Zealand and the United Kingdom and canvassed various options for reform of this aspect of Victorian law. In this report, the Council presents the views submitted during the consultation process and its findings on the merits of a specified reduction in sentence for a guilty plea. It also considers, when examining the merits of introducing a sentence indication process, what guidance would be required regarding the sentencing value of a guilty plea entered after an indicative sentence has been provided.

The Council's methods of inquiry

Most proposals for law reform require a balance to be struck between potentially conflicting goals or principles. In some areas of law, the conflict arises between two competing legal principles. However, in this inquiry, the competing considerations to be reconciled in deciding whether sentence indication and a specified sentence discount should be adopted are matters of principle and pragmatism: the extent to which criminal procedure and sentencing law can be modified to improve the efficiency of the justice system without compromising the justice of the outcome.

In this inquiry, therefore, the Council has had to consider not only whether the two measures are consistent with the relevant principles of justice and can be integrated within Victoria's existing procedural framework, but also whether they are likely to achieve the expected gains in efficiency.

The Council has compiled data on the nature of the caseload and case-flow challenges that Victorian courts face, and has drawn on the limited research undertaken in other jurisdictions[8] to identify the expected benefits of reform. The Council also sought to understand the factors that may be influencing the nature and timing of defendants' plea decisions. To this end, the Council consulted with offenders directly and used the findings to add depth to the raw data on plea behaviour presented in the Discussion Paper. While the Council is not in a position to quantify the likely costs and benefits of sentence indication and sentence discounts, it has nevertheless been able to identify factors that are likely to affect the impact of these measures.

Related developments: Australia-wide efforts to tackle delay

During the course of this inquiry, the Council has noted the action taken around Australia to address the problem of delay in legal proceedings. In May 2007, the Attorney-General announced several measures that are intended to streamline criminal procedure and address the problem of delay in criminal cases, including a possible change to listing practices for indictable proceedings and the provision of additional judges, staff and funds to the courts and the Office of Public Prosecutions.[9]

The Terms of Reference for this inquiry referred to the proposed creation of sexual assault lists in the Magistrates' and County Courts and suggested that the Council consider the possible provision of specialist prosecutors when examining the merits of sentence indication. Of particular relevance to this reference was the establishment of a Specialist Sex Offences Unit within the Office of Public Prosecutions and the amendments to the legislation governing the conduct of committals in relation to indictable matters and streamlining of summary procedure in the Magistrates' Court.[10]

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8 See for example, James Chalmers, Peter Duff, Fiona Leverick and Yvonne Melvin, *An Evaluation of the High Court Reforms Arising From the* Criminal Procedure (Amendment) (Scotland) Act 2004 (February 2007) and New South Wales Judicial Commission, *Sentencing Robbery Offenders since the Henry Guideline Judgment,* Monograph 30 (June 2007).

9 Chris Merritt, 'Court Changes', *The Australian* (Sydney), 25 May 2007. See also The Office of the Attorney-General, '$110 Million to Deliver Justice for all Victorians' (Media Release, 1 May 2007). The Victorian budget for 2007–08 included a commitment of $45 million to reduce court delays.

10 Office of the Attorney-General, 'A more sensitive approach to prosecuting sex assaults' (Media Release, 26 April 2007). Chapter 6 considers the implications of using sentence indication in proceedings relating to sexual offences.

Efforts to address delay and improve the efficiency of proceedings have not been confined to the criminal courts. In September 2006, at the request of the Attorney-General, the Victorian Law Reform Commission began an inquiry into civil procedure. The Commission has called for comment on the merits of introducing incentives to encourage parties to settle disputes, as well as on other reforms to encourage pre-trial resolution of the disputed issues, reduce delay and shorten civil proceedings.[11]

Other Australian jurisdictions are also exploring ways to reduce delay and shorten criminal proceedings. In March 2007, the Australian Institute of Criminology (AIC) released a research paper, *Criminal Trial Delays in Australia: Trial Listing Outcomes*,[12] presenting the results of Australia-wide research into the reasons for delays in criminal trials. In South Australia, a report on criminal trial delays prompted the establishment of a Judicial Working Party to consider its recommendations, which included a proposal to encourage early discussions and 'more plea bargaining' between prosecution and defence counsel.[13] In Western Australia, the Chief Judge of the District Court of Western Australia has drawn attention to the magnitude of the delay experienced in criminal proceedings in that state in her annual report for 2006, and outlined work on a comprehensive examination of current criminal listings processes to tackle the problem of delay.[14]

1.3 The program of consultation

In December 2005, the Council invited members of the legal community to participate in an informal Advisory Group on sentence indication. During 2006, members of the Advisory Group met as a group and individually to help develop the options for reform that were presented for public comment in the Discussion Paper. In February 2007, the Council released a Discussion Paper as a springboard for public consideration of the issue. The questions posed in the Discussion Paper are set out in Appendix 1.

On 20 February 2007, the Council released a Discussion Paper and called for submissions, launching it with a media release and a public information session. Advertisements were placed in the Victorian daily newspapers, copies of the Discussion Paper were provided to stakeholders and interested members of the public, and the call for submissions, the Discussion Paper and a summary of it were posted on the Council's website. A submission form was also provided, to assist members of the public who wished to make submissions.

Stakeholders consulted in this inquiry

The Council received 28 submissions and held 27 meetings involving more than 150 participants. As Table 1 shows, the Council and its staff have consulted with judges and magistrates, lawyers and legal advocacy organisations, victims of crime and their relatives, counsellors, offenders, and members of the general public. Lists of the submissions received and meetings held during the course of the inquiry are provided at Appendices 2 and 3 respectively.

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11 The Terms of Reference require the Commission, among other things, 'to identify the key factors that influence the operation of the civil justice system, including those factors that influence the timeliness, cost and complexity of litigation': Victorian Law Reform Commission, *Civil Justice Review: Consultation Paper* (September 2006), 4–5.

12 Payne (2007), above n 2, 64–5. This research confirms that criminal trial delay is an enduring and endemic problem throughout Australia and reaffirms the importance of measures designed to encourage early and open discussions between the parties to criminal proceedings.

13 Colin James, 'Top judge applauds court reform', *The Advertiser (Adelaide)*, 3 November 2006.

14 'WA District Court has the longest delays', *The Age* (Melbourne), 23 January 2007; District Court of Western Australia, *Annual Review 2006*, 2–3.

Table 1: Participants in the current inquiry by background and form of involvement

Participants' background	Number of submissions received	Number of participants in informal discussions and focus groups
Legal organisations	13	40
Legal academics	3	
Victims of crime and Victims' advocates	4	20 - victims and victims' relatives 25 - counsellors and advocates
Past or present offenders	1	30
Members of the public	7	60
Total	**28**	**175**

In response to the Attorney-General's request that the Council obtain the views of the Victorian community, the Council also convened five focus groups comprising 65 randomly selected members of the general community.

The legal community

During the public phase of the inquiry, the Council received 16 submissions from legal stakeholders and participated in discussions with 40 members of the Victorian legal community. Members of the secretariat also held informal discussions with six members of the NSW profession who had experience of the sentence indication process that operated in the NSW District Court between 1993 and 1995.

Victims of crime and their advocates

The Attorney-General specifically asked the Council to ascertain the views of victims of crime and their relatives. Accordingly, the Council's Advisory Group included a representative from a Centre Against Sexual Assault (West CASA) and the Discussion Paper canvassed the implications of sentence discounts and sentence indication for victims.

Consultation with victims and their advocates was a high priority in the Council's public consultation program, and the Council acknowledges the efforts of the state-wide Steering Committee, the Victims Support Agency, and the coordinators of the Victims Assistance Program to promote interest in this inquiry among victims, their relatives and their advocates.

The Council received submissions from the Crime Victims Support Association and three Melbourne-based Centres Against Sexual Assault (CASAs). The Council also invited victims, their relatives and their advocates to participate in roundtables that considered the implications of sentence indication and specified sentence discounts.

Offenders

The Council also consulted with offenders to gain insight into the factors of most importance to defendants in determining when and how to plead to criminal charges, and to obtain their views on sentence indication and specified sentence discounts. Thirty-one past or present offenders participated in this inquiry. In December 2006, focus groups were conducted at Dhurringile and Tarrengower prisons, and in March 2007, a group was convened at the Victorian Association for the Care and Resettlement of Offenders (VACRO) to canvass the views of former offenders. Interviews were conducted under the auspices of Corrections Victoria and VACRO.

1.4 Findings from the public consultation program

One of the Council's key roles, enshrined in s 108C(d) of the *Sentencing Act 1991* (Vic), is to gauge public opinion on sentencing matters. During the public consultation program, the Council observed that the participants' views of the merits of the sentence indication and sentence discounts reflected their general expectations, views and experiences of the justice system. These views are set out and considered in this report.

While it is beyond the scope of this inquiry to examine the wider context in which public opinion on sentencing issues is formed, it is nevertheless relevant to note some of the themes that emerged in the public consultation program. The Council hopes to explore some of the issues identified here in greater depth in future projects.

Public perceptions of sentencing practices

Members of the public and non-legal participants in criminal proceedings who responded to this inquiry indicated that they had difficulty understanding how the court determined a particular sentence. Almost all of the non-lawyers who participated in this inquiry—whether victims of crime, counsellors, offenders or members of the wider community—wanted greater clarity in the way in which sentencing decisions were expressed and presented in the public arena.

Some participants commented that when public attention is focused on a few high-profile crimes, it is hard for the general community to know where a particular sentence fits in the sentencing range for that type of offence.[15] In the absence of any specific guidance, many members of the public indicated that they regarded the maximum penalty for the offence as the starting point for determining an appropriate sentence. These participants had concerns about apparent inconsistencies in sentencing. They noted that from the information contained in media reports of high-profile cases, it was hard to avoid the conclusion that condemnation and punishment of the conduct are not being given enough weight in these sentencing decisions.[16]

The Council is aware that public perceptions of sentencing practices can, and often do, differ from actual sentencing practices. One of the Council's prime objectives is to bridge this gap: to provide the Victorian community with information on actual sentencing trends to enable members of the public to see the principles and practices behind individual sentencing outcomes. The Council's *Sentencing Snapshots* reports provide up-to-date information on actual sentences imposed in Victorian courts for the most serious and most common offences. These reports reveal, among other things, how the actual sentencing range relates to the statutory maximum penalty available for the most serious instance of that offence.

The Council also endeavours to promote public discussion on the disparities that may arise between perceived and actual sentencing practices; in 2006, it held a sentencing conference and published a research paper on myths and misconceptions about sentencing and in 2007 it will be publishing the proceedings of this conference.[17]

15 Focus Group 2 (21 March 2007).

16 Victims' Issues Roundtable (27 February 2007); Focus Groups 1–5 (held between 20 and 23 March 2007).

17 Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (2007, forthcoming).

The expectations and concerns of victims

The consultation program revealed the importance that members of the public and victims attach to judicial recognition of the seriousness of the offence and its impact on the victim. This is regarded as a vital element of the sentencing process, not only when a victim or relative has provided a victim impact statement, but also when the victim has no family or support network and is not personally in a position to articulate the harm that has been done. Victims and their advocates emphasised how important it was for them to have their experience acknowledged and directly referred to by the sentencing judge.[18] Many participants in this inquiry noted that victims attach considerable importance to both the remarks of the sentencing judge and the severity of the sentence as recognition of the severity of the crime.[19]

Victims' expectations of the justice system varied considerably. Several participants in this inquiry observed that victims of crime tend to find legal processes confusing and traumatic and are not prepared—factually or emotionally—for the criminal proceedings. Victims and their families often feel as though they are 'left in the dark' about the steps involved in the proceedings and how long it will take to get a result. This can cause victims to have unmet and in some cases unrealistic expectations of what criminal proceedings can achieve.[20]

Counsellors for the victims of sexual assaults indicated that victims frequently hoped the trial would be 'their day in court': an opportunity to present their experience of the crime. However, they found that it often had the reverse effect: the investigation and cross-examination caused some victims to feel as though they, in fact, were on trial, and discouraged them from proceeding with their complaint.[21] It is common for victims to feel frustrated when their experiences are reduced to a 'few admitted facts' for the purposes of a court hearing, which cannot reflect the significant impact the offence has had on their lives.[22]

In other cases, victims and their families looked to the sentencing process to recognise and take account of their experiences through their being able to inform the court of the impact of the offence on them at sentencing, and the court's imposition of a proportionate sentence.[23] Clearly, the final sentence is not the only measure of the outcome, for victims of crime; information about the process, their feeling of engagement, the victim impact statement, the sentencing judge's remarks and the sentence itself are all factors that affect their level of satisfaction with the outcome.

The Council detected a desire among many participants for more clarity and certainty about the victim's role at sentencing and how the victim's influence on the course and outcomes of criminal proceedings can be assured before embarking on reforms that might indirectly reduce the victim's influence.

A number of victims and counsellors who participated in roundtables and discussions also expressed concern at the leniency of sentences imposed for crimes of violence, and sexual offences in particular, when compared to those imposed for drug and property crimes.[24] West CASA, for example, advocated severe sentences for sexual offences, to reflect the severe and long-term impact of these offences on victims and to communicate 'to the offender and to society as a whole that this type of conduct is inappropriate and that the justice system values and protects personal integrity of victims of these crimes'.[25] There was a fear that the introduction of sentence indication or discounts could lead to a further reduction in sentences. The view shared by many victims was that any discounts should only operate where the starting point is close to the maximum penalty for that offence.[26]

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18 Victims' Issues Roundtable (27 February 2007).
19 Ibid.
20 Victims' Issues Roundtable (27 February 2007); Meeting with Victims of Homicide Support Group (Frankston) (15 March 2007); Submissions 14 (South Eastern CASA) and 18 (CASA House).
21 Meeting with South Eastern CASA (7 March 2007); Meeting with West CASA (21 March 2007).
22 Meeting with West CASA (21 March 2007).
23 Meeting with Victims of Homicide Support Group (Frankston) (15 March 2007).
24 Submission 14 (South Eastern CASA).
25 Submission 25.
26 Meeting with West CASA (21 March 2007).

Concern about the leniency of sentences for some crimes against the person also gave rise to concerns about the limited opportunities available to the victim to influence the course and outcome of criminal proceedings. While the purpose of criminal proceedings is to establish, beyond reasonable doubt, whether the accused is guilty of the alleged offence, there is also widespread acknowledgment—now reinforced by statutory provisions[27]—that the proceedings can and should give the victim a meaningful opportunity to describe the impact of the offence, to have judicial affirmation of the seriousness of the offence, and to see the offender receive a sentence proportionate to his or her conduct.[28]

27 *Sentencing Act 1991* (Vic) s 5(2)(daa) and (da); *Victims' Charter Act 2006* (Vic).

28 Victims' Issues Roundtable (27 February 2007); Submissions 14 (South Eastern CASA), 17 (Law Institute of Victoria), 18 (CASA House) and 22 (Victoria Police).

Chapter 2 Guilty Pleas and Their Impact

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This inquiry focuses on guilty pleas, and specifically on two measures intended to alter defendants' plea behaviour: sentence indication, which is expected to alleviate concerns that may be deterring a defendant from entering a guilty plea (or an early guilty plea), and a specified sentence discount, which provides a clear incentive to defendants to plead guilty as early as possible.

Most criminal cases are finalised by a guilty plea. In Victoria, approximately 88 per cent of indictable matters are resolved by a plea of guilty,[29] and while it is not possible to state the equivalent figure for summary matters, we know that over 95 per cent of summary matters adjudicated in the Victorian courts conclude with a guilty outcome.[30]

2.1 The importance of the guilty plea in criminal proceedings

In order to understand the implications of these measures, it is necessary to appreciate the importance of the guilty plea in the administration of justice. A plea of guilty can be regarded as the optimum outcome of criminal proceedings. It validates the victim's complaint and establishes the basis on which the victim or the victim's family can articulate the impact of the offence and commence the process of recovery. When made freely by an offender who fully understands the consequences, it signifies the defendant's willingness to accept criminal liability for his or her conduct. From a practical perspective, a guilty plea obviates the need for a trial; this can reduce the pressure on victims. It also releases witnesses from their commitment and allows counsel and the courts to devote their time to other matters.

Late-resolving pleas

Studies of delay in criminal proceedings have consistently, and with good reason, targeted late-resolving guilty pleas in their efforts to improve efficiency. The most recent Australian publication on this subject, a report by the Australian Institute of Criminology, found that late guilty pleas were 'the single most common reason that criminal trials do not proceed on the day of listing'.[31] The Institute interviewed more than 60 stakeholders from 42 Australian criminal justice agencies and reported:

> It was the unanimous opinion of all respondents to this review that late guilty pleas remain of most concern to criminal trial procedure in Australia, both in the higher and lower courts.[32]

Given the number of cases that are ultimately resolved by a guilty plea, it is vital to have a legal and administrative framework that supports the early identification and resolution of matters that may be causing defendants to defer entering a plea of guilty.

While late-resolving guilty pleas were a prime cause of delay, the AIC found that the measures most useful in addressing delay did not necessarily directly target guilty pleas. The AIC found general agreement among the legal community on the need for 'front ending'—that is, measures to encourage participants

29 Australian Bureau of Statistics, *Criminal Courts Australia, 2004–05*, Catalogue 4513.0 (2005), 5. According to the AIC, guilty pleas constitute approximately 88 per cent of all guilty outcomes in indictable proceedings.

30 Magistrates' Court of Victoria, *Annual Report 2005–06*, 19. In 2005–06 a total of 134,193 summary matters were initiated and 125,432 matters finalised in the Magistrates' Court, compared with 134,270 initiated and 130,680 finalised in 2004–05. The criminal caseload of the Magistrates' Court and the length of proceedings from commencement to finalisation have remained relatively stable in recent years. The Court has consistently finalised more than 92 per cent of adjudicated cases within 26 weeks, with the most common duration for adjudicated cases being between six and 13 weeks.

31 Payne (2007), above n 2, 20, 24.

32 Ibid 24. While the relative importance of some reasons for trials failing to proceed varied between regions, the Institute found that 'the proportion of trials not proceeding due to late pleas of guilty was relatively consistent across all jurisdictions', 20.

in the proceedings to discuss the case fully and openly at an early stage of the proceedings. The AIC detected a need for improved communication between the police, prosecution, defence and the court, between defence counsel and the accused, and with victims and witnesses generally.[33]

Expected effect of sentence indication and/or discount on guilty pleas

The Council has considered the likely effect of sentence indication and/or a specified sentence discount on the theory and practice of criminal proceedings.[34] This chapter considers the extent to which these measures would be likely, in practice, to achieve their goals: to alter defendants' plea behaviour and thereby maximise the benefits that the participants in the proceedings and the justice system as a whole can reap from early guilty pleas. It examines the extent to which a sentencing incentive, such as a sentencing discount for a guilty plea, or a new procedure, such as sentence indication, can reasonably be expected to bring about earlier guilty pleas and produce the expected benefits. Using the statistics provided in the Discussion Paper, relevant studies published in other jurisdictions during 2007, and the views and submissions put to this inquiry, we identify constraints on the capacity of a specific incentive or a new procedure, acting in isolation, to alter the timing of defendants' plea decisions.

The Council also sounds a note of caution about the use of incentives to influence the decisions made by participants in criminal proceedings. We note that the criminal law affords the parties certain rights and places on them a number of obligations. We share the concerns expressed by stakeholders who saw the potential for incentive-driven reforms to undermine some of these established rights. Finally, we point to other aspects of the administration of justice that could limit or distort the expected effects of sentence indication, and could also vitiate the effect of more explicit guidance on sentence reduction.

2.2 The context: Mounting pressures on the courts

The impetus for this inquiry has been the urgent need to address the problem of delay in Victorian courts, and particularly in the County Court, which hears the majority of the indictable criminal matters.

Delay and its effect on the administration of justice

Delay affects the justice as well as the efficiency of criminal proceedings. It can compromise the reliability of the evidence, cause victims additional and unnecessary suffering, and result in accused persons being either detained or released on bail for a significant period before the case is adjudicated. Delay also affects the operation of any incentives to plead early or deterrents intended to discourage the seeking of adjournments for tactical reasons. If the parties are aware that there will be a long period between the commencement and the conclusion of the proceedings, both the incentives that would otherwise encourage defendants to 'get it over and done with' and the sanctions for unnecessary delay will be ineffectual.

Delay puts all the participants in the proceedings 'on hold': it defers the moment when the victim can achieve closure, forces witnesses to keep their recollections and evidence of the alleged offence fresh, and defers defendants' rehabilitation and reform.

While delay can cause injustice, it does not necessarily follow that measures introduced to improve efficiency will nevertheless maintain or increase the system's fairness. Several participants in this inquiry cautioned against placing undue emphasis on efficiency at the expense of justice. Victoria Police

33 Payne (2007), above n2, 20.

34 Chapter 3 reviews the evidence and submissions on whether a specified sentence discount for a guilty plea could exert unfair pressure on defendants to alter their plea decisions and examines the implications of such a change on sentencing law. Chapters 4, 5 and 6 consider whether a sentence indication process would alter the roles of the judicial officer and counsel, or affect the rights and interests of the defendant or the victim.

indicated that it 'would not support trading off any aspect of a fair and just system only to create fewer delays in the court system'.[35] The Director and Office of Public Prosecutions welcomed 'any initiative that would encourage early settlement of prosecutions as pleas of guilty, because of the obvious savings in time and resources which would otherwise be expended',[36] but cautioned that achieving this involved providing sufficient resources for the prosecution, defence and the courts to do the necessary preparation. It observed:

> We do not support any system where the clearance rate and the reduction of resources becomes a primary aim which takes priority at the expense of the just and fair resolution of criminal prosecutions.[37]

Community Legal Centres were also concerned to avoid what they believed to be undue emphasis on efficiency. The Federation of Community Legal Centres submitted that applying pressure to defendants to resolve their pleas could be a way of passing on the problem of delay, rather than addressing the underlying causes. Further, the Federation expressed the concern that efficiency-based reforms might be counter-productive. It observed that 'there is a price to be paid for speed':

> While it is certainly important to deal with proceedings as quickly as possible, the emphasis on speed can set up a tension between achieving a just outcome and a fast outcome.[38]

Some members of the public who participated in the focus groups also queried why sentencing law should be modified to address delay, when to some extent this could be resolved by providing more resources to the courts and other agencies involved in criminal proceedings.[39]

The Council has been mindful of the care needed to ensure that reforms improve the efficiency of proceedings without detracting from their fairness. In order to minimise this risk, it is important to appreciate the extent and nature of the problem targeted and to make as accurate an assessment as possible of the likely impact of the reforms. To this end, the report provides background on the trends in the criminal caseload, highlighting the undesirable consequences of delay. It also presents findings on the characteristics of defendants' plea behaviour, identifying the scope and likely limits to the potential effect of a sentencing incentive, such as a specified sentence discount, to alter the timing of defendants' plea decisions.

Trends in the criminal caseload: Background and update

The Discussion Paper provided a profile of the courts' caseload and case flow to identify the courts' workload, the nature of the problem of delay and the role played by late-resolving pleas. Since the Discussion Paper was released, more information has become available on the Victorian courts' criminal workload. The following brief summary outlines and updates the main findings presented in the Discussion Paper.

While the caseload of the Magistrates' Court has remained relatively stable, delay has become a significant challenge for the higher courts, partly because of the steady increase in criminal prosecutions for indictable offences. Since 2000–01, more cases are commencing in the higher courts, and these cases typically involve more charges and are less likely to resolve before the trial. The impact has been especially marked on the County Court, which adjudicates the vast majority of indictable matters. Figure 1 shows the County Court's gradually increasing caseload as well as the Court's declining capacity to maintain the same level of cases finalised.

35 Submission 22 (Victoria Police).

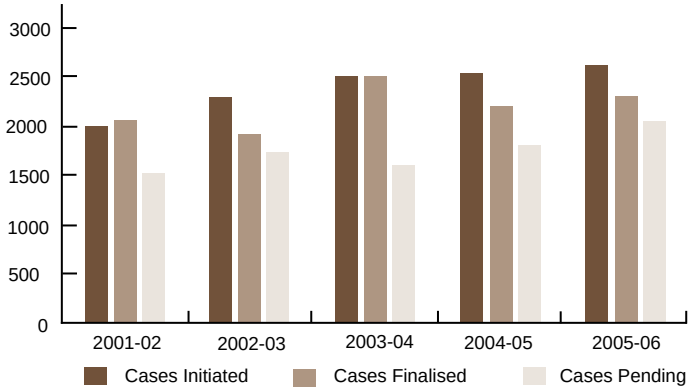
36 Submission 29 (Director and Office of Public Prosecutions).

37 Ibid.

38 Submission 24. West Heidelberg Community Legal Centre (Submission 21) also expressed concerns about 'expediency com[ing] before principle in the administration of justice'.

39 Focus Group 1 (20 March 2007).

Figure 1: County Court of Victoria, criminal cases: Trials and pleas, 2001–02 to 2005–06



Source: County Court of Victoria, 2005–06 Annual Report, 17.

In 2005–06, a 2.8 per cent increase in the County Court's workload (the number of cases initiated) was matched by a rise (3.1 per cent) in the number of sittings, with the result that the Court managed to exceed its target for timeliness and to limit the effect of the increased workload on the clearance rate. Nevertheless, at the end of the June sittings in 2006, 2038 people were awaiting trial compared with 1802 persons at the end of June 2005.[40]

The Supreme Court is also faced with an increased and changing workload. Since February 2004 the Supreme Court has adopted the policy of hearing major criminal trials outside its exclusive jurisdiction (murder and attempted murder), and as a result has adjudicated a wider range of cases (drug trafficking, police corruption, terrorism) as well as the trials flowing from the 'gangland murders'. The Court has also been required to deal with a surge in the number and range of applications for orders following the commencement of legislation covering major crime, confiscation, witness protection and terrorism.[41] The Court has noted that these pressures have had a marked effect on the court's clearance rate: prior to 2003, the number of outstanding criminal trials had rarely exceeded 50, but by May 2007, the number had reached 80.[42] Table 2 shows the Supreme Court's criminal caseload for the period 2003–04 to 2004–05.

40 County Court of Victoria, *2005–06 Annual Report*, 3.

41 Supreme Court of Victoria, *2004–05 Judges' Annual Report,* 26. The number of applications filed in the Supreme Court rose from 20 in 2003–04 to 169 in 2004–05.

42 The Hon. Marilyn Warren, Chief Justice of the Supreme Court of Victoria, 'State of the Victorian Judicature' (Speech delivered at the Supreme Court of Victoria, 22 May 2007), 12.

Table 2: Supreme Court of Victoria, criminal case statistics, 2003–04 to 2004–05

Type of criminal proceedings	2003–04	2004–05
Criminal case (Trial or plea of guilty)		
Melbourne	95	97
Circuit	9	12
Total	104	109
Trial		
Melbourne	73	47
Circuit	8	9
Total	81	56
Pleas of guilty		
Melbourne	22	50
Circuit	1	3
Total	23	53
Applications filed		
Bail Act 1977	51	71
Listening Devices Act 1969	135	165
Crimes (Mental Impairment and Unfitness to be Tried) Act 1997	8	12
*Other Applications Filed **	169	20
Total	214	415

Source: Adapted from Supreme Court of Victoria, 2004–05 Judges' Annual Report, 26.

* Other applications include applications for witness protection, proceeds of crime, confiscation of profits, extension of time for filing presentment, change of venue of trial and extension of time for commencing rape trials.

The backlog in Victoria: Comparison with the national average

While Victorian courts are confronted with pressures and challenging targets for timeliness, the position in Victoria compares favourably with that of other Australian jurisdictions. Table 3 below compares the Victorian courts' 'backlog indicator' with the national average.

Table 3: Backlog indicator by court level, 2004–05 (%), Victoria and Australia (average)

Backlog of cases	Victoria (% of cases)	Australia (% of cases)
Magistrates' Court		
Cases > 6 months	17.6	21.6
Cases > 12 months	4.7	8.9
County Court		
Cases > 12 months	14.1	20.2
Cases > 24 months	2.8	5.0
Supreme Court		
Cases > 12 months	13.6	18.0
Cases > 24 months	8.2	6.9

Source: Adapted from Jason Payne, Criminal Trial Delays in Australia: Trial Listing Outcomes, Table 4, 10.

The guilty plea rate: Features and trends

As Table 2 reveals, in the Supreme Court, approximately half the adjudicated criminal cases are finalised by a plea of guilty, and the 'plea rate' has been rising rapidly. Since 2003–04, the number of matters finalised in the Supreme Court by a guilty plea has more than doubled (from 22 in 2003–04 to 50 in 2004–05), and there has been a corresponding decrease in the number of cases proceeding to trial.

In the County Court, although the plea rate appears to be higher than in the Supreme Court, it has been declining since 2002.[43] Further, not only is the proportion of guilty pleas declining, but the proportion of pleas resolving late in the proceedings is increasing.[44] In 2005–06, 28 per cent of guilty pleas were indicated or entered after the directions hearing (the case had been listed for trial) and in fact 17 per cent (299 out of 1749 guilty pleas) were indicated at the door of the court on or after the trial began.[45] The combined effect of these two trends, together with a steady increase in caseload, is placing pressure on the County Court's capacity to achieve its targets for timeliness and case clearance.[46]

In the Magistrates' Court, the summary caseload has remained relatively stable. There does not appear to have been any significant change in the proportion of cases finalised by a guilty plea or in the timing of defendants' plea decisions since 2002.[47] Nevertheless, with over 130,000 summary matters adjudicated in the Magistrates' Court each year, measures that assist in identifying cases that might be resolved by a guilty plea and in addressing issues or concerns that may be causing defendants to defer their plea would enhance the Court's capacity to manage its caseload.

2.3 Defendants' plea decisions

It is clearly in the interests of both justice and efficiency to explore ways of placing defendants who are ultimately pleading guilty in a position to do so early in the proceedings, by identifying the considerations that might be causing them to defer their plea decision. However, not all of these considerations can be addressed. Further, defendants are not solely or primarily responsible for the timing of their decisions. In assessing the potential value of a sentencing incentive, it is necessary to appreciate the extent to which defendants can respond to the incentive, and to note factors that might limit their ability to plead guilty at an earlier stage of the proceedings.

Systemic factors affecting the timing of plea decisions

As the Law Institute observed, 'often the timing of a guilty plea is out of the control of a defendant'.[48] There are many reasons why the defendant may not be in a position to decide the plea early in the proceedings.

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43 Figures for the higher courts combined show that between 2002 and 2006, the proportion of cases finalised by a guilty plea fell from 75 to 63 per cent. Given the small number of cases dealt with in the Supreme Court (these cases account for only approximately 100 of the 2700 cases dealt with), these combined figures reflect primarily the position in the County Court.

44 The proportion of guilty pleas entered in higher court proceedings after the trial has been listed almost doubled in three years: in 2002–03, approximately 5.7 per cent of all guilty pleas in County and Supreme Court were entered after the trial had been listed, while in 2004–05 this proportion had risen to 10 per cent. See Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts: Discussion Paper* (February 2007), 6–8 and 91–4, hereafter referred to as 'Discussion Paper'.

45 Discussion Paper (2007), above n 44, 8–9. One third (885) of the initial pleas entered at the commencement of County Court proceedings were reserved; of these, approximately 78 per cent (687) ultimately resolved into a plea of guilty.

46 See County Court of Victoria, *2005–06 Annual Report*, 5.

47 Discussion Paper (2007), above n 44, 5, 63. See also Magistrates' Court of Victoria, *Annual Report 2005–06*, 19. The Court has consistently finalised more than 92 per cent of adjudicated cases within 26 weeks.

48 Submission 17 (Law Institute of Victoria). See also Submissions 13 (Victorian Bar Council) and 24 (Federation of Community Legal Centres).

The defendant will generally not be in a position to make a plea decision until the prosecution has disclosed the case against him or her.[49] Delays in the analysis of forensic evidence and problems affecting the availability of witnesses, for example, may retard the preparation of the prosecution case. There may also be procedural reasons why the prosecution case cannot be disclosed fully at an early stage of the proceedings. Associate Professor John Willis suggested that provisions prohibiting the cross-examination of certain vulnerable witnesses at committal could prevent the defendant from testing all the prosecution evidence prior to the trial.[50] Associate Professor Willis contemplated the possibility that in these circumstances some defendants might decide to proceed to trial rather than enter a guilty plea at a late stage of proceedings.

Similarly, the timing of the plea decision will be affected by the defendant's access to legal advice. The Victorian Bar Council observed that the late engagement of counsel also affects the timing of the defendant's plea decision, and stressed that 'the real key to early pleas of guilty is the early engagement of experienced trial counsel for both prosecution and defence'.[51] The Bar observed that in most cases:

> the directions hearing held about four weeks prior to the trial will be the first time that a defendant will receive detailed and fully prepared advice about his/her prospects of success at trial. By that stage, a defendant will have lost much of the benefit for an early plea of guilty. But until that stage, he/she will not have had the benefit of detailed advice from trial counsel.[52]

This observation was also made by the Pegasus Task Force, which was formed to address the acute problem of delay experienced by the County Court over the period 1989–92. The Task Force secured the early involvement of the OPP and defence counsel in criminal proceedings. The effect on case flow was immediately apparent: within four months the proportion of defendants committed for trial who reserved their plea fell from 60 to 20 per cent, while the proportion who entered a guilty plea almost doubled.[53]

There is also evidence that the Legal Aid fee structure can have a bearing on the stage at which counsel are engaged and on their readiness to advise on the plea. New South Wales research cited in the Discussion Paper revealed that late preparation of the case and late resolution of guilty pleas were partly caused by difficulties that the defendant faced in securing ongoing legal assistance at an early stage of the proceedings.[54]

Two recent studies have confirmed this finding. A report by the Australian Institute of Criminology has found that 'the legal aid structure in some jurisdictions encourages counsel to take a matter to trial, rather than seek earlier resolution'.[55] Similarly, an evaluation of the effect of changes in Scottish criminal procedure on case flow has found that an increase in early guilty pleas was, in part, due to reforms to the legal aid structure which increased funding to advocates whose clients pleaded early in the process.[56]

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49 Kathy Mack and Sharyn Roach Anleu, 'Guilty Pleas: Discussions and Agreements' (1996) 6 *Journal of Judicial Administration* 8, 12.

50 Submission 27. See for example, Schedule 5, Clause 11A of the *Magistrates' Court Act 1989* (Vic), which provides that a complainant in a sexual offence matter who is a child or a person with a cognitive impairment cannot be cross-examined at a committal hearing.

51 Submission 13.

52 Ibid.

53 Pegasus Task Force, *Reducing Delays in Criminal Cases* (1992).

54 Discussion Paper (2007), above n 44, 47.

55 Payne (2007), above n 2, 26.

56 Chalmers, Duff, Leverick and Melvin (2007), above n 8, 59.

Victoria Legal Aid has indicated that some features of the current fee structure may have a bearing on the stage at which the defendant receives legal advice and thus, indirectly, the stage at which he or she is ready to make a plea decision. Under the current guidelines, the most remunerative course of action for the solicitor and barrister representing a defendant who intends to plead guilty would be to enter a guilty plea on the first or second day of the trial. This is because the fee structure includes a payment for the time required to prepare for the trial; a defendant who pleads after the commencement of the trial has already caused counsel to incur the cost of preparing for the trial.

In summary cases, once VLA has approved a grant of aid for a defendant to contest the matter, VLA funds every 'event' (appearance or hearing) in a contested case. The fee structure and administration therefore do not affect the timing of a defendant's plea decision. By contrast, in indictable proceedings, assistance for contested matters will only be granted if the defence has merit and the case is certified as ready for a committal hearing. In practice, this is not possible before the committal mention; this means that contested indictable matters only receive legal assistance after they have received a 'certificate of readiness' and have been booked in for a committal hearing.

Some participants in this inquiry suggested that defendants' plea decisions also might be affected by their legal advisers' financial interest in obtaining the highest remuneration available to them for the matter. A similar concern prompted a study of the factors taken into consideration by English barristers when advising clients on the plea.[57] The study surveyed London barristers to find out how they 'understand their incentives' when providing advice and concluded not only that many were unaware of the financial consequences for them of a defendant's plea decision, but also that respect for their professional duties and reputation outweighed any financial motivations that they might have had.[58] The Council notes that the *Legal Profession Act 2005* (Vic) establishes a comprehensive set of professional obligations and sanctions, and regards this consideration as having negligible impact on the timing of plea decisions.

Finally, delay itself may be the factor that causes a defendant to defer entering a plea. There are many anecdotal reports of the reluctance of some defendants to decide their plea until the imminent trial makes it impossible to defer or avoid the issue any longer. In these circumstances, the prospect of a long delay before the case goes to trial will reinforce the defendant's tendency to avoid the issue. A sentencing incentive is unlikely to have the desired effect if the defendant is aware that the case will not proceed for many months, regardless of the plea.

Defendants' plea behaviour in Victorian criminal proceedings

A threshold issue in this inquiry is whether it is realistic to expect defendants who are entering guilty pleas very late in the proceedings to change their behaviour in response to the incentive of a specified sentence discount or the certainty provided by an indicative sentence.

In order to answer this question it was necessary to understand the main considerations that defendants take into account in deciding when and how to plead. The Council sought submissions and interviewed offenders to identify the main factors that influence when and how a defendant makes his or her plea decision. We were interested not only in those considerations that motivate a defendant to enter an early plea, but also any considerations that may be causing a defendant to defer the plea decision or discouraging him or her from pleading guilty.

57 Peter Tague, 'Barristers' Selfish Incentives in Counselling Defendants over the Choice of Plea' (2007) *Criminal Law Review* 3.

58 Ibid 4.

The Discussion Paper reviewed the limited literature available on defendants' plea behaviour and the factors influencing defendants in deciding how and when to indicate their plea.[59] It presented evidence showing that defendants' plea behaviour varied, depending on their criminal history and they type of offence they were accused of. Among defendants whose cases were finalised in the County Court, a high proportion changed their initial plea, with three-quarters of those who reserved their plea, and over half of those who initially indicated a not guilty plea, ultimately entering a final plea of guilty.[60]

There were clear differences between the plea rates—the proportion ultimately pleading guilty and the proportion whose pleas changed to guilty during the proceedings—for different offence types. Cases involving robbery and fraud seemed to have a higher rate of early guilty pleas than those involving assault and sexual offences. Further, whereas a relatively high proportion of those who were charged with assault and sexual offences proceeded to trial (about one-third), virtually all defendants who reserved their pleas in fraud, drug, robbery, and break and enter offences ultimately entered a plea of guilty.[61] The offences for which there was the greatest variation between the initial and the final plea were the illicit drug offences.

When the New South Wales District Court piloted a sentence indication process that incorporated an unspecified incentive for pleading guilty, the New South Wales Judicial Commission also found that defendants' responses to the scheme varied, and that the defendants' criminal history and the type of offence appeared to influence their responsiveness. The Commission noted that defendants who were most receptive to sentence indication were those who had a prior conviction and/or were being held on remand, and that defendants charged with drug offences were more likely to seek sentence indication than those charged with other types of offences.[62] If a clear reduction in sentence were provided for a guilty plea, it is likely that its impact would vary, depending on the type of offence and the defendant's criminal history.

Considerations influencing plea decisions

Once the key factors influencing defendants' plea decisions are understood, it is possible to determine the extent to which an incentive, such as a sentence discount, or a process, such as sentence indication, is likely to change defendants' plea behaviour.

In order to gain a deeper understanding of the factors influencing defendants' plea decisions, the Council conducted focus groups with past and present offenders. Twenty-four offenders from Tarrengower and Dhurringile prisons and six former offenders now released into the community attended focus groups to consider the questions raised in this inquiry and completed a questionnaire that provided some background on their experience of the criminal justice system. All participants had had legal representation in their most recent criminal proceedings, with about half receiving assistance from Victoria Legal Aid. Approximately four-fifths of the offenders who responded to this question had pleaded guilty in their most recent case and were sentenced in the higher courts.

The participants were asked to reflect on the factors of greatest importance to them in deciding when and how to plead. They were given 10 factors (listed below) and asked to rank them as 'very important', 'a little important', or 'not important'.[63] Table 4 below shows how the respondents rated the factors that were presented to them.

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59 In Victoria, a defendant may reserve his or her plea and is not obliged to enter a plea until formally arraigned. Some Australian jurisdictions, such as New South Wales, have abolished reserved pleas and require the defendant to indicate whether he or she will be pleading guilty or not guilty.

60 Discussion Paper (2007), above n 44, 79–81. Approximately 77 per cent of those who reserved their pleas ultimately pleaded guilty, while only 46 per cent of those who initially indicated a 'not guilty' plea entered a final plea of not guilty.

61 Ibid 82.

62 Ibid 74.

63 Factors were developed reference to the National Survey of Offenders; Australian Law Reform Commission, *Sentencing of Federal Offenders*, Report 15 (1980) Interim Report (Appendix D).

Table 4: Survey of Victorian offenders: Factors relevant in plea decisions, Sentencing Advisory Council, 2006–07

Factor	Very important	A little important	Not important
To have the chance of a shorter sentence	22	1	1
To do what is best for my family	21	2	1
To get it all over and done with	21	1	1
Advice from my lawyer	17	5	2
Advice from family, friends, counsellor	16	5	3
To avoid a long court case	15	6	2
Didn't want to rush my decision	10	4	7
To wait until I had done some rehabilitation	7	4	10
To do what was best for the victim	6	5	8*
To wait as long as possible before deciding	3	4	16

* *These included a case with no victim, and a respondent who observed that the low priority given to the victim's interests did not reflect a lack of remorse, but rather the need to make a decision on the basis of his or her own circumstances.*

The responses revealed that the three most important factors in their plea decisions were having the chance of a shorter sentence, wanting to get it over and done with, and wanting to do the best for their families. The offenders surveyed indicated that finalising the case was an important consideration: they were not motivated to prolong the proceedings, and stressed the importance of avoiding a long court case.

One consideration that was not raised in the survey but which can also have a bearing on the timing of a defendant's plea decision is his or her custodial status. Defendants who are on bail, but are likely to be convicted and sentenced to an immediately servable jail term, may choose to defer a plea decision in order to postpone the moment of their eventual imprisonment.[64]

Systemic disincentives: Factors discouraging early guilty pleas

The Mental Health Legal Centre, the Law Institute of Victoria and the Federation of Community Legal Centres noted that a defendant's automatic liability to orders for confiscation and the registration of sex offenders on conviction for relevant offences already have a deterrent effect on entering a guilty plea and may also limit the impact of a stronger incentive to plead guilty.[65]

Several participants in this inquiry also pointed out that defendants may be discouraged from pleading guilty if they believe that they may become subject to onerous post-sentence orders, such as extended supervision orders.[66] An extended supervision order requires an offender to be subject to a period of supervision in the community once released from custody, for up to fifteen years.[67] An application for such an order may be made in relation to an offender who has been convicted of a relevant offence

64 It should be noted, though, that defendants who believe that they are likely to receive an immediately servable term of imprisonment might elect to plead guilty at the first opportunity, in order to reduce the amount of time remaining to be served at sentencing.

65 Submissions 17 (Law Institute of Victoria), 24 (Federation of Community Legal Centres) and 26 (Mental Health Legal Centre).

66 Submissions 11 (J. Knight) and 17 (Law Institute of Victoria). The purpose of extended supervision orders is 'to enhance the protection of the community by requiring offenders who have served custodial sentences for certain sexual offences and who are a serious danger to the community to be subject to ongoing supervision while in the community': *Serious Sex Offenders Monitoring Act 2005* (Vic) s 1(1).

67 *Serious Sex Offenders Monitoring Act 2005* (Vic) s 14.

(generally sexual offences against children) and is serving a custodial sentence.[68] A defendant who is facing such charges may feel that, regardless of any reduction in the sentence ultimately imposed, there is greater benefit in contesting the charges and preserving the possibility of an acquittal.

The Mental Health Legal Centre submitted that it has encountered another 'disincentive' that influences defendants with a mental impairment or illness who are charged with summary offences to plead guilty rather than raise the defence of mental impairment. (The defence of mental impairment recognises that if a person is suffering from an impairment that clouded his or her judgment or capacity at the time of the offence, he or she may not be legally culpable for the conduct).[69] The Centre observed that defendants with mental illnesses often choose not to raise a defence of mental impairment, preferring to be sentenced without regard being had by the sentencer to their mental health. They believe that if they raised that defence and were found not guilty due to mental impairment, they would be likely to receive a treatment order for a substantially longer term than they would serve if convicted and sentenced.[70]

2.4 Discussion: The use of incentives in the administration of justice

Participants in this inquiry registered divergent views on the appropriateness of using incentives to attempt to influence defendants' plea behaviour. Many participants accepted the sentencing incentive as a relatively slight extension of the current law and as a practical means of advancing the stage at which guilty pleas are entered. They noted that as the vast majority of matters are already resolved by a guilty plea, by pleading guilty these defendants are already indicating their willingness to waive their right to contest the matter. In these circumstances, the incentive could actually make a difference to whether the defendant pleaded guilty in only a relatively small proportion of cases.

However, others saw a sentence discount as 'a triumph of expediency over principle'.[71] Some submissions expressed concern at the possibility that a specified discount could induce rather than merely encourage a defendant to plead guilty, putting pressure on a defendant not to defend the case or actually causing an innocent person to plead guilty.[72]

The integrity of the plea decision: The risk of improper inducement

One risk in providing a clear discount for a guilty plea is that it could improperly induce a defendant to plead guilty and thereby undermine the voluntary nature of the decision and the fairness of the outcome.[73] Some commentators have suggested that the impact may be most significant on defendants in borderline cases, where providing a discount may not merely advance, but induce the actual plea decision.[74]

68 The Secretary to the Department of Justice may make an application to the County or Supreme Court in relation to an offender who has committed a relevant offence (as listed in Schedule to s 3(1)) and is serving a custodial sentence. A court may only make an extended supervision order if it is satisfied, to a high degree of probability, that the offender is likely to commit a sexual offence if released into the community after serving a prison sentence. See *Serious Sex Offenders Monitoring Act 2005* (Vic) ss 5 and 11(1).

69 See *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Part 4).

70 Submission 26 (Mental Health Legal Centre).

71 Submission 20 (Victorian Aboriginal Legal Service).

72 Submission 27 (Associate Professor Willis).

73 Ibid.

74 See *R v Harman* (1998) 35 A Crim R 447, 451 (Andrew CJ), quoted in Kathy Mack and Sharyn Roach Anleu, 'Sentence Discount for a Guilty Plea: Time for a New Look' (1997) 1 *Flinders Journal of Law Reform* 123, 135.

Professors Mack and Anleu suggested that the availability of a sentence discount 'puts an inappropriate burden on the accused's choice to plead guilty'.[75] Some of the offenders involved in this inquiry shared this concern. One offender thought that the prospect of a long delay before the trial, coupled with an incentive to plead guilty early, would lead defendants to 'plead guilty even if they didn't do it because it takes so much time for a trial'.[76]

The particular risks for vulnerable defendants

Some stakeholders were concerned that an explicit incentive to plead guilty could put more pressure on vulnerable defendants to plead guilty when they should not do so. The Victorian Aboriginal Legal Service, the Mental Health Legal Centre and West Heidelberg Community Legal Centre drew the Council's attention to the risks involved in encouraging vulnerable defendants to make early plea decisions.

They noted that vulnerable defendants might be inclined to respond too readily to incentives and take up options that are not wholly suited to their circumstances. Defendants who are already experiencing pressure because of a particular disadvantage may be too readily persuaded to abandon a reasonable defence if offered a substantial and certain incentive to plead guilty.

The Mental Health Legal Centre observed that defendants with mental illnesses feel under 'huge pressure to resolve the issue'.[77] The pressure faced by any defendant on criminal charges is compounded by the anxieties, doubts or delusions that characterise mental illness. The Centre reported that when defendants are unwell 'they are unable to understand the nature of the proceedings and can easily be persuaded to admit to charges'.[78]

The Victorian Aboriginal Legal Service made similar observations in relation to the pressures that Indigenous defendants face. It noted that while safeguards may be built into a sentence indication regime, these may not be strong enough to counteract the pressures that defendants have faced in the early stages of the investigation, and that a potential discount may constitute too great an incentive to waive their legal rights.[79]

Indigenous Australians were not the only group identified as being at risk of being induced to plead guilty. Another submission raised the possibility that an explicit incentive could induce defendants to plead guilty when they should not do so, and when the guilty plea might diminish their prospects of obtaining citizenship later:

> Under s 501 of the *Migration Act* (Cth), a permanent resident who has been sentenced to twelve months imprisonment is liable to have their visa cancelled, regardless of how long they have been in Australia or when they received the twelve-month sentence. Several permanent residents to whom this has happened have explained to me how they 'built up to' receiving a twelve-month sentence, often for minor drug offences, by pleading guilty over the years because it was easier and cheaper than contesting matters. Anyone resident in Australia who is not an Australian citizen can find themselves banished from family forever, as a result of 'cooperating with case management tools'.[80]

The Victorian Bar also acknowledged that a sentence discount could amount to an unfair inducement on defendants to plead guilty. However, its submission also noted the importance of the early engagement of trial counsel, as 'detailed advice from trial counsel' would decrease the risk of an inappropriate guilty plea.[81]

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75 Submission 9.

76 Offenders' Focus Group, Dhurringile (12 December 2006).

77 Submission 26.

78 Ibid. Incentives such as diversion and the PERIN court list, which provide a less rigid forum for resolving minor summary charges, can also induce defendants with mental illnesses to abandon a strong defence of mental impairment or commit the defendant to give undertakings that he or she may not be capable of meeting.

79 Submission 25 (Victorian Aboriginal Legal Service).

80 Submission 8 (R. Paterson).

81 Submission 13 (Victorian Bar).

The potential impact on sentencing: The risk of leniency

While some participants were concerned at the potential for an incentive to induce guilty pleas, others were concerned that the incentive might result in the imposition of unduly lenient sentences.

Some victims of crime, their counsellors and advocates expressed concern at the possibility that fast-track pre-trial processes or sentencing incentives could skew the operation of sentencing law. They were concerned that encouraging prosecutors to agree to prefer lesser charges or encouraging defendants to plead guilty to lesser sentences diminishes the importance of the judicial process and the seriousness of the conduct for which the offender is being sentenced.[82]

Conclusion: Are sentencing incentives appropriate?

The Council recognises that there are risks associated with the use of incentives in the criminal justice system, especially when defendants may be prevented from availing themselves of the benefit of the sentence discount for reasons beyond their control. However, criminal law and procedure already recognise the value to the justice system of an early guilty plea and a defendant's cooperation, and the Council sees no objection in principle to reforms that make the current operation of the law more explicit and transparent. Chapter 3 presents the Council's findings on the extent to which, within the constraints of the current sentencing framework, Victorian law could more clearly identify the sentencing benefits of an early guilty plea.

2.5 The potential impact of a sentencing incentive to plead guilty

We were asked to consider whether the introduction of a specified sentence discount would lead to earlier guilty pleas and/or an increase in the number of cases resolved by a guilty plea.

There is a complex relationship between a defendant's decision to plead guilty and arrangements put in place to assist case flow management, however, in theory, the optimum result of a change in the law or practice governing the weight given to guilty pleas would be a significant increase in the number of pleas entered at an early stage of the proceedings, but little or no change in the proportion of cases finalised by a plea of guilty. If the number of defendants pleading guilty at an early stage of the proceedings did not change substantially, it would suggest that the incentive was not having a clear impact on defendants' decision-making. A marked change in the proportion of defendants pleading guilty would suggest that the incentive was inducing rather than merely encouraging defendants to plead guilty.

Are defendants likely to plead guilty earlier?

Very little is known about the effect of laws or guidelines encouraging explicit recognition of the value of the guilty plea on the timing of defendants' plea decisions. There does not seem to be a clear correlation between the provision of a specified reduction in sentence for a guilty plea and timeliness: some of the Australian jurisdictions that have provided more explicit guidance on the reduction in sentence available for a guilty plea nevertheless continue to face challenges posed by delay.

Two recent reports suggest that, while a certain proportion of offenders will remain unresponsive to any incentives to plead guilty at an early stage of proceedings, many will advance their plea decision if provided with the opportunity and the encouragement to do so.

A Scottish study comparing the stage of proceedings at which guilty pleas were entered before and after major reforms to High Court procedure provides data on plea behaviour and its responsiveness to changes in the 'guilty plea' provisions.[83] The study found that the proportion of pleas entered at an

82 Submission 18 (CASA House).

83 Chalmers, Duff, Leverick and Melvin (2007), above n 8, 25.

early stage rose dramatically, while the proportion of matters concluded by a guilty plea nevertheless remained relatively stable. The major procedural changes were disclosure requirements, which ensured that the defence was provided with the case against the accused within a shorter time frame; a revised fee structure, which provided greater remuneration for an early plea; and a High Court judgment that encouraged Scottish courts to provide a reduction in sentence for an early guilty plea. [84]

The study found that the proportion of 'early pleaders' (defendants who pleaded as early as possible) did not alter, but that changes in criminal law and procedure allowed this cohort to plead at an earlier stage. Before and after the reforms, approximately 77 per cent of defendants pleaded at the earliest practicable stage, the 'section 76' accelerated plea process or the trial itself. After the reforms (which included the introduction of preliminary hearings), the proportion that pleaded guilty through the s 76 process or at a preliminary hearing remained much the same. It appeared that 77 per cent of those who pleaded guilty were 'pre-disposed' to do so at the earliest possible opportunity.

> What is clear, then, is that the proportion of 'early pleaders' has not changed, which suggests that there is a relatively stable proportion of accused who are pre-disposed to plead guilty at the earliest possible opportunity.[85]

A report by the New South Wales Judicial Commission has also revealed that offenders found guilty of armed robbery responded to the encouragement provided in a guideline judgment of the New South Wales Court of Criminal Appeal for more explicit recognition of the value of the guilty plea.[86] The Commission found that before and after the guideline judgment, the proportion of offenders pleading guilty remained relatively stable, but that stage at which defendants entered their guilty pleas altered.

Table 5: Guilty pleas before and after the *Thomson and Houlton* Guideline Judgment, Judicial Commission of New South Wales

	Pre- *Thomson and Houlton* %	Post- *Thomson and Houlton* %	Overall %
Guilty plea	94.3	86.9	95.2
Timing of the guilty plea			
Earliest (Committal)	64.3	82.0	74.3
Early (Arraignment)	19.3	10.4	14.2
Late	16.4	7.7	11.5

Source: Judicial Commission of New South Wales, Sentencing Robbery Offenders since the Henry Guideline Judgment (2007) Table 8, 75.

As Table 5 indicates, the proportion of defendants pleading guilty at the first opportunity (defined for this study as the committal hearing) increased by 18 per cent, while there was a 9 per cent reduction in the proportion of defendants pleading at the next stage (arraignment) and another 9 per cent reduction in the proportion pleading guilty at the trial. Approximately 8 per cent of offenders in the cohort examined by the Judicial Commission pleaded guilty at a late stage of proceedings (just before, at or during the trial) after the guideline judgment had been produced.

84 *Du Plooy v HMA* 2003 SLT 1237, 3 October 2003.

85 Chalmers, Duff, Leverick and Melvin (2007), above n 8, 25.

86 *R v Thomson; R v Houlton* (2000) 49 NSWLR 383. ('*Thomson and Houlton*') For details of this judgment, see Discussion Paper (2007), above n 44, 18 and Chapter 3 below.

There is a striking similarity between the proportion of offenders whose cases were covered by the NSW guideline but who nevertheless pleaded guilty at a late stage of the proceedings and those who, following changes in Scottish law and procedure, entered a guilty plea at a late stage of the proceedings. In 2002, a Scottish survey of offenders canvassed their likely reaction to a sentence discount and found that offenders had different expectations of its effect, depending on their circumstances. The report found that 'some people would always plead not guilty', regardless of any incentive to do otherwise'.[87]

In fact, after extensive reform to criminal procedure in the High Court, including measures to encourage earlier plea decisions, approximately 7 per cent of defendants were still pleading guilty at the latest possible opportunity. The Scottish evaluation concluded that some defendants were 'late pleaders', who would not be likely to change their plea behaviour in any circumstances. It found

> a relatively stable proportion of accused who will always wait until the last possible opportunity to plead, no matter what incentives are on offer for early guilty pleas.[88]

Similarly, the AIC has found that one of the main reasons for late guilty pleas is a 'difficult or apathetic' defendant. The AIC observed:

> Despite legal counsel's best efforts, some defendants simply refuse to communicate or negotiate on plea until the last minute. This was indicated as particularly prevalent among recidivist offenders with significant experience in the criminal justice system.[89]

The Council's findings

Based on the evidence available to this inquiry, it would seem that an incentive to plead guilty at an early stage of the proceedings could have an effect on the timing of guilty pleas, but that this effect would vary depending on the type of offence and the criminal history of the offender.

However, clearly there are constraints already limiting defendants' plea behaviour, and even where an incentive is applied, it may not be enough to persuade a defendant to change his or her plea behaviour. Regardless of the strength of the incentive, there will continue to be cases in which the defendant is not in a position to make an informed plea decision until relatively late in the proceedings, or in which there are factors that discourage the defendant from pleading guilty, despite the apparently poor prospects of acquittal. Finally, there will continue to be a small but stable proportion of defendants who will remain unresponsive to any form of incentive or deterrent and who will continue to resolve their plea of guilty at a very late stage of the proceedings.

The research conducted in New South Wales and Scotland suggests that it is possible to make reforms to law and procedure that will encourage defendants to advance the stage at which they enter a guilty plea without improperly inducing defendants to change their plea from not guilty to guilty. Neither jurisdiction has offered an explicit incentive to plead guilty. Both jurisdictions encourage the courts to state the reduction available and guide courts as to the factors and reduction range that would be appropriate in recognition of a guilty plea, but do not mandate a reduction in sentence. However, the reforms introduced also reflect the distinctive features of criminal procedure and sentencing that operate in those jurisdictions. The following chapter explores the framework in which the current Victorian provision operates, and assesses the options for reform.

87 Elaine Samuel and Ian Clark, *Improving Practice: A Summary of Responses to the Consultation on the 2002 Review of the Practices and Procedure of the High Court of Justiciary* (2003) 86.

88 Chalmers, Duff, Leverick and Melvin (2007), above n 8, 25.

89 Payne (2007), above n 2, ix.

Chapter 3 Specified Sentence Discounts

Chapter 3 Specified Sentence Discounts

> The tension between principle and pragmatism … is nowhere clearer than in the matter of the weight to be accorded to the fact that an offender has made a full confession and pleaded guilty.[90]

3.1 Introduction

The Council was asked to consider whether a specified reduction for a guilty plea should be incorporated in a sentence indication process. The Council saw that a specified sentence discount or some other means of clarifying the weight given to a guilty plea could operate independently of a sentence indication process. Further, the Council considered that introducing a specified sentence discount as part of a sentence indication process would inevitably affect the sentencing of offenders whose matters did not proceed through that process, with implications for sentencing law and policy generally. Therefore, the Council has canvassed the merits of introducing a stand-alone regime that specifies the reduction in sentence provided for a guilty plea.

The legal framework: Statutory and common law

The Victorian sentencing framework

In Victoria, sentencing is governed by a combination of statutory and common law. The *Sentencing Act 1991* (Vic) sets out the framework that governs the sentencing of adults: the principles and purposes of sentencing, the types of sentencing dispositions available, the sentencing scale, and additional matters that may be dealt with in the sentencing process.[91] Common or case law builds upon the legislative provisions. In Australia, the leading authority is the High Court, and Victorian courts apply the common law principles set out by the High Court unless and until they are altered or removed by statute.

The relevance of the guilty plea at sentencing

Under the *Sentencing Act 1991* (Vic), an offender who pleads guilty may receive a lesser sentence than would otherwise have been imposed. A guilty plea may be relevant at sentencing for a number of reasons. It may be taken as an indication of the defendant's remorse or contrition, or an understanding of the wrongfulness of the conduct and a willingness to accept responsibility for it. When a guilty plea is considered for these reasons, it is being considered as an indication of the extent of the defendant's culpability and potential for rehabilitation, rather than as a sentencing factor in its own right.[92]

The guilty plea also must be taken into account for its utilitarian value: the practical benefit that pleading guilty provides to the justice system. Section 5(2)(e) of the *Sentencing Act 1991* (Vic) requires the court to have regard to the fact that a defendant has pleaded guilty and the stage of proceedings at which the defendant indicated his or her willingness to plead guilty.[93] The timing of the plea is relevant because, in determining its utilitarian value, the earlier the guilty plea is entered, the greater its potential value to the justice system. The court does not have to reduce the sentence because of the guilty plea, but if it decides that a reduction in sentence is justified, it can decide on the amount of the reduction at its discretion.[94]

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90 Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) 321.

91 Part 5.3 of the *Children, Youth and Families Act 2005* (Vic) governs the sentencing of child offenders.

92 Fox and Freiberg (1999), above n 90, 321.

93 See *R v Duncan* [1998] 3 VR 208, 214–15 (Callaway JA); *R v Kittikhoun* [2004] VSCA 194, [12] (Chernov JA).

94 As noted by Charles JA in *R v Donnelly* [1998] 1 VR 645, 649, citing *Wangsaimas, Vanit and Tansakun v R* (1996) 87 A Crim R 149, 171.

It is settled law that the 'utilitarian' value of a guilty plea is important enough to the administration of justice to justify treating it as a mitigating factor.[95] The utilitarian value represents not only the practical value of the savings to the justice system, but also the intangible benefits that the participants derive from the early finalisation of the matter. The guilty plea itself also has some value because, by waiving his or her legal right to put the prosecution to the test, the offender is cooperating in the administration of justice.

Just as an offender receives credit for assisting the police with their investigations, criminal law recognises that an offender who cooperates with the court—who is 'willing to facilitate the course of justice'[96]—should also receive some credit at sentencing. Both these forms of cooperation are taken into account at sentencing, despite the fact that they do not relate to the offender's culpability for the crime or prospects of rehabilitation, for a pragmatic reason: criminal law encourages defendants to cooperate because this conduct benefits the justice system.

Whereas Victorian courts are under a statutory obligation to state the reduction in sentence allowed for past or future cooperation with law enforcement authorities, they are discouraged from quantifying the value of an offender's guilty plea. When passing sentence on an offender who has pleaded guilty, a Victorian court may state that the guilty plea has been taken into account and that the sentence has been reduced because of it. In fact, Victorian case law encourages Victorian courts to do so.[97]

> It is … a sentencing judge's duty to set out in detail the facts involved in the commission of the each offence and the reasoning, which has led him [or her] to impose the relevant punishment.[98]

However, the court is not required to state the weight or relevance of every fact or issue considered in arriving at the sentence,[99] and is discouraged, under the doctrine of intuitive or instinctive synthesis, from quantifying the effect of the guilty plea on the sentence.[100]

The doctrine of instinctive synthesis is a common law principle that describes the method by which the relevant factors are to be 'synthesised' to determine an appropriate sentence.[101] This High Court doctrine, which is binding on Victorian courts, establishes that the sentencer 'intuitively' or 'instinctively' arrives at an appropriate sentence. The High Court has stressed that sentencing must not be treated as an arithmetical equation: it is not possible or desirable for the sentencer to establish a starting point and then add and subtract the relevant aggravating and mitigating factors to arrive at the final sentence. The doctrine permits and indeed encourages the sentencer to state the factors that he or she has taken into account in determining the sentence, but discourages the sentencer from quantifying the weight that is given to any single factor.

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95 *Cameron v The Queen* (2002) 209 CLR 339; *Markarian v The Queen* (2005) 215 ALR 213.

96 *Cameron v The Queen* (2002) 209 CLR 339, 343. This phrase is the term that the High Court uses in *Cameron's* case and *Markarian's* case to describe a defendant's motivation for, and assistance given by, pleading guilty.

97 Pegasus Task Force (1992), above n 53, 24. Before 1991, when the *Sentencing Act* 1991 (Vic) was enacted, s 4 of the *Penalties and Sentences Act 1985* (Vic) required the court to state at sentencing if a lesser sentence was imposed because of the guilty plea. However, the court was not required to state the amount of any reduction given. When this provision was re-enacted in the *Sentencing Act 1991* (Vic), it was amended to remove the requirement that the court disclose the effect of the plea on the sentence.

98 *Miller* (1989) 44 A Crim R, 185, 187.

99 Fox and Freiberg (1999), above n 90, 175.

100 See *R v Marshall* [1981] VR 725; *R v Williscroft* [1975] VR 292.

101 *R v Williscroft* [1975] VR 29; *Wong v The Queen*: *Leung v The Queen* (2001) 76 ALJR 79; *Cameron v The Queen* (2002) 209 CLR 339; *Markarian v The Queen* (2005) 215 ALR 213.

Approaches adopted in other jurisdictions

Almost all Australian jurisdictions have also enacted legislation to provide statutory authority for this principle.[102] Most jurisdictions specifically require the court to have regard not merely to the fact, but also to the timing of the guilty plea. In fact, most Australian jurisdictions, as well as New Zealand, England, Scotland and Wales, have adopted a statutory framework for the consideration of guilty pleas similar to that set out in the Victorian *Sentencing Act 1991*. Further, even where there is no statutory requirement to this effect, Australian case law recognises that the prime factor determining the utilitarian value of a guilty plea is its timing.[103]

However, in some other Australian jurisdictions, notably South Australia, New South Wales and Western Australia, the respective Courts of Appeal have allowed sentencers to 'carve out' the value of the guilty plea and state its effect on the sentence imposed. The Discussion Paper outlined the approaches in these jurisdictions as well as the more prescriptive approach taken in England and Wales, where the Sentencing Guidelines Council has produced a guideline that sets out the method by which courts should determine the value of the plea at sentencing.[104]

3.2 The case for reform

During consultation on this reference, the Council received feedback from members of the legal profession, offenders and victims of crime that confirmed the Council's preliminary observations. Those with experience of criminal proceedings perceived inconsistencies in the sentencing of offenders who had pleaded guilty, suggesting that it was not possible to predict the value of an early guilty plea in any given case. There was, as expected, a certain level of scepticism as to the sentencing value to the defendant of indicating a willingness to plead guilty at an early stage of the proceedings.

The rationale for reducing a sentence for a guilty plea

The rationale for giving credit for the offender's guilty plea, even if he or she is not contrite or remorseful, is that victims of crime, the criminal justice system and the community benefit from the early identification of a defendant's intention to plead guilty to an offence. The practical benefits of the plea justify a reduction in the sentence.[105]

While the legal profession is familiar with the rationale and operation of this area of sentencing law, many participants in this inquiry were not previously aware of this aspect of sentencing policy and held differing views on its appropriateness. Some considered that a reduction in sentence could be seen as constituting a reward for criminal behaviour,[106] while others were concerned that it could serve as an unfair inducement to offenders to plead guilty when it was not in their best interests to do so.[107]

Some participants expressed the view that the reduction was in effect a reward for bad behaviour (the original criminal activity) and that there was no moral justification for reducing an offender's sentence on this basis. They saw a fundamental difference between crediting offenders for their assistance to the police (which contributes something over and above what is required of them) and providing credit for a guilty plea (which is no more than the minimum that a defendant should provide if he or she has committed the crime).[108]

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102 With the exceptions of Tasmania and the Northern Territory.

103 Mack and Anleu (1997), above n 74.

104 Discussion Paper (2007), above n 44, 17–38.

105 Submission 15 (Judges of the Criminal Trials Division of the Supreme Court of Victoria).

106 Meeting with South Eastern CASA (7 March 2007); Meeting with Victims of Homicide Support Group (Frankston) (15 March 2007); Focus Groups 1 (20 March 2007) and 5 (23 March 2007).

107 Submissions 20 (Victorian Aboriginal Legal Service), 21 (West Heidelberg CLC) and 26 (Mental Health Legal Centre).

108 Focus Group 3 (22 March 2007).

Several members of the public who took part in the inquiry were concerned about, as one submission termed it, 'proposing discounts for the crimes committed'.[109] This view was shared by one of the offenders spoken to in the course of our consultations, who objected in principle to a person getting a reduction in sentence for pleading guilty: 'If you're guilty and the evidence is there, why should you get a discount?'[110]

The Council accepts the rationale for the current provision and does not propose to question or confine the policy of permitting the court to give credit for the practical benefits of the guilty plea at sentencing.

The operation of the current law

Two concerns with the operation of the current law emerged during this inquiry: firstly, that the current approach was not sufficiently clear and transparent and secondly, that the current law might not be achieving its purpose—that is, to encourage defendants to plead guilty at an early stage of proceedings.

English and Australian research based on laws operating in other jurisdictions found that unclear laws governing the weight given to a guilty plea at sentencing resulted in inconsistent sentencing, and that inconsistent application of these laws at sentencing was contributing to a lack of confidence in the operation of this aspect of sentencing law.

The English research analysed sentences imposed in the Crown Court during the 1990s, when courts were required to take into account the fact and timing of the guilty plea and to state its effect on the sentence. The researchers found that judges were inconsistent in their approach: the value of the guilty plea varied between cases, and early guilty pleas did not necessarily receive a greater reduction in sentence than pleas entered at the door of the court. While it was relatively common for lower fines to be imposed because of the plea, it was less common for offenders receiving custodial or community-based orders to get a clear reduction in sentence.[111]

In Australia, a survey commissioned by the Australian Institute of Judicial Administration (AIJA) found high levels of uncertainty as to the actual effect of the guilty plea on the sentence imposed and scepticism about the value to the defendant of entering an early guilty plea.[112] The judicial officers and practitioners who took part in the survey generally accepted that courts calculated the sentence discount primarily because of its timing, but doubted whether the discount always made a significant difference to the sentence.[113] The authors of the AIJA survey, Professors Mack and Anleu, suggested that 'a clear statement of the amount is necessary; otherwise the accused would be left to wonder whether the benefit which was the inducement for the plea was actually conferred'.[114]

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109 Submission 4 (K. Davies).

110 Offenders' Focus Group, Dhurringile (12 December 2006).

111 Ralph Henham, 'Bargain Justice or Justice Denied?' (1999) 62 *Modern Law Review* 515, 519–21. A sample of 310 cases was examined where the accused pleaded guilty from the Crown Court in 1994. See also Ralph Henham, *Sentence Discounts and the Criminal Process* (2001); Ralph Henham, 'Sentencing Policy and Guilty Plea Discounts', in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society* (2002) 371; David Moxon, *Sentencing Practice in the Crown Court*, Home Office Research Study 103 (1988) 32–3.

112 Mack and Anleu (1995), above n 6; Standing Committee of Attorneys-General, *Working Group on Criminal Procedure* (1999); Australian Institute of Judicial Administration, *Case Management Seminar, Sydney, 25 February 2005: Report* (2005).

113 See Mack and Anleu (1995), above n 6. Some respondents believed that because the court had complete discretion to determine the total sentence and the amount of any sentence discount, it was possible for the court to start with a more severe sentence so that when the discount was applied, the final sentence was not unduly lenient.

114 Mack and Anleu (1997), above n 74, 124.

Two Australian jurisdictions recognised that scepticism about the value of pleading early was having an effect on plea behaviour and instituted reforms to encourage more explicit treatment of the plea at sentencing. The New South Wales Attorney-General sought a guideline judgment on this matter because, despite statutory authority to award a discount for a guilty plea,[115] there was 'significant doubt amongst practitioners that a substantial discount was in fact given by all sentencing judges and … particular scepticism as to whether an early plea was being appropriately recognised'.[116] The South Australian Court of Criminal Appeal referred to and confirmed the observations of its New South Wales counterpart, noting in *R v Place* that 'experience in this State and in New South Wales has demonstrated that public policy objectives are not achieved unless the specific reduction is identified'.[117] In that case it encouraged South Australian courts to state the value of the offender's guilty plea when passing sentence.

During this inquiry, the Council received a number of comments from victims, offenders and members of the public who thought that greater clarity of process would benefit not only those directly involved in the process but also the community in general.[118] Many participants indicated that they found it difficult to understand how sentencing decisions were made.[119] This confusion sometimes caused them to doubt whether the courts had given sufficient attention to all the factors relevant at sentence and to question the appropriateness of particular sentencing decisions. For example, some offenders interviewed at Dhurringile prison observed that judges 'say they take it into consideration but that's just words'.[120] Approximately two-thirds of the offenders consulted during this inquiry who had pleaded guilty in their most recent case thought that their sentence had not been reduced because of the guilty plea; with approximately the same number also indicating that they did not get the sentence that they expected.[121]

Alternatives to the current approach

In Victoria, the statutory provision sets the sentencing framework in which the reduction is determined, and is amplified and applied by case law. There are two ways in which the current law could be modified: by a guideline judgment[122] or by an amendment to the *Sentencing Act 1991* (Vic).[123]

The Discussion Paper provided details of the ways these mechanisms have been used elsewhere. In England and Wales, an executive agency, the Sentencing Guidelines Council, issued a guideline specifying how the reduction is to be determined. In New South Wales, the Court of Criminal Appeal produced a guideline on the discount available for a guilty plea in response to a request from the

115 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22.

116 *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, 390.

117 *R v Place* (2002) 81 SASR 395, 425.

118 For example, the following comment in the Offenders' Focus Group, Dhurringile (12 December 2006); 'The judge said he had taken into account the guilty plea, but you don't really know'.

119 For example, a participant in Focus Group 4 (23 March 2007) commented: 'What you see and hear on television isn't relevant because you haven't been in court'.

120 Offenders' Focus Group, Dhurringile (12 December 2006).

121 Sentencing Advisory Council, Survey of Offenders (Unpublished), 2007.

122 *Sentencing Act 1991* (Vic) s 6AB; see also *R v Thomson; R v Houlton* (2000) 49 NSWLR 383. For a brief outline of the development of judicial reasoning on this subject see *Sentencing—Recent Cases and Changes: 2004–2005*, NSW Public Defenders' Office <www.lawlink.nsw.gov.au/lawlink/pdo> at 17 January 2006. See also Sentencing Guidelines Council, *Definitive Guideline: Reduction in Sentence for a Guilty Plea* (2007).

123 See *Crimes (Sentencing) Act 2005* (ACT).

NSW Attorney-General.[124] The guideline is 'not binding in any formal sense'; it 'operates by way of encouragement and not by way of prescription'.[125]

While no other Australian courts have produced a formal guideline judgment on this matter, the Courts of Appeal in South Australia and Western Australia also provided similar guidance in leading cases.[126] In New Zealand, the High Court dealt with this matter administratively, through a Practice Note.[127] In contrast to those jurisdictions that have used judicial or executive guidelines to supplement a bare statutory provision, the Australian Capital Territory (ACT) provides explicit statutory guidance on the means by which the weight of a guilty plea should be determined.[128]

There is no model provision that specifies the reduction in sentence to be provided for a guilty plea. Even within Australia, individual states and courts have taken diverging paths in defining the weight to be given to a guilty plea. There are several options for reform, and in giving effect to the preferred option, various mechanisms that could be used to change the current law.

The current law could be made more specific in two ways: by changing the law to give more specific guidance as to the basis on which the value, if any, of the guilty plea is determined, and/or by allowing or requiring the courts to be more explicit in accounting for the value given to the guilty plea when passing sentence. In the Discussion Paper and this report, we have considered the two potential areas of reform—articulating at sentencing the value given to the guilty plea and prescribing the basis on which the value of the plea should be determined—as two separate options that could be pursued together or individually.

Articulating the value of the guilty plea

The law defining what the court may state about the value of the guilty plea at sentencing, and the obligations on the court to give reasons for this aspect of the sentencing decision, vary between states. Queensland is the only jurisdiction in which the court must state that the guilty plea has been considered, although in the other jurisdictions the courts are nevertheless under a statutory obligation to have regard to it. Whereas in some jurisdictions, including Victoria, the court is under no obligation to articulate any aspect of the decision relating to the weight of the guilty plea, in other jurisdictions courts are required to indicate whether the sentence has or has not been reduced and to give reasons for that aspect of the decision.

Prescribing how the weight of the plea should be determined

As Table 6 shows, in all but one jurisdiction, Tasmania, the court is under a statutory obligation, when passing sentence, to consider the fact that the offender has pleaded guilty. In most jurisdictions, the court is also under a statutory obligation to consider the timing of the plea. In jurisdictions where there

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124 *R v Thomson; R v Houlton* (2000) 49 NSWLR 383. See also *Sentencing—Recent Cases and Changes: 2004–2005*, NSW Public Defenders' Office <www.lawlink.nsw.gov.au/lawlink/pdo> at 17 January 2006.

125 *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, 402. The Court recognised that the objective of encouraging guilty pleas, especially early guilty pleas, was not being attained, and that a greater degree of transparency in the sentencing processes was required to meet this objective.

126 See for example *Heferen v R* (1999) 106 A Crim R 89 and *Vershuren v R* (1996) 17 WAR 467, in relation to Western Australia; *R v Place* (2002) 81 SASR 395 for the position adopted by the South Australian Court of Criminal Appeal.

127 Chief Justice of the High Court of New Zealand, *Criminal Jury Trials Case Flow Management: Practice Note* (1995). See also the Court of Appeal's guideline in *R v Wong-Tung* (1996) 2 HRNZ 272, applied in *R v Tryselaar* (2003) CRNZ 57.

128 Otherwise, the 'default' statutory provision, comparable to the current s 5(2) of the *Sentencing Act 1991* (Vic), applies. The court must have regard to the fact and timing of the guilty plea and to state if a lesser sentence is imposed, giving reasons for this decision.

is no statutory obligation to consider the timing of the plea, common law has filled the gap. In South Australia, Tasmania, and Queensland, there is strong authority in case law for courts to consider the utilitarian value of the plea when determining its effect on the sentence.[129]

The one exception is the Australian Capital Territory, which has in effect codified the factors that can be taken into account in determining whether and by how much to reduce a sentence for the guilty plea. This provision, however, applies only to cases in which a term of imprisonment is imposed. In all other cases, the law before the commencement of this provision continues to apply.[130]

In most states, the statutory framework has been supplemented by judicial guidance on the factors relevant to determining the value of a plea in any given cases, and/or the amount, in percentage terms, by which a sentence can be reduced.

Table 6: Statutory provisions: Factors relevant to determining the weight of the guilty plea

Relevant factor	VIC	NSW	SA	WA	QLD	ACT	Cth	TAS	NZ	UK
Fact that guilty plea entered	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-	Yes	Yes
Timing of guilty plea	Yes	Yes	-	Yes	-	Yes	-	-	Yes	Yes
Discount range or scale		10–25%		25–35%				25–35%	20–35%	1/10–1/3

Australian courts are also bound (unless released by statutory law) to apply the High Court's rulings in relation to the factors that should be taken into account in determining the weight to be given to the guilty plea. While this is still a complex and controversial area of law, it is clear that the High Court regards the prime consideration as being the defendant's willingness to facilitate the course of justice, although remorse and the utilitarian value of the plea will also have a bearing.

Models considered

The Discussion Paper reviewed the approaches adopted in these jurisdictions and identified three models, on which it sought public comment.[131] In essence, the discretionary model is the current Victorian approach: the guilty plea is just one of several factors that must be considered, and its relevance is not isolated or its weight disclosed. At the other end of the spectrum is a highly prescriptive approach: a scale that gives all offenders who plead guilty a sentence discount, and specifies the amount by which a sentence is to be reduced. An intermediate option, the hybrid model, is a form of 'guided discretion' that permits courts to decide that no reduction should be given, but guides their decision about the amount of reduction allowed.

129 See for example *R v Place* (2002) 81 SASR 395 for the position adopted by the South Australian Court of Criminal Appeal.

130 *Crimes (Sentencing) Act 2005* (ACT) s 35.

131 For further details see Discussion Paper (2007), above n 44, 17–25.

Table 7: Models for reform considered in relation to a sentence discount for a guilty plea

Models	Description
A discretionary approach	This model preserves the court's discretion to determine whether to reduce the sentence for a guilty plea and if so, the amount of the reduction. However, it adds specificity to the sentencing remarks, by requiring the court to disclose what reduction, if any, was provided because of the offender's guilty plea.
A hybrid model	This model attempts to strike a compromise between the two extremes. It is loosely based on the approach adopted in judicial guidelines produced by the courts of criminal appeal in New South Wales and South Australia. It provides guided discretion as to the amount by which a sentence may be reduced for a guilty plea and/or the basis on which the reduction should be calculated. It provides some level of certainty and consistency by imposing a cap on the amount by which a sentence could be reduced for a guilty plea and/or by setting a range within which the reduction must fall. It provides judicial discretion by permitting the court with an 'override' power, that is, the discretion to decide not to give a reduction in sentence for the offender's guilty plea.
An across-the-board, specified sentence discount	The most specific model, based on the English approach, makes all offenders who plead guilty eligible for a reduction in sentence. The amount of the reduction is calculated according to a sliding scale, with the maximum reduction given for a plea entered at the earliest opportunity.

The Council called for comment on the merits and risks of each of these models for reform, as well as on the potential to allow or require the courts to be more explicit in stating the value given to the guilty plea at sentencing. In order to assess the merits of these possible reforms it is necessary to understand their implications for sentencing law: what considerations are currently considered when the courts have regard to the practical value of the plea. On this basis, it will then be possible to appreciate the implications of imposing specific requirements on the determination or description of the sentencing decision.

3.3 Relevant principles of criminal law

Two fundamental principles of criminal law and sentencing that establish the framework for the current law are the presumption of innocence and the doctrine of instinctive synthesis.

The presumption of innocence

Criminal law is based on the principle that the defendant enjoys the presumption of innocence and the right to put the prosecution case to the test. In every criminal case, regardless of how overwhelming the prosecution case is, the court must recognise 'the rule that the accused is entitled to plead not guilty, put the prosecution to its proof and cannot be punished more severely for having exercised these rights'.[132]

In practice, the majority of defendants plead guilty to the charges against them.[133] Nevertheless, determining how far sentencing law should go in acknowledging the value of a guilty plea and thereby encouraging early guilty pleas, involves determining the point at which the encouragement (which is permissible) becomes an improper inducement or coercion (which would undermine the operation of the presumption of innocence). Justice McHugh, for example, has expressed concern that it may not be possible to provide a basis at law for encouraging guilty pleas that is not 'relevantly discriminatory' against defendants who elect to preserve their right to put the prosecution case to the test.[134]

132 *Cameron v The Queen* (2002) 209 CLR 339, 361 (Kirby J).

133 Discussion Paper (2007), above n 44, 5–7.

134 *Cameron v The Queen* (2002) 209 CLR 339, 352–3 (McHugh J).

The current approach is intended to strike a balance between affirming the defendant's entitlement to rely on the presumption of innocence and encouraging early guilty pleas. To this end, the High Court has maintained that recognising the value of a guilty plea should not be taken to derogate from the defendant's right to contest the matter. In *Cameron's* case, it remarked that '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 have otherwise have been imposed'.[135]

The doctrine of instinctive synthesis

The doctrine of instinctive synthesis describes the method by which the various factors relevant at sentencing are to be synthesised to determine an appropriate sentence.[136] The High Court has ruled that sentencing must be an 'instinctive synthesis' of the many factors that are relevant in determining an appropriate sentence for a particular offender. While the various factors that are taken into account can be described, they cannot be quantified.

The doctrine of instinctive synthesis expresses the High Court's objection to a two-step 'arithmetical' process of sentencing that involves taking the objective seriousness of the offence as the starting point, and then adding and subtracting to adjust for the various aggravating and mitigating factors. The Court's objection to a two-step approach is that it reduces sentencing to an arithmetical equation: the High Court has consistently held that sentencing is more than merely the sum of the value given to each of the various factors that are taken into account.

3.4 Identifying the guilty plea at sentencing: The implications

When considering options for making the sentencing value of the guilty plea more explicit, it is vital to understand the basis on which the current law operates and to appreciate whether any proposed reform would alter the sentencing framework. Specifically, it is necessary to consider whether it would be consistent with the doctrine to specify at sentencing the value of one factor in the sentencing 'mix'. A second and related issue is whether it would be possible to 'quarantine' the factors relevant to determining the weight to be given to the guilty plea.

Articulating the weight given to the guilty plea

It would not be consistent with the doctrine of 'instinctive synthesis' to arrive at the sentence in two steps: to establish a sentence or sentence range as a starting point and then *add and subtract* the value of the various aggravating or mitigating factors. It appears that in some circumstances, however, it is possible to establish a starting point and then merely subtract the value of one discrete aspect of the sentence. This approach has been taken in relation to cooperation with law enforcement agencies, and in some states, has also been used to enable courts to identify the value of an offender's guilty plea.

The High Court's approach

Since the instinctive synthesis was first enunciated, there has been continuing debate in case law and academic circles as to its scope and limits. The majority of the High Court, variously constituted, has been reluctant to permit the reduction given for a guilty plea to be specified at sentencing.[137] However, this has not been a 'blanket prohibition' on the disclosure of the weight of all sentencing considerations. The Court has left the door open for some exceptions to this approach.

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135 '… on the pragmatic and objective ground that the plea has saved the community the expense of a trial': *Cameron v The Queen* (2002) 209 CLR 339, 343.

136 *Cameron v The Queen* (2002) 209 CLR 339; *Markarian v The Queen* (2005) 215 ALR 213; *R v Williscroft* [1975] VR 292.

137 *Cameron v The Queen* (2002) 209 CLR 339; *Markarian v The Queen* (2005) 215 ALR 213.

For example, the Court has acknowledged that there already is an exception to the doctrine in the treatment of an offender's assistance to law enforcement authorities. The 'value' of an offender's assistance to police with their investigations can be disclosed at sentencing. It would appear that while the Court would be opposed to a general relaxation of the doctrine, it can accept the isolation of particular, discrete sentencing factors. In *Markarian's* case, the majority of the court appeared to soften their approach towards specifying the weight given to the guilty plea, as they took the view that

> the law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends.[138]

There is also a line of dissenting opinion in successive High Court cases that advocates a pragmatic approach to this aspect of sentencing. Justices Kirby and McHugh have favoured disclosure at sentencing of the effect of the guilty plea on the sentence imposed, because this enhances the transparency and accountability of the sentencing process and encourages greater consistency of approach. Justice Kirby is of the view that the instinctive synthesis should not be adhered to at the expense of transparency and clarity in the sentencing process.[139] Similarly, Justice McHugh, while defending the 'instinctive synthesis' approach to sentencing, has held that such an approach is not

> inconsistent with awarding a discount for some factor, provided that that discount relates to a purpose distinct from the sentencing purpose ... [s]o the quantification of a discount commonly applied for an early plea of guilty or assistance to the authorities is offered as an incentive for specific outcomes in the administration of criminal justice and is not related to sentencing purposes.[140]

The Scottish reform

In Scotland, a High Court rule that encouraged Scottish courts to provide a reduction in sentence for a guilty plea was accompanied by legislative reform that permitted the courts to identify the effect of the plea on the sentence.[141] The High Court recognised the desirability of providing greater guidance to the court on the weight that could be given to a guilty plea. It observed:

> [I]t would be desirable for the court to take the opportunity to give guidance … as to the basis of, and scope for, an allowance in the sentencing of an accused in respect of the fact that he has pled guilty, and in respect of the fact that he has pled guilty, and the form which such an allowance might take.[142]

The Court held that 'a guilty plea should result in a discount normally no greater than one-third of the sentence which would otherwise have been imposed', and that the extent of the discount should be stated by the judge in open court. The Court recognised that the extent of the discount would depend on a number of factors, although primarily the timing of the plea.[143]

The subsequent legislative reform inserted a requirement into the *Criminal Procedure (Scotland) Act 1995,* that Scottish courts must have regard to the stage at which an offender pleaded guilty, and the circumstances. The legislation now provides that:

> In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court *shall* take into account—
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
>
> (b) the circumstances in which the indication [of a guilty plea] was given.[144]

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138 *Markarian v The Queen* (2005) 215 ALR 213, [39]. Their Honours went on to say that they did not believe that the case currently being considered was an appropriate vehicle for such an indulgence.

139 *Cameron v The Queen* (2002) 209 CLR 339, 361–63 (Kirby J).

140 *Markarian v The Queen* (2005) 215 ALR 213, [74] (McHugh J).

141 The High Court's decision in *Du Plooy v HMA* 2003 SLT 1237 was handed down in October 2003. Section 196(1) of the *Criminal Procedure (Scotland) Act 1995* was amended by the *Criminal Procedure (Amendment) (Scotland) Act 2004* and came into effect in October 2004. For background on these developments see Chalmers, Duff, Leverick and Melvin (2007), above n 8, 1–8.

142 *Du Plooy v HMA* 2003 SLT 1237 [1], (Lord Justice-General Cullen).

143 Chalmers, Duff, Leverick and Melvin (2007), above n 8, 13.

144 *Criminal Procedure) (Scotland) Act 1995*, s 196 as amended by the *Criminal Procedure (Amendment) (Scotland) Act 2004*, s 20.

Further, it now requires the court to state the effect, if any, of the guilty plea on the sentence imposed. A new provision requires the court, in passing sentence on an offender who has pleaded guilty, to:

(a) state whether, having taken account of the matters mentioned in paragraphs (a) and (b) of that subsection, the sentence imposed in respect of the offence is different from that which the court would otherwise have imposed; and

(b) if it is not, state reasons why it is not.[145]

The effect of this amendment is to require the judge to state whether a sentence discount has been given.[146]

Precedent in other Australian jurisdictions

Some Australian courts of criminal appeal have already tested the flexibility of the doctrine, by permitting the courts within their jurisdiction to allow the weight given to the guilty plea to be disclosed at sentencing. The courts of criminal appeal in New South Wales and South Australia have held that it is possible to carve out the sentencing value of the guilty plea without engaging in a two-step sentencing process that would be at odds with the doctrine of instinctive synthesis. Like the High Court, they have eschewed a process that adds or subtracts the value of aggravating and mitigating factors from a starting point. However, they have held that it is possible, within the doctrine, simply to subtract the notional value of the guilty plea from the sentence that would otherwise have been imposed. This avoids the additions and subtractions that so concern the High Court, and still permits courts to state the effect of the guilty plea on the sentence.

Relevant Victorian law

For some time, Victorian courts have been leading exponents of the instinctive synthesis as the preferred sentencing methodology. The Victorian cases of Wiliscroft[147] and Young[148] formed the foundation upon which courts have criticised any attempt to separate out any one of the interrelated factors relevant to sentencing. It is relevant to note that, in the recent case of Williams,[149] the court specifically stated that it had fixed a minimum term (a non-parole period) for a sentence of life imprisonment as a direct result of the offender entering a plea of guilty. This would suggest that Victorian courts are prepared to identify the impact of the guilty plea on the sentence, where this is not a quantifiable amount; that is, where it results in a lesser type of sentence being imposed.

Conclusion

It would appear, therefore, that there is scope within the doctrine as it is currently construed for the value of the guilty plea to be identified at sentencing. The High Court has left this possibility open, other Australian jurisdictions have already taken this approach, and there is precedent for this in the way that an offender's assistance to the authorities is already being treated at sentencing.

Factors relevant to determining the weight of the guilty plea

The effect of the doctrine of instinctive synthesis has been to permit the individual considerations that are relevant in determining the weight of an offender's guilty plea to remain loosely defined, because they are not separately isolated and quantified at sentencing. However, if the defendant's guilty plea were to be isolated and its sentencing value identified, it would be necessary to establish what considerations were and were not relevant specifically to determining the weight of a guilty plea.

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145 *Criminal Procedure (Scotland) Act 1995*, s 196 (1A) as inserted by the *Criminal Procedure (Amendment) (Scotland) Act 2004*, s 20.

146 *Criminal Procedure (Amendment) (Scotland) Act 2004*, Explanatory Notes, <www.opsi.gov.uk/legislation/Scotland/en2004/2004en05.htm> at 30 July 2007.

147 [1975] VR 292.

148 [1990] VR 951.

149 *R v Williams* [2007] VSC 131 (Unreported, King J, 7 May 2007).

Several leading High Court cases have developed the law in this area, and the scope and meaning of these terms seem to still be evolving. Broadly speaking, the plea can be relevant at sentencing because:

- it indicates the offender's 'willingness to facilitate the course of justice';
- it has 'utilitarian' value, which represents the usefulness of the plea; that is, the practical benefits that flow from concluding the case and avoiding the need for a trial; and
- it is indicative of remorse, contrition or willingness to accept responsibility for his or her conduct and its consequences.

Willingness to facilitate the course of justice

The High Court has searched for a principled basis for recognising the value of the guilty plea without derogating from the presumption of innocence.[150]

In *Cameron v R,* the High Court introduced the notion of a defendant's 'willingness to facilitate the course of justice' as a rationale that justifies allowing courts to recognise and encourage guilty pleas by crediting an offender who pleads guilty with a reduction in sentence. The High Court has stressed that expediency alone, the mere fact that it 'has saved the community the expense of a contested hearing', is not enough to justify a reduction in sentence.[151] However, the Court also has recognised that there is a fine line between recognising the value of a guilty plea and diminishing the defendant's right to plead not guilty and to put the prosecution case to the test.

It is difficult to define 'willingness to facilitate the course of justice' and the use of this phrase has generated considerable debate.[152] It seems to describe the extent to which the defendant is prepared to relinquish legal rights or some benefit by pleading guilty. Understood in this way, a defendant's willingness to facilitate the course of justice is a consideration that can only apply when the defendant pleads guilty, and can be adjusted to take into account the strength of the right or likely benefit that the defendant has forsaken.[153] It allows the amount of sentencing benefit that a defendant receives to vary, depending on the actual circumstances of the case. For a defendant who faces an overwhelming prosecution case, for example, the presumption of innocence rings hollow because there is no real prospect of acquittal. In these circumstances, the sentencer can infer that the defendant's willingness to facilitate the course of justice was low, because he or she had no other option. However, in a case where the prosecution case was circumstantial but the defendant nevertheless entered an early guilty plea, he or she may be given substantial credit for the plea because, in entering a guilty plea, the defendant actually gave up a viable defence.

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150 The High Court has addressed this issue in a series of cases heard on appeal from New South Wales and Western Australian courts.

151 *Cameron v The Queen* (2002) 209 CLR 339, 343.

152 See Mirko Bagaric and Julie Brebner, 'The Guilty Plea Discount—Why and How Much: An Analysis of *Cameron*' (2002) 2(3) *Bourke's Criminal Law News Victoria* 17, 19. Bagaric and Brebner describe the concept of 'willingness to facilitate the course of justice' as 'so open-ended and nebulous as to be incapable of serving as a justificatory ideal' and the corollary is that the offender who pleads not guilty has 'thwarted' the course of justice. See also David Field, 'Plead Guilty Early and Convincingly to Avoid Disappointment' (2002) 14 *Bond Law Review* 251, 258 regarding the question of whether the plea of guilty is not purely utilitarian but also demonstrates the defendant's willingness to facilitate the course of justice: courts may have to make some judgment as to whether the plea in any given case actually facilitated the course of justice.

153 The SCAG Working Group on Criminal Procedure supported this approach, recommending that a defendant who 'fully co-operates and is found guilty should be entitled to a sentence discount, but that failure to co-operate "in a meaningful way" results in a loss of any sentencing discount that would otherwise be available'; SCAG (1999), above n 112, 36–7.

There has been some debate in legal circles as to the extent to which the strength of the prosecution case should be taken into account in determining the weight of the guilty plea. From a practical standpoint, the value of the plea is that it averts the need for a trial; but from the High Court's principled standpoint, the value of the plea is related to the strength of the prosecution case and the prospects of the accused's defence. The High Court's emphasis on the defendant's willingness to relinquish his or her legal rights may significantly alter the weight that a guilty plea is given at sentencing.

The concept of willingness to facilitate the course of justice overlaps with, but does not entirely subsume, two other considerations relevant to determining the value of a guilty plea: the utilitarian value of the plea and remorse.

The utilitarian value of the plea

The utilitarian value of a guilty plea is the practical value that a guilty plea provides to the justice system. This concept can be construed either narrowly or broadly. If it is defined narrowly, every guilty plea has essentially the same value: the value to the justice system of having one less trial.[154] On the narrow interpretation, the value of the guilty plea is largely proportionate to its timing. An early plea merits a greater reduction in sentence than a late one, because the early plea provides greater benefits to the justice system.

If defined more broadly, however, the utilitarian value denotes not merely the notional value of the guilty plea to the justice system as a whole, but also its usefulness to the particular proceedings in which it is entered. This understanding of the term allows other matters to be taken into account, such as the stress that the victim and witnesses are spared, as well as factors beyond the defendant's control, such as the complexity of the evidence and the likely duration of the trial. It could result in a plea of guilty in a complex trial where the defendant faces multiple serious charges having a greater utilitarian value than a plea in case involving comparatively simple evidence or fewer witnesses.

Remorse and contrition

Although remorse is not explicitly identified as a sentencing factor in the *Sentencing Act 1991* (Vic), the offender's remorse is an established sentencing factor at common law. When considering the extent to which the offender is remorseful, the fact that he or she has pleaded guilty is relevant. However, a 'bare' guilty plea would generally not be enough to indicate remorse. Other considerations that are also relevant are the offender's conduct after the commission of the offence and his or her conduct during the criminal proceedings. In fact, section 5(2C) of the *Sentencing Act* provides that the court may take the defendant's conduct during the course of the proceedings into account in determining the extent of his or her remorse.

Overlapping and discrete considerations

Under the umbrella of instinctive synthesis, the way that these considerations are defined is not significant: they can all be taken into account, regardless of how they are characterised, because their individual weight in the final sentence is not quantified. However, if the guilty plea, or one aspect of the guilty plea, is separately identified and valued at sentencing, it becomes important to define what considerations this 'factor' will include and exclude.

The considerations relevant to determining the defendant's 'willingness to facilitate the course of justice' partly overlap with those relevant to determining his or her remorse and the utilitarian value of the plea. However, there is no overlap between the notions of remorse and the utilitarian value of the plea: these two notions are conceptually quite distinct.

154 This does not mean that the utilitarian value is the only benefit that a guilty plea provides. Defining the utilitarian value narrowly still permits the court to recognise other benefits, or to credit the offender for other aspects of the guilty plea.

If the defendant's guilty plea were to be isolated as a separate sentencing factor, it would be necessary to define what considerations were and were not relevant specifically in determining the weight of a guilty plea. All of the three notions discussed above are relevant when an offender who has pleaded guilty is sentenced; remorse can also be relevant in determining the sentence of an offender who has not pleaded guilty, but been found guilty.[155] Consequently, it would not be possible to draw a clear boundary between the considerations that are relevant, and exclusively so, in determining the weight of a guilty plea, because remorse can be taken into account in the sentencing of all offenders.

Should the strength of the prosecution case be taken into account?

The High Court's formulation of the notion of a 'willingness to facilitate the course of justice' requires the strength of the prosecution case to be taken into account, because the extent to which a defendant will relinquish certain rights and interests will depend on his or her prospects, and this in turn depends on the strength of the prosecution case.

However, some have taken the view that this matter should be excluded from consideration when the sentencing value of the guilty plea is determined. The Australian Law Reform Commission's proposal is based on the notion that the defendant's subjective willingness to facilitate the course of justice should not be relevant when determining the value of the guilty plea. The Commission therefore does not consider the strength of the prosecution case to be a relevant consideration either.

In *R v Thomson and Houlton*, the NSW Court of Criminal Appeal took the view that factors such as the strength of the Crown case should not be considered.[156] While the Court's guideline has been extensively considered and applied in New South Wales, NSW courts nevertheless seem to have been reluctant to exclude the strength of the prosecution case when considering the weight to be given to an offender's guilty plea. In a review of the effect of the Court's guideline judgment on the sentencing of offenders guilty of robbery,[157] the New South Wales Judicial Commission found that while the courts were clearly providing a sentencing benefit for an early guilty plea in cases determined after the guideline judgment was produced, they were not as consistent in excluding the prosecution case from their consideration. Although the Court of Criminal Appeal had held that the strength of the Crown case had no bearing on the plea, it was mentioned as a factor in 39.4 per cent of cases reviewed by the Judicial Commission. The proportion of cases in which the Crown case was cited as a factor barely changed after the guideline was produced.[158]

How should a guilty plea's utilitarian value be determined?

A narrow definition of utilitarian value would provide a simple and uniform method for calculating its weight at sentencing. Regimes that use a sliding scale to determine the value of a guilty plea are able to do so uniformly because in every case, the value of the plea is determined on the basis of one single factor: the stage of the proceedings at which it is entered. When the utilitarian value of the plea is defined on the basis of a single measurable factor in this way, its sentencing value can be readily quantified.

A broader interpretation, which allows adjustments for the particular circumstances of the case, will provide a more 'rounded' assessment of the utility of the plea but less clarity and predictability. The New South Wales Court of Appeal's conception of utilitarian value is an example of a broad interpretation.

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155 *Cameron v The Queen* (2002) 209 CLR 339 (Kirby J).

156 *R v Thomson and Houlton* (2000) 49 NSWLR 383, 418. See further *R v Sutton* [2004] NSWCCA 225, [12]-[14].

157 Judicial Commission of New South Wales, *Sentencing Robbery Offenders since the Henry Guideline Judgment* (Monograph 30) (2007) 75–6.

158 Before the Guideline (*R v Thomson; R v Houlton* (2000) 49 NSWLR 383), the Crown case was mentioned in 40 per cent of cases, whereas after the Guideline, it was mentioned as relevant in 38.9 per cent of cases: Ibid 76

It allows matters such as the length and complexity of the trial and the potential trauma that the plea has saved the victim or witnesses to be considered in determining the value of the plea, although these considerations may not be decisive.[159]

The Australian Law Reform Commission (ALRC) seems to have adopted an approach that could be described as a broad interpretation of the notion of utilitarian value in its report on federal sentencing law. It recommended that, when determining the value of the guilty plea and the discount that it should receive, the court should consider whether, objectively, the guilty plea facilitated the administration of justice, and whether the defendant pleaded guilty at the first reasonable opportunity. Matters relevant in determining whether the plea objectively facilitated the administration of justice would be the extent of the savings to 'judicial and court resources, prosecutorial operations, the provision of legal aid to accused persons, witness fees and the fees paid to jurors'.[160]

Should remorse be excluded?

If it were thought necessary to determine the weight of the guilty plea by referring to those considerations relevant only to offenders who plead guilty, one approach might be to exclude remorse, as this is relevant to the sentencing of all offenders. This has been the subject of some legal debate and there are two schools of thought on whether remorse could, and should, be isolated from the other considerations.

The High Court of Australia and the NSW Court of Criminal Appeal[161] have held that in determining the weight of the guilty plea, its relevance as an indication of the defendant's remorse should not be taken into account. The High Court was concerned at the possibility of double counting: if remorse was included in determining the weight given to the guilty plea and also factored into the court's general assessment of the offender's willingness to accept responsibility for his or her conduct, it could in theory be counted twice.

By contrast, the South Australian Court of Criminal Appeal is prepared to consider remorse, where relevant, in determining the value of the guilty plea and is not concerned at the possibility of double counting. The fact that the plea may have been considered as indicative of remorse does not mean that the offender's remorse is ignored when formulating the sentence itself. In *R v Place*, the court commented that 'the existence of one or more of these factors [such as remorse] is almost invariably relevant to an assessment of the need for individual deterrence and the prospects of rehabilitation'.[162] In that jurisdiction, it is permissible to include factors such as remorse in the weight of the guilty plea and the sentence itself, as 'in this way an offender receives the greatest possible benefit'.[163]

The risk that a factor has been counted twice at sentencing might be appreciable if all the sentencing factors were actually quantified. However, when courts pass sentence, individual factors are not being quantified, because the High Court has ruled against giving a value to the various mitigating and aggravating factors. In these circumstances, the 'double counting' is purely notional; there is no reason why it would, in practice, lead to the imposition of a lesser sentence.

Options and conclusions

One option for the reform of the current law would be to attempt to clarify the considerations that are relevant in determining the weight of the guilty plea. Specifying the relevant factors would, in theory, clarify an area of law that has evolved largely through case law.

159 *R v Johnstone* [2004] NSWCCA 307, [21], but Sully J did not accept the proposition that an offender who pleaded guilty at the earliest opportunity had a 'legitimate expectation' to receive the maximum discount 'merely because the trial was potentially long and complex'.

160 ALRC (2006), above n 3, 319–20.

161 *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, 411–12.

162 *R v Place* (2002) 81 SASR 395, 417.

163 Ibid.

It would be possible, for example, to specify that the relevant consideration was to be the defendant's willingness to facilitate the course of justice and that, in assessing the extent of a defendant's willingness, the court would take into account the utilitarian value of the plea (its timing, matters such as the age and vulnerability of the defendant and the complexity of the matter) as well as the strength of the prosecution case. When a late plea has been entered at or after the commencement of the trial the court could also infer that the defendant had sought to obtain a tactical advantage by that course of action.[164]

A second option would be to restrict the factors that can be taken into account in determining a quantifiable value for the guilty plea, and to specify that only the utilitarian value, on its narrowest interpretation, should be taken into account. Matters such as the strength of the prosecution case, the complexity of the issues, the vulnerability of the victim and the likely length of the trial would be irrelevant, as would be the defendant's motivation or tactical reasons for entering a guilty plea.

Each of these options would require the defendant's willingness to facilitate the course of justice and the utilitarian value of the guilty plea to be defined more precisely, but given the abstract quality of these notions, the reform might produce merely illusory benefits. If the sentencing value of the guilty plea were quantified on the basis of a concept as abstract as willingness to facilitate the course of justice, or the notional utilitarian value of the plea, there would in theory be no reason why other, equally abstract sentencing factors could not also be quantified. This would have implications for the wider sentencing law.

The Council has formed the view that it would be difficult and unnecessary to identify or prescribe the factors that should or should not be taken into account in determining the weight of the guilty plea in Victorian cases. In fact, the abstract quality of the notions used to determine the relevance of the guilty plea would make the task of isolating and quantifying some of these considerations not merely complex, but potentially also arbitrary.

There is clearly some overlap between the considerations that are relevant when determining the weight of a defendant's guilty plea and the relevance of remorse in sentencing an offender who has been found guilty. Similarly, as evidenced by the divergent approaches taken in New South Wales and South Australia, provided that the effect of the guilty plea on the sentence is clearly identified, it is not necessary to quantify or specify the particular considerations that led the court to give the plea that value.

Another approach would be to isolate the sentencing value of the plea without identifying particular factors that are relevant, and exclusively relevant in this regard. This is the approach that has been adopted in South Australia and New South Wales. It is consistent with the doctrine of instinctive synthesis, it avoids confining or redefining the considerations that the courts take into account in determining the weight of the guilty plea, and it has the attraction of practicality: it provides a simple and transparent explanation of the effect of the guilty plea on the sentence.

The Council has concluded that it is possible for Victorian courts to identify the weight given to the guilty plea—that is, the sentence that would have been imposed but for the plea, without affecting the operation of the doctrine of instinctive synthesis. The Council therefore does not consider it necessary to consider the merits of that doctrine.

3.5 Stating the reduction given for a guilty plea

The Discussion Paper outlined several proposals, within and beyond Victoria, intended to remove the impediments to disclosing the sentencing value of the guilty plea and to encourage courts to articulate the basis on which this aspect of the sentencing decision was made. The Council therefore canvassed public opinion on the merits of a reform that would achieve this.

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164 It is possible for a defendant to submit that a late plea was a reflection of a delay in receiving full disclosure of the prosecution case, or a failure by the prosecution to respond to a plea offer. See *Atholwood v R* (1999) 109 A Crim R 485.

In our program of public consultation we detected strong support for a measure that would bring greater clarity and transparency to sentencing generally, and in particular, to the way in which this aspect of sentencing law is applied in Victorian courts. This support is consistent with the support that similar proposals for reform have received from reviews and commissions exploring improvements to criminal procedure, and from members of the Victorian and federal judiciary.

Reviews and commissions supporting reform

Successive reviews of criminal procedure and sentencing law have supported explicit identification of the sentencing benefit awarded for a guilty plea.[165] The Discussion Paper noted the encouragement provided by the Pegasus Task Force and the New South Wales Law Reform Commission, which conducted reviews of criminal procedure and sentencing law respectively during the 1980s.[166]

In 2000, the Deliberative Forum on Criminal Procedure convened by the Standing Committee of Attorneys-General recommended that 'the existing system of discounts for pleading guilty be continued and strengthened by the requirement at sentence that judges publicly state in reasons for sentence what discount has been given for the plea of guilty'.[167] The forum affirmed that sentencing courts should 'indicate specifically the amount of discount allowed and the basis of the allowance or lack of allowance'.[168]

The Australian Law Reform Commission's (ALRC) review of federal sentencing laws considered whether more provision should be made, under federal law, for a specific reduction in sentence for a guilty plea. The ALRC also recommended that the court retain the discretion to determine whether a reduction in sentence should be given and the amount of any such discount, but that:

> where a court discounts the sentence of a federal offender for pleading guilty … the court must specify the discount given, whether by way of reducing the quantum of the head sentence or the non-parole period or by imposing a less severe sentencing option.[169]

The New Zealand Commission reached a similar conclusion in its review of criminal procedure,[170] while in England, reforms to this area of law were mooted in the Auld report and ultimately implemented through the reforms spearheaded by the *Criminal Justice Act 2003* (UK).[171]

Judicial support for articulating the value of the guilty plea

There has also been some judicial support for courts to disclose the value of any reduction provided for an offender's guilty plea. Notwithstanding the doctrine of instinctive synthesis, members of the High Court and some state appeal courts have encouraged courts to be more explicit about the weight given to a guilty plea at sentencing. In a series of dissenting judgments in the High Court, Justices Kirby and McHugh have favoured disclosure at sentencing of the effect of the guilty plea on the sentence imposed, because this enhances the transparency and accountability of the sentencing process and encourages

165 Pegasus Task Force (1992), above n 53. The Pegasus Task Force proposed that offenders who pleaded guilty and were to be sentenced to a term of imprisonment should be entitled to a reduction of up to 30 per cent of the total sentence, depending on the timing of the plea.

166 Pegasus Task Force (1992), above n 53; New South Wales Law Reform Commission, *Procedure from Charge to Trial: Specific Problems and Proposals*, Discussion Paper No. 14(2) (1987).

167 Standing Committee of Attorneys-General, *Deliberative Forum on Criminal Trial Reform* (2000), 37.

168 Standing Committee of Attorneys-General (1999), above n 112, Recommendation 21, 39; Standing Committee of Attorneys-General (2000), above n 167, 37.

169 ALRC (2006), above n 3, 317 (Recommendation 11-1).

170 New Zealand Law Commission, *Reforming Criminal Pre-Trial Processes*, Preliminary Paper 55 (2004) and *Criminal Pre-Trial Processes: Justice Through Efficiency*, Report 89 (2005).

171 The Right Honourable Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 91–114 (Recommendations 186–193).

greater consistency of approach to this matter.[172] In *Cameron v R*, Justice Kirby observed that if the effect of the guilty plea on sentence is not articulated:

> 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.[173]

Without an explanation of the weight given to the guilty plea at sentencing, it is difficult to establish the extent to which the courts are complying with the obligation under s 5(2)(e) to have regard to the fact and timing of the offender's guilty plea. This uncertainty also can lead to a lack of confidence as to whether or not defendants are actually receiving the benefit of the plea. In *Cameron's* case, Kirby J observed:

> If 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 proper cases … Knowing that such a discount will be made represents one purpose of such discounts.[174]

Similarly, whereas in principle an offender may appeal a sentence on the basis that his or her plea of guilty was not considered or given sufficient weight, in practice, this is difficult to achieve within the constraints of the current law. The Victorian Court of Appeal has observed that:

> it is important, if the administration of justice is to be facilitated, that defendants not only receive appropriate credit for pleas of guilty, but that they appear to do so. If legitimate pleas of guilty are to be entered, it is necessary that barristers are able to assure their clients, and that their clients are able to accept, that any purported sentencing discount is real and not illusory.[175]

The Court of Appeal has held that 'in a case in which a sentencing judge sentencing an offender who has pleaded guilty does not state that he [or she] has made an allowance for a plea of guilty, it may be more readily inferred that he [or she] has not done so'.[176] However, 'failure to state that a guilty plea has been taken into account' is not necessarily 'an error that vitiates a sentence'.[177] Therefore, if the court fails to make it clear that the plea of guilty has been taken into account, an offender may have no recourse, despite the fact that the legislation requires the court to have regard to the fact and timing of the plea.

If courts were to articulate the weight given to the guilty plea, appeal courts would have a clearer indication of the basis for imposing the sentence and therefore they would be better equipped to determine whether the sentencer had fallen into error. In *Markarian's* case, the sentencer's explanation of the weight given to the guilty plea not only illuminated the sentencing decision, but also contributed to the appeal court's capacity to review the decision. As Justice Kirby observed:

> 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 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.[178]

The judicial support for a more explicit treatment of the plea at sentencing rests on the value of clarity and transparency in preventing and resolving appeals.

Another, less direct indication of judicial support for this approach is the willingness of Victorian courts to identify the effect that a guilty plea has had on the sentence in cases where this effect is not quantifiable: fixing a non-parole period for a sentence of life imprisonment. There is Victorian precedent for a court, when imposing a life sentence, to indicate at sentencing that, but for the guilty plea, a sentence of life

172 *Cameron v The Queen* (2002) 209 CLR 339 (Kirby J); *Markarian v The Queen* (2005) 215 ALR 213, [74] (McHugh J).

173 Ibid 362 (Kirby J).

174 Ibid.

175 *R v Huong Kieng Taing* [2004] VSCA 46 (Unreported, Vincent JA, Smith and Coldrey AJA, 2 April 2004) [20].

176 *R v Gillick* [2001] VSCA 201 (Unreported, Charles, Buchanan and Chernov JJA, 1 November 2001), [14].

177 Ibid.

178 *Cameron v The Queen* (2002) 209 CLR 339, 362 (Kirby J).

without parole would have been imposed.[179] In *Williams*' case, for example, Justice King stated that the setting of a minimum term was a direct result of the offender entering a plea of guilty. In doing so, the court clarified a sentence, which some might otherwise have considered disproportionate, by linking the setting of the non-parole period with the value of the guilty plea to the system as a whole.

Precedent: Identifying the reduction given for cooperation with the authorities

There is precedent for isolating one sentencing factor and identifying its effect on the sentence. Victorian sentencing law already permits, and in fact requires, the court to state when it reduces an offender's sentence on the strength of his or her assistance to the police. Subsection 5(2AB) of the *Sentencing Act 1991* (Vic) provides that if a court imposes a less severe sentence than it would otherwise have imposed because an offender has undertaken to assist law enforcement authorities after sentencing, 'the court must announce that it is doing so and … [note] the fact that the undertaking was given and its details'.

One reason for a different approach being taken in relation to cooperation with the authorities is that when a sentence is reduced because of the offender's willingness to cooperate, the reduction is based on the defendant's future conduct; when a discount is awarded for a guilty plea, the reduction is based on the offender's past conduct. The fact that a reduction in sentence is provided on the strength of an undertaking to cooperate with the authorities, rather than actual assistance rendered, makes it imperative that the sentencer record the discount allowed for that purpose. In the event that the promised assistance is not provided, the sentence could be adjusted.

Support for more explicit disclosure of the value of the guilty plea

There was overwhelming support among all sectors of the community involved in this inquiry for a reform that would add to the clarity and transparency of the current law. One submission suggested that the current state of the law 'reduces transparency in sentencing'.[180] Participants in the focus groups observed that if the community knew the 'starting point' from which the sentencer deducted the reduction for the guilty plea, it would be better able to gauge the relative severity or leniency of the sentence.[181]

Almost all the legal stakeholders supported a reform that would encourage courts to articulate the weight given to a guilty plea.[182] The Victorian Bar Council submitted that 'there is widespread scepticism about whether there is in fact a reduction, and if so, the extent of such a reduction' and that 'if a system of sentencing discounts is to continue, then transparency seems to require that the extent of the discount be knowable'.[183]

The Judges of the Criminal Division of the Supreme Court of Victoria referred to the possibility, raised in the Discussion Paper, that a lack of confidence in the value of pleading guilty early could be affecting defendants' willingness to indicate a guilty plea early in the proceedings. Their Honours acknowledged that 'this lack of confidence is no doubt contributed to by the restrictions on Victorian judges specifying the amount by which a sentence has been discounted on account of the plea of guilty entered by the accused'. [184]

This Division of the Supreme Court supported reform to allow courts to disclose the effect of the guilty plea on the sentence. It submitted that removing the restriction [that prevents Victorian judges from identifying the amount by which a sentence has been discounted for the guilty plea] 'would contribute to changing current perceptions and increasing confidence that discounts are provided in appropriate cases'.[185]

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179 *R v Williams* [*[*2007] VSC 131 (Unreported, King J, 7 May 2007).

180 Submission 6 (Confidential).

181 Focus Groups 2 (21 March 2007) and 4 (23 March 2007).

182 Submissions 13 (Victorian Bar), 17 (Law Institute of Victoria) and 20 (Victorian Aboriginal Legal Service).

183 Submission 13 (Victorian Bar).

184 Submission 15.

185 Ibid

Some victims' advocates observed that a more explicit reference to the value of the plea could affect the number of appeals against sentence: clarifying the basis on which the sentence was imposed would provide evidence as to the impact of the guilty plea and discourage appeals. However, there is also a possibility that exposing the court's reasoning will assist in identifying grounds for appeal. Indeed, it has been suggested that 'the opaqueness produced by this instinctive synthesis method of arriving at a sentence is intended to deter the bringing of sentencing appeals by defendants aiming to attack the penalty by unravelling the individual threads of reasoning which support it'.[186]

3.6 Options for law reform

The Council concluded that there is a compelling need to reform the law so that the courts can give a clear statement of the weight given to the guilty plea in passing sentence on an offender, and found unqualified support from the stakeholders as well as the wider Victorian community for such a reform. The Discussion Paper canvassed two distinct approaches to reform. The current legislation could be amended to permit, or to require, the court to disclose the weight and effect of a guilty plea.

Permitting the court to state the reduction given for a guilty plea

In some Australian jurisdictions where courts have been encouraged to state the reduction in sentence given for a guilty plea, the courts are permitted, but not required, to articulate the extent of the discount. In the South Australian case of *R v Harris,*[187] Chief Justice King commented that when imposing a sentence which included a discount for pleading guilty, 'the judge should indicate so far as possible and wherever possible, the extent of the discount he [or she] is making for the plea of guilty'.[188]

Similarly, in New South Wales it was held that:

> it will not always be possible or appropriate to specify a discount for a plea. Whether or not it is possible or appropriate is a matter for the exercise of the discretion of the sentencing judge. The Court should go no further than encouraging judges to do so.[189]

In *R v Thomson and Houlton,* the Court encouraged NSW courts to quantify the effect of the plea on the sentence, 'as far as they believe it appropriate to do so'.[190] This approach allows the court the flexibility to determine the weight of the guilty plea in the light of the particular circumstances of the case, without confining the exercise of its discretion by directing it to meet a particular requirement.

In consultations with the Council, the Law Institute of Victoria supported the court 'being permitted to state how much weight has been given to a guilty plea and its effect on the sentence imposed'; however, the Institute did not think it would be appropriate for the court to be compelled to do so.[191] In a similar fashion, some offenders did not think that the court should be compelled to state the value of the guilty plea, but that it should have the option to do so.[192]

Requiring the court to state the reduction given for a guilty plea

While there may be some benefit in allowing the court some discretion as to whether or not the reduction in sentence for a guilty plea should be stated, it is arguable that if courts are merely permitted but not required to state the reduction given, many judges may simply decide to continue with current practice. In the dissenting judgement in *R v Nagy*, McGarvie J accepted that 'the identification of amounts of

186 Fox and Freiberg (1999), above n 90, 196.
187 *R v Harris* (1992) 59 SASR 300.
188 Ibid 302. This passage was cited with approval in *R v Place* (2002) 81 SASR 395.
189 *R v Gallagher* (1991) 23 NSWLR 220 (Gleeson CJ and Hunt CJ), cited in *R v Thompson*; *R v Houlton* (2000) 49 NSWLR 383, 411.
190 *R v Thompson*; *R v Houlton* (2000) 49 NSWLR 383, 419.
191 Submission 17.
192 Offenders' Focus Group, Tarrengower (7 December 2006).

reduction does make the task of the judge more difficult'.[193] The majority of judges simply may not articulate the effect of a guilty plea in their reasons for sentence.

Merely permitting courts to state the reduction would also be of little assistance in encouraging defendants to plead guilty, as it would not necessarily provide the consistency required to give defendants and their legal advisers confidence that the discount was being regularly applied. On this basis, submissions received from the Magistrates' Court and the Victorian Bar took the view that a judge should be required to specify how the guilty plea has affected the sentence imposed.

Most victims of crime saw a benefit in requiring the court to disclose the reduction provided for a guilty plea. Some of the victims and advocacy groups consulted in this inquiry believed that such a requirement would help victims to understand why a particular sentence was imposed in relation to a particular crime.[194] Counsellors of victims of sexual offenders observed that if offenders are already receiving discounts for pleading guilty, it is better to be 'up front' and state by how much the sentence is being reduced.[195]

Most of the offenders who expressed a view on this issue also believed that the court should be required to state how much weight has been given to the guilty plea.[196] One offender suggested that 'articulating the guilty plea would encourage more people to plead guilty than sentence indication'.[197] Similarly, most community focus group participants and submissions received from other members of the public favoured a requirement that the court must state whether a reduction has been provided and if so, the amount of the discount (if this is quantifiable) or its effect on the type of sentence imposed.[198]

The likely effect of a change in the law: Relevant research and findings

As noted in the Discussion Paper, little attention has been given to how a law that encourages courts to state the effect of the guilty plea on the sentence might influence plea behaviour or sentencing outcomes. The only comprehensive research on this topic has been undertaken by English researchers who have examined the extent to which English courts have implemented the relevant guilty plea provisions and reduced the sentences accordingly. The studies reviewed sentencing remarks to ascertain the extent to which disparities in the sentences imposed on offenders who were found guilty and those who pleaded guilty could be ascribed to the guilty plea discount.

A 1994 study of Crown Court proceedings found that there was considerable variation in the way that courts described the weight given to a guilty plea at sentencing, making it difficult to identify whether the plea was actually taken into account and if so, what weight it was accorded. The study was conducted to determine whether Crown Court judges were complying with amendments to the *Criminal Justice and Public Order Act 1994 (UK)*, which required them to take into account the timing and circumstances of the plea and to state in open court if a lesser sentence was imposed on this basis.[199] Despite these statutory obligations, only about half of the judicial officers surveyed stated in open court that they had given a discount in relation to a plea of guilty,[200] and the majority only indicated that the sentence had been reduced accordingly if a fine was imposed.

193 *R v Nagy* [1992] 1 VR 637, 650.

194 Submission 18 (CASA House), Victims' Issues Roundtable (27 February 2007),

195 Meeting with South Eastern CASA (7 March 2007)

196 Submission 11 (J. Knight), Offenders' Focus Group, VACRO (14 March 2007); Offenders' Focus Group, Tarrengower (7 December 2006).

197 Offenders' Focus Group, Tarrengower (7 December 2006).

198 Focus Groups 1 (20 March 2007), 4 and 5 (23 March 2007); Submissions 10 (M. Noe), 16 (R. Grattan) and 19 (B. Pownall).

199 Henham (1999), above n 111, 519. See also Henham (2001) above n 111; Henham (2002), above n 111, 371.

200 Henham (1999), above n 111, 535.

The requirement to give reasons

One further matter that needs to be considered is whether, in requiring the court to articulate the effect, if any, of the guilty plea, a further requirement should be imposed on the court to give reasons for this aspect of the sentencing decision.

In some other Australian jurisdictions, which do not require the court to state the value of the plea, the court is under a statutory obligation to disclose its reasons for either providing or failing to provide a reduction for the guilty plea. Table 8 below summarises the current law in jurisdictions that have such a requirement.

Table 8: Stating the value of the guilty plea: Approaches adopted in other jurisdictions

Identifying the value of the guilty plea	VIC	NSW	WA	QLD	ACT	UK
Statutory obligation to state:						
1. Guilty plea considered				Must state		
2. Effect on sentence						
if sentence reduced			Must state		Must state	Must state
if sentence not reduced		Must state				
3. Reasons for decision to reduce/not reduce		Must state	Must state		Must state	

The form of the obligation varies. In New South Wales, there appears to be a presumption in favour of a reduction being given for the guilty plea: the court must give reasons if a reduction *is not* given for a plea of guilty. If the court does not impose a lesser sentence because of the offender's plea of guilty, it 'must indicate to the offender, and make a record of, its reasons for not doing so'.[201] By contrast, in Western Australia[202] and the Australian Capital Territory,[203] there appears to be a presumption against giving credit for the guilty plea: the court must give reasons if the sentence *is* reduced for a guilty plea.

The Council's view

The Council is of the view that specifying the effect of the guilty plea on sentence would promote clear, transparent and accountable sentencing. Further, we believe that the court should be required rather than merely permitted to disclose the reduction in sentence provided for a guilty plea. The sentencer should have to state whether the sentence was reduced because of the guilty plea, and if so, to indicate the sentence that would have been imposed but for the offender's guilty plea.

The *Sentencing Act 1991* (Vic) already distinguishes the guilty plea from other mitigating and aggravating factors by requiring the court to consider the fact and timing of the guilty plea. Requiring the court to articulate the value of the plea allows the sentencer to illuminate a process that is already occurring in the vast majority of adjudicated criminal proceedings. It is, moreover, consistent with the approach already taken in relation to the offender's assistance to law enforcement authorities. Finally, the fact that courts are already identifying the impact of the guilty plea when sentencing offenders to life imprisonment suggests that this reform is only a small departure from current law and practice.

The Council therefore recommends amending section 5 of the *Sentencing Act 1991* (Vic) to require the court, when passing sentence on an offender who has pleaded guilty, to state whether a sentence has been reduced for that reason and if so, the sentence that would have been imposed but for the guilty plea. In view of the proposed requirement to identify the weight, if any, given to the plea, the Council believes it would be superfluous to impose a further requirement on the court to give reasons for this

201 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2).

202 *Sentencing Act 1995* (WA) s 8(4).

203 *Crimes (Sentencing) Act 2005* (ACT) s 37(2)(b).

aspect of the sentencing decision in isolation. In discharging its obligation to articulate the impact of the plea, it is inevitable that the court will explain any decision not to provide a reduction for a guilty plea.

Recommendation 1: Courts to state the effect of the guilty plea on the sentence

The *Sentencing Act 1991* (Vic) should be amended to require the court, in passing sentence on an offender who has pleaded guilty, to state whether the sentence has been reduced for that reason, and if so, the sentence that would have been imposed but for the guilty plea.

3.7 Prospective guidance: Prescribing the weight of a guilty plea

Having recommended that legislation require Victorian courts to identify the sentence that would have been imposed, but for the guilty plea, we now consider whether the framework within which the court determines the value of the plea should also be more prescriptive.

Under the current discretionary regime, the court has the discretion to determine:

- which factors are most relevant in determining whether a reduction should be given and its amount;
- whether any reduction in sentence should be provided for the offender's guilty plea; and
- the amount (a maximum or a range) by which the sentence can be reduced.

It would be possible to create a more explicit sentencing framework by making any one of these elements of the current law more prescriptive. To some extent, these elements are interrelated. A highly prescriptive regime requires a clear and narrow basis for calculating the reduction allowed; it would not be possible to apply a sliding scale without a single, measurable factor (such as the timing of the plea). Within a discretionary regime, it is not necessary to have a clear and narrow basis for determining the value of the plea, because this factor is just one of several possibly interrelated considerations that are taken into account in determining the final sentence.

Models canvassed for discussion

The Discussion Paper outlined the ways in which each of these aspects of sentencing law could be made more prescriptive. It canvassed three notional models, loosely based on actual regimes, to stimulate discussion on the merits and options for reform. They differed in the extent to which they confined judicial discretion to determine the three aspects of the sentencing decision listed above.

The discretionary model represented the status quo in Victoria. It provided the court with discretion (guided by existing statutory and case law) as to the basis on which reduction should be decided, whether a reduction should be provided, and the amount of the reduction.

At the other end of the 'discretionary spectrum' was the prescriptive model, the specified sentence discount, loosely based on the guideline issued by the English Sentencing Guidelines Council (the SGC).[204] The existing statutory provision requires the court to take into account 'the stage in the proceedings at which the offender indicated his intention to plead guilty and the circumstances in which the plea was indicated'. The guideline, which is persuasive, not binding, suggests that 'the level of reduction should be a proportion of the total sentence imposed, with the proportion based [primarily] upon the stage in the proceedings at which the guilty plea was entered'.[205]

204 Sentencing Guidelines Council, *Definitive Guideline: Reduction in Sentence for a Guilty Plea* (2007). In the United Kingdom, the Sentencing Guidelines Council has a statutory responsibility to frame or revise sentencing guidelines; it can develop guidelines at its own initiative or at the request of the Secretary of State or the Sentencing Advisory Panel. The Council, which was established under the *Criminal Justice Act 2003* (UK), develops and reviews sentencing guidelines.

205 *Criminal Justice Act 2003* (UK), s 144.

The SGC guideline provides for all offenders to receive a reduction for a guilty plea. It introduced a sliding scale that specified the amount by which the sentence can be reduced, depending almost exclusively on the timing of the plea. The scale provides for a maximum discount of one-third of the total sentence if the guilty plea was entered at the first reasonable opportunity, and one-tenth for a plea on or after the first day of the trial.[206]

Finally, the Council canvassed a hybrid model that would offer 'guided discretion'. One example of a hybrid model is the regime that operates in New South Wales, where the Court of Criminal Appeal indicated in a guideline judgment that the primary consideration should be the utilitarian value of a guilty plea. It recommended a reduction range of between 10 and 25 per cent of the total sentence, but recognised that the relevance of the plea will vary between cases, and that the sentencer should have the discretion to depart from this guideline and to decide not to give any credit for a guilty plea in some circumstances.[207]

The issue: Striking a balance between certainty, clarity and proportionality

The Council asked for comment on the merits of these options. Each of these models reflects a different way of reconciling the various tensions within the law governing the reduction in sentence provided for a guilty plea.

Participants' views

The consultation process highlighted the difficulty of identifying a single model for reform that would meet the concerns of all those with a stake in the criminal justice process. Each of the models canvassed had weaknesses as well as strengths: the wholly discretionary approach lacks clarity and transparency and the highly prescriptive specified sentence discount lacks flexibility. A hybrid model, which provides a form of 'guided discretion', has the weaknesses of both the discretionary and prescriptive models: it confines judicial discretion without providing enough clarity or certainty about the value of an early guilty plea to make a significant difference to plea behaviour.

Most members of the legal community favoured either a fully discretionary or a specified sentence discount regime. They tended to reject the compromise 'hybrid model' on the basis that it offered neither the certainty nor consistency of a specified sentence discount, nor the flexibility that came with the current discretionary approach.

While the views of the legal community were polarised between the discretionary and prescriptive models, most victims of crime and their advocates preferred some form of hybrid model. They indicated that they recognised that it would not have the same impact as a specified sentence discount but considered it vital for the court to retain the discretion not to provide a reduction in sentence in some circumstances. Victims, their families and their counsellors were particularly concerned at the prospect of an offender who had committed a serious or violent crime receiving an unduly lenient sentence because of a mandatory discount for pleading guilty.

In consulting on the advantages and disadvantages of a more prescriptive approach, the Council sought comment on each of the two main features of a specified sentence discount regime: permitting all offenders who plead guilty to receive a reduction in sentence, and specifying both the basis on which the reduction was to be calculated (the timing of the plea) and the amount by which the sentence could be reduced.

206 Sentencing Guidelines Council, *Definitive Guideline: Reduction in Sentence for a Guilty Plea* (2007).

207 *R v Thomson; R v Houlton* (2000) 49 NSWLR 383, 419.

3.8 Should all offenders who plead guilty get a reduction in sentence?

The Council sought comment on whether all offenders should be eligible for an automatic reduction in sentence for an early plea and if not, in what circumstances a reduction in sentence should be lessened or denied.

Participants' views

The Magistrates' Court submitted that 'if defendants are not convinced that a benefit will flow to them in return for pleading early they will not do so'.[208] Similarly, Associate Professor Willis noted that:

> [i]t is essential that the sentencing discount apply in all cases. There is either a sentencing discount for pleading guilty or there isn't … [If] a sentencer has discretion as to whether or not to give a sentencing discount for pleading guilty … in any given case there cannot be any certainty that there will be a discount.[209]

A number of the participants in the focus groups also saw an across-the-board reduction as the only way to provide certainty that a plea of guilty will necessarily lead to a lesser sentence.[210] They supported an automatic reduction because, as one submission put it, it 'takes out the ambiguity, the 'airy fairy' approach to sentencing'.[211]

However, the majority of participants—legal stakeholders, victims, offenders and members of the general community—favoured a model that provided for cases in which no reduction in sentence was to be given. It was suggested that 'it is important for judicial discretion to remain in sentencing, as it will not always be appropriate for a sentence discount to be awarded for an early guilty plea'.[212] The Law Institute of Victoria and the Victorian Aboriginal Legal Service both submitted that the court should have the discretion to decide whether a reduction in sentence is warranted in any given case.[213] Similarly, most victims of crime and their advocates preferred a model that allowed courts the discretion not to provide a reduction in sentence for a guilty plea. CASA House specifically commented on situations where an automatic discount in sentence could lead to an unjust outcome. Its submission contemplated that 'an automatic discount may result in a non-custodial sentence when it may initially have been custodial. The impact of this on the victim/survivor may be detrimental.'[214] Victoria Police concurred, submitting that 'if every offender who pleads guilty is given a reduction in sentence, there is a possibility that the victim will feel a sense of betrayal'.[215]

The Council's view

The Council believes that Victorian law should not require all offenders to receive a reduction in sentence for a guilty plea automatically. While we accept that an automatic reduction would bring certainty to this aspect of the sentencing process, we believe that the risks outweigh the likely benefits. Cases will arise in which it would be inappropriate for an offender to receive any reduction in sentence, notwithstanding their guilty plea. It would be undesirable to have a situation where, due to a compulsory reduction in sentence for a guilty plea, an offender received a sentence that was incongruous with the offence committed.

208 Submission 12 (Magistrates' Court of Victoria).
209 Submission 27.
210 Focus Group 2 (21 March 2007) and Focus Group 4 (23 March 2007).
211 Submission 19 (B. Pownall).
212 Submission 6. See also Legal Issues Roundtable (14 March 2007) and Submission 10 (M. Noe).
213 Submissions 17 (Law Institute of Victoria) and 20 (Victorian Aboriginal Legal Service).
214 Submission 18 (CASA House).
215 Submission 22 (Victoria Police).

Having concluded that there will be cases in which little or no reduction in sentence is warranted for the guilty plea, the Council considered whether it would be possible to define the circumstances in which this approach should be taken. Two options were canvassed:

- specifying these circumstances or cases; or
- allowing the courts to determine this matter at their discretion.

Option 1: Specified exceptions (the English approach)

The SGC's guideline, as first released, specified the few exceptional circumstances in which the court could depart from the sliding scale that it prescribed. In the original version of the guideline, released in 2004, the SGC envisaged that the only circumstances in which the court could depart from the guideline in determining the level of reduction were when the sentence was imposed for crimes of the utmost seriousness: where the offender was convicted of murder or the offender's release presented a particularly high danger to public safety.[216]

However, after the SGC guideline came into effect, there were some high-profile cases[217] in which the application of the SGC guideline, together with unrelated provisions setting minimum non-parole periods for offenders sentenced to life imprisonment, resulted in the offenders' non-parole period being substantially reduced.[218] In these cases, the offenders had indicated their willingness to plead guilty at the first opportunity—in one case because the offender was caught red-handed and in the others because the prosecution case was overwhelming.

Partly as a result of the public response to these cases, the SGC guideline has been revised to allow more flexibility.[219] The revised guideline establishes a presumption in favour of a reduction in sentence by the full amount of the scale, but allows the court to provide a lesser reduction if the prosecution case is overwhelming.[220]

Option 2: Unspecified exceptions (the current Australian approach)

No Australian regime requires the sentence to be reduced automatically for a guilty plea. Each preserves the court's discretion to determine that the plea of guilty does not merit a reduction in the sentence to be imposed. In New South Wales, for example, the Court of Criminal Appeal has observed that the importance of a guilty plea could vary from case to case, and acknowledged that 'in some cases a plea of guilty will not lead to any discount'.[221] The Court noted that cases would arise in which 'the protection of the public requires a long sentence to be imposed so that no discount for the plea is appropriate'.[222]

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216 Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea* (2004), Guideline 5.1 provided that '[i]f the court determines that a longer than commensurate, extended or indeterminate sentence is required to protect the public, the minimum custodial term should be reduced to reflect the plea, but the component of the sentence that has been imposed for the protection of the public need not be reduced'.

217 *R v Craig Sweeney* (Unreported, Cardiff Crown Court, Griffith Williams J, 12 June 2006); *R v Alan Webster and Tanya French* (Unreported, St Albans Crown Court, Finlay Baker J, 10 January 2006, Judge Findlay Baker). *Attorney General's Reference (No. 14 and No. 15 of 2006) (Tanya French and Alan Webster)* [2006] EWCA Crim 1335, 8 June 2006.

218 In both these cases, the offenders received reductions in the minimum term of their life sentences that could be served, on the basis of not only the reduction granted for their early guilty pleas, but also statutory provisions governing the imposition of sentences of life imprisonment.

219 The SGC Guidelines were reviewed by the Sentencing Advisory Panel and a revised guideline was issued in January 2007. Among the provisions that were altered were the provisions relating to a guilty plea entered in circumstances where there is an overwhelming prosecution case.

220 Sentencing Guidelines Council, *Definitive Guideline: Reduction in Sentence for a Guilty Plea* (2007).

221 *R v Thompson*; *R v Houlton* (2000) 49 NSWLR 383, 419.

222 Ibid.

Similarly, in Victoria, in *R v Hall*,[223] it was held that 'a court may (although such a case would be rare) elect to give no weight to a [guilty] plea'.[224] The court observed that a plea 'may attract no reduction in sentence' where there is no evidence of remorse, and where it is entered at the eleventh hour and is made in a case of overwhelming strength.[225]

Participants' views

In consulting on this reference, the Council sought participants' views on whether there were any circumstances in which, as a rule, a reduction in sentence should not be permitted. In the Discussion Paper, the Council had noted that the SGC guideline permitted departures—that is, a lesser reduction in sentence—for defendants who pleaded guilty to murder or whose crimes would require the imposition of a term that reflected the need to promote public safety. The Council sought comment on whether offences that result in the death of a victim, such as murder, manslaughter and culpable driving, should be excluded from a regime that permitted an automatic reduction in sentence.

The Crime Victims Support Association, the Frankston Homicide Victims Support Group and some advocates for victims of sexual offences considered that where the offender has committed a violent crime, such as homicide or sexual assault, he or she should not be eligible for a reduction in sentence.[226]

Other participants, including CASA House and some offenders, took the view that while all offences could still attract a reduction in sentence, serious offences such as sex offences should generally only entitle the offender to a smaller discount.[227] However, there were other offenders who took the view that, in fairness, the reduction in sentence should be applicable to anyone who enters a plea of guilty.[228]

Some victims favoured restricting such a scheme to first time offenders who have committed relatively minor crimes.[229] This view was endorsed by some members of the Victims of Homicide Support Group (Frankston).[230] CASA House also submitted that repeat offenders should not be eligible.[231]

Another suggestion put to this inquiry was that a distinction could be drawn between the reduction available to those convicted of summary and of indictable (more serious) offences. It was suggested that in sentencing persons who had committed summary offences, and where there was 'little controversy and community concern surrounding the amount of reduction offered', an 'automatic reduction based on a sliding scale' could be implemented. However, in relation to indictable offences and offences that would warrant a custodial sentence, it was seen as preferable to retain the full discretionary powers of the judiciary.[232]

The Council's view

The short history of the changes to the SGC's guideline illustrates the difficulties that arise when a rigid guideline is applied to the sentencing of individual offenders. Despite the apparent clarity and consistency of the SGC's approach, it quickly was found to lack the flexibility that the courts require in order to impose the appropriate sentence in a given case.

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223 *R v Hall* (Unreported, Supreme Court of Victoria Court of Appeal, Phillips CJ, Crockett and Southwell JJ, 12 December 1994).

224 Ibid 26 (Crockett and Southwell JJ).

225 Ibid.

226 Submissions 7 (Crime Victims Support Association) and 25 (West CASA), Meeting with Victims of Homicide Support Group (Frankston) (15 March 2007).

227 Submission 18 (CASA House), Offenders' Focus Group, Tarrengower (7 December 2006); Offenders' Focus Group, Dhurringile (12 December 2006); Offenders' Focus Group, VACRO (14 March 2007).

228 Offenders' Focus Group, Tarrengower (7 December 2006).

229 Victims' Issues Roundtable (27 February 2007).

230 Meeting with Victims of Homicide Support Group (Frankston) (15 March 2007).

231 Submission 18 (CASA House).

232 Submission 3 (A. Flynn).

The Council has considered the various suggestions put forward to this inquiry to specify the circumstances in which little or no reduction in sentence should be given. However, the Council was not able to formulate criteria that would be both clear and flexible enough to cover all the circumstances in which an offender might plead guilty. If offenders who admitted to serious crimes of violence were prevented from receiving a specified discount, those offenders might defer their plea decision, to the detriment of the victims and the justice system. Similarly, if repeat offenders were excluded, the vast majority of defendants who plead guilty in Victorian courts would be ineligible for the specified discount.

The Council also believes that identifying and excluding a particular group, such as repeat offenders or offenders who have committed designated serious offences, could reduce the fairness of such a regime. It is arguable, for example, that to treat repeat or serious offenders differently in relation to the value of their plea would constitute an additional penalty for this particular aspect of their offending.

The Council has concluded, therefore, that excluding a particular type of case or defendant would be unfair and counter-productive; it would discriminate against particular types of defendants or cases, and the types of offences excluded may be ones in which the timely plea provides greatest benefit.[233]

3.9 Should the permissible reduction for a guilty plea be specified?

Having concluded that Victoria should not require an automatic reduction in sentence for all offenders who plead guilty, the Council considered whether, as a separate measure, Victorian sentencing law should specify the maximum or range within which a reduction in sentence can be made for a guilty plea.

The reduction for a guilty plea could be allowed for in several ways: by prescribing the maximum reduction, by specifying the range in which the reduction can be determined, or by introducing a sliding scale that sets the reduction applicable at various points in the range.

The Discussion Paper outlined several jurisdictions and law reform bodies that have provided an indication of the range within which a reduction for a guilty plea can be determined. The Sentencing Guidelines Council is the only executive body to have produced such a guideline, although the Pegasus Task Force, which advised the Victorian Attorney-General on this issue, was performing an executive function. The remaining guidelines have been produced by superior courts and presented in leading judgments.

Table 8 shows the reduction ranges that have been proposed (in the case of the Pegasus Task Force)[234] or specified in cases or guidelines in other jurisdictions. The effect of the guidance given as to the appropriate reduction range varies between jurisdictions.

In England and Wales, the Sentencing Guidelines Council's guideline is not binding on the courts, but courts are under a statutory obligation to have regard to it.[235] While in theory they have the discretion to depart from it (and the English Court of Appeal has affirmed that discretion on appeals in relation to the guideline) in practice, the courts have been reluctant to depart from it.[236]

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233 Submission 24 (Federation of Community Legal Centres).

234 Pegasus Task Force (1992), above n 53, 8.

235 Sentencing Guidelines Council, *Definitive Guideline: Reduction in Sentence for a Guilty Plea* (2007). This guideline expands on the statutory requirement that 'the level of reduction should be a proportion of the total sentence imposed, with the proportion based [primarily] upon the stage in the proceedings at which the guilty plea was entered'. The SGC's Guideline establishes a sliding scale, setting the maximum reduction available for a guilty plea entered at the first available opportunity at one-third of the total sentence, and stipulating that little or no discount should be provided for a plea entered at the door of the court on the day of the trial.

236 *Attorney-General's Reference (No, 14 and No. 15 of 2006) (Tanya French and Alan Webster)* [2006] EWCA Crim 1335, 8 June 2006, [52]. The SGC's guideline was considered in *R v Gisbourne* [2005] EWCA Crim 2491; *R v Oosthuizen* [2005] EWCA Crim 1978; and *R v Greenland* [2002] EWCA Crim 1847.

Table 9: Sliding scales and discount ranges, selected jurisdictions

Jurisdiction	Reduction range (% of total sentence)		
	Maximum	Mid-point	Minimum
Pegasus Task Force	30%	20% (after trial date set)	10%
England and Wales	1/3	1/4 (after arraignment)	1/10
New Zealand	25%		5%
New South Wales	25%		10%
Western Australia	35%		25%

In New Zealand, the Court of Appeal established a sliding scale with a maximum discount for a guilty plea at the first opportunity of 25 percent, falling to 5 per cent for a plea entered on the first morning of the trial.[237] In New South Wales and Western Australia, the reduction ranges are indicative only, and the respective Courts of Criminal Appeal have stressed that in any particular case the court retains the discretion to impose the appropriate sentence and, subject to that obligation, to determine the reduction appropriate for the guilty plea according to the circumstances of the case. [238]

In New South Wales, the Court of Criminal Appeal encouraged NSW courts to quantify the effect of the plea 'as far as they believe it appropriate to do so'.[239] However, the effect of the guideline produced by the NSW Court of Criminal Appeal has been diluted with the introduction of standard non-parole periods. Standard non-parole periods, introduced in 2002, established a presumption in favour of imposing specified non-parole periods for cases falling in the middle of the range of seriousness for 24 designated offences.[240] While these provisions have been held to apply to the sentencing of offenders who have been found guilty, and not to those who have pleaded guilty,[241] it appears that in practice, the introduction of standard non-parole periods has capped the reduction in sentence provided to offenders who plead guilty to offences covered by this legislation.[242]

The implications for sentencing

Whereas the intended benefit of a specified reduction range is the clarity and certainty that it offers, this does not mean that the regime provides no flexibility or discretion. In practice there are nevertheless opportunities for the courts to exercise discretion and thereby adjust the weight given to a guilty plea even where the allowable reduction range has been specified.

237 *R v Wong-Tung* (1996) 2 HRNZ 272, *R v Tryselaar* (2003) CRNZ 57. In *R v Wong-Tung*. Section 9(2)(b) of the *Sentencing Act 2002* (NZ) treats the guilty plea as a mitigating factor. Guidance for calculating the amount of the discount is provided in the Chief Justice's 1995 Practice Note, *Criminal Jury Trials Case Flow Management*. See also Kiernan J, 'Sentence Indication Hearings: Justice or Expediency' (Paper presented at the Australian Institute of Judicial Administration Conference, Adelaide, 15–17 September 2006).

238 See *R v Thomson; R v Houlton* (2002) 49 NSWLR 383, 419 for the position adopted in NSW, were the Court set 'the utilitarian value of a guilty plea as a discount of between 10 and 25 per cent on sentence, with the primary consideration in determining the discount being the timing of the plea'; See *Heferen v R* (1999) 106 A Crim R 89; *Miles v* R (1997) 17 WAR 518 for the position adopted in Western Australia.

239 *R v Thomson; R v Houlton* (2002) 49 NSWLR 383, 419

240 *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).

241 *R v Way* (2004) 60 NSWLR 168.

242 Nicholas Cowdery, *Recent Developments in Sentencing* (2007).

The starting point

During our public consultation, a number of participants queried whether a specified reduction range would have any significant impact on Victorian sentencing decisions when the starting point from which the reduction would be calculated is left to the discretion of the court.[243]

Many participants were sceptical about whether a specified reduction range or cap would provide consistency, believing that for a specified reduction in sentence to be applied consistently, a specified starting point or range would also be needed. They were concerned that, without a fixed starting point, courts would still be able to determine the reduction largely at their discretion by adjusting the starting point up or down to ensure that the sentence imposed after allowing for the guilty plea was, in their view, appropriate. While this would ensure that the sentence was still proportionate to the seriousness of the offence, it was feared that this practice would not engender confidence as to the value of the guilty plea and would not, therefore, have the desired effect of encouraging earlier plea decisions.

From another perspective, however, it is clear that specifying the reduction range will not, on its own, completely confine the discretion of the court in determining the weight to be given to an offender's guilty plea.

Defining the first reasonable opportunity

A sliding scale based on the timing of the plea requires a clear definition of when the defendant's 'first reasonable opportunity' to plead guilty occurs. While it would be possible simply to specify a particular stage of the proceedings, generally courts have found it necessary to adopt a more flexible definition, to account for the many reasons that defendants, through no fault of their own, may not be in a position to make a decision whether or not to plead guilty.[244]

When the SGC considered this issue, it took the view that the first reasonable opportunity was prior to the first court hearing, because it was at this stage of the investigation that the justice system could reap the greatest benefits from an early plea.[245]

The Victorian Bar pointed to the complexity of assessing the first reasonable opportunity, which, in its view, goes beyond 'applying a simple sliding scale'.[246] As the Bar observed, factors such as lack of access to legal advice and delays in the preparation of the prosecution case can delay a defendant's plea decision.

Some offenders consulted were concerned that if the discount were calculated according to the timing of the plea, defendants could get a reduced discount because of delays by the prosecution. One of the offenders with whom the Council met referred to his case, where there was significant delay between the date he was charged and the date on which he received the brief of evidence. As soon as he received the brief, he indicated a willingness to plead guilty, but the sentencing judge found that he had not pleaded guilty at the earliest reasonable opportunity. Similarly, several offenders noted that in their cases the adjournments were sought by the court ('because they had more important cases') or by the

243 Focus Groups 2 (21 March 2007), 3 (22 March 2007), and 4 (23 March 2007); Victims' Issues Roundtable (27 February 2007); Victims of Homicide Support Group (Frankston) (15 March 2007); Meeting with CASA West (21 March 2007).

244 In *Atholwood v R* (1999) 109 A Crim R 465, the court noted the importance of closely examining the circumstance preceding the plea in order to reach a conclusion as to what the appropriate reduction should be in that situation.

245 This was a point of contention that was considered by the Sentencing Advisory Panel when the guidelines were reviewed. One of the issues raised in the Panel's Advice to the Sentencing Advisory Council was that a defendant cannot actually plead guilty until the first court hearing, but there are significant savings for the prosecution if they can anticipate a plea of guilty being entered. Ultimately, this was retained in the guideline: Sentencing Advisory Panel, *Advice to the Sentencing Guidelines Council: Review of Guideline Reduction in Sentence for Guilty Plea* (2006) [28]–[35]; see also Sentencing Guidelines Council, *Definitive Guideline: Reduction in Sentence for a Guilty Plea* (2007).

246 Submission 13.

prosecution.[247] This would suggest that the first reasonable opportunity for a defendant to plead guilty may not always be related to his or her intention, but rather could also be influenced by factors outside the defendant's control.

There is already established case law on this matter in Australia, which provides that the circumstances of the case need to be taken into account when determining whether the defendant indicated a guilty plea at the first reasonable opportunity.[248]

The Council's view

The Council acknowledges that deciding on the preferred model involves making a trade-off between flexibility (provided by giving the court discretion) and certainty (provided by establishing a clear basis for calculating the allowable reduction). The Council is concerned that, without a clear basis for understanding current sentencing practices, specifying the reduction range or cap would be premature. Specifying a reduction range, when the extent to which courts are recognising the value of the guilty plea and providing a reduction in sentence on this basis is unknown, could have unintended and unquantifiable effects on sentencing practice.

As courts do not currently have to state the weight given to the guilty plea, it may be that by setting a reduction without reference to what is happening at the moment could lead to a situation where sentences imposed in accordance with the reduction are markedly different from current sentencing practice.[249]

We believe that it would be more appropriate to retain a wholly discretionary approach to the reduction in sentence for a guilty plea. While the timing of the plea is obviously a relevant factor in how much weight it should be given by the court, we consider that this is a matter that should be left to the sentencing judge to determine in the circumstances of each individual case.

3.10 Implementation

Introducing specified sentence discounts would require amendment to the current provisions of s 5(2)(e) of the *Sentencing Act 1991* (Vic). However, unlike a sentence indication process, it would not require any change to administrative procedures or have resource implications for the major agencies involved in criminal proceedings.

Other Australian jurisdictions with reductions in sentence for the guilty plea have provided explicit (though not necessarily statutory) guidance to courts on the weight to be given to a guilty plea at sentencing without making any alterations to criminal practice or procedure. In New South Wales, South Australia, Western Australia and Tasmania the superior courts have provided judicial guidance in leading cases. Once current sentencing practices are revealed, there may be a role for the Court of Appeal to offer Victorian courts further guidance as to the basis on which the reduction in sentence is determined.

We have recommended a change in the law to require the court to articulate the effect that the guilty plea has had on the sentence, as a first step in achieving a clearer understanding of the way in which the current provision is being applied. The Council draws on the experience of the Scottish High Court, and expects that in Victoria there should be an appreciable change in the stage at which defendants facing indictable charges indicate a willingness to plead guilty once the effect on the sentence is made clear. We note, however, that the impact of this change will depend partly on the extent to which the parties are able to prepare the cases early enough to place the defendant in a position to benefit from an early guilty plea.

247 Offenders' Focus Group, Tarrengower (7 December 2006).

248 *Atholwood v R* (1999) 109 A Crim R 465.

249 Submission 24 (Federation of Community Legal Centres).

Chapter 4 Sentence Indication & the Principles of Justice

Chapter 4 Sentence Indication & the Principles of Justice

The Terms of Reference ask the Council to consider whether sentence indication is a form of 'bargained justice'. This chapter explores what is meant by the term 'bargained justice' and examines whether a sentence indication process would affect the justice of the proceedings in which it was used. We examine the procedural changes that a sentence indication process requires, and consider the implications of sentence indication for the judicial officer, prosecution and defence counsel.

We also present the findings of our consultation on the implications for victims and defendants and assess the extent to which a sentence indication process can provide the necessary safeguards for their interests. The chapter concludes by presenting the Council's views on whether, in principle, a sentence indication process can conform to the standards of fairness and transparency required of Victorian criminal procedure.

Chapters 5 and 6 examine how sentence indication could be provided in summary and indictable proceedings, and present our findings on the merits of formalising the process already used in summary proceedings and of making sentence indication available in contested criminal proceedings in the County Court.

4.1 Plea bargaining, sentence indication and 'bargained justice'

In common usage, the term 'bargained justice' describes practices such as charge bargaining or plea bargaining. These terms refer to agreements as to the charges preferred by the prosecution and admitted by the defence.[250] Such an agreement can take several forms: it includes informal discussions between counsel, formal agreements between prosecution and defence counsel, and finally, agreements that that are submitted to the court and approved by the judicial officer.[251]

In Victoria, the term 'bargained justice' tends to have negative connotations. It suggests a process or system that is in some way unfair, or practices that fall below accepted standards of transparency, fairness or propriety:

> a kind of Dutch auction or horse-trading session in which bids and counter-bids are exchanged until a deal is done, and a charge is found to which the defendant is prepared to plead guilty.[252]

In asking whether sentence indication could be regarded as a form of bargained justice, the Attorney-General is seeking comment on the suggestion that a sentence indication process might fall short of accepted norms or standards of criminal practice in Victoria.

In order to answer this question, it is necessary first to understand what distinguishes sentence indication from conventional criminal procedure and practice, and secondly, to assess whether sentence indication can be provided without compromising the transparency, propriety or fairness of criminal proceedings.

250 There are various definitions of plea and charge bargaining, each reflecting the culture of the jurisdiction in which these terms are used. See also Gordon Samuels, *Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts* (May 2002). A charge bargain is an agreement between prosecution and defence as to the charges that will be laid or proceeded with; a plea bargain is an agreement between the parties as to the charges that will be admitted or contested. See Paul Gerber, 'When is Plea Bargaining Justified?' (2003) 3(1) *Queensland University of Technology Law & Justice Journal* 1.

251 Fox and Freiberg (1999), above n 90, 327.

252 Samuels (2002), above n 250, 8.

What is plea bargaining?

A charge bargain or plea bargain is an agreement—whether formal or implied—under which the prosecutor prefers certain charges in return for the defendant's guilty plea to those charges.[253] The 'bargain' may involve the prosecutor agreeing to withdraw, amend or reduce certain charges in order to obtain the defendant's agreement to plead guilty. A plea bargain can also secure the prosecution's agreement to recommend or not to oppose a particular sentencing disposition, such as a non-custodial sentence.[254]

Under US state and federal laws, the plea agreement is an established part of criminal procedure. Prosecution and defence counsel may jointly submit an agreement for the approval of the judicial officer, sitting either in court or in chambers.[255]

Plea bargaining is also being encouraged in the United Kingdom. The Fraud Review, which was instigated to identify strategies to deal with the particular problems encountered in prosecuting and managing complex fraud cases, approved the use of 'charge bargaining' to encourage early resolution of such cases. Under this proposal, parties could develop a 'sentence package' or 'court-sanctioned agreement' for approval by the judge.[256] The Review recommended that:

> A formal system of plea bargaining [should] be introduced at a pre-charge stage enabling discussions to take place between the prosecuting authorities and defence to see whether acceptable pleas can be agreed at that stage and, if so, to allow access to the courts before charge so that judicial approval can be sought.[257]

This arrangement would be subject to two constraints: no judge should be expected to rubber-stamp agreements on plea made between the parties, and the prosecution would only accept a plea if it allowed the court to pass sentence that adequately reflected the seriousness of the offence.[258]

Pre-trial discussions: Their place in Victorian law and practice

Australian criminal law and practice differ from US practice in two important respects. First, Australian law prohibits the involvement of the judicial officer in any form of plea agreement. Secondly, it draws a clear distinction between informal discussions between counsel and formal plea agreements: it permits the former, but strongly discourages the latter.

Formal plea agreements, whether concluded by the parties or sanctioned by the judicial officer, 'are considered improper in Australia'.[259] The Victorian Supreme Court, in *R v Marshall,* expressed the view that it would be inappropriate for judicial officers to become involved in plea negotiations.[260] This was confirmed by the High Court in another Victorian case, *GAS v The Queen; SJK v The Queen*,[261] where it was held that the judge has no role to play in the decision as to which charges to prefer against the accused and similarly, no role in the accused's decision as to whether or not to plead guilty to those charges.[262]

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253 The term 'charge bargain' denotes an agreement between the accused and the police/prosecution as to which charges will be laid or prosecuted.

254 Robert Seifman and Arie Freiberg, 'The Role of Counsel in Plea Bargaining in Victoria' (2001) 25(2) *Criminal Law Journal* 63, 74. For a discussion of public attitudes to plea bargaining, see Stanley Cohen and Anthony Doob, 'Public Attitudes to Plea Bargaining' (1990) 32(1) *Criminal Law Quarterly* 85. See also John Willis, 'Late Pleas and Withdrawals', (1998) 8 *Journal of Judicial Administration* 77.

255 Seifman and Freiberg (2001), above n 254, 63. For a discussion of plea bargaining in North America, see John Baldwin and Michael McConville, *Negotiated Justice: Pressures to Plead Guilty* (1977).

256 Discussion Paper (2007), above n 44, 51.

257 The Legal Secretariat to the Law Officers, *The Fraud Review* (2005) 250.

258 Ibid [11.4].

259 Samuels (2002), above n 250, 4.

260 *R v Marshall* [1981] VR 725, 734.

261 *GAS v The Queen; SJK v The Queen* (Unreported, High Court of Australia, Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ, 19 May 2004).

262 Ibid [28]–[29].

In *GAS*, the High Court accepted that the parties would be involved in plea discussions and observed that wherever possible, the outcome of these discussions should be recorded, to prevent confusion as to the basis on which the plea was entered.[263] However, the High Court also made it clear that any agreement reached in relation to the sentence was not binding on the relevant court, as 'it is for the sentencing judge alone to decide the sentence to be imposed'.[264]

GAS was applied in NSW in relation to plea (or in NSW, charge) agreements.[265] Here the prosecution and defence submitted on sentence that a 25 per cent reduction in sentence should be allowed for the utilitarian value of the plea. The NSW Court of Criminal Appeal held that a plea agreement 'cannot bind a judge' and 'in effect can only extend to an understanding of the facts to be placed before the Court'. The sentencing judge's decision to reject the joint submission was upheld. In a 2007 case, *R v Ahmed*,[266] on a similar point, the Court of Criminal Appeal again observed:

> With respect to any aspect of the agreement, which related to the appropriateness of any particular sentence, or a component of it, the Crown's agreement is confined to an undertaking to make a submission to the sentencing judge consistent with the terms of that agreement. The agreement can neither bind the judge nor be given any greater weight that is appropriate to a submission of counsel, with knowledge of the facts related to the offence and the offender … If it were otherwise, the fundamental assumption that it is for the judge to determine an appropriate sentence would be seriously compromised.[267]

While formal plea agreements are not part of Victorian criminal practice, informal plea negotiations are common.[268] Out-of-court discussions between counsel are a vital element of the preparation of the case. Prosecution and defence counsel routinely make contact outside the courtroom to prepare for their court appearances and to explore the potential to reach agreement on issues in dispute.

A survey of fifty-two Victorian barristers conducted in 1996 revealed that almost all had engaged in informal plea negotiations. That study found plea negotiations to be more common in matters proceeding through the Magistrates' Court than in the higher courts.[269]

In 2000, a Deliberative Forum on Criminal Trial Reform convened by the Standing Committee of Attorneys-General (SCAG) rejected a recommendation seeking consideration of 'formalising plea discussions between the prosecution and defence'. The Forum considered that this would be unnecessary, that the informal discussions between counsel were 'advantageous', and that 'any formal requirement might jeopardise the success of the current arrangements'.[270]

For the courts, early and open communication between counsel provides significant savings in court time. Successive proposed and actual reforms of criminal procedure in recent years have attempted to foster a more collaborative and communicative legal culture, in which informal out-of-court discussions between counsel play a pivotal role.[271] For example, the Pegasus Task Force, which was established to tackle the problem of the delay besetting the courts in 1988, concluded that the early involvement of experienced prosecution and defence counsel, permitting close and open communication under clear judicial supervision, was the most important precondition for timely resolution of criminal proceedings. Similarly, the *Crimes (Criminal Trials) Act 1999* (Vic) introduced case conferences and directions hearings to provide a forum in which the parties could be encouraged to resolve as many contested issues as possible.

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263 *GAS v The Queen; SJK v The Queen* (Unreported, High Court of Australia, Gleeson CJ Gummow, Kirby, Hayne and Heydon JJ, 19 May 2004) [42]-[44].

264 Ibid [30].

265 Cowdery (2007), above n 242, 10.

266 *R v Ahmed* [2006] NSWCCA 177 (Unreported, McClellan CJ, Hislop and Johnson JJ, 5 June 2006).

267 Ibid [23].

268 See Seifman and Freiberg (2001), above n 254.

269 Ibid.

270 Samuels (2002), above n 250, 4.

271 The reforms to committals, for example, and the introduction of pre-trial hearings—case conferences and directions hearings—were intended to foster early discussion of the disputed facts and issues. See for example, Pegasus Task Force (1992), above n 53.

> The process [of informal discussion] is designed to establish the appropriate charge, that is to say, the charge which the prosecutor believes can be proved beyond reasonable doubt, which adequately reflects the criminality, which those facts reveal and which provides for the sentencer an adequate range of penalty.[272]

The proactive approach to case management adopted by Victorian courts under the *Crimes (Criminal Trials) Act* 1999 also signified the courts' interest in fostering early, open and informal discussions between counsel. Since 2002–03, the Supreme Court, the Magistrates' Court and the County Court have introduced processes intended to encourage pre-trial discussions. The Magistrates' Court has introduced case conferences in the committal stream, and the County Court has piloted a system of 'cylinders' for case management[273] and introduced specialist lists to manage sexual offences and complex fraud offences.[274] The Supreme Court has introduced pre-trial case management conferences, called 'section 5 hearings', to assist in managing its criminal trial list.[275]

Among legal practitioners, it is therefore generally accepted that criminal proceedings could not be resolved—whether by a trial or a guilty plea—without discussion between the parties.[276] At present, prosecution and defence counsel routinely engage in pre-trial discussions to resolve disputed issues, although they may not necessarily refer to them in court. As the AIC noted in its report on trial delay, 'early communication between the parties [is] critical to the timeliness and quality of trial preparation'.[277]

Consultation

Several legal stakeholders noted the importance of early discussions between counsel in the early resolution of contested matters. The Victorian Bar Council saw these discussions as the key to resolving cases before the trial.

> The real key to early pleas of guilty is the early engagement of experienced trial counsel … The main reason that 28% of guilty pleas come at the directions hearing/door of the court is because trial counsel for both prosecution and defence are not engaged until that stage.[278]

In fact, the Bar Council considered that any scheme or provision intended to encourage early pleas would be ineffective without the early engagement of counsel.

> Early engagement of trial counsel has implications for the effectiveness of both discounts for guilty pleas and sentence indications. First, without the early engagement of trial counsel, neither the prosecution nor the defence will have a detailed appreciation of the case so as to give fully informed advice about the merits (including any available discount) of an early guilty plea. Second, in the absence of detailed advice from defence trial counsel, the risk of an inappropriate guilty plea increases.[279]

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272 Samuels (2002), above n 250, 9.

273 County Court of Victoria, *2002–03 Annual Report*; *2003–04 Annual Report*. The 'Six Cylinder System' was aimed at 'examining whether criminal trials can be dealt with more expeditiously if they are managed intensively by the trial judge'. Each participating judge is allocated a cylinder of cases at random and the judge is responsible for scheduling and monitoring the matters from commencement in the County Court through to the trial. A formal evaluation of the pilot has revealed the benefits in productivity that flow from judges handling their own lists, but also the difficulties of maintaining sufficiently flexible listings to capitalise on these benefits across the criminal jurisdiction; County Court of Victoria, *2005-06 Annual Report*, 5.

274 Chief Judge, County Court, *Sexual Offences List*, PNCR 1-2007.

275 Chief Justice, Supreme Court of Victoria, *Criminal Division: Case Management by Section 5 Hearings*, Practice Note 5 of 2006.

276 Seifman and Freiberg (2001), above n 254.

277 Payne (2007), above n 2, 42. Note that these developments are not confined to criminal proceedings. There have been comparable developments in civil case management, as evidenced by the introduction of alternative methods of dispute resolution. The Victorian Law Reform Commission has been asked to inquire into these issues as part of its current inquiry into civil procedure.

278 Submission 13 (Victorian Bar).

279 Ibid.

Similarly, members of the Criminal Bar Association, VLA lawyers and staff of the Office of Public Prosecutions confirmed that defence counsel routinely approach the prosecution to engage in preliminary, without prejudice discussions as to the charges that will be preferred, to explore the potential for the case to be resolved by a guilty plea. [280]

Pressures to increase the openness and transparency of criminal proceedings

However, while some reforms to criminal procedure are aimed at fostering out-of-court discussions, others are increasing the pressure on the justice system to make its proceedings more accessible and transparent. Measures introduced to increase victims' involvement in criminal proceedings, for example, open up the negotiations between counsel to victims, who are consulted when the prosecution considers a defendant's plea offer, and who prepare a victim impact statement prior to the sentencing of an offender.[281] Measures to clarify and publicise the courts' decisions in criminal proceedings, such as the immediate electronic release of judgments and media backgrounders in high-profile cases, similarly open up the sentencing process to public scrutiny.[282]

This inquiry has brought to the fore concerns about the appropriateness of the informal discussions and negotiations between counsel that take place during the course of criminal proceedings. Many of these concerns relate to one of the fundamental issues confronting this inquiry: the extent to which various elements of the criminal justice system can be made more transparent and accountable. This issue, specifically with respect to sentence indication, is discussed in Chapters 5 and 6 of this report.

Some participants were concerned about the appropriateness of informal discussions and negotiations between counsel. One participant in a focus group believed plea bargaining to be 'a dangerous process that could "poison" the system'.[283] Another suggested that the process is 'really trying to unfairly "tempt the defendant"'.[284]

Victims and their families were apprehensive about informal negotiations, fearing that these discussions could cause them to be left out or sidelined, reducing the scope for their views and experiences to influence the outcome of the case.[285] In a similar vein, counsellors of victims of sexual assault at West CASA suggested that victims were concerned about 'backroom deals' that reduced the transparency of the court processes:

> It is common for a victim to indicate that she wants the whole story to come out. She will not want the story reduced to a few admitted facts. The charges are a tiny part of the whole experience.[286]

280 Legal Issues Roundtable (14 March 2007).

281 Section 24 of the *Public Prosecutions Act 1994* (Vic) requires the Director, in discharging his or her functions, to give appropriate consideration to the concerns of the victim. Sections 95A–F of the *Sentencing Act 1991* (Vic) cover the law in relation to victim impact statements. Section 9 of the *Victims' Charter 2006* (Vic) requires the prosecution to ensure that the victim is kept informed about the process, including whether a plea of guilty to a lesser charge will be accepted. Section 13 of the same Act covers the victims' rights in relation to victim impact statements.

282 Victorian courts have been strengthening their links and channels of communication with the community through the establishment of media units, and the prompt release of sentencing remarks. For example, both the Supreme Court and the County Court have recently published sentencing remarks in high-profile cases on their websites within days of the sentence being handed down. (See *R v Dupas* [2007] VSC 305 (Unreported, Cummins J, 27 August 2007), <www.supremecourt.vic.gov.au> at 4 September 2007; *R v Forde* (Unreported, County Court of Victoria, Wodak J, 13 December 2006), <www.countycourt.vic.gov.au/ CA256D90000479B3/Lookup/Judgments_F/$file/06_VCC1610.pdf at 4 September 2007.)

283 Focus Group 1 (20 March 2007).

284 Focus Group 2 (21 March 2007).

285 Victims' Issues Roundtable (27 February 2007).

286 Meeting with West CASA (21 March 2007).

Participants in a victims' roundtable were concerned that plea bargaining could allow a bargain to be made which could lead to the defendant pleading guilty to a lesser charge and receiving a more lenient sentence. West CASA expressed concern at the potential for the victim to feel 'sidelined' if the victim has limited opportunity to contribute his or her views on the defendant's admissions, or if the case is resolved with a plea to lesser charges.[287]

There is precedent for such bargains in other jurisdictions. For example, the former Israeli president entered into an agreement to plead guilty to a number of charges of indecent acts and sexual harassment on the basis that rape charges against him would be dropped and he would escape a jail term. This 'deal' received widespread condemnation and prompted large-scale protests. The Israeli Attorney-General has been asked by the nation's High Court to explain the basis for the agreement.[288] However, the fear that such an agreement could be struck here is based on a misunderstanding of the roles of the parties in the Victorian criminal justice system, particularly the role and power of the prosecution.

The role and obligations of the prosecutor in charge and plea negotiations

The decision whether to proceed with particular charges is guided by legislation and criteria governing the decision to prosecute.[289] Under the *Public Prosecutions Act 1994* (Vic), the Director of Public Prosecutions, in discharging his or her functions, is required to have regard to 'considerations of justice and fairness', 'the need to ensure that the prosecutorial system give appropriate consideration to the concerns of victims of crime',[290] and 'the need to conduct prosecutions in an effective, economic and efficient manner'.[291]

For each and every case, the prosecutor must determine whether there is sufficient evidence to proceed, whether there is a reasonable prospect of conviction, and finally, whether it is in the public interest to proceed. It is only after the consideration of each of these questions that the prosecutor can choose to withdraw any charges with a view to resolving the case earlier. Further, the Victorian Director of Public Prosecutions, like his or her counterparts in other Australian jurisdictions, acts consistently with Australia-wide guidelines defining the circumstances in which plea bargaining can be conducted.[292] They permit plea bargaining, 'consistent with the requirements of justice', but indicate that it should not take place unless:

> the proposed charges bear a reasonable relationship to the nature of the criminal conduct of the accused; those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and there is evidence to support the charges.[293]

The statutory obligations of the prosecution minimise the risk that the prosecution will agree, in informal discussions, to proceed with charges that do not fully reflect the criminality of the case.

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287 Submission 25 (West CASA).

288 See Rory McCarthy, 'Israeli president strikes plea bargain over sex offences', *Guardian Unlimited* (28 June 2007) <www.guardian.co.uk/print/0,,330107198-103552,00.html> at 13 August 2007; 'Israel president sex case delayed'; *BBC News* (1 July 2007) <http://news.bbc.co.uk/1/hi/world/ middle_ east/6258132.stm> at 13 August 2007; 'Israeli president's sex case delayed' *ABC News* (3 July 2007) <www.abc.net.au/news/stories/2007/07/03/1968096.htm> at 13 August 2007.

289 *Public Prosecutions Act 1994* (Vic). See also *Criteria Governing the Decision to Prosecute*, The Office of Public Prosecutions <www.opp.vic.gov.au> at 21 July 2007.

290 *Public Prosecutions Act 1994* (Vic) s 24(a) and (c).

291 *Public Prosecutions Act 1994* (Vic) s 24(b). Factors that the Director will take into account include: the seriousness of the alleged offence, the offender's personal circumstances, including age, mental health, background and antecedents, when the offence was committed, the prevalence of the offence and the need to deter the alleged offender and others from engaging in similar behaviour and the attitude of the victim towards any prosecution.

292 Fox and Freiberg (1999), above n 90, 328.

293 *Prosecution Policy of the Commonwealth* (2nd ed, 1990), [5.14-5.15], cited in Fox and Freiberg (1999), above n 90, 328.

4.2 The implications of sentence indication for criminal practice

The main benefit that sentence indication can offer is the early resolution of cases that would otherwise proceed to trial. However, the sentence indication process alters the roles of the judicial officer and counsel, and requires adjustments to criminal procedure and practice. It is therefore necessary to consider how a sentence indication process would affect the conduct of criminal proceedings before deciding whether the expected benefits would justify the adjustments required to introduce it.

The Council notes that there is a trade-off between promoting informal communication to advance the early resolution of cases and providing more open and accessible proceedings. It needs to be recognised that measures to expedite criminal proceedings inevitably place demands on counsel to resolve informally matters that would otherwise tie up the time and resources of the court. In assessing the extent to which a sentence indication process is a desirable and feasible means of expediting contested criminal proceedings, we recognise the crucial role that informal discussion between counsel plays in case management.

Features of a generic sentence indication process

Sentence indication is sometimes associated with charge or plea bargaining because it involves the judicial officer in a potentially pre-emptive indication of the likely sentence.[294] However, sentence indication differs from both informal and formal plea bargaining in several respects.[295] It is conducted in open court, provides the judicial officer with the discretion to indicate not only the type but also the 'duration' of the penalty, and involves judicial adjudication rather than mere approval of a counsel-initiated plea agreement.

Whereas the judicial officer's role is conventionally to adjudicate the matter, the provision of an indicative sentence in advance of a plea comes close to empowering the judicial officer to provide advice. This represents a departure from conventional practice that can affect not only the role of the judicial officer, but also the roles and duties of counsel for the prosecution and defence.

Under the conventional rules of criminal procedure, a judicial officer passes sentence on an offender who has pleaded guilty or been found guilty. The sentence is determined after a plea hearing at which prosecution and defence submit relevant material. At this stage, the prosecution provides details of the offender's criminal record and makes submissions in relation to the sentences imposed for comparable offences. If the victim has prepared a victim impact statement, the prosecution also provides this to the court.[296] The defence provides material in mitigation of the plea, including evidence relating to the defendant's personal circumstances and his or her prospects of rehabilitation.

By contrast, a sentence indication process allows the judicial officer to provide an indication of the likely sentence before the defendant decides whether to plead guilty or defend the charges. The defendant can request an indicative sentence without prejudice; the defendant is not bound to accept the indicative sentence and plead guilty. Similarly, the judicial officer is not obliged to provide an indicative sentence. However, if an indication is given and 'accepted' (in other words, the defendant pleads guilty thereafter), the matter is listed for sentence with the same judicial officer, who is bound by the sentence indication. If the defendant does not plead guilty within a reasonable time of the sentence indication, the matter proceeds to a contested hearing presided over by a different judicial officer, who is not informed of or bound by the sentence indication process.

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294 Donna Spears, Patrizia Poletti and Ian MacKinnell, Judicial Commission of New South Wales, *Sentencing Indication Hearings Pilot Scheme* (1994) 3. 'In Australia, there has been a traditional reluctance to endorse any mechanism which would unfairly pressure an accused person to plead guilty, because it would stretch justice beyond the bounds of fairness.' See *R v Tait and Bartley* (1979) 24 ALR 473, and Peter Sallman and John Willis, *Criminal Justice in Australia* (1984), 99.

295 Spears, Poletti and MacKinnell (1994), above n 294, 6.

296 It should be noted that a victim impact statement is not prepared in every case.

The indicative sentence does not specify the exact sentence that would be imposed. It can be expressed in general terms: it might state the maximum sentence that would be imposed or the type of sentence that is likely to be imposed, or merely rule out a particular sentencing disposition, such as an immediately servable prison sentence. It can include a reduction in sentence for a guilty plea entered after sentence indication is provided. While an indicative sentence cannot be appealed, the prosecution and defence retain their rights of appeal against the final sentence.

Safeguards embedded in the sentence indication process

To some extent, this process already incorporates safeguards to minimise the risk of the process itself causing a miscarriage of justice. The process preserves the defendant's right to put the prosecution case to the test, by giving the defendant the option of seeking sentence indication.[297] The defence can weigh up the likely benefits and risks of sentence indication before making a request for it. While the request for an indicative sentence implies that the defendant is willing to plead guilty as charged, the request for sentence indication does not commit the defendant to pleading guilty or compromise a not guilty plea; the defendant may 'reject' an indicative sentence and elect to contest the matter without prejudice.

The judicial officer is not obliged to grant the defence's request for sentence indication: he or she may choose to reject or defer consideration of this request. Before granting a request for sentence indication, the judicial officer determines whether the material available at that stage of the proceedings would support the provision of an indicative sentence.

Under the NSW pilot sentence indication scheme, if the prosecution successfully appealed a sentence imposed after (and consistent with) an indicative sentence, the defendant had the right to withdraw the guilty plea and have the matter listed for trial.[298]

The implications for the role and independence of judicial officers

The Discussion Paper presented a brief history of the use of sentence indication and highlighted the disapproval voiced by Australian courts at a judge providing a 'quote' of the likely sentence to counsel privately in chambers. The practice fell into disrepute for many years because it diminished the openness of criminal proceedings and threatened to undermine the impartiality of the judicial officer.

Is it appropriate for a judicial officer to give a sentence indication?

However, despite concerns about the use of sentence indication in these circumstances, it was introduced informally in summary proceedings in 1993 and quickly spread from the Victorian Magistrates' Court to New Zealand and some other Australian courts of summary jurisdiction. In the past twenty years, the courts' approach to case management has altered, and increasing use is made of measures that require judicial officers to manage rather than simply adjudicate the proceedings. In this context, the Discussion Paper called for comment on whether it was appropriate for a judicial officer to provide an indicative sentence in advance of a trial or a guilty plea.[299]

The forum and the transparency of the process

Some of the early concerns with sentence indication (and, in other jurisdictions, with plea bargaining) arose because the discussions involving counsel and judicial officers were held in private, and not in open court. In *R v Marshall*, the Victorian Supreme Court observed that negotiations involving a

297 The Law Institute of Victoria (Submission 17) and Victoria Legal Aid (Submission 23) submitted that the fact that the initiative rests with the defendant reduces the risk that this process could place pressure on the defendant to plead guilty.

298 *R v Glass* (1994) 73 A Crim R 299, 304; *R v Warfield* (1994) 34 NSWLR 200, 209–14. See also *R v Spanakakis & Tsolakis* (1995) 85 A Crim R 513.

299 Discussion Paper (2007), above n 44, 52 (Question 5).

judicial officer would be 'inconsistent with the integrity of the court' and 'thoroughly unseemly in the administration of justice'.[300] As then Justice Hampel observed, there would be 'justified public disquiet about a system of justice which condones bargains between the accused and the court, particularly when such bargains are struck behind closed doors'.[301]

In 1987, the Canadian Sentencing Commission indicated that its main concern with 'active judicial participation in plea bargaining' was 'the erosion of a judge's role as an objective, non-partisan arbitrator', and the potential for the court's intervention—by way of sentence indication—'to effectively coerce the accused into accepting the [plea] agreement and pleading guilty'.[302]

However, most contemporary sentence indication schemes involve the provision of sentence indication in open court, but allow suppression orders to be made as required.[303] One of the chief advantages of this process was seen to be its transparency: it permitted informal discussions to take place, but subjected them to the supervision of the court. The scheme was initially proposed in the hope that a formal process would bring the pre-trial discussions between prosecution and defence into open court and subject them to judicial scrutiny and supervision.

Similarly, Mack and Anleu have supported sentence indication on the basis that it would increase rather than reduce transparency, because it would bring pre-trial discussions under judicial scrutiny. They observed that 'creating an accepted, accessible, transparent process for sentence indication will alleviate some concerns'.[304]

The involvement of the judicial officer in case management

There have been many changes in the administration of justice since the 1980s, when *Marshall* was decided, and, faced with mounting pressures to deliver justice with the maximum speed and efficiency, courts are increasingly expected to take a more direct and proactive role in case management. Criminal procedure has evolved: there are more developed pre-trial processes and courts have become increasingly focused on problem-solving than on the iteration of the parties' arguments. Arguably, in the current environment, the provision of sentence indication could also be regarded as an appropriate strategy for case management:

> Enabling and encouraging judges to give sentence indications in the right circumstances is not asking them to act out of keeping with their accepted role within our system of justice, which gives the judge great scope to exercise sound and realistic judgment.[305]

Consultation: Participants' views

The Council found strong support from participants in this inquiry for judicial officers to take a more proactive and managerial role in the resolution of disputed criminal matters. We found that victims and their advocates, offenders, members of the general community, the judiciary, and the legal profession shared the same concern at the length of criminal cases and the impact that protracted proceedings can have.[306] They therefore generally were willing to accept a process that altered the conventional role of

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300 *R v Marshall* [1981] VR 725, 734.

301 George Hampel, 'Plea Bargaining—A Judge's Involvement' (1985) 59 *Law Institute Journal* 1304, 1305. For a Canadian study of public opinion on plea bargaining see Cohen and Doob (1990), above n 254.

302 Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1998), 424–5, cited in Peter Charleton and Paul Anthony McDermott, 'Constitutional Implications of Plea Bargaining' (July 2000) *Bar Review* 478.

303 The exception is the English scheme, where sentence indication may be provided in the judge's chambers, but must be transcribed.

304 Submission 9.

305 Hampel (1985), above n 301.

306 Submissions 2 (A. English), 3 (A. Flynn), 10 (M.Noe) and 13 (Victorian Bar). Meeting with Crime Victims Support Association (27 February 2007); Victims' Issues Roundtable (27 February 2007); Victims of Homicide Support Group (Frankston) (15 March 2007).

the judicial officer if it meant that, through a more hands-on approach to case management, there would be more efficient disposal of cases through the system.

However, participants were divided on the merits of permitting a judicial officer to become involved in a sentence indication process. Victoria Police saw sentence indication as a way of strengthening defendants' confidence in the value of these discussions.

> The negotiations would be simpler and much more effective, if the judge was allowed to take part in the process … This would lead to significantly more people pleading guilty at an early stage and assisting authorities.[307]

Some offenders shared this view. It was suggested by one offender that 'too many legal representatives give too low an estimate of the sentence',[308] and this view was echoed by other offenders with whom the Council spoke.[309] A number of offenders stated that they would have more confidence in an indication given by a judge. It was noted, however, that if the defendant did not plead guilty after receiving an indicative sentence, another judge should hear the trial in relation to that matter.[310]

When the judicial officer provides an indicative sentence, he or she is committing the sentencer (albeit in general terms) to a particular type of sentence or a sentencing range, before the facts of the case have been admitted or proven. If the judicial officer decides to provide an indication, he or she will then face the difficulty of expressing it in terms that are clear and specific enough to be useful, without pre-empting or confining the sentencer's discretion to impose an appropriate sentence once all the relevant material has become available. The more specific an indicative sentence is, the more useful it may be to the defendant. However, the more specific it is, the greater the risk of pre-empting and confining the sentencer's decision on conviction. To strike an acceptable balance involves defining the content of the indicative sentence broadly enough to be relevant to the defendant, but loosely enough to permit the sentencer to depart from it if material becomes available that justifies the imposition of a different sentence.

Some participants were concerned at the prospect of the judicial officer becoming a party to a sentencing 'contract' with the defendant; they sought safeguards to ensure that an indicative sentence could not bind the sentencing court to impose a sentence that was found to be inappropriate once all the relevant material was available. While these participants did not oppose the provision of an indicative sentence, they stressed the importance of permitting the sentencer to depart from the indicative sentence.[311]

The effect of sentence indication on the role of the prosecution

A sentence indication process can have an effect on the role of the prosecution. In New South Wales, the effect of the sentence indication process on the prosecutor's role and duties became a matter of concern during the operation of the scheme. The main concern appeared to be the pressure on the prosecution to make highly specific submissions in relation to the indicative sentence. The expectation or requirement that the prosecution make submissions as to the quantum of sentence could be construed as implicitly conferring an obligation on the prosecutor to signal a view as to the appropriate sentence during the sentence indication process, or lose the right to appeal against an unduly lenient sentence imposed after, and in accordance with, the indicative sentence.[312]

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307 Submission 22.

308 Offenders' Focus Group, Tarrengower (7 December 2006).

309 Offenders' Focus Group, Dhurringile (12 December 2006); VACRO Focus Group (14 March 2007).

310 Offenders' Focus Group, Tarrengower (7 December 2006). VACRO Focus Group (14 March 2007).

311 Submission 24 (Federation of Community Legal Centres).

312 See Paul Byrne, 'Sentence Indication Hearings in New South Wales' (1995) 19 *Criminal Law Journal* 209, 217.

The implications for defence counsel

Some defence lawyers saw the provision of an indicative sentence by a judicial officer as more appropriate and authoritative than the provision of advice on the likely sentence by a defence lawyer.[313] However, some submissions considered the possibility that a defence counsel, who is instructed to seek an indicative sentence but is subsequently instructed to enter a defence, faces an ethical dilemma. Byrne, in a review of the NSW process, expressed the view that the request for sentence indication implies a willingness to plead guilty; if, after an indicative sentence has been provided, the defendant elects to plead not guilty, the lawyer may have to resolve the instruction to defend the charges with the client's implied admission of guilt.[314] Professors Mack and Anleu[315] and the Victorian Bar Council recommended that 'guidelines for defence practitioners should address the problems raised by continued representation after a rejected sentence indication'.[316] The Council regards the position of defence counsel in a sentence indication process as no different from their position when initiating discussions with the prosecution in relation to a possible plea.

4.3 Victims' interests in and concerns with sentence indication

The criminal justice system is increasingly coming to recognise the importance of validating the experience of victims and providing them with an appropriate level of involvement and influence in criminal proceedings. The *Victims Charter Act 2006* (Vic) establishes a statutory obligation for the relevant agencies to inform victims of their rights and interests, and to provide information relating to court processes.[317] It provides a victim with a statutory entitlement to make a victim impact statement 'to the court sentencing the person found guilty of the offence' and stipulates that 'unless the court orders otherwise, that statement may be considered by the court in determining the sentence of the offender'. This provision operates in conjunction with Division 1A of Part 6 of the *Sentencing Act 1991* (Vic), which sets out the framework for the presentation, content, distribution and examination of victim impact statements in the making of sentencing and other orders.[318]

The Attorney-General specifically asked the Council to seek the views of victims of crime on the implications of a sentence indication scheme. Accordingly, we convened a number of discussion groups with victims and peak victim advocacy and support groups to examine the impact that sentence indication could have on victims.

The advantages and disadvantages for victims: Participants' views

The submission by Victoria Police was one of several that stressed the importance of finding a way to incorporate victims' views and interests and acknowledged the difference that the Charter will make in this regard. Victoria Police indicated that 'any new proposals should be line with the work that is currently being progressed in regards to the Victims Charter and in particular the work on Family Violence and Sexual Assaults'.[319] Victoria Police recognised the differing views that victims might have on the merits of sentence indication:

> There is the potential to minimise trauma of victims of having to appear in court and give evidence by resolving cases in a timelier manner … There is also the potential for the victim to feel frustrated, as there will no longer be the opportunity for the defendant to have to confront the victims' accusations. [320]

313 Legal Issues Roundtable (14 March 2007).
314 Byrne (1995), above n 312, 215.
315 Submission 9 (Professors Mack and Anleu).
316 Submission 13 (Victorian Bar).
317 *Victims' Charter Act 2006* (Vic) ss 7–12.
318 *Sentencing Act 1991* (Vic) ss 95A–F.
319 Submission 22.
320 Ibid.

Victims and their advocates presented diverging views on the merits generally of resolving a matter by a guilty plea, and specifically on the potential value of a sentence indication process.[321] Some victims' representatives could see the merit in a sentence indication scheme. While South Eastern CASA raised a number of issues with procedural aspects of sentence indication, it was of the opinion that its clients would find sentence indication to be beneficial if it could bring about earlier guilty pleas.[322] Similarly, a participant at a victims' roundtable suggested that it would be helpful to victims of sexual assault.[323]

The attrition rate—the proportion of cases that lapse between reporting and trial—is particularly high for sexual offences, and there may therefore need to be special consideration of the implications of sentence indication for this offence group.

While some victims may benefit from averting the need for a trial, others would have already undergone the committal process and may believe the benefits are diluted.[324] One participant took the view that the scheme would have only limited effectiveness in relation to sexual assault cases because the rate of conviction is so low in Victoria that the majority of offenders charged with such an offence would probably take their chances with a jury at trial.[325] West CASA could not see any 'significant advantage' to its clients through the introduction of sentence indication.[326]

Identifying the scope for victims' involvement in a sentence indication process

It was clear that in order to meet the expectations of victims whose cases proceed through a sentence indication scheme, it would be vital to ensure that the victim understands the purpose and possible outcome of a sentence indication process and has the opportunity to convey his or her views and experiences before a sentence indication is given.[327] The South Eastern Centre Against Sexual Assault submitted that 'at the very least, the victim should be informed all along the process … they often find that they are not aware of what is happening and it is explained to them inadequately'.[328]

Many participants felt that it was important for victims to have the chance to present or convey their views and experiences prior to the judge providing a sentence indication to a defendant.[329] However, CASA House noted that this could be counter-productive and could have a 'negative impact if the victim/survivor's experiences are used to inform a sentence indication and then the defendant pleads not guilty'.[330]

The majority of the participants in this inquiry concluded that the acceptability of sentence indication would depend, in large part, on whether it was possible to devise a sentence indication process that ensured that victims were consulted and their views made available to the court.[331] However, some doubted whether a sentence indication process could achieve this.[332]

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321 Submission 14 (South Eastern CASA). This submission highlighted the difficulty in presenting a 'victim's perspective' as their 'clients and their responses to trauma are varied'.

322 Ibid.

323 Victims' of Homicide Support Group (Frankston) (15 March 2007).

324 Victims' Issues Roundtable (27 February 2007).

325 Victims of Homicide Support Group (Frankston) (15 March 2007).

326 Submission 25 (West CASA).

327 Victims' Issues Roundtable (27 February 2007).

328 Submission 14 (South Eastern CASA).

329 Victims' Issues Roundtable (27 February 2007).

330 Submission 18 (CASA House).

331 Victims' Issues Roundtable (27 February 2007); Victims of Homicide Support Group (Frankston) (15 March 2007); Submissions 14 (South Eastern CASA), 17 (Law Institute of Victoria), and 22 (Victoria Police).

332 Submissions 18 (CASA House) and 25 (West CASA).

4.4 The implications for the defendant

Several submissions raised the possibility that sentence indication could place pressure on vulnerable defendants to plead guilty when it is not in their best interests to do so. This was particularly felt to be a concern for vulnerable defendants who lack capacity or support and who may feel the pressure to conclude the case more acutely than other, less disadvantaged defendants.[333] Some of the offenders the Council consulted also raised this concern.[334]

The most appropriate protection for a free and voluntary plea decision is for the defendant to have access to legal representation and advice. Victoria Legal Aid suggested that a defendant should not be able to request a sentence indication if he or she is not represented.[335] However, some defendants may wish to represent themselves, and the Council believes that sentence indication should be available to a defendant who is represented or states to the court that he or she has chosen not to engage a legal representative.

We see merit in the suggestion by the Law Institute of Victoria that a judicial officer should be required to adjourn a matter to allow an unrepresented defendant to seek legal advice before participating in a sentence indication hearing. In practice, this would ordinarily occur when an unrepresented defendant appears in criminal proceedings.[336]

Despite the risks associated with a sentence indication scheme for defendants, a number of offenders thought that it could also significantly help them. One offender had a very positive perception of the sentence indication scheme that was in operation in New South Wales, as offenders who were involved in the process seemed to have a better idea of what was happening.[337] Another offender suggested that it would encourage defendants to plead guilty earlier because, under the current system, people 'hold out' because of the 'fear of the unknown'.[338] It was also suggested by a number of offenders that having some indication of the sentence from the judge would assist them in planning for the future, especially if they are facing a term of imprisonment.[339] This was seen as particularly useful where the offender had children.[340]

4.5 The value and risks of sentence indication

The Council notes the various statutory and professional obligations that guard against the prosecution entering into an agreement that diminishes the seriousness of the conduct alleged or that disregards the impact of the offence on the victim, and regards concerns about the propriety of informal discussions between counsel relating to the charges and the likely plea as unfounded. Further, there is likely to be an increasing emphasis on professional discussions as courts explore ways of streamlining their criminal proceedings.

Together with the increasing emphasis on out-of-court discussions, there has been a general acceptance that judicial officers must assume a managerial role to advance criminal proceedings. We expect this trend to continue. We have concluded that the informal discussions between counsel are often needed to advance a case to the point where sentence indication could be provided, are a vital part of professional practice, and do not compromise the transparency or integrity of the proceedings.

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333 Submissions 21 (West Heidelberg Community Legal Centre), 20 (Victorian Aboriginal Legal Service) and 26 (Mental Health Legal Centre).

334 Offender's Focus Group, Tarrengower (7 December 2006); Offender's Focus Group, Dhurringile (12 December 2006).

335 Submission 23 (Victoria Legal Aid).

336 Submission 17 (Law Institute of Victoria).

337 Offenders' Focus Group, VACRO (14 March 2007).

338 Offenders' Focus Group, Tarrengower (7 December 2006).

339 Offenders' Focus Group, Tarrengower (7 December 2006); Offenders' Focus Group, Dhurringile (12 December 2006).

340 Offenders' Focus Group, Tarrengower (7 December 2006).

Criteria for a sentence indication scheme

Sentence indication has been available in summary proceedings in several jurisdictions and for many years, without challenges to the authority or consequences of this process. The endurance and apparent success of this arrangement suggest that it is possible to devise a process that does not constrict the sentencing discretion of the court.

However, it is clear that sentence indication has the potential to alter the conventional roles of the judicial officer and the prosecution, and if combined with a reduction in sentence for pleading guilty early, to affect the adequacy of the sentences imposed after this process. If a formal sentence indication is to be introduced it must be transparent, fair, useful and workable.

The usefulness of sentence indication will vary, depending on the court and the type of proceedings in which it is used. Chapter 2 outlines the extent to which each of the courts is challenged by its caseload and case flow, and suggests the extent to which defendants' plea decisions might be influenced by a change in law or procedure. In considering whether a sentence indication should be made available, it is necessary to consider not only whether it could be provided fairly and openly, but also whether it could resolve issues that are actually impeding the resolution of cases in that court.

Sentence indication must be workable. It must operate within the existing system for case management. Each court has its own statutory and administrative regime that establishes the procedure and practice devised to meet the particular demands of its jurisdiction. Some of the most complex challenges are the practical difficulties associated with devising a process that meets all the requirements of justice and efficiency. To be feasible, the sentence indication process must be quick and flexible, but still provide the time and opportunity for victims' views to be taken into account. The indication must be specific enough to be useful to the defendant, without pre-empting or inappropriately confining the ultimate sentencing decision.

Chapters 5 and 6 review the different procedural changes required to provide sentence indication in summary and indictable matters. They present the views submitted during consultation on this question and the Council's findings on whether the use of sentence indication in summary proceedings should be given a statutory underpinning and whether sentence indication should be made available in indictable proceedings.

Chapter 5 Sentence Indication in Summary Proceedings

Chapter 5 Sentence Indication in Summary Proceedings

Given the size of the caseload in the summary jurisdiction (approximately 134,000 criminal matters),[341] it is vital for cases in which there is likely to be a guilty plea to be identified as early as possible.

The guilty plea is also significant for participants in individual cases, as it can affect the types of processes used to sentence the offender, and in this way, the outcome of the case. The fact that a defendant pleads guilty has a bearing on the course of the proceedings. A defendant's willingness to admit his or her guilt can trigger alternative means of disposing of the matter. For example, a defendant who pleads guilty may be eligible to have the matter referred to the Koori Court, the Drug Court or the Diversion program.

5.1 The operation of the current sentence indication process

The mention system, which has been in operation for over fifteen years, is the main route by which contested summary cases are dealt with. Defendants whose matters proceed by arrest may make their first court appearance at a bail hearing; the remainder, whose matters are initiated by summons, first appear at a mention hearing. At this stage, some defendants indicate their willingness to plead guilty. However, the prosecution has not yet finalised its brief or obtained details of any other pending matters involving that defendant to be consolidated in these proceedings, and the defendant may not yet have obtained legal advice. The mention hearing is commonly the forum used to bring the matter before the court and set the timelines for the next stage of the proceedings.

Contest mention hearings are held to identify the disputed issues in contested matters and explore the possibility of resolving these issues before a contested hearing (the summary equivalent of a trial). At a contest mention the prosecution is expected to have available full details of the offence, including a summary and brief of evidence, the defendant's prior criminal record and any relevant victim impact statements, while the defence is expected to have available details of the most salient points that could be made on a plea on the defendant's behalf. These would include details of the defendant's personal circumstances and current or proposed rehabilitation programs.[342]

The current guidelines for the provision of sentence indication

Sentence indication has been available in the Magistrates' Court at contest mention hearings since 1992–93, when a pilot process commenced in the Broadmeadows Magistrates' Court. Guidelines issued by the Chief Magistrate regulate the conduct of contest mention hearings.

The scope and nature of the indication

Under these guidelines, the magistrate may indicate, in general terms, the sentence likely to be imposed on a plea of guilty. The sentence indication will state only the type of sentence (for example custodial/non-custodial) or the type of order (such as a fine or community-based order) that is likely to be imposed. The magistrate may also indicate that a particular type of sentence is *not* likely to be imposed, for example that the defendant is not likely to receive an immediately servable term of imprisonment.

The guidelines allow magistrates to incorporate a reduction in sentence for a guilty plea when indicating the sentence that a defendant is likely to receive if he or she pleaded guilty at that stage of the proceedings.[343] If the defendant does not plead guilty after receiving an indication, the matter proceeds to a contest.

341 County Court of Victoria, *2005-06 Annual Report*, 21.

342 Magistrates' Court of Victoria, *Magistrates' Court—Guidelines on Contest Mention* (1994) [1.2]. Submission 12 (Magistrates' Court of Victoria).

343 Magistrates' Court of Victoria (1994), above n 342.

The use of sentence indication in contest mention hearings

While there is no means of identifying the contribution that sentence indication has made to the effectiveness of contest mention hearings, anecdotal evidence from magistrates, practitioners and police prosecutors suggests that sentence indication has played a vital role in alleviating concerns that would otherwise lead a defendant to defer a plea decision.

The Discussion Paper reviewed data showing the number and proportion of cases resolved with a guilty plea after a contest mention hearing since 1993–94.[344] This revealed that a high proportion of cases dealt with at contest mention hearings are resolved immediately or shortly afterwards by a guilty plea.[345] The effectiveness of the mention system, and especially the contest mention hearings, in streamlining and resolving cases is not disputed. The Court's statistics reveal an increasing proportion of defendants whose cases are being finalised at contest mention hearings in the past ten years and what appears to be a corresponding decline in the number of matters proceeding to a contested hearing.[346]

The value of the contest mention hearing has also received judicial recognition. In *DPP v John Cummings*,[347] Justice Kellam of the Victorian Court of Appeal observed:

> There can be no doubt that the use of 'contest mentions' has proved to be highly effective in terms of dealing with issues before that court.[348]

The Federation of Community Legal Centres observed that contest mention hearings save a lot of time.[349] Similarly, members of the Criminal Law Section of the Law Institute of Victoria, Mark Pedley, and the Victorian Bar Council believed that the provision of sentence indication at contest mention hearings has been effective in resolving contested cases.[350] Members of the general community and victims of crime consulted during this inquiry generally accepted that it was appropriate and useful for sentence indication to be provided in summary proceedings.[351]

The Discussion Paper considered the possibility that the provision of sentence indication under informal arrangements presented a risk of inconsistency. It noted that in New Zealand, where the operation and impact of a similar process (the status hearing) was reviewed, it was found that there was significant variation between magistrates and regional courts in the use that they made of sentence indication and the sentences imposed after this process.

Several submissions noted that inconsistencies in approach reduced confidence in the sentence indication process. The Federation of Community Legal Centres observed:

> Magistrates differ in their approach … While some magistrates are not willing to provide sentence indication, others take a more active role in adjudication, identifying strengths and weaknesses in both sides' cases and 'forcing the hand' of lawyers who do not wish to reveal their defence.[352]

Some of the offenders consulted during this inquiry also indicated that there were inconsistencies between the approaches to sentence indication and to sentencing generally, by individual magistrates.[353]

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344 Discussion Paper (2007), above n 44, 62–3.
345 Ibid.
346 Ibid 63 (Table 7 and Figure 7).
347 [2006] VSC 327.
348 Ibid [70].
349 Submission 24.
350 Submissions 13 (Victorian Bar), 17 (Law Institute of Victoria) and 28 (M. Pedley).
351 For example, see Victim's Issues Roundtable (27 February 2007).
352 Submission 24.
353 Offenders' Focus Group, VACRO (14 March 2007).

The implications of sentence indication for defendants

Several legal organisations whose clients include disadvantaged defendants to summary criminal matters—the Victorian Aboriginal Legal Service, the Mental Health Legal Centre and West Heidelberg Community Legal Centre—expressed concern at the prospect of reforms that would impose excessive pressure on these vulnerable people to plead guilty.

The Mental Health Legal Centre drew the Council's attention to the needs of defendants to proceedings in the Magistrates' Court who suffer from a mental illness. It presented observations provided by its clients, police, lawyers and magistrates that illustrated the difficulties that people with a mental impairment face in having their impairment identified and their conduct understood as an incident of their mental health problem.[354]

The West Heidelberg Community Legal Centre submitted that the provision of sentence indication could add to the pressure that defendants already face. The Centre noted:

> Our clients live in one of the most disadvantaged regions in Victoria; have low incomes and a lack of resources. This means that clients that are already squeezed by unemployment and under-employment can face an added pressure to plead guilty, as our clients do not have the time, money, knowledge or faith in the legal system to pursue a contested case.[355]

The Mental Health Legal Centre, the Victorian Aboriginal Legal Service and West Heidelberg Community Legal Centre were concerned that in these circumstances the combined effect of sentence indication and specified sentence discounts could provide too great an incentive to already vulnerable defendants to abandon a strong defence and plead guilty.[356]

The Mental Health Legal Centre reported a perception that defendants who are found not guilty after raising a defence of mental impairment may receive orders for treatment that are more onerous than the sentence they would have received on a plea of guilty. It indicated that many of its clients were reluctant to lead a defence of mental impairment because they would get a longer sentence if they went to a psychiatric hospital for treatment than they would have received if convicted of the offence.

> The defence of mental impairment provides the opposite to a sentence discount; people on non-custodial supervision orders languish in the criminal justice system at the behest of the courts for periods far beyond [the sentence that] a person without a mental illness would receive.[357]

Victims' involvement in the sentence indication process: Scope and practice

The scope for victims' involvement

Consultation with the victim is the responsibility of the prosecution, which, in summary proceedings, is undertaken by Victoria Police. Since the inception of the contest mention hearings, the Court's *Guidelines for Contest Mention* have included provision for the magistrate to take into account the view of the victim before a sentence indication is given. The guidelines indicate that before providing an indication, it is appropriate to seek the attitude of the informant, if present, and the victim. This can be done by giving the victim, if present, the opportunity to address the court,[358] or by considering a victim impact statement, if available.[359]

354 Submission 26.
355 Submission 21.
356 Submissions 20 (Victorian Aboriginal Legal Service), 21 (West Heidelberg Community Legal Centre), and 26 (Mental Health Legal Centre).
357 Submission 26 (Mental Health Legal Centre).
358 Magistrates' Court of Victoria (1994), above n 342, [6.2].
359 Ibid [3.1], [6.3].

In 2006, the enactment of the *Victims' Charter Act 2006* (Vic) established a statutory basis for victims' involvement in criminal proceedings. The Act provides statutory recognition of the principles governing the response by agencies responsible for the investigation and prosecution of crime to victims. It designates certain 'developments' that may take place in the course of the proceedings, such as the defendant's indication of a willingness to plead guilty or a finding of guilt, and establishes a statutory obligation on the prosecution to inform the victim of these developments as they occur.[360]

The extent of victims' involvement in contest mention hearings: The Council's findings

Victims appear to have limited involvement in summary proceedings. To some extent, this is a reflection of the less serious nature and the different types of cases dealt with summarily. It is also a reflection of the speed and informality of these proceedings, and the reduced opportunities for direct victim involvement.

The extent to which informants ensure that victims are kept informed of and consulted on developments in contested summary proceedings seems to vary, as does their level of involvement in the proceedings. This variation reflects the different practices and requirements of the police prosecution and presiding magistrates across the state. In some regions or cases, the police informant would routinely attend the contest mention hearing and would be expected to have consulted with the victim, if appropriate, whereas in others, the police informant might not generally be required to attend the contest mention hearing. Similarly, in some matters, victims are rarely present at contest mention or contested hearings, and in others they are present.[361]

The submission by Victoria Police stressed the importance of finding a way to incorporate victims' views and interests and acknowledged the difference that the Charter will make in this regard. Victoria Police indicated that 'any new proposals should be line with the work that is currently being progressed in regards to the Victims Charter and in particular the work on family violence and sexual assaults'.[362]

5.2 Proposal: The consolidation of the current scheme

The Magistrates' Court's view

The Magistrates' Court submitted that sentence indication has been an effective means of resolving cases at contest mention hearings. The Court indicated that it believed that the full potential of this process has not been tapped. The Magistrates' Court submitted that it was aware of inconsistencies of approach in the use of sentence indication.[363] It observed that 'not all magistrates are prepared to give sentence indications. Those who are not prepared to do so usually state that the reason for their reluctance is the lack of a statutory basis for the system'.[364] The Magistrates' Court therefore seeks statutory authority for the provision of sentence indication so that its use can be consolidated and extended.[365]

The likely impact of consolidation of the current arrangements

A consolidated process, along the lines envisaged by the Magistrates' Court, could mean that sentence indication was available not just at contest mention hearings, but also at other hearings, such as bail hearings, at which the defendant requested it. The decision as to the stage(s) at which sentence indication is made available in summary proceedings will have a significant impact on the operation and interests of all those involved in criminal proceedings.

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360 *Victims' Charter Act 2006* (Vic) s 9.

361 Meeting with Federation of Community Legal Centres (13 March 2007).

362 Submission 22.

363 Submission 12.

364 Ibid.

365 Ibid.

Victoria Police shared with the Magistrates' Court an interest in making sentence indication available as early as possible in summary proceedings, to maximise the benefits that flow from resolving the case early with a guilty plea. However, while the Magistrates' Court favoured making sentence indication available at various stages of the proceedings, Victoria Police suggested that sentence indication should be made available at the earliest opportunity to plead guilty, and only at this stage of the proceedings:

> Victoria Police believes that to be effective sentence indications should be only be available at the earliest mention date as opposed to waiting until contest mention.[366]

Victoria Police advocated restricting the offer of sentence indication to the mention hearing, which in some cases may be the defendant's first court appearance, to discourage defendants from deferring their decision in the expectation that they would still receive a reduction in sentence if they indicated a guilty plea at or after the contest mention hearing.

> If a discount or reduction is given at any other stage of the court proceedings, exceptional circumstances would need to be proven.[367]

Victoria Police submitted that this would encourage defendants to plead guilty at the earliest opportunity and discourage defendants from 'penalty-shopping'—that is, deferring their decision or seeking an indication in another forum, such as the contest mention hearing, before deciding whether or not to plead guilty.[368] Some members of the public who participated in the focus groups also considered that there should be a point after which sentence indication should/could not be offered.[369]

Victoria Police has also noted that while the provision of sentence indication at mention hearings—but only at this point of proceedings—would significantly benefit police, the expanded provision of sentence indication without such a restraint on its availability would have cost implications.[370]

Victoria Police's proposal was raised with the representatives of the Community Legal Centres, the Law Institute of Victoria and Victoria Legal Aid during consultation on this reference. The Federation of Community Legal Centres saw it as vital not to make sentence indication available, or implicitly to put pressure on defendants to seek this, until the prosecution has disclosed the case to the point that is reasonable for the defendant to consider a plea decision.[371] The Federation, along with other legal stakeholders, cautioned that making sentence indication available before the parties were ready for it would not on its own increase the likelihood of the case resolving with a guilty plea.[372] They noted that both the prosecution and defence would be unlikely to be in a position to deal with a request for sentence indication at such an early stage of the proceedings: the prosecution case is not generally complete at that point and most defendants have not yet had the opportunity to seek, let alone receive legal assistance and advice.[373]

The Federation of Community Legal Centres saw the timing of the sentence indication as a potential safeguard for the defendant. Members of the Federation noted that police may be reluctant to provide evidence such as witness statements and drug analyses until the matter has been booked for a contest.[374] In these circumstances, it would be unsafe as well as impractical to permit sentence indication to be provided any earlier than the contest mention hearing, because of the risk that a defendant could be improperly induced or pressured to plead guilty on the basis of faulty or incomplete information.

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366 Submission 22.
367 Ibid.
368 Ibid.
369 Focus Group 1 (20 March 2007).
370 Submission 22.
371 Submission 24.
372 Submissions 17 (Law Institute of Victoria), 23 (Victoria Legal Aid) and 24 (Federation of Community Legal Centres).
373 Submission 24.
374 Ibid.

> The defendant should not be put in a position where he/she requests sentence indication when his circumstances may change in a relatively short period of time and the indication could later be found to be inappropriate. Similarly, deciding to plead to an indicative sentence obtained before the full prosecution case has been disclosed could be prejudicial to the defendant, especially when he/she may not be fully aware of the implications of a guilty outcome.[375]

The Council has formed the view that restricting both the number of requests that can be made and the stage at which the request could be made could limit the flexibility and usefulness of the sentence indication process. In the Council's view, the flexibility of the current arrangements—the speed and informality of the proceedings and the willingness of prosecution and defence to respond to changing circumstances as the case progresses—are vital ingredients in the effectiveness of the current arrangements and should be preserved in the event that these are consolidated and expanded.

5.3 The Council's view

The Council notes the general support that the current arrangements receive from police prosecution and legal stakeholders who appear in summary proceedings. The Court's data on case flow also demonstrate that the contest mention hearings are effective in identifying cases in which a guilty plea is likely and addressing the issues that are impeding the early resolution of the case. Further, the Council has formed the view that the main defect of the current arrangements—inconsistencies in approach that may give rise to forum-shopping—arises at least partly from the lack of statutory support for magistrates to provide sentence indication.

The Council therefore recommends that the Magistrates' Court Act 1989 (Vic) be amended to provide explicit statutory authority for magistrates to provide an indication of the sentence likely to be imposed if a defendant pleads guilty at that stage of the proceedings. The Council further notes that the current Guidelines for Contest Mention rely on the Chief Magistrate's general authority under sections 5A and 16 of the Magistrates' Court Act 1989 (Vic) to give directions and make rules of court.

To avoid doubt as to the statutory authority for such guidelines, the Council further recommends that the Magistrates' Court Act 1989 (Vic) be amended to provide the Chief Magistrate with explicit authority to make any rules or directions required for the provision of sentence indication in summary proceedings. The Council envisages that explicit statutory support for magistrates to provide sentence indication and for the Chief Magistrate to give directions and make the rules necessary for this purpose should establish a statutory framework that allows for optimum use of sentence indication in summary cases.

Recommendation 2: Statutory support for sentence indication in summary cases

The *Magistrates' Court Act 1989* (Vic) should be amended to provide explicit statutory authority for magistrates to indicate the sentence likely to be imposed on a guilty plea entered at that stage of the proceedings, and for the Chief Magistrate to give any directions and make any rules required for this purpose.

5.4 The weight given to a guilty plea in an indicative sentence

The Victorian process, like its counterparts in New Zealand and Tasmania, has defined an indicative sentence as the sentence likely to be imposed if a guilty plea was entered at this stage of the proceedings. Each of these processes permits the magistrate to provide a reduction in sentence for pleading guilty shortly after sentence indication.

The guidelines governing contest mention hearings in the Victorian Magistrates' Court permit the magistrate to provide a reduction in sentence for a guilty plea entered at or shortly after a contest

375 Submission 24.

mention hearing.[376] The reduction can be applied to impose a less severe sentencing disposition, or to reduce the length or amount of the sentence. Similarly, the guidelines for status hearings conducted in the New Zealand District Court authorise the judge to give an indication of a sentence the defendant 'could expect were he or she to plead guilty'.[377]

The magistrate may treat a plea entered after sentence indication as a plea entered at the first reasonable opportunity. This approach permits the maximum allowable reduction in sentence for a guilty plea to be given for a plea entered at the time the defendant receives an indicative sentence, or after. For example, the guidelines governing contest mention hearings in the Magistrates' Court of Tasmania allow the magistrate to 'take the view that a plea of guilty at contest hearing ought to attract the same sentencing "discount" as may have been applicable if that plea had been entered at an earlier time'.[378]

In summary proceedings, the Victorian Magistrates' Court has the jurisdiction to impose up to two years' imprisonment for a single offence, and to impose aggregate sentences or cumulative sentences of up to five years.[379] This means that sentences are determined within a relatively narrow sentencing range, and in many if not most cases, the single most important aspect of the sentencing decision will be whether the offender should serve a prison term. This is also likely to be a critical issue for the defendant when he or she requests sentence indication.

Anecdotal evidence suggests that because of the relatively wide range of orders available, but the small sentencing range within the jurisdiction of the court, a reduction in sentence is most commonly achieved through the use of a less severe sentencing disposition rather than simply a reduction in the length of the sentence. For example, the early guilty plea might result in a prison sentence being suspended, a community based order made or the court deciding not to enter a conviction for the offence.

In Chapter 3, the Council recommended that the *Sentencing Act 1991* (Vic) be amended to require the courts to state what effect, if any, a guilty plea has had on the sentence. The Council has recommended that Victorian courts, when passing sentence, should articulate the weight given to the guilty plea by stating the sentence that would have been imposed, but for that plea.

The Council believes it desirable that the same approach be adopted in summary proceedings when an indication of the likely sentence is given. The Council believes that magistrates should be required to state, when providing sentence indication, whether the indication has been affected by credit given for a guilty plea entered at that stage of the proceedings. Consistent with this approach, the Council recommends that when a magistrate indicates the type of order that is likely to be imposed on a guilty plea at that time, the magistrate should also state whether a more severe sentence would have been imposed, but for the guilty plea. The Council believes that this will increase the transparency of the sentence indication process.

Under the current guidelines, the indication is confined to the type of sentence that is likely to be imposed or to an indication that a particular order or type of sentence is not likely to be imposed on a guilty plea entered at that stage. The effect of our recommendation would be to require the court to indicate whether it has indicated a less severe type of order on the basis that a guilty plea is entered at that stage of the proceedings.

However, we are also recommending that the Chief Magistrate's current authority to provide guidance on the provision of sentence indication be given explicit statutory underpinning. Given such authority, the Chief Magistrate may decide to vary the process by which sentence indication is sought and provided, including changing the guideline defining what an indication may or may not state.

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376 Magistrates' Court of Victoria (1994), above n 342.

377 New Zealand Law Commission, *Status Hearings Evaluation: New Zealand Study of Pre-Trial Hearings in Criminal Cases* (July 2004) 140.

378 Magistrates' Court of Tasmania, *5.5 Sentence Indication*, <www.magistratescourt.tas.gov.au/ practice_ and_procedure/criminal_proceedings/> at 4 June 2007.

379 *Sentencing Act 1991* (Vic) ss 113–113B.

If a more specific indication of the likely sentence were to be given, more specific guidance on the weight to be given to a guilty plea entered at that stage of the proceedings would also be required. As noted in Chapter 3, prescribing the value that a guilty plea may be given—as distinct from merely articulating the value that it *has been* given in a particular case—has wider implications for sentencing law and we have eschewed the introduction of more explicit guidance on the weight to be given a guilty plea at this stage. We formed the view that it is necessary to establish current sentencing practices before introducing explicit guidance on how the weight of a guilty plea should be determined. We envisage a role for the Victorian Court of Appeal in the provision of such guidance.

The Council wishes to ensure that when an indication is given, the court specifies the effect of such a plea on the indication. However, the Council does not wish to confine the Magistrates' Court's discretion to determine the scope of an indication. We therefore recommend that the requirement to state the credit, if any, given for a guilty plea in an indicative sentence be achieved through imposed by the Chief Magistrate making provision for this in of a practice note or direction, rather than by including such a recommendation in the legislation.

Recommendation 3: The effect of the guilty plea on the indication

The Chief Magistrate should issue a note or direction to require a magistrate, when providing an indication of the sentence likely to be imposed on a guilty plea entered at that stage of the proceedings, to state whether, but for such a guilty plea, a more severe sentence would be indicated.

Resource implications

While the consolidation of the Court's sentence indication process is expected to shorten some contested criminal proceedings, the expansion of this process is not without resource implications.

Extending the provision of sentence indication to other hearings or forums in the Magistrates' Court could have significant cost implications for Victoria Legal Aid (VLA). Currently, once VLA has approved a grant of aid for a defendant to contest the matter, VLA funds every 'event' (appearance or hearing) in a contested case. However, VLA does not currently fund legal representation at the first mention hearing. Most defendants who appear at this hearing have not yet sought or received legal assistance. If sentence indication were to be made available at this stage, representation would have to be arranged and VLA would be expected to provide assistance for this appearance.

When estimating the expected savings and gains in efficiency that could flow from an expanded use of sentence indication, it is important to recognise that not all cases in which sentence indication is provided will result in an early guilty plea. It must be assumed that Victoria Police (and VLA) will have a continuing commitment to cases that are not resolved through this process. Funding the provision of sentence indication does not guarantee that the matter will be resolved once an indicative sentence has been provided. There are and will be cases that still proceed to a contest, and at that stage, will still require the same level of funding and legal representation that is currently being provided.

If sentence indication were to be made available at hearings other than the contest mention, VLA would need to consider, for example, whether to provide a grant that covers appearance/advice in relation to sentence indication at a hearing conducted before contest mention, and any flow-on effect on demand for duty lawyers at these proceedings.

Chapter 6 Sentence Indication in Indictable Proceedings

Chapter 6 Sentence Indication in Indictable Proceedings

One of the key issues in this inquiry is whether it is both appropriate and feasible to make sentence indication available to defendants involved in indictable proceedings. The Discussion Paper called for comment on whether sentence indication should be available in all contested criminal proceedings, and if not, what restrictions on its use should apply.[380]

Chapter 4 of this report examined whether in theory a sentence indication process would be compatible with the fundamental principles of criminal justice: that is, whether it can provide the necessary transparency, judicial independence, sentencing parity and certainty. It considered whether it would be appropriate for a judicial officer to provide an indication of the likely sentence in advance of a guilty outcome and whether, at least in theory, sentence indication can be provided without compromising the role of the prosecution, and with the necessary safeguards for the interests of defendants and victims.

Having considered the views of participants and the relevant research on this subject, the Council concluded that it was possible to devise a sentence indication process that would not compromise the roles of the judicial officer or counsel and would safeguard the interests of both victims and defendants. However, the Council noted that there are inherent tensions between the requirements of transparency, efficiency and procedural fairness that could make it difficult to devise a 'working model' capable of being used in all types of contested criminal proceedings.

Chapter 5 presented a proposal to place the provision of sentence indication in summary proceedings on a statutory footing. This chapter examines the desirability and feasibility of extending the provision of sentence indication to contested indictable proceedings.

6.1 Can sentence indication be adapted to indictable proceedings?

The key issue confronting the Council in this part of the inquiry was whether the simple, informal and flexible process that has been used in contest mention hearings could be readily adapted to meet the quite different requirements of criminal practice and procedure in the higher courts.

While in principle, the same principles apply regardless of the types of matters in which sentence indication is available, in practice there are important differences between the conduct of summary and indictable proceedings, which could affect the scope, operation and impact of sentence indication. In summary matters, for example, it may be relatively simple to define and obtain the material needed for sentence indication, because neither the prosecution case nor the proposed defence relies on extensive argument or evidence. In indictable proceedings, however, settling the agreed facts and admissions may raise complex issues for both the prosecution and defence. In addition, the sentencing range for summary offences is comparatively narrow compared with the breadth of the range within which the major indictable offences are determined.

While it would be desirable to aim for a sentence indication process in the higher courts that could fulfil the same purpose as the contest mention hearing, to be effective, a sentence indication process would need to be compatible within and integrated into existing higher court procedures.

Precedents and proposals for indictable sentence indication schemes

The starting point was to identify model sentence indication processes used in indictable proceedings in other jurisdictions.[381] The only comparable jurisdictions that have offered sentence indication in indictable proceedings are New South Wales, which piloted a project in the District Court between 1993 and 1996; New Zealand, which currently offers sentence indication in the Auckland District Court; and the United Kingdom, where the Court of Appeal authorised its use in Crown Court proceedings in 2005.

380 Discussion Paper (2007), above n 44, Questions 7 and 11 respectively.

381 Discussion Paper (2007), above n 44, 69–73.

Sentence indication processes adopted in other jurisdictions

In New South Wales, the District Court introduced a pilot scheme pursuant to the *Crimes (Sentencing Procedure) Act 1993* (NSW), but this scheme was abandoned in 1996 and the enabling legislation repealed. The scheme permitted a defendant to request and a judge to provide sentence indication after arraignment in the District Court. The defence would request sentence indication at or before the arraignment and the Court would decide whether to grant the request at a sentence indication hearing. The parties were to provide materials similar to those relied on for a formal plea hearing and the indicative sentence, if granted, stated the likely sentence that would be imposed if the defendant pleaded guilty at that stage of the proceedings. It generally included an unidentified reduction in sentence for the guilty plea.[382]

In New Zealand, the Auckland District Court permits the defence to request sentence indication at one of the 'callovers' (pre-trial case conferences) held after the commencement of proceedings in that Court. There is no explicit statutory basis for this arrangement: the Court authorises the provision of an indicative sentence at the request of the defendant and the discretion of the judge as an incident of its statutory power to make directions and do all things necessary for the administration of proceedings in that Court.[383]

In England, sentence indication has been available in indictable proceedings since 2005, when the Court of Appeal produced a guideline judgment*, R v Goodyear.*[384] This authorises judges of the Crown Court (the English equivalent of the County Court) to give an 'advance indication of sentence'—the maximum sentence that would be likely to be imposed if a guilty plea was entered at that stage of the proceedings—at or before a Plea and Case Management Hearing. This is the case conference conducted on the commencement of proceedings in the Crown Court. There must be an agreed (written) basis of plea and the prosecutor must ensure that the judge is in full possession of the material relied on by the prosecution (including the English equivalent to victim impact statements). However, the prosecution must not express a view in relation to the appropriateness of the indication that is provided.[385] Under the Sentencing Guidelines Council's guideline on the reduction in sentence for a guilty plea, this hearing is taken to be the first opportunity for a defendant to enter a plea; a plea entered after sentence indication could therefore receive the maximum reduction in sentence available for a guilty plea.[386]

The Australian Law Reform Commission's proposal

The Australian Law Reform Commission (the ALRC) has recommended that sentence indication be made available in federal criminal proceedings. It envisaged that sentence indication would be provided at the request of the defendant and the discretion of the judge, and would indicate the general type and severity of the sentence likely to be imposed if the defendant pleaded guilty at that stage of the proceedings.[387]

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382 Donna Spears, *Taming Judicial Discretion* (unpublished thesis, University of New South Wales, 2006).

383 Chief Justice of the High Court of New Zealand, *Criminal Jury Trials Case Flow Management: Practice Note* (1995).

384 *R v Goodyear* [2005] EWCA Crim 888.

385 Details of the guidelines establishing the framework for this process are presented below.

386 Sentencing Guidelines Council, Definitive Guideline: Reduction in Sentence for a Guilty Plea (2007). See also The Attorney-General's Office (UK), Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's role in the Sentencing Exercise (2005) <www.attorneygeneral.gov.uk/attachments/acceptance_of_pleas_guidance.doc> at 26 July 2007; The Crown Prosecution Service (UK), CPS Instructions for Prosecuting Advocates (Annex A) (2005) (UK) Section 3 <www.cps.gov.uk/legal/section15/chapter_j_annex_b.html> at 26 July 2007.

387 ALRC (2006), above n 3, Recommendation 15-1.

The Victorian context: Criminal procedure and practice

When examining the potential to transplant any one of these existing schemes, the Council noted some important differences between the criminal justice systems in those jurisdictions and the Victorian system. These differences have a bearing on when and how sentence indication is offered.

In New South Wales and New Zealand, the District Court manages indictable proceedings from their inception to sentencing. In England, however, the case commences in the Magistrates' Court, where a Plea and Case Management hearing is conducted to allocate matters to the indictable and the summary streams. Australian federal jurisdiction is different again, because although federal criminal law covers all criminal offences, in practice the federal jurisdiction is confined to offences relating to customs and international relations, corporations law and fraud against federal entities.

The committal stream in the Magistrates' Court

In Victoria, indictable proceedings commence in the Magistrates' Court. Matters proceed through the committal stream, which is intended to establish whether there is a basis for committing the matter to a higher court for trial. If a defendant indicates a willingness to plead guilty during the committal proceedings, the matter is referred to the relevant higher court for a plea hearing and sentencing. The Magistrates' Court has a lower jurisdictional limit and is therefore not able to sentence beyond that limit in relation to indictable offences.[388] If the defendant reserves his or her plea or indicates an intention to plead not guilty, he or she will be committed to either the Supreme Court or the County Court for trial.

The Magistrates' Court of Victoria has instituted some changes to the committal stream in recent years. It has introduced case conferences to prepare for the committal hearing, and in 2005–06 created specialist lists to manage cases involving sexual offences and fraud.[389] Further, the *Courts (Jurisdiction) (Miscellaneous Amendments) Act 2006* (Vic) introduced statutory provisions to support a streamlined committal procedure.

Criminal procedure in the higher courts

Criminal procedure in the higher courts is governed by the *Crimes (Criminal Trials) Act 1999* (Vic), which came into effect on 1 September 1999. This legislation was intended 'to improve trial procedures by empowering the judiciary to effectively manage cases, enable the issues in dispute to be defined prior to the trial commencing, and also to facilitate productive discussions between the parties'.[390] It introduced case conferences to resolve administrative and evidentiary issues in advance of the trial and directions hearings to finalise the practical arrangements close to the date of the trial.

To give effect to the *Crimes (Criminal Trials) Act 1999* (Vic), the County Court introduced the case list management system, which provided guidelines for the conduct of case conferences and directions hearings in the general list. The first hearing in an indictable matter that has been committed to the County Court for trial is the case conference. One of the reasons for the case conference is to allow the parties to turn their minds to the case well before the trial and identify the main issues.[391] Directions hearings are held closer to the trial date in order to clarify the issues in dispute at trial and ensure that the trial will be ready to commence on the listed date. Since the commencement of this Act, the County

388 Matters that are triable summarily can be adjudicated in the Magistrates' Court. (See s 53 and Schedule 4 of the *Magistrates' Court Act 1989* (Vic)) A matter proceeds through the committal stream after it has been determined that it shall not be dealt with summarily. In Victoria, the defendant can elect whether to proceed summarily (by a magistrate sitting alone) or have the matter heard by a judge and jury (in the County Court).

389 Chief Magistrate, Magistrates' Court of Victoria, *Complex Fraud Committals,* Practice Direction 1 of 2005; Chief Magistrate, Magistrates' Court of Victoria, *Sexual Offences List:*, Practice Directions 2–4 of 2007.

390 *Crimes (Criminal Trials) Act 1999* (Vic) s 1.

391 Chief Judge, County Court, 'Case List Management System: Crimes (Criminal Trials) Act 1999', PNCR 1-99.

Court has also introduced specialist lists to manage sexual offences[392] and complex fraud offences, with a view to resolving as many issues as possible pre-trial. A designated judge is responsible for overseeing the allocation of cases and supervising the case flow within the list.

In the Supreme Court, the Criminal Trial Listing Directorate manages criminal cases, providing a listing service for Supreme Court cases and providing administrative support and advice. An officer of the Directorate convenes a case conference to ensure that the case is ready for trial. When a matter is ready to proceed, it is assigned a date and a final directions hearing is scheduled.[393] In 2004, the Chief Justice introduced a pilot final directions hearing in the Criminal Division of the Supreme Court to finalise arrangements for trials approximately one week before the trial date.[394] In 2006, the Supreme Court introduced 'section 5' hearings that will be used to identify and resolve pre-trial issues in a way that the Court believes is more appropriate for its cases.[395] The Judges of the Criminal Division of the Supreme Court have noted:

> While it is too early to evaluate the success of this initiative, the Court is hopeful that, with support from the profession, these measures will encourage earlier indications of the accused's intention to plead guilty.[396]

In order to establish, as requested, whether Victoria should introduce a (single) sentence indication process for criminal proceedings, the Council needed to consider whether it would be useful and feasible for such a regime to operate across the entire indictable jurisdiction.

6.2 Should the use of sentence indication be restricted?

The Discussion Paper canvassed whether sentence indication should be available in all contested indictable proceedings and if not, on what basis its use should be restricted.[397] The Council therefore considered, in relation to each of the courts that adjudicate indictable matters, whether sentence indication would be both useful and feasible.

It has also been necessary to take into account the effects that changes 'down- or upstream' can have on the operation of criminal procedure in the other court. For example, the introduction of case conferences in the County Court after the commencement of the *Crimes (Criminal Trials) Act 1999* (Vic) appeared to have had the unintended and undesirable effect of prolonging matters so that the parties could receive the benefit of judicial direction at the case conference. From a purely practical standpoint, the earlier in the proceedings that sentence indication is available, the greater the benefits that it will provide.

The use of sentence indication in the committal stream

The advantages of an early indication of sentence are clear: the earlier the guilty plea is entered, the shorter the proceedings and the lower the cost of the administration of justice in that case.

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392 Chief Judge, County Court, *Sexual Offences List*, PNCR 1-2007.

393 Chief Justice, Supreme Court of Victoria, *Criminal List: Practice Direction, Pegasus Two—1998*. The Supreme Court introduced a revised protocol for the conduct of criminal trials. In 1998, the Chief Justice issued 'Pegasus Two', a new protocol 'for the more efficient conduct of criminal jury trials'. Pegasus Two was designed to ensure that no unnecessary witnesses were called, and that jury trials proceeded without interruption. Counsel who would be appearing at the trial were required to attend a Pegasus Two hearing, conducted outside court hours, intended to ensure that the parties would compile and exchange the relevant documentation and identify the witnesses required and the agreed and disputed matters in advance of the trial.

394 Chief Justice, Supreme Court of Victoria, *Criminal Division: Final Directions*, Practice Note 1 of 2005.

395 Chief Justice, Supreme Court of Victoria, *Criminal Division: Case Management by Section 5 Hearings*, Practice Note 5 of 2006.

396 Submission 15.

397 Discussion Paper (2007), above n 44, Question 7.

The Magistrates' Court's submission

For this reason, the Magistrates' Court suggested that consideration be given to permitting a defendant whose case is proceeding through the committal stream in the Magistrates' Court to have the case remitted to the higher court for an indicative sentence. If the defendant decided to plead guilty, the plea hearing would be conducted in the County Court; if the case did not resolve in a guilty plea at that stage, it would be remitted to the committal stream.

> It is desirable for the sentence indication hearing, if requested by the defendant, to be conducted as early as possible in the process, in order to save resources as much as possible and maximise the defendant's potential plea discount. A process therefore needs to be developed that will allow a sentence indication hearing to occur in the County Court at any time after the filing hearing in the Magistrates' Court.[398]

The Council's view

While it is desirable to maximise the benefit derived from a sentence indication process, the procedure as described above does not seem feasible. There would be legal and logistical difficulties involved in transferring the case to and from the higher court; the Council is mindful that the effect of these might be to compound rather than reduce the length and complexity of the affected proceedings.

It is also possible that defendants who are likely to plead guilty at a committal hearing are concerned and motivated primarily by factors that a sentence indication process will not address. As Mack and Anleu reported in their study of guilty pleas, the most significant factor for defendants is, ultimately, the strength of the prosecution case.[399] Defendants who plead at or immediately after committal recognise the strength of the prosecution case and aim to obtain the maximum possible credit for an early plea entered at the first reasonable opportunity. The Magistrates' Court has introduced case conferences to prepare for the committal hearing and it expects these conferences to identify and resolve contested issues in the same way that their counterparts operate in the County Court. These conferences present an opportunity to identify cases that could conclude with an early guilty plea. For these reasons, the Council does not support making sentence indication available to defendants before committal.

The use of sentence indication in the higher courts

As far as can be ascertained, no jurisdiction has provided sentence indication in its highest court; in fact, the use of sentence indication in indictable proceedings is relatively rare. Nevertheless, the Discussion Paper did not rule out this option, and sought comment on whether sentence indication should be available in all contested indictable proceedings.

Participants' views

Consultation on this issue revealed a fundamental difference of opinion as to whether, as a matter of principle, sentence indication should be available to all defendants (extended to defendants in all contested indictable cases) or whether its use should be restricted in some way.

Some participants considered that fairness would require the same rights and processes to be available in all proceedings. On this view, if sentence indication is introduced, it should be available to all defendants regardless of the type of crime or the court in which the proceedings were conducted.

Associate Professor John Willis considered that 'a sentencing indication scheme should be available for all matters'.[400] Likewise, the Criminal Bar Association, the Victorian Bar Council and the Law Institute of Victoria submitted that in theory there should be no restriction as to the matters in which sentence indication is provided.[401] The Law Institute acknowledged that 'a sentence indication scheme would be more difficult to implement in the higher courts', but considered that 'the benefits of such a scheme

398 Submission 12 (Magistrates' Court of Victoria).
399 Mack and Anleu (1995), above n 6.
400 Submission 27.
401 Submissions 5, 13 and 17 respectively.

would make it worthwhile'.[402] This view was shared by some members of the public, who considered that there should be 'no restrictions on its use';[403] that 'the system should be the same', regardless of the offence involved.[404]

These stakeholders also tended to believe that the most significant factor to be considered in determining whether sentence indication should be available in a particular type of proceedings was its potential utility. The Magistrates' Court, which has used sentence indication to good effect in contested summary proceedings,[405] submitted that:

> there should be no restriction on the type of offences for which sentence indications are given … If restrictions are created, it will hinder the early resolution of cases in the restricted category.[406]

Similarly, Victoria Legal Aid observed that as sentence indication was useful in clarifying the likelihood of a custodial or non-custodial sentence, and as uncertainty as to the likelihood of a custodial sentence was not confined to one court or to particular types of cases, the provision of sentence indication should not be restricted.

> The possibility of a non-custodial sentence is a live issue in most summary offences and many indictable matters. The Council's own data shows that in 2004–05, only 40% of offenders sentenced in the higher courts received an immediate term of imprisonment. Even for the most serious offenders, a sentence indication may assist by clarifying whether a parole period will be fixed.[407]

However, the Judges of the Criminal Division of the Supreme Court submitted that a sentence indication process 'would be unlikely to achieve the aim of encouraging early pleas of guilty' in the types of cases dealt with in the Supreme Court. Their Honours noted that while sentence indication was 'based on the idea that a lack of certainty in relation to the likely sentence is a factor in the defendant's decision not to plead guilty at an early stage', other matters were more likely to be factors in a defendant's plea decision in Supreme Court matters. Their Honours observed that 'in Supreme Court matters this concern was not a major impediment to defendants' plea decisions'. The Criminal Division of the Supreme Court submitted that it 'does not see the sentence indication process as being effective in bringing cases heard in that court to an earlier conclusion'.[408]

Some participants in this inquiry considered that some offences were too serious, and the penalties too severe, for a judicial officer to give a 'quote' on the likely sentence. Those who took this view believed that in cases relating to the serious offences, for which the most severe sentences in the Victorian hierarchy could be imposed, it would be inappropriate to permit the case to be 'abbreviated' by a sentence indication process. One concern about the use of sentence indication in Supreme Court cases was the possibility that prosecution and defence counsel might reach a plea agreement that allowed offenders who were admitting offences such as murder, terrorism, or police corruption to receive significantly more lenient sentences, failing to give sufficient weight to the seriousness of the offender's conduct. 'In the worst cases', according to one member of the public, 'there should be no indication'.[409]

This view resonated with the Criminal Division of the Supreme Court. Their Honours observed that in Supreme Court matters, the trial judge would be unlikely to have all the materials that should be taken into account at sentencing. Their Honours observed:

> Even with the investment of additional time and resources, the Court is unlikely to have before it some of the most significant evidence in relation to sentencing [such as remorse].[410]

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402 Submission 17.
403 Submission 19 (B. Pownall).
404 Submission 16 (R. Gattan).
405 *See DPP v John Cummings* [2006] VSC 327 (Kellam JA).
406 Submission 12.
407 Submission 23 (Victoria Legal Aid).
408 Submission 15 (Judges of the Criminal Division of the Supreme Court of Victoria).
409 Submission 10 (M. Noe).
410 Submission 15 (Judges of the Criminal Division of the Supreme Court of Victoria).

Even if sentence indication were available in these cases, their Honours considered it unlikely that a judge would agree to a defendant's request for sentence indication, because of the risk that not all of the relevant material would be before the court at this stage.[411]

The Council's view

As noted earlier in this report, the Supreme Court adjudicates only the most serious criminal cases, relating to charges such as terrorism, murder and police corruption, and therefore manages a relatively small proportion of the indictable criminal caseload. In 2004–05, 109 criminal cases were adjudicated.[412] The proportion of matters resolved by a guilty plea has increased markedly in the past three years; whereas in 2003–04, 23 cases (approximately 22 per cent) resolved with a guilty plea, in 2004–05 the proportion had risen to over 49 per cent.[413] For the Supreme Court, the plea rate is not currently presenting a challenge for case management. In fact, the Supreme Court's case data go against the trend registered for County Court proceedings.

Further and possibly related to this, in 2006 the Supreme Court introduced pre-trial hearings intended to resolve contested issues and prepare matters for trial. The Council believes that in view of the measures already in place to prepare Supreme Court matters for trial, the seriousness of the offences being dealt with in that Court, and the steadily rising plea rate, sentence indication should not be made available in Supreme Court matters.

6.3 Sentence indication in the County Court

Clearly, the court with the greatest need for a 'circuit breaker' and the most to gain from sentence indication is the County Court. Therefore, attention focused on whether it would be possible to provide sentence indication in indictable proceedings, and if so, how and when this could be done.

Can sentence indication provide the necessary safeguards?

Transplanting and adapting the informal process used in the Magistrates' Court to meet the particular requirements of proceedings in the higher courts raises a number of legal and procedural issues. Legal stakeholders noted that informality, which seems the key to the early resolution of contested summary cases, is not as easy to achieve in indictable proceedings, because the more complex charges and evidence and the more exacting rules of evidence and criminal procedure require the use of a more formal process.

Following informal discussions with legal stakeholders,[414] the Council prepared a draft Protocol, the purpose of which was to stimulate discussion of the legal, administrative and evidentiary issues arising from the introduction of a formal sentence indication process.

411 Submissions 15.

412 Supreme Court of Victoria, *2004-05 Annual Report*, 26.

413 Ibid. It should be noted that there was a slight decrease (down to 42%) in the plea rate in the Supreme Court during the period 2005-06; Supreme Court of Victoria, *2005-06 Annual Report*, 14.

414 During 2006, the Council convened an Advisory Group on sentence indication and held informal discussions with members of the legal community to discuss the issues associated with the introduction of sentence indication in indictable proceedings.

Draft protocol for the provision of sentence indication in the County Court

The request for a sentence indication

1. The defendant (or his or her legal representative) may request a sentence indication. A judge may enquire of the parties whether a sentence indication would be of assistance.
2. The defendant must be present either personally or by video link and must be represented by a legal practitioner when the sentence indication is sought.

The court's discretion to grant or refuse a request for sentence indication

3. The court may provide or refuse to provide an indicative sentence. A sentence indication will not be provided unless the court is satisfied that it has at its disposal all the material required to determine the sentence that would be imposed in the event that a guilty plea is entered at this stage of proceedings.

The content of the sentence indication

4. A sentence indication should state the type of sentence/order that would be made and the maximum penalty that would be imposed in the event that a guilty plea is entered at that stage of the proceedings.

The forum for the sentence indication

5. The sentence indication must be sought and given in open court. Proceedings at a sentence indication hearing will be on the record.
6. The court may make a suppression order in relation to a hearing at which a sentence indication is sought and/or given.

The effect of the sentence indication where the matter is resolved by a guilty plea

7. If the court has provided a sentence indication and the defendant indicates his or her intention to plead guilty at the first available opportunity thereafter, the sentence indication is binding on the court.

The effect of the sentence indication where the matter proceeds to trial

The following guidelines would apply if the court provides the indication and the defendant does not plead guilty at the first available opportunity thereafter:

8. The sentence indication is not binding on the court.
9. Nothing used in the sentence indication hearing can be used in the trial. Nothing said by or on behalf of a defendant at a sentence indication hearing, and no failure by a defendant to answer a question at such a hearing, shall be used in any subsequent hearing or made the subject of any comment at that hearing.
10. A judge who conducts a hearing at which a sentence indication is sought and provided must not hear the trial except with the consent of the parties.

Appeal rights

11. The prosecution and defendant retain their rights to appeal against sentence.

The differences between the draft protocol and the guidelines for contest mention

Since the main purpose of the protocol was to identify how a sentence indication process would need to be adapted for use in indictable proceedings, it is necessary to appreciate the differences between the draft protocol and the Magistrates' Court's guidelines governing the provision of sentence indication in contested summary proceedings.

The main difference concerned the content of the indicative sentence (that is, what the court can actually indicate). In summary proceedings, the magistrate can give an indication only of the type of sentence (custodial/non-custodial) or the type of order (for example a fine or community-based order) likely to be

imposed.[415] The draft protocol permitted the indicative sentence to identify not only the type of sentence or order, but also the maximum penalty likely to be imposed on that particular offender.[416] The draft protocol envisaged a more specific indication; as indictable offences attract a wider penalty range, it was thought that defendants in these proceedings would seek a more specific indication than merely the type of sentence.

Two procedural requirements included in the draft protocol do not currently apply in summary proceedings. Clause 9, which prevents evidence relied upon for sentence indication from being used in the trial, attempts to resolve the evidentiary problems that might arise if the prosecution or defence disclosed, 'without prejudice' in advance of a guilty plea or trial, material that they later wished to rely on if the matter proceeded to a trial. Clause 13, which preserves the parties' appeal rights in relation to the final sentence, does not appear in the Magistrates' Court's *Guidelines for Contest Mention*.

Finally, whereas the Magistrates' Court's guidelines noted the prosecution's obligation to consult with the victim and encouraged the informant to be in a position to convey the victim's views, where applicable, the draft protocol was silent on the role of the prosecution and the involvement of the victim. It had become apparent during the preliminary discussions that the process used in summary proceedings could not be simply transplanted into a scheme developed for use in indictable matters. Whereas parties may have prepared plea material in advance of a contest mention hearing, the more evidentiary and procedural rules would make it difficult for parties to prepare and submit plea material prior to the sentencing hearing. The Council therefore sought comment from key stakeholders, including the Director and Office of Public Prosecutions and victims themselves, before canvassing a proposed approach to this problem.

Issues arising from the consultation program

Participants differed in their views on the appropriateness of using sentence indication in indictable proceedings. Most of the legal stakeholders that participated in this inquiry expressed interest in exploring the use of sentence indication in the County Court. The Criminal Bar Association,[417] the Victorian Bar Council,[418] the Law Institute of Victoria[419] and the Federation of Community Legal Centres[420] all supported the introduction of a process along the lines of that canvassed in the draft protocol. The Victorian Bar Council, for example, observed:

> [T]his extension of court involvement seems consistent with case management principles and the Case Conference/Directions Hearing procedure in criminal cases.[421]

However, victims, offenders and members of the public were divided on this question, while the Victorian Aboriginal Legal Service, West Heidelberg Community Legal Centre and the Mental Health Legal Centre expressed concerns about the use of sentence indication in conjunction with a specified sentence discount.[422]

Offenders generally supported a process that would offer them an indication of the likely sentence, if the indication was reliable—that is, if they could be assured that the sentencing court would abide by it when passing sentence.[423] For some, the fact that they would receive the indication from the judge rather than their lawyer would make them more confident about making an appropriate plea decision. However, others believed that this type of process could be unnecessary, as they were able to get advice from their lawyers on the likely sentence and/or form their own views on their prospects.[424]

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415 Magistrates' Court of Victoria (1994), above n 342, [3.2].

416 Note that this is not the statutory maximum penalty for the offence, but the highest penalty that a court would be likely to impose on the facts of the case before it.

417 Submission 5.

418 Submission 13.

419 Submission 17.

420 Submission 24.

421 Submission 13.

422 Submissions 20, 21 and 26 respectively. These concerns are outlined in Chapters 2 and 3 above.

423 Offenders' Focus Group, VACRO (14 March 2007).

424 Ibid.

The implications for victims

Many victims of crime and their advocates were concerned at the prospect of sentence indication allowing plea agreements and were worried that such agreements would pre-empt the judge's sentencing decision, and they were further concerned that unduly lenient sentences would give rise to appeals that would prolong the proceedings and compound victims' suffering.[425]

Some victims and their advocates, especially those involved in sexual assault proceedings, queried the value of sentence indication being offered after committal. They indicated that their clients would see clear benefits in a process that removed the need to appear at the committal, but less value in a process that took place after they had already endured the trauma of the committal hearing. Counsellors working with victims/survivors of sexual assault observed that these victims often found the committal hearing to be the most traumatic part of the process, feeling as though it is testing them personally rather than the strength of the prosecution case.[426]

However, others saw benefits in a process that could avert the need for a trial, even if the victim was still required to give evidence at the committal. Victims who had already been through the complaint process, the investigation and the committal may be relieved that the case could be concluded by the defendant's admission of guilt.[427] South Eastern CASA, for example, observed that a process that gave the victim as well as the defendant an indication of the likely sentence would help victims and their counsellors to prepare and cope with the proceedings.[428]

Nevertheless, while victims' views on the value of sentence indication differed, all victims and their advocates shared with members of the public and the prosecution a desire to ensure that victims would be consulted and their views made known to the court during a sentence indication process.[429] For these participants, devising a process that ensured that the victim's perspective was taken into account was therefore an important safeguard.

The independence and certainty of the sentencing decision

To be effective, the sentence indication process needs to provide the defendant with the certainty that the indicative sentence will be imposed, as well as having the flexibility to enable the judge to depart from the indicative sentence if, based on the material available to the court at sentencing, a different sentence would be more appropriate. The draft Protocol provided that if the court has provided a sentence indication and the defendant indicated his or her intention to plead guilty shortly afterwards, the indication would be binding on the sentencing court.

Virtually all the participants in this inquiry stressed the importance of preserving the court's discretion to refuse to provide sentence indication and to depart from the indicative sentence if, when the sentence is finally determined, the sentencer forms the view that the indicative sentence would not be appropriate. The Federation of Community Legal Centres acknowledged the tension between the requirements of certainty and flexibility, and favoured a process that permits the court to depart from the indicative sentence if further material becomes available that makes the indicative sentence inappropriate.[430]

This view was shared by many participants in the focus groups, as well as offenders and victims who expressed an opinion on this matter. Participants in roundtables with victims of crime and their advocates and the members of the public who contributed to the focus groups also wished to see some protection

425 Victims' Issues Roundtable (27 February 2007), Victims of Homicide Support Group (Frankston) (15 March 2007) and Submission 18 (CASA House). These concerns are addressed in more detail in Chapter 4 above.

426 Meeting with South Eastern CASA (7 March 2007).

427 Victims' Issues Roundtable (27 February 2007).

428 Meeting with South Eastern CASA (7 March 2007). However, staff noted that the impact of the process on the victim would depend in part on the victim's stage of recovery.

429 Submissions 3 (A. Flynn), 14 (South Eastern CASA), 18 (CASA House), 22 (Victoria Police) and 29 (Director and Office of Public Prosecutions).

430 Submission 24.

for the judicial officer, such as a proviso that the indication would no longer be binding if further material became available that rendered the indicative sentence inappropriate.[431] One participant noted from personal experience that a sentence indication process would not succeed in resolving contested matters unless the defendant is confident that he or she can rely on it: the indicative sentence must be binding on the court.[432] He observed that when the opportunity to seek an indicative sentence arose, he was concerned that 'any sentencing "indication" handed down … would not be binding on the Magistrate who finally heard the case'.[433]

Procedural requirements

As far as the legal community was concerned, there were two major procedural challenges to be addressed in framing a fair sentence indication process. First, there was a need to ensure that the sentence indication reflects the impact of the offence on the victim and matters relating to the circumstances of the defendant without prejudicing the use of material at a trial, if the defendant does not enter a guilty plea.[434] The issues arising in relation to victims have been addressed above. The implications for defendants are well illustrated by the account below of the operation of the New South Wales pilot sentence indication project.

Secondly, there was a need to establish a framework that would not put pressure on the prosecution to provide submissions or advice to the court on sentencing matters that are conventionally the responsibility of the sentencer, or that would affect its capacity to appeal the final sentence. These issues have also been canvassed, and as discussed below, were clearly problematic for the NSW District Court during the operation of its scheme.

A further procedural issue that arose in consultation on the draft Protocol was how a hearing that provided sentence indication would proceed. Two options were considered:

- an informal process conducted as part of an existing case management hearing, such as the case conference; or
- a separate sentence indication hearing.

The option adopted would depend on the specificity of the indication provided. An indication that was specific as to both the type and range of sentence likely to be imposed would require the prosecution to provide material relating to the defendant's criminal history, the impact of the offence on the victim, and the defendant's personal circumstances and prospects of rehabilitation. This type of hearing—which was the process used in the NSW pilot scheme—requires notice to be given and the preparation of relevant material. If a less specific indication were to be provided, based essentially on the 'objective seriousness' of the offence, the material currently available at a case conference, namely the prosecution summary, depositions, and the defence's brief response, would suffice.

Other procedural requirements flow from the decision relating to the specificity of the indication. If a specific indication is provided and the defendant 'rejects' the indication and elects to proceed to trial, the judge who provided the indication could be disqualified from presiding over the ensuing trial. The evidentiary concerns discussed elsewhere in the chapter are relevant here. Similarly, if a specific indication is provided, there needs to be provision for departures if further material becomes available which suggests that the indication would not be appropriate.

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431 See Victims' Issues Roundtable (27 February 2007); Focus Groups 1 (20 March 2007) and 5 (23 March 2007). See also Submissions 17 (Law Institute of Victoria) and 24 (Federation of Community Legal Centres).

432 Submission 1 (Confidential).

433 Ibid.

434 While both parties can be disadvantaged by this process, the impact on the prosecution is arguably more severe. The defendant has the option but not an obligation to seek sentence indication, so it is reasonable for the defence to assess and then bear the risk of disclosure.

The legal stakeholders who participated in this inquiry favoured a process that was brief and informal: one that would maximise the flexibility of the hearing and minimise the additional preparation required. To ascertain the legal and procedural issues that arise in an operational sentence indication process the Council reviewed the case law that developed around the use of sentence indication in the NSW District Court.

6.4 The NSW sentence indication project: Lessons to be learnt

The New South Wales sentence indication process, which operated for just under than three years, resulted in over 30 appeals relating to the procedures governing the conduct of the scheme, and many more concerning the leniency of the sentences imposed. A review of the case law from this period provides a salutary lesson in the many pitfalls to which such a process can give rise.

The framework of the scheme

The stated purpose of the scheme was 'to attract early pleas of guilty in matters committed for trial'.[435] It was authorised by the *Criminal Procedure (Sentence Indication) Amendment Act 1992* (NSW) and supported by a series of Practice Notes, setting out the arrangements that applied in each of the metropolitan and regional courts that participated in the pilot.

The key elements of the scheme were as follows:

1. Sentence indication was provided at or immediately after arraignment, in open court, in the District Court. Arraignment at that time was approximately 8–10 weeks after the committal hearing.
2. The defendant could only seek one indicative sentence, and could not make a request within four weeks of the trial date.
3. The defence was to inform the prosecution of its intention to request sentence indication, and the prosecution would indicate its readiness to have the matter listed.
4. The sentence indication hearings were conducted in a manner similar to a normal plea hearing.[436] The Crown was to hand up the draft indictment, a statement of alleged facts, copies of the prosecution witness' statements, a committal transcript and any relevant antecedents. The defence could tender material in mitigation, and put before the court pre-sentence reports, call witnesses on behalf of the accused and call evidence from the accused him- or herself.[437]
5. The Court could refuse to provide an indicative sentence, but the grounds on which it could so determine were not specified.
6. If an indicative sentence was given, the defendant was allowed time to seek advice and consider his or her decision.
7. The indicative sentence was 'intended to bind the judge who formulated it, if the facts and other relevant material adduced for the purpose of the indication hearing are not altered when the case comes up for sentence' [italics added]. However, if different or additional material was adduced at the plea hearing, the judge could depart from the indicative sentence and 'decide to impose a lesser or greater sentence'. If a higher sentence was imposed, the accused was 'entitled to change his plea to 'not guilty' and go to trial before another judge'.[438]

435 Chief Judge, NSW District Court, *Practice Note No. 22: Sentence Indication at Parramatta in 1993* (December 1992).

436 John Willis, 'The Sentence Indication Hearing' (1997) 7 *Journal of Judicial Administration* 98, 99.

437 Mack and Anleu (1995), above n 6, 155.

438 Chief Judge, NSW District Court, *Practice Note: Sentence Indication at Parramatta in 1993* (December 1992), extracted in Spears, Poletti and McKinnell (1994), above n 294, 46.

It is instructive to note the matters on which no guidance was provided. The content of the indicative sentence was left to the discretion of the judge.

- There was no clear guidance to the court on how the indicative sentence was to be determined or how specific it was to be. It appears that the judges involved in this scheme were expected to provide an indicative sentence for each of the charges to be admitted, but this aspect of the process was not dealt with in the Practice Notes or on appeal.
- While there was a statutory requirement that the guilty plea be taken into account and the court had to give reasons in passing sentence for not allowing a reduction in sentence for the plea, no specific guidance was provided on the credit to be given, when determining an indicative sentence, for a plea entered after the sentence indication hearing.
- Finally, the Practice Notes contained no guidance on what materials, if any, the prosecution would be required to provide in relation to the impact of the offence on the victim or the scope of any submissions it was to make in relation to the provision or the content of the sentence indication.[439]

Pitfalls encountered during the operation of the scheme

The scheme gave rise to a number of appeals concerning the processes used and the sentences imposed after sentence indication hearings. The history of the Court of Appeal's rulings to guide and adjust the defects in the original framework illustrates the complications that arise when conventional criminal procedure is departed from, and the judicial officer provides an indicative sentence in advance of the guilty outcome.[440] In determining whether it is feasible to introduce sentence indication in the Victorian County Court and if so, how such a scheme should operate, it is worthwhile to note the defects in the conception and implementation of the NSW scheme.

The judicial discretion to refuse to provide sentence indication

The New South Wales scheme gave the judge an unqualified discretion to refuse to provide sentence indication. The Court of Appeal was asked to consider the criteria on which a court could refuse to provide sentence indication in the case of *Impiombato*.[441] The court had refused to provide sentence indication because the Crown case against the accused was overwhelmingly strong. On appeal, the Court of Appeal held that this was not a proper discretionary basis for declining to conduct a hearing.

The evidentiary risks of early disclosure at a sentence indication hearing

While the concerns raised in this inquiry about the consequences of premature disclosure of the evidence relating to the impact of the offence on the victim were not an issue in New South Wales, the New South Wales Court of Appeal did have to consider the potentially prejudicial effect on the defence case of evidence provided to a sentence indication hearing. This issue arose in at least three cases. In *Chait*,[442] Chief Justice Gleeson commented:

> It might be thought that there are many cases in which it would be inappropriate that an accused person, who had not yet indicated whether the plea would be one of guilty or not guilty, should be going into the witness box and giving evidence about potentially controversial matters, including matters relating to the facts and circumstances of the alleged offences.[443]

439 Victim impact statements were not yet in use at the time when the NSW sentence indication process was operating.

440 For a discussion of the case law on appeal see Willis (1997), above n 436; Byrne (1995), above n 312, 209.

441 (1995) 35 NSWLR 627, 629.

442 (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Gleeson CJ, Grove and Allen JJ, 17 September 1993).

443 Ibid 3. See also *R v Spanakakis & Tsolakis* (1995) 85 A Crim R 513.

In another case decided the same year, the Court of Appeal observed that 'subject only to relevance and the trial judge's discretion, there is nothing to prevent the Crown tendering [the accused's] evidence … at his subsequent trial'.[444] In a later case, the Court suggested that the prosecution could give an undertaking not to use any evidence given by the defendant at the sentence indication hearing at trial.[445] In fact, it would have been unusual for the prosecution to seek to use such evidence, and as far as we can ascertain, such a situtation did not arise during the operation of the sentence indication scheme.[446]

Dealing with departures from the indicative sentence

A recurring issue during the operation of this scheme was how to deal with cases in which the sentencing judge departed from the indicative sentence. In order to provide the certainty of outcome needed to encourage defendants to plead guilty on the strength of the indicative sentence, it had to bind the sentencing court. The scheme envisaged that once an indicative sentence had been provided and on the strength of it, the defendant had pleaded guilty, the court would impose the sentence indicated. The indication was binding on the judge, unless different or additional material was put before the court.

However, it is settled practice to permit the defence to provide material in mitigation at the sentencing hearing. Applying this convention to the sentencing of offenders who had received an indicative sentence meant that sentencers could depart downwards from the indicative sentence. In the interests of fairness, it was also necessary to permit departures 'up' if the prosecution produced material that suggested a more severe sentence would be appropriate. Accordingly, the sentence indication was not always imposed when the final sentence was imposed. Departures more commonly resulted in a more lenient sentence being imposed; however, there were also cases in which the offender ultimately received a more severe sentence.

Departures 'up': Defence appeals against sentence after sentence indication

There were cases where the sentencer departed from the indicative sentence and imposed a more severe sentence. If, on the basis of new material, a more severe sentence was ultimately imposed, the sentencing judge had to advise the defendant of the new sentence and the accused was given the option of withdrawing the guilty plea and proceeding to trial.

The scheme also allowed the defence to appeal against the severity of the sentence that had been imposed, although as Justice Smart observed in *R v Chaouk,* 'it [would] be an unusual case where a severity appeal succeeds after an accepted sentence indication'.[447] *Chaouk's* case was unusual in that respect. The defence appealed against the severity of the sentence, claiming a lack of parity between the appellant and a co-accused who was sentenced afterwards. In this instance, the Court found that there were unusual circumstances in relation to the co-accused, which warranted a significantly reduced sentence.[448]

The relevance of the guilty plea: An unspecified incentive to plead guilty

In 1993, when the NSW District Court first offered sentence indication in indictable proceedings, there was a general expectation that a sentence indication would incorporate a significant although unspecified reduction in sentence for pleading guilty. It was a stated aim of the project to 'attract guilty pleas': to encourage defendants who were inclined to plead guilty to do so at an earlier stage of the proceedings.[449]

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444 *R v Warfield* (1994) 34 NSWLR 200, 205 (Hunt CJ).

445 *R v Spanakakis & Tsolakis* (1995) 85 A Crim R 513.

446 Ibid 216.

447 *R v Chaouk* (Unreported, New South Wales Court of Criminal Appeal, Smart and Bruce JJ, 5 May 1997) 1.

448 Ibid 4.

449 Byrne (1995), above n 312, 209.

There was already a legislative provision enabling the court to consider the fact that an accused person had pleaded guilty, and based on the timing of the indication to plead guilty, reduce the sentence it would have otherwise imposed accordingly.[450] The provision appears to have operated as a presumption in favour of a reduction in sentence for a guilty plea: if the sentence was not reduced on this basis, the court had to state that fact, but the provision did not specify the amount of any reduction that was made for a plea entered after a sentence indication hearing.

A judge giving an indication was to indicate the sentence that he or she would impose if the accused pleaded guilty at that time, and not what the sentence would be if the accused proceeded to contest the case. As the sentence indication could only occur at or before arraignment,[451] an accused could expect an indication to include a significant discount for pleading at this stage. However, the sentence indication hearing was not the defendant's first opportunity to plead guilty and the provision of a significant sentence discount on the sentences of defendants who pleaded guilty after a sentence indication hearing affected sentencing parity.

An important issue for the operation of the New South Wales project was a lack of clear guidance on the weight that should be given to a guilty plea made at or immediately after a sentence indication hearing. The amount by which sentences were discounted for a guilty plea entered at or after a sentence indication hearing varied considerably, with the result that some defendants who pleaded guilty at the first opportunity, or who contested the case, received harsher sentences than those who pleaded guilty after a sentence indication hearing.[452] The Court of Appeal heard a number of Crown appeals against the leniency of sentences imposed after a sentence indication.

Departures 'down': Prosecution appeals against unduly lenient sentences

If a more lenient sentence was imposed after further material was submitted, the prosecution could appeal against the leniency of the sentence. Not surprisingly, there were occasions when the defence submitted further material at sentencing with the result that a more lenient sentence was ultimately imposed.

The Court of Appeal confirmed the right of the Crown to appeal sentences imposed after a sentence indication hearing.[453] In response to one appeal at an early stage of the operation of the pilot project, the NSW Court of Criminal Appeal provided guidance on the reduction in sentence allowable after a sentence indication hearing. In the matter of *Warfield,* Chief Justice Hunt clearly articulated that the position of an accused who pleaded guilty after a sentence indication 'should not expect as much leniency as those who plead at an earlier stage and who do so as a result of their contrition'.[454] Although this approach was endorsed in this and further appeals,[455] lenient sentences continued to be imposed and appealed.

In *Hollis*,[456] Chief Justice Hunt was compelled to reiterate the point more forcefully:

> The many complaints which have been made by the profession—that the extraordinary leniency being shown by some of the judges in the sentence indication process places an unfair pressure upon others to follow such a course—seem to me to be fully justified. This scheme will be brought into disrepute if irresponsible sentences like this one imposed by Judge Moore continue to be imposed in such cases.[457]

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450 *Crimes Act 1900* (NSW) s 439.

451 *R v Nicolaidis* (1994) 33 NSWLR 364.

452 Spears, Poletti and MacKinnell (1994), above n 294, 37–41.

453 *R v Warfield* (1994) 34 NSWLR 200. A sentence imposed upon an accused following a sentence indication hearing pursuant to Part 12 of the *Criminal Procedure Act 1986* (NSW) is a sentence within the meaning of the *Criminal Appeal Act 1912* (NSW) so that the Crown retains its right of appeal.

454 Ibid 209.

455 See *R v WHS* (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ, Smart and McInerney JJ, 27 March 1995); *R v Fuller* (Unreported, New South Wales Court of Criminal Appeal, Grove and Bruce JJ, 6 March 1995).

456 *R v Hollis* (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ, 3 March 1995).

457 Ibid 7.

The Court of Appeal's concerns about the imposition of unduly lenient sentences were borne out by the findings of all three evaluations of the scheme. The Judicial Commission's review compared the sentences imposed on all defendants sentenced under the pilot scheme with those imposed on a sample of offenders arraigned but dealt with outside the sentence indication process.[458] Some disparity was found between sentences imposed after a sentence indication hearing, those who pleaded guilty at committal, and those who entered a guilty plea at any other stage of proceedings. BOCSAR's final evaluation, which compared sentencing outcomes generally before and after the introduction of sentence indication, found that 'those pleading guilty after receiving a sentence indication are dealt with as leniently as those pleading guilty at committal, if not more so'.[459]

The procedural consequences of a Crown appeal against sentence

In allowing prosecution appeals against leniency, the Court of Appeal grappled with the concept of 'triple jeopardy': where the normal 'unfairness or injustice which a successful Crown appeal may otherwise entail'[460] will be increased because an offender who pleaded guilty only after receiving the indication then faces the possibility of a trial or a longer sentence if he or she does not plead guilty. Accordingly, the Court prescribed a cautious approach to the exercise of the discretion to uphold Crown appeals.[461]

The procedure to be followed where the Court found that the sentence was manifestly inadequate and wished to exercise its discretion to substitute a higher sentence was for the Court to advise the respondent that the sentence would be increased and to allow him or her the opportunity to withdraw the guilty plea.[462] In determining whether the respondent should be able to withdraw a plea of guilty, the test applied by the Court was 'whether the circumstances in which the plea was entered indicate that it was not really attributable to a genuine consciousness of guilt'.[463] It was held in *Warfield* that 'an unsuccessful respondent may well be entitled to have greater weight placed upon the miscarriage of justice simply arising out of the failure of the sentence indication scheme to work properly'.[464] Chief Justice Hunt drew a parallel between this sort of case and a case where the accused pleaded guilty to charge of rape because he was told that once certain evidence was admitted he had no chance of acquittal. On appeal, it was determined that the evidence should not have been admitted. [465] The appellant in that case was allowed to withdraw his plea and a new trial ordered.

The role of the prosecution in a sentence indication hearing

During the operation of the NSW sentence indication scheme, the role of the prosecution developed into something quite distinct from its usual role in the sentencing process.[466]

The Crown has a general responsibility to the court to assist if there is the possibility that the court is falling into appellable error.[467] However, there is a distinction between assisting the court by submitting that a particular sentence, such as a custodial sentence, would be appropriate under the circumstances and submitting a sentencing range, and indicating that a departure from this range will lead to a Crown appeal.

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458 Spears, Poletti and MacKinnell (1994), above n 294, 40 (Table 8).

459 Don Weatherburn, Elizabeth Matka and Bronwyn Lind, *Sentence Indication Scheme Evaluation* (1995) 21.

460 *R v Warfield* (1994) 34 NSWLR 200, 210.

461 Ibid.

462 *R v Glass* (1994) 73 A Crim R 299, 304; *R v Warfield* (1994) 34 NSWLR 200, 209–14. See also *R v Spanakakis & Tsolakis* (1995) 85 A Crim R 513.

463 *R v Warfield* (1994) 34 NSWLR 200, 209.

464 Ibid.

465 Ibid 214.

466 Byrne (1995), above n 312, 217.

467 *R v Niga* (Unreported, New South Wales Court of Criminal Appeal, 13 April 1994).

In an effort to confine the Crown appeals against sentence, the Court of Appeal encouraged the prosecution to provide the judge presiding over the sentence indication hearing with advice on the appropriate sentencing range. The case of *Glass*[468] is the leading authority on the role of the Crown in sentence indication proceedings. The Court found that the prosecutor should assist the court by advising of the appropriate range of sentences 'which the Crown considers appropriate to the particular case being considered'.[469] This was to ensure that if the judge indicated and ultimately imposed a sentence outside the range identified by the prosecutor, the court and the offender would be aware of the possibility of a Crown appeal.

The Court accepted that imposing this obligation on the prosecution was a departure from the prosecution's conventional role at sentencing hearings. The Court took the view that it was necessary for the prosecution to take on this responsibility to ensure that 'the undoubted utilitarian benefits of that scheme are not matched by any detriment to the community, which suffers when manifestly inadequate sentences such as these are imposed'.[470]

The failure of the prosecutor to follow this procedure would not have necessarily led to the failure of a Crown appeal.[471] Further, the fact that the prosecution proceeded with arraignment after a defendant accepted a sentence indication was not evidence of the Crown's acquiescence to that sentence.[472] However, if the Crown had not made any submissions in relation to the appropriate sentencing range, this could have had the potential to limit the success of any future Crown appeal.[473]

In *R v Brooking,*[474] Justice Carruthers described the conflict faced by the courts between a responsibility to ensure that sentences were in the correct range and the care that should be taken not to infringe on the rights of a defendant. His Honour observed that there was:

> significant public interest in the due administration of the criminal law, which includes of course that appropriate sentences are imposed on offenders, particularly those committing serious crime, irrespective of whether that sentence was imposed following a sentence indication hearing or not. It could never have been the intention of the Legislature that sentence indication hearings which resulted in sentences so inadequate as to cause public disquiet about the administration of justice should remain immune from appellate intervention. However … the resolution of any Crown appeal must be approached with much circumspection.[475]

The effect of the process on sentencing outcomes

A brief survey of the appeals against sentence filed in relation to sentences imposed after a sentence indication hearing confirms that the substantial reduction in sentence offered to defendants who pleaded at this stage of the proceedings caused inconsistencies between the sentences imposed on offenders convicted of similar crimes, and gave rise to concerns that the process was offering an unduly strong incentive to plead guilty.

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468 *R v Glass* (1994) 73 A Crim R 299.

469 Ibid 304.

470 Ibid 303.

471 See *R v Brooking* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Carruthers, Newman and Dowd JJ, 7 December 1994) 11-2. That case was heard on circuit and it was argued on appeal that it would have been difficult for the Crown Prosecutor to seek instructions on an appropriate range of sentences in a timely fashion. The Court noted with approval that the DPP had since put in place a mechanism to rectify this situation and ultimately allowed the appeal.

472 *R v Warfield* (1994) 34 NSWLR 200, 211.

473 Byrne (1995), above n 312, 217.

474 (Unreported, Supreme Court of New South Wales Court of Criminal Appeal, Carruthers, Newman and Dowd JJ, 7 December 1994)

475 Ibid 15.

The Discussion Paper noted the sentencing disparities that arose during the operation of the NSW scheme.[476] It appeared, from the limited comparison of sentence outcomes undertaken early in the operation of the scheme, that defendants who pleaded guilty after a sentence indication hearing were likely to receive a less severe sentence than defendants who pleaded guilty earlier (i.e. at committal). In particular, the NSW Judicial Commission found that a disproportionately high number of 'sentence indication' offenders received periodic detention, and a significantly lower proportion received an immediately servable term of imprisonment compared with offenders who had pleaded guilty to similar offences at an earlier stage of the proceedings.[477]

The final evaluation of the scheme, conducted by the NSW Bureau of Crime Statistics and Research, confirmed the Commission's preliminary conclusions. It compared the sentences imposed on people who had pleaded guilty at committal and those who had pleaded after a sentence indication hearing, and found a 'quite substantial' difference in the severity of the sentence imposed: those who pleaded guilty earlier were nevertheless 'more likely to receive a full-time sentence of imprisonment'.[478]

The demise of the process

The Discussion Paper outlined the divergent findings of the initial evaluation by the NSW Judicial Commission, and the two subsequent evaluations by the New South Wales Bureau of Crime Statistics and Research (BOCSAR). The Commission had examined the cases dealt with at the Downing Street Court during the first six months of operation and concluded that the scheme was reducing court time and resolving contested matters effectively.[479] The Bureau conducted two evaluations after the scheme had been operating for two years.[480]

Unlike the Commission, BOSCAR did not analyse sentencing practices or the duration of cases in which sentence indication had been used. It compared overall trends in the duration of criminal matters and the proportion of guilty pleas and found no evidence that the scheme gave rise to shorter proceedings or more guilty pleas. While it found that court delays in cases where an accused committed for trial changed his or her plea to guilty were lower than before the introduction of sentence indication, the BOSCAR indicated that the decline could not be ascribed to the introduction of sentence indication. It concluded:

> Regrettably, the scheme does not appear to have been generally effective in encouraging either earlier or more frequent guilty pleas.[481]

The scheme was ultimately abandoned largely because it gave rise to sentencing disparities (and particularly, to unduly lenient sentencing) and it appeared to have no quantifiable impact on the proportion of matters finalised by a guilty plea or the duration of proceedings that concluded in this way.

476 Discussion Paper (2007), above n 44, 76–8.
477 Spears, Poletti and MacKinnell (1994), above n 294, 40, Table 18.
478 Weatherburn, Matka and Lind (1995), above n 459, 21.
479 Spears, Poletti and MacKinnell (1994), above n 294, 43–4.
480 Weatherburn, Matka and Lind (1995), above n 459.
481 Ibid (iii)

6.5 Defining the scope for sentence indication: Issues and limits

This section reviews the most significant legal and procedural challenges encountered in adapting sentence indication to indictable matters, and examines ways in which these problems might be resolved.

Sentencing issues: Achieving reliability, certainty and finality

Earlier in this chapter, we outlined some of the concerns raised by participants in this inquiry about the risk of departures from the indicative sentence and the possibility that the process could engender more appeals against sentence. The experience in New South Wales confirmed that these are potential risks of the process; it also suggests, however, that introducing procedural safeguards to address these concerns may complicate the process and force the parties to invest more time and preparation in the indication process in order to avoid appeals.

Problems arising from a specific indication of the likely sentence

In canvassing a possible framework for sentence indication, it is generally assumed that, to be useful, the indication would have to specify not only the type of sentence likely to be imposed but also, at least in general terms, the likely maximum or range. This was the approach adopted in New South Wales and England and recommended by the Australian Law Reform Commission.

However, it has become clear from reports of the operation of the NSW and UK schemes that a specific indication of the likely sentence is impractical.[482] In both these jurisdictions it would seem that creating a set of procedures that put the court in a position where it can safely provide such a specific indication of the likely sentence makes the process cumbersome and thus reduces its efficiency.

In order to provide a specific indication of the likely sentence, the court needs material relating to the impact of the offence on the victim, as well as material indicating the defendant's criminal record, efforts at rehabilitation and other relevant circumstances. However, providing this material in advance of a trial or guilty plea can prejudice the prosecution case or the proposed defence. Further, failure to provide this material may result in the provision of an inappropriately severe or lenient indicative sentence, which may in turn put the sentencer in the invidious position of departing from the indicative sentence or risk falling into appellable error.

Tensions in the role of the prosecution in a sentence indication process

In order to avoid this scenario, both the English and NSW schemes gave the prosecution additional responsibilities in relation to sentence indication hearings. The approach adopted in New South Wales, which proved problematic, was to require the prosecution to make specific submissions on the range of sentences applicable in that case. Failure to do so could constrain the Crown's right of appeal against a manifestly inadequate sentence, while if the Crown's appeal was successful, the defendant retained the right to withdraw the guilty plea.

In England, the prosecution's role in a sentence indication hearing has not been a significant departure from its role in the usual sentencing process, but it has nevertheless proved difficult to apply. There is an expectation that the prosecution will draw the judge's attention to 'all the evidence relied on by the prosecution, including any information about relevant previous convictions recorded against the defendant', any relevant personal statements by the victim, and minimum or mandatory sentencing

482 Under the New South Wales scheme, the court could provide a specific indication of the final sentence. By contrast, under the UK *Goodyear* guidelines, the court can indicate the maximum sentence that would be imposed for a guilty plea.

requirements and any relevant sentencing guidelines.[483] The prosecutor is obliged to ensure that the victim and/or victim's family are consulted prior to accepting a plea and to remind the court that there must be an agreed, written basis for plea before sentence indication can be given.[484] The prosecution is also expected to remind the judge that the right of the Attorney-General to refer any sentencing decision as unduly lenient to the Court of Appeal is not affected.[485] Furthermore, the prosecutor 'should not say anything which may create the impression that the sentence indication has the support or approval of the Crown'.[486]

In practice, it has proven difficult to ensure that prosecutors comply with these guidelines, and their failure to do so has drawn criticism from the Attorney-General, in his capacity as First Law Officer.[487] An open letter from the Directors of Public Prosecutions, the Serious Fraud Office, the Revenue and Customs Prosecutions Office and the Chairman of the Criminal Bar Association expressed concern that prosecutors were not adhering to the guidelines. The letter alleged that prosecutors were failing to remind the court of the Attorney's right to appeal, appearing at sentence indication hearings without having agreed on the basis for the plea, and not providing victim personal statements (the equivalent of victim impact statements) to the court.[488]

In view of the problems that arose in both schemes when the conventional role of the prosecution was altered, the Council has concluded that if sentence indication were to be offered in County Court proceedings, the existing role and duties of the prosecution in relation to the plea hearing should be preserved. In practice, this would mean it should be possible for the indication to be given without submissions from the prosecution as to the appropriateness of a particular type or range of sentence.[489]

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483 *R v Goodyear* [2005] EWCA Crim 888, [70](b). See also The Attorney-General's Office (UK) (2005), above n 386, D3 and The Crown Prosecution Service (UK), *Judicial Independence, Open Justice and Advance Sentence Indication (Annex B)* (2005) [15], <www.cps.gov.uk/legal/section15/chapter_j_annex_b.html> at 26 July 2007.

484 *R v Goodyear* [2005] EWCA Crim 888, [70](b); Attorney-General's Office (UK) (2005), above n 386, D1; Crown Prosecution Service (UK) (2005), above n 483, [3].

485 *R v Goodyear* [2005] EWCA Crim 888, [70] (c) & (d); Attorney-General's Office (UK) (2005) above n 386, D4; Crown Prosecution Service (UK) (2005), above n 483, [15].

486 *R v Goodyear* [2005] EWCA Crim 888, [70] (c) & (d); Attorney-General's Office (UK) (2005) above n 386, D4; Crown Prosecution Service (UK) (2005), above n 483, [15].

487 In England the Attorney-General, and not the prosecution, is responsible for appeals against sentence: *Guidelines on the Acceptance of Pleas: Joint Letter from Directors and Criminal Bar* (12 January 2007) Revenue and Customs Prosecutions Office <www.rcpo.gov.uk/rcpo/guidance/guidance.shtml> at 26 June 2007. At law the Attorney-General is not precluded from referring a sentence to the Court of Appeal, even if the prosecutor fails advise the court that the right to appeal is preserved. However, in practice the Attorney-General has been concerned that the failure to do so implies the prosecution's agreement to the indicative sentence: *Attorney- General's Reference (No 48 of 2006); R v Farrow* [2006] EWCA Crim 888.

488 *Guidelines on the Acceptance of Pleas: Joint Letter from Directors and Criminal Bar* (12 January 2007) Revenue and Customs Prosecutions Office <www.rcpo.gov.uk/rcpo/guidance/guidance.shtml> at 13 August 2007. While the Guidelines provided by the Attorney-General are not binding, the authors of the letter reminded prosecutors that 'they should always be followed in every case in the absence of compelling and justifiable reasons for any deviation' and that the reasons for any deviation must be recorded.

489 Conventionally, in Victoria the prosecution makes submissions in relation to the appropriateness of a custodial sentence and the suspension of all or part of such a sentence.

Evidentiary issues associated with the use of victim impact statements

One evidentiary issue that was raised by the prosecution during this inquiry, but that does not appear to have arisen in New South Wales or England,[490] was the potential for the parties' case at trial to be compromised by the provision of material relating to the impact of the offence on the victim or, in relation to defendants, their criminal record and personal circumstances. The court would need such material to be in a position to provide an informed indication of the likely sentence; however, the provision of this material before a guilty outcome was assured could prejudice its use in any ensuing trial.

In passing sentence, the court has a statutory obligation to consider the impact of the offence on the victim.[491] Relevant information is generally conveyed to the court through the victim impact statement, which is prepared after a finding of guilt or a guilty plea has been entered. There is often material in the victim impact statement that is not directly relevant to the proceedings, and it is up to the sentencing judge to determine whether and how this material can be taken into account in determining the appropriate sentence.

Providing this material at a sentence indication hearing, ahead of a guilty plea or verdict, could compromise the victim's evidence and prejudice the prosecution case if the matter proceeds to trial. The Director and the Office of Public Prosecutions were particularly concerned about the possibility that any material contained in the victim impact statement could be used at a subsequent trial.[492]

Various strategies to address this problem were presented during the inquiry. Some legal stakeholders suggested that the defence should be required to give an undertaking that any material in the victim impact statement that is contradictory to the victim's witness statement will not be used at trial.[493] Another suggestion was that the prosecution compile a 'bullet point' summary of material that is likely to be contained in the victim impact statement.

The Council believes that both of these suggestions have merit, but both also would leave open the possibility that the evidentiary issues would prejudice the trial. West CASA suggested that in sexual offence cases a generic or global impact statement could be compiled to convey the impact that a sexual offence typically or commonly has on a victim, and provided an example of such a statement for a child victim.[494] While there may be cases in which such material would be relevant, the Council believes that a generic statement would not be sufficiently specific to enable a judge to determine an appropriate and reliable indicative sentence.

The Council considers that, if introduced in the County Court, a sentence indication process should not require the preparation of a victim impact statement, or other material ordinarily derived from such a statement, until after the guilty plea has been entered.

490 The reason that this matter was not a significant issue in New South Wales was probably that, when the pilot scheme commenced, the impact of the offence on the victim did not have the standing as a sentencing factor that it now does. There was, for example, no statutory requirement to tender a victim impact statement.

491 *Sentencing Act 1991* (Vic) s 5 (2AC)(daa).

492 Submission 29 (Director and the Office of Public Prosecutions). See also Submission 18 (CASA House).

493 Legal Issues Roundtable (14 March 2007).

494 Submission 25. The generic statement outlined the common effects of childhood sexual assault that have been identified by researchers in this field.

6.6 Should sentence indication be introduced in the County Court?: The Council's view

The Council has concluded that the neither the NSW scheme nor the English Goodyear Guidelines would provide a workable framework for the provision of sentence indication in indictable proceedings in Victoria. The safeguards that these schemes relied on imposed obligations that the prosecution could not discharge without risk to its case at any ensuing trial, its appeal rights, or the appropriateness of the sentence. Further, neither process appeared capable of resolving the evidentiary issues associated with the preparation and submission of plea material in advance of a guilty outcome.

While there are a number of challenges faced in extending sentence indication to the indictable jurisdiction in Victoria, the Council believes it is possible to devise a scheme with appropriate safeguards for use in the County Court that over time may assist in the earlier resolution of matters. The Council is confident that limited nature of the scheme we propose in this report, and the safeguards identified, should operate as a check against the possible inappropriate use and operation of such a scheme. The proposed framework for such a scheme (including recommended safeguards) is outlined below.

As a further precaution the Council has concluded that it would be desirable to introduce sentence indication in County Court proceedings initially by way of a pilot project, in order to establish the likely use and impact of such a scheme on those directly affected by the proceedings. This approach will allow the scheme's impact on case flow, on sentencing, on the interests of victims and defendants, and on the operation of all the relevant participating agencies (the County Court, the DPP and the OPP, and Victoria Legal Aid) to be monitored before a commitment is made to make sentence indication more broadly available on an ongoing basis. We discuss the scope of the scheme, as well as issues relevant to the effective monitoring and evaluating the operation of the pilot project below.

As for the Magistrates' Court scheme, we recommend that the provision of an indicative sentence in County Court proceedings be given statutory underpinning to provide judges with clear statutory authority for the provision of an indication. The Chief Judge should also be empowered to give any directions and make such rules as are required to establish the administrative framework needed.

Recommendation 4: A pilot sentence indication project in the County Court

(i) A pilot process for the provision of sentence indication should be established in the County Court in accordance with the framework set out in Recommendation 6; and

(ii) The Department of Justice, in collaboration with the County Court, the Office of Public Prosecutions, Victoria Legal Aid and the Sentencing Advisory Council, should monitor its impact on case flow, on sentencing, and on the resources and operation of the key participating agencies.

Recommendation 5: Statutory support for sentence indication in the County Court

The Crimes (Criminal Trials) Act 1999 (Vic) should be amended to authorise judicial officers to provide a sentence indication as outlined in Recommendation 6 and to allow the Chief Judge to give any direction and make such rules as are required for this purpose.

6.7 The framework for a pilot scheme

Prerequisites for a workable sentence indication process

In the absence of a workable model that could be transplanted from another jurisdiction, the Council identified certain features that a sentence indication scheme would need in order to:

- preserve the current role and duties of the prosecution;
- maintain the discretion and independence of the sentencing court;
- minimise the risk of departures from the indicative sentence and appeals against the final sentence; and
- avoid prejudice to the parties' cases in the event that the matter proceeds to trial.

In the Council's view, satisfying all of these requirements would only be possible if the content of the indication was confined to a general indication of the likely sentence that would be imposed on a guilty plea. Table 10 summarises the goals and proposed requirements for such a process.

Table 10 : Suggested requirements of a sentence indication process

Goal	Requirement
To avoid the premature preparation and submission of material that could compromise the admissibility of evidence that might be relied on if the case proceeds to trial	The indicative sentence must be sufficiently general for it to be determined on the basis of existing material (i.e. material available at the commencement of proceedings in the County Court). The prosecution should not be required to provide a victim impact statement or to summarise material that would ordinarily be contained in such a statement. The defence may, but should not have to, provide material relevant in mitigation.
To ensure that the judge only provides an indicative sentence where he/she is satisfied that he/she is in possession of all the relevant material	The judge has the unfettered discretion to refuse to provide an indicative sentence.
To preserve the role that is currently undertaken by the prosecution at the plea hearing	At the hearing when the request for sentence indication is considered, the prosecution should make a submission as to whether an immediately servable term of imprisonment would be appropriate.
To avoid departures and the appeals that follow departures from the indicative sentence	The indicative sentence must be binding on the sentencing court if a guilty plea is entered at the time or shortly after the indication is given.

The scope and content of the sentence indication

In determining what an indication might specify, the Council considered two options: the Criminal Bar Association's suggestion that it be limited to the likely disposition, not to its term,[495] and the possibility that it could be confined to stating whether an immediately servable term of imprisonment would be likely to be imposed on a finding of guilt entered at that time.[496]

Specifying the type of disposition would have the advantage, from the defendant's viewpoint, of providing more detail as to the likely sentence than merely an indication of the likelihood of a prison term. However, it would have implications for the prosecution, which might have to do more than merely make a submission as to the appropriateness of a prison term, and it might require the defence to prepare and produce more material than is ordinarily available at the commencement of proceedings in the County Court; that is, the case conference.

By contrast, an indication that was confined to the likelihood of an immediately servable term of imprisonment being imposed is consistent with the prosecution's role at a plea hearing and could in many cases be made on the basis of material available to the court at this stage of the proceedings.

The Council believes that this approach, although significantly more confined than that adopted in other jurisdictions or in the Magistrates' Court, would nevertheless resolve some of the uncertainties that cause defendants to defer plea decisions in indictable matters. The Law Institute of Victoria submitted that 'the main factor which drives a plea decision is the certainty of outcome for the defendant, *particularly in knowing whether or not they are facing a term of imprisonment*'.[497] Similarly, Victoria Legal Aid observed that a significant proportion of matters dealt with in the County Court resulted in the imposition of non-custodial sentences and that, in these cases, an indication of whether an immediately servable prison term was likely would assist the defendant in making his or her plea decision.[498]

The Council therefore recommends that the indication should be restricted to whether an immediately servable term of imprisonment is likely to be imposed. While we recognise that this limits the specificity of such a process, we believe that on balance, the risk of uncertainty and appeal outweighs the benefits to be gained by a more specific indication of the likely sentence. If the indicative sentence were confined to an indication of whether the defendant is likely to receive a prison sentence on pleading guilty at that stage, many of the difficulties that arose during the operation of the New South Wales sentence indication scheme would be avoided.

The prerequisite for the provision of sentence indication: The agreement of the parties and the court

The Council also recognises that a sentence indication scheme requires the agreement and support of all the parties; otherwise, the process will not succeed in resolving the matter without dispute. If the defence requires the consent of the prosecution to make a request to the court for sentence indication, the use of sentence indication depends on the agreement of the parties. Such a framework encourages the parties to resolve disputed issues but does not place any pressure on any party or on the court to accede to a request for sentence indication.

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495 Submission 5.

496 A precedent for this approach is the provision governing the indication that can be provided in the English Magistrates' Court before the defendant decides whether to have the matter heard summarily or tried on indictment. The indication that a non-custodial sentence would be imposed if the matter were dealt with summarily is intended to encourage defendants to elect to plead guilty and have the matter resolved forthwith. The *Magistrates' Court Act 1980* (UK) allows the accused to request an indication 'of whether a custodial sentence or non-custodial sentence would be more likely to be imposed'. If the court indicates that a non-custodial sentence would be imposed and the defendant pleads guilty, the indication is binding. Section 20A(1) of the *Magistrates' Court Act 1980* (UK) further provides that 'no court … may impose a custodial sentence for the offence unless such a sentence was indicated'.

497 Submission 17 (emphasis added).

498 Submission 23.

As the recommended scheme requires the agreement of the prosecution before the defence can request an indication hearing, the defence is not likely to make such a request, nor is the prosecution likely to agree to a request, if either party believed that the provision of sentence indication would damage their case if the matter went to trial, unnecessarily complicate proceedings, or in the case of the prosecution, cause significant further hardship for the victim.

Further, the Council proposes that the court should retain the unfettered discretion to refuse to provide an indication. Mindful of the difficulties that arose when this aspect of judicial discretion was examined on appeal in New South Wales, we recommend that if sentence indication is introduced in the County Court, it should be made clear that discretion to refuse sentence indication is unrestricted.

The role of the prosecution and the involvement of the victim

By restricting the scope of the indication to whether an immediately servable term of imprisonment is likely to be imposed, the prosecution's conventional role—to make submissions in relation to the appropriateness of an immediately servable term of imprisonment—would be preserved. The prosecution would not be obliged or expected to make submissions in relation to the possible type of order or quantum of sentence to be imposed.

Further, the prosecution would be required, in line with its current obligations to consult with the victim during the course of criminal proceedings, to do so where the defence has requested a sentence indication hearing. We discuss this in more detail below.

The effect of the indication on the sentence

This framework would also achieve the appropriate balance between certainty and flexibility necessary for the effective operation of a sentence indication scheme. Certainty is needed to assure defendants that the indication can be relied on, while flexibility is needed to give the sentencer the discretion to impose the appropriate sentence.

Certainty would be achieved by making the indication binding on the court. If a court indicated that an immediately servable term of imprisonment would *not* be likely to be imposed on a guilty plea entered at that stage, and the defendant entered such a plea, the court would be bound by the indication and could not impose an immediately servable prison term. Defendants could therefore be certain that if a prison term is ruled out and they plead guilty, a prison term could not be imposed.

Flexibility would be maintained because the indication would be of a general nature: it would not confine the sentencer's discretion to impose an appropriate and proportionate sentence. If, a court indicated that an immediately servable prison term *would* be likely to be imposed, the sentencing court would retain an unfettered discretion to determine the appropriate sentence. The sentencing court could, but would not be obliged to, impose an immediately servable prison term: it could impose a less severe sentence if, on the material presented at the plea hearing, it formed the view that such a sentence was appropriate, taking into account all the circumstances of the case.

The materials required for sentence indication

As the rationale for such a scheme is to advance guilty pleas and shorten proceedings, it would be counter-productive if the request for sentence indication became another issue between the parties. We therefore consider it important to discourage forum-shopping and the possible use of the sentence indication process to delay proceedings, and we support permitting the defence only one request for sentence indication unless the prosecution consents to a further request being made.

As the content of the indication is restricted to whether the accused will receive an immediately servable term of imprisonment, the prosecution's case conference summary and the defence response should provide enough material to support this limited form of indication. Therefore, neither the prosecution nor the defence would be required to submit material for the purposes of the indication that could compromise the strength of their case in the event that the matter proceeded to trial.

The likely forum for the request and provision of sentence indication

The first opportunity at which sentence indication could be sought would be the case conference; such a request could also be made after the case conference, before or at a directions hearing. At this stage, the case will have proceeded through the committal stream, clarified what evidence the prosecution would be able to rely on at trial, and therefore narrowed the scope of the issues in dispute. The case conference is still early enough in the proceedings for the plea of guilty to be of significant utilitarian value.

Providing sentence indication as part of an existing hearing that is already part of the case management system would avoid the creation of a new set of hearings, which could serve to prolong rather than simplify the process. The recommended sentence indication provided can be on the basis of materials already available by the time of the case conference, so it is anticipated that by modifying existing procedures, any significant increase in the participants' workload can be avoided. The framework also leaves open the possibility that, with the agreement of the prosecution, the defence might seek sentence indication at a later stage of the proceedings.

We envisage that a sentence indication process could be incorporated within current County Court procedure along the lines set out below.

- The defence could be required to advise the court and the prosecution whether it intends to seek a sentence indication. The prosecution would then have the responsibility of notifying the defence and the court as to whether or not they agreed that a request for sentence indication was appropriate in that case.
- If the prosecution took the view that a sentence indication hearing was appropriate, the prosecution solicitor should come to court with instructions as to any submissions to be made in relation to the sentence. Likewise, the defence should be prepared to advise his or her client as to the best outcome based on the indication. As it is a broad indication, with two possible answers, the accused should not require much time after the indication to advise the court as to his or her course of action.
- If the prosecution took the view that a sentence indication was not appropriate in any given case, they should notify the defence of this position and both sides should come to the hearing prepared to make submissions as to whether or not the judge should give an indication.

The role of the 'sentence indication judge' at any ensuing trial

Further, because the sentence indication is not specific enough to restrict the discretion of the sentencing court, we believe that it would not be necessary to exclude the judge who gives the indication from presiding over the trial, should the defendant not plead guilty after the indication. This would preserve the simplicity of the process. One of the concerns voiced about a more formal protocol was that it would force the judicial officer who had managed the case to withdraw once the indication was provided. As one participant observed:

> Not enabling the allocated judge to continue will no doubt result in a significant delay in re-listing such matters.[499]

We share this participant's view that allowing the judge to continue, even if the defendant elects to go to trial, is more efficient and more flexible.

499 Submission 28 (M. Pedley).

Recommendation 6 : Framework for a pilot sentence indication scheme in the County Court

The County Court should adopt a sentence indication procedure that incorporates the following elements:

1. The defence should be permitted to request an indication during proceedings in the County Court, subject to the agreement of the prosecution.
2. There should be a requirement for the victim to be consulted if a request for sentence indication is made.
3. The defence should only be permitted to seek an indicative sentence once during the proceedings, unless the Director of Public Prosecutions agrees otherwise.
4. The indication should state whether an immediately servable term of imprisonment would be imposed on a guilty plea entered at that stage of the proceedings or, in the event that a term of life imprisonment would be likely to be imposed, whether a non-parole period would be set.
5. The judge should have the discretion to refuse to provide an indication. The judge should not provide an indicative sentence unless he or she is satisfied that the material available is sufficient to provide a binding indication.
6. If the judge indicates that an immediately servable term of imprisonment is not likely to be imposed (or a non-parole period set in relation to a term of life imprisonment), and the defendant pleads guilty at that stage of the proceedings, the court should not be permitted to impose an immediately servable term of imprisonment (or life without parole).
7. (i) If the judge indicates that an immediately servable term of imprisonment will not be imposed, he or she should be required to state whether, but for a guilty plea being entered at that stage of the proceedings, a more severe type of sentence would have been imposed.

   (ii) If the judge indicates that a non-parole period will be set in relation to a sentence of life imprisonment, he or she should be required to state whether, but for the guilty plea being entered at that stage of the proceedings, life imprisonment without parole would have been imposed.
8. The sentence indicated should be binding on the sentencing court only if the defendant pleads guilty at the time when the sentence indication is provided.
9. A refusal by a judge to give an indication should not be reviewable. However, the prosecution and defence should retain their rights to appeal the sentence ultimately imposed.

The involvement of victims in the sentence indication process

The Council supports an approach that will ensure in all cases, that victims are kept informed of the process and their views taken into consideration when the prosecution decides whether or not to agree to a sentence indication hearing. If sentence indication were introduced, the prosecution would bear the responsibility for consulting with the victim in relation to sentence indication, as it would in relation to a defendant's offer to plead guilty. In any given case, the prosecution may form the view that the request for a sentence indication hearing should not be entertained and this decision should be informed by the attitude of the victim. This should apply equally to all victims.

As discussed in Chapter 4, the *Public Prosecutions Act 1994* (Vic) currently confers a general obligation on the prosecution to discharge its role while giving appropriate consideration to the concerns of victims of crime,[500] and the *Victims' Charter Act 2006* (Vic) requires the prosecution to keep victims informed of

500 *Public Prosecutions Act 1994 (Vic)* s 24 (a) and (c).

developments in relevant criminal proceedings.[501] The combined effect of these provisions is to create a statutory obligation on the prosecution to confer with the victim and a corresponding right of victims to be consulted as part of the process.

The Council believes that the government should review these provisions, in the light of the Council's recommendations in relation to sentence indication, to ensure that they are sufficient to extend the prosecution's obligations to consult with a victim if a request for a sentence indication is made and to protect the rights of the victim under a sentence indication scheme. Consideration should to be given to whether any legislative amendments are necessary to give full effect to these rights and obligations.

Recommendation 7: Victims' rights in the sentence indication process

The Victorian Government should review whether the current statutory provisions governing the involvement of victims in criminal proceedings are adequate to ensure that victims will be consulted if a defendant requests sentence indication, and enact any amendments required to achieve this effect.

The effect of the guilty plea on the indicative sentence

The Council has concluded that Victoria should not introduce specified sentence discounts for a guilty plea, because it believes that the sentencing court needs to have the discretion to determine the appropriate reduction in the light of the circumstances of the case, and that discretion should not be confined by an across-the-board reduction or a prescribed scale. However, the Council supports legislative action to require the courts to state, when passing sentence, the sentence that would have been imposed but for the offender's guilty plea.

The New South Wales experience revealed that there is a close connection between the specificity of a sentence discount regime and the specificity of a sentence indication process. A fundamental flaw in the New South Wales scheme at its inception was that it permitted a specific indication of the likely sentence to be given but did not specify the weight to be given to a guilty plea entered at or immediately after a sentence indication hearing.

If a specific indication of sentence is provided and an unspecified reduction in sentence for a guilty plea is allowed, the process can (and in New South Wales did) give rise to sentencing disparities. An unspecified sentence discount leaves open the possibility that courts will give more credit for a plea at this stage than for a plea entered at an earlier stage of proceedings. Such an effect would run counter to the purpose of the scheme, which is to encourage defendants in indictable proceedings to indicate their guilty plea at the first reasonable opportunity.

In devising a practicable sentence indication process for Victoria, the Council has opted for a scheme in the first instance that does not provide a specific indication of the likely sentence and therefore does not require the weight to be given to a guilty plea to be specified.

Consistent with our view that the value of a guilty plea should be stated at the time of sentencing, the Council believes that a court should state, when providing an indication that an immediately servable term of imprisonment would *not* be likely to be imposed, what effect the offender's likely plea of guilty has had on the indication; that is, whether an immediately servable term of imprisonment would be likely to be imposed but for a guilty plea being entered at this stage of the proceedings. The Council notes that determining whether an immediately servable term of imprisonment is warranted is an established aspect of sentencing practice; the introduction of the sentence indication process along the lines proposed above should therefore not require any further guidance to be provided on the weight to be given to the guilty plea in determining the indicative sentence.

501 *Victims' Charter Act 2006* (Vic) s 9.

When providing an indication as to the likely sentence, even a strictly confined indication as recommended in this report, the Council believes that it may ultimately prove necessary to provide guidance on how a defendant's first reasonable opportunity to plead might be determined and whether, for example, a plea entered at or shortly after sentence indication could be regarded, in some circumstances, as a plea entered at the first reasonable opportunity.

In proposing this form of guidance, the Council has borne in mind the sentencing disparities that arose during the operation of the NSW scheme. Many of these disparities occurred because the court, when indicating the likely sentence, typically treated a plea entered at this stage as one made at the first reasonable opportunity. This encouraged defendants to defer their pleas from committal until arraignment in the higher court, and disadvantaged those defendants who pleaded at the first opportunity. The Council sees a role for the Victorian Court of Appeal in this matter.

Recommendation 8: The effect of the guilty plea on the indication

The Chief Judge should issue a note or direction to require a judicial officer, when providing a sentence indication, to state whether, but for a guilty plea being entered at that stage of the proceedings, a more severe sentence (an immediate term of imprisonment) would be indicated.

Implementation issues

Because the process outlined above represents only a small extension of the current roles of the judicial officer and prosecution, the Council believes that it should not require a cumbersome or significant change to procedure. However, it will require a commitment to resolve any issues that may retard the parties' readiness for sentence indication, and it will require discretion on the part of the prosecution and judicial officer to determine when it may not be appropriate to provide an indication.

The introduction of sentence indication in County Court proceedings would not only require legislative action, but also administrative support. It would also require the cooperation and support of prosecution and defence counsel and would consequently require an additional investment of time and resources in preparation for the conference at which the process could be sought and provided. These issues will need to be addressed should a pilot indication scheme be introduced in the County Court.

Possible future developments

The Council recommends that in the first instance, the indication should be confined to whether an immediately servable term of imprisonment is likely to be imposed on a guilty plea. However, if the proposed evaluation of the pilot scheme concludes that the scheme should be expanded, the Council believes that permitting a more specific form of indication, such as an indication that identifies the likely sentencing range, should be considered.

If a more specific sentence indication were to be provided, guidance would be necessary in order to ensure that judges providing an indication of the likely sentence did not give the maximum discount to offenders pleading guilty after a sentence indication is given, when this was not their first reasonable opportunity to plead guilty. Otherwise, defendants who would have pleaded guilty before the matter was committed to the County Court might be induced to defer their decision in order to take advantage of the sentence indication scheme. This would lead to inconsistent sentences and would give an advantage to defendants who plead at a later stage in the proceedings, thus limiting the scheme's effectiveness in encouraging defendants to plead guilty at the first reasonable opportunity.

The Council believes that this guidance would most appropriately be provided by the Court of Appeal. Two issues would require clarification: first, the maximum reduction allowable for a guilty plea and secondly, in what circumstances the maximum reduction should be permitted. Assuming that as a general rule, the greatest discount should be reserved for a plea at the earliest reasonable opportunity, the Court of Appeal would need to clarify what the maximum allowable discount for a guilty plea should be, as well as

the basis on which to determine the first reasonable opportunity. Specifically, such guidance would need to establish that as a general rule, the first reasonable opportunity would occur when the prosecution case has been fully disclosed and the defence has had access to legal advice, and that this is generally likely to have been achieved before the proceedings commence in the higher court.

6.8 Should sentence indication be available in all County Court matters?

As a separate issue the Council considered whether the use of sentence indication in County Court proceedings should be restricted in any way. Earlier in this chapter it was noted that participants had expressed concerns about using sentence indication in serious cases attracting the most severe penalties in the sentencing hierarchy, and the Council has not recommended the use of sentence indication in Supreme Court matters. The Council therefore examined the extent to which the proposed sentence indication scheme would be likely to meet a need, on the part of defendants, for such an indication, and would assist in reducing the number of late-resolving cases.

How useful will such a scheme be?

The Council is recommending a process that provides a limited indication of the likely sentence without a specified reduction in sentence for pleading guilty at an early stage of the proceedings. The Council noted that there is no statutory restriction on the types of matters in which sentence indication can be sought in England or New Zealand; nor had there been any restriction on the types of matters that could proceed to sentence indication in New South Wales, although initially the scheme was confined to cases in which the defendant had not yet been arraigned.[502]

Participants in this inquiry held different views about the likely value of a scheme that did not incorporate a specified reduction in sentence for pleading guilty. Some of the participants in this inquiry saw a specified sentence discount as working in tandem with a sentence indication process.[503] A specified reduction in sentence would provide the incentive to plead guilty early, while the sentence indication would provide certainty of outcome, alleviating concerns about the type or severity of the sentence. Specifying the basis for determining the amount of the reduction would also provide certainty: certainty that the reduction in sentence allowable for a guilty plea would, in fact, be given.[504] For others, however, sentence indication on its own would be an acceptable option, to the extent that it alleviated an unjustified concern about the likely sentence, but would not be acceptable if it incorporated an incentive to plead guilty, whether or not this incentive was specified in some way.[505]

The Council has recommended this limited process because it is concerned at the risk of sentencing disparities and wishes to avoid the potential for a sentence indication process to provide too great an incentive to finalise cases and to alter too extensively the conventional roles of the judicial officer and the prosecution in criminal proceedings.

Having proposed a relatively limited process, the Council inquired as to whether such a process would still be useful in resolving contested matters. In the Council's view, the appropriate approach was to define the criteria that a sentence indication process must satisfy and then to determine whether such a process would also be useful.

Matters in which sentence indication might have greatest potential

In determining whether sentence indication will be of use in particular types of proceedings, it is necessary to establish the types of defendants and cases that are most likely to be benefit from an indication that an immediately servable prison term is or is not likely to be imposed.

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502 Chief Judge, NSW District Court, Practice Note 25, extracted in Spears, Poletti and McKinnell, *Sentence Indication Hearings* (1994), above n 294, 47.

503 For example, submissions 17 (Law Institute of Victoria) and 23 (Victoria Legal Aid).

504 Submission 23 (Victoria Legal Aid).

505 For example, submission 14 (South Eastern CASA).

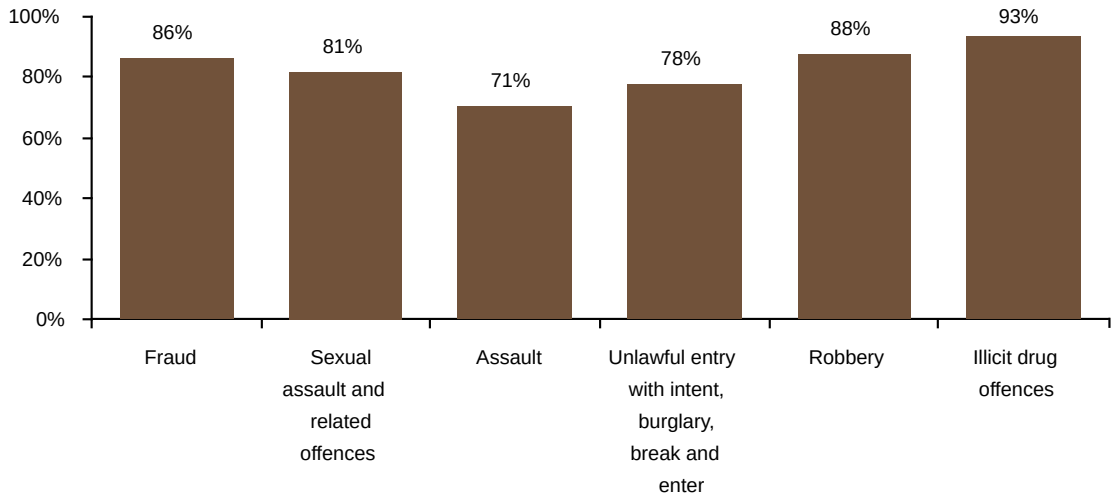
In the Discussion Paper, the Council reviewed current Victorian County Court data showing defendants' plea behaviour to establish in what types of matters defendants are entering a late guilty plea. It identified six major offences and offence categories dealt with in the County Court—assault, robbery, sexual offences, illicit drug offences, fraud, and break and enter/burglary—and compared the pleas entered or indicated at the commencement of proceedings in the County Court with the final plea entered.[506] This information suggested the extent to which a defendant who commenced the County Court proceedings by contesting the matter was likely to abandon the defence and plead guilty. By comparing such findings by offence group, the Council was able to identify the 'elasticity' of defendants' initial indications of plea by offence type.

Late-resolving pleas in County Court matters by offence type

In Victoria, defendants who have reserved pleas to the six offences and offence categories identified constituted 27 per cent (253 out of 885) of all reserved pleas entered at the commencement of County Court proceedings, and 23 per cent of all final guilty pleas in 2004–05. Figure 2 shows the changes in plea between the commencement and conclusion of County Court proceedings. The most 'volatile' or 'elastic' plea behaviour was that of defendants to illicit drug offences. In 2004–05, approximately 93 per cent of defendants charged with drug offences who initially reserved their plea entered a final plea of guilty.

A high proportion of defendants to armed robbery and drug charges reserved their plea at the commencement of proceedings but ultimately entered a final plea of guilty. In 2004–05, approximately 94 per cent of defendants charged with drug offences who initially reserved their plea entered a final plea of guilty, while approximately 88 per cent of those charged with robbery ultimately pleaded guilty.[507]

Figure 2: The percentage of reserved pleas resolving into guilty pleas by type of offence, County Court of Victoria, 2004-05



Approximately 51.4 per cent of adult offenders sentenced in the County Court receive a sentence that involves an immediate term of imprisonment, that is, a prison sentence, a combined custody and treatment order or a partially suspended sentence. Since 2000–01, this proportion has remained relatively stable, fluctuating between 49.5 per cent in 2004–05 and 53.4 per cent in 2002–03.[508]

506 Discussion Paper (2007), above n 44, 81–2. A person who pleads guilty at or after committal will be sentenced in the higher court. A matter may commence in the County Court as a guilty plea, listed for a sentencing hearing.

507 Discussion Paper (2007), above n 44, 80–1.

508 Sentencing Advisory Council, *Victoria's Prison Population 2001 to 2006* (2007) <www.sentencingcouncil.vic.gov.au> at 13 August 2007.

The Council examined sentencing outcomes for County Court matters to ascertain the types of cases that were 'borderline custody' matters. These are the matters most likely to be affected by an indication as to whether an immediately servable term of imprisonment is likely. In these matters, if a defendant receives an early indication that an immediate prison term is not likely, the defendant may be inclined to enter a guilty plea at that stage.

Between 2001–02 and 2005–06, approximately 37 per cent (3501) of the 9542 people sentenced in the County Court received one of the three sentencing dispositions imposed as a lesser alternative to a term of imprisonment: an intensive correction order (ICO), a community-based order (CBO), or a wholly suspended sentence (WSS).[509] Table11 below shows the number and proportion of people receiving these types of sentences.

Table 11: The number of people sentenced to an intensive correction order (ICO), community-based order (CBO) or wholly suspended sentence (WSS) in the County Court of Victoria, 2001–02 to 2005–06[510]

Type of offence (ASOC)*	Number of people sentenced	Intensive correction order (ICO), community-based order (CBO) or wholly suspended sentence	
		Number	%
Homicide and related offences	137	7	5.1
Robbery, extortion and related offences**	**1687**	**469**	**27.8**
Assault	**1478**	**663**	**44.9**
Illicit drug offences	**1229**	**419**	**34.1**
Sexual assault and related offences	**1070**	**305**	**28.5**
Unlawful entry with intent, burglary, break and enter	**875**	**371**	**42.4**
Fraud—Deception and related offences	**752**	**306**	**40.7**
Offences against justice procedures, government security and government operations	192	106	55.2
Abduction and related offences	180	68	37.8
Dangerous or negligent acts endangering persons	164	50	30.5
Miscellaneous offences	285	47	16.5
Weapons and explosive devices	39	10	25.6
Total	**9542**	**3501**	**36.7**

Source: County Court of Victoria, unpublished.

* *ASOC is the ABS Australian Standard Offence Classification (Cat. No. 1234.0)*

** *The offence types in bold are the offence types for which data on plea behaviour were obtained.*

509 The remaining offenders received sentences such as a fine, Youth Training Centre, or home detention.

510 This table presents sentencing outcomes for people sentenced for the principal proven offences (PPOs) listed. The PPO describes the offence proven that attracted the most serious sentence according to the sentencing hierarchy set out in the *Sentencing Act 1991* (Vic). The analysis therefore excludes people sentenced for an offence who received a more serious sentence for another offence forming part of the same presentment.

The six offence groups for which plea data were provided accounted for approximately 74 per cent (7091) of all people sentenced, and 72 per cent (2533) of all ICOs, CBOs and WSSs imposed.The offences for which the greatest number of these orders was imposed were assault, robbery and illicit drug offences, in that order. Together, the ICOs, CBOs and WSSs imposed for these three types of offences constituted 44 per cent of all such orders imposed. From the courts' perspective, defendants to these types of charges who are entering late guilty pleas may be likely to advance their plea decision if given an early indication.

The offence for which the highest proportion of these types of orders was imposed were offences against justice procedures, government security and operations, where 55 per cent of those sentenced received an ICO, WSS or CBO. This offence group, however, comprised a relatively small number of all people sentenced. Of the remaining offence groups, the offence registering the highest proportion of people sentenced to non-custodial orders was assault, where 45 per cent of people sentenced received an ICO, CBO or wholly suspended sentence. Property damage, theft and unlawful entry and break and enter offences were the offences with the next highest proportion of orders imposed. From the defendants' perspective, the cases in which they have the best prospects of avoiding an immediately servable prison term would be assault, house-breaking offences and fraud. In cases involving sexual assault, weapons and robbery, the likelihood of an immediately servable prison term being imposed on a guilty outcome is significantly higher.

Relevant findings from New South Wales

The Council also considered the NSW Judicial Commission's findings in relation to the sentence indication scheme. The Commission found that the defendants most likely to seek sentence indication were those charged with drug offences, followed by those charged with robbery.[511] The Commission also found that a higher proportion of defendants on remand and repeat offenders were seeking sentence indication than those facing court for the first time.[512] Although the data are inconclusive, it is possible to infer that defendants who participated in that scheme were motivated more by the prospect of the discount than the certainty of knowing the type of sentence to be imposed.

Conclusions

The plea data from the Victorian County Court and from New South Wales suggest that, for a significant proportion of defendants at the lower end of offending in property, assault and drug matters, an indication of the likelihood of an immediate prison sentence could remove unwarranted concerns as to their sentence and advance the stage at which the guilty plea is entered.

The use of sentence indication in proceedings relating to sexual offences

In referring this inquiry to the Council, the Attorney-General noted that sentence indication had been identified as a potentially useful means of resolving cases involving sexual offences. Accordingly, the Council specifically inquired into the plea behaviour of defendants charged with sexual offences and canvassed the option of introducing a sentence indication scheme in these cases, consulting on this issue with several organisations that support and advocate on behalf of victims of these offences.[513]

511 Spears, Poletti and MacKinnell (1994), above n 294, 19.

512 Ibid 22–3.

513 Meeting with South Eastern CASA (7 March 2007); Meeting with West CASA (21 March 2007); Submissions 14 (South Eastern CASA), 18 (CASA House), 25 (West CASA).

The plea behaviour of defendants to sexual offence proceedings

As several participants observed, currently the 'attrition rate' for cases involving sexual offences—the proportion of complaints that do not proceed to trial—is still high compared to other types of cases and, despite greater encouragement being given to the reporting of sexual assaults, the proportion of reported events is not increasing.[514] This would suggest that in determining the potential for the use of sentence indication, the implications for proceedings in relation to sexual offences need to be carefully considered.[515]

In these circumstances, defendants charged with sexual offences are more likely to contest the matter than to indicate a willingness to plead guilty in advance of the trial. Further, from the offender's perspective, the opportunity to receive a reduction in sentence for a timely guilty plea would need to be weighed against the certainty of being registered as a sex offender[516] and the possibility of receiving an extended supervision order at the completion of the sentence.[517]

However, as noted above, approximately 80 per cent of the defendants to sexual assault and related charges who reserve their pleas at the commencement of proceedings in the County Court enter a final plea of guilty. This places sexual offences midway between drug and assault offences, when measuring the proportion of people who changed their plea to guilty.

In New South Wales, relatively few defendants charged with sexual offences sought sentence indication. A comparison of a random sample of defendants arraigned and those who sought sentence indication revealed that while approximately 8 per cent of the arraigned group were charged with sexual offences, less than 4 per cent (3.8 per cent) of those who sought sentence indication were defending sexual offence matters.[518] However, the NSW scheme operated over 15 years ago, and changes in the handling of complaints and the prosecution of sexual offences may have altered the plea behaviour of this group of defendants.

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514 Victoria, Statewide Steering Committee to Reduce Sexual Assault, *Study of Reported Rapes in Victoria 2000–2003* (2007).

515 Victims' Issues Roundtable (27 February 2007).

516 The *Sex Offenders Registration Act 2005* (Vic) requires sex offenders to keep the police notified of their whereabouts and inform them of their personal details in order to reduce the likelihood that they will reoffend. Registered offenders must then report annually to the police and must also report any changes to relevant personal details. The length of the reporting period differs according to the seriousness of the offence committed, ranging from eight years to life. The punishment for failing to comply with any reporting obligations without a reasonable excuse is 240 penalty units or imprisonment for two years.

517 In 2005 the Victorian Government enacted the *Serious Sex Offenders Monitoring Act 2005* (Vic) that provides for the extended supervision of offenders convicted primarily of sexual offences against children. An extended supervision order is not part of the offender's sentence, but is an additional period of supervision designed to protect the community by minimising the chance that offenders assessed as likely to reoffend will commit another crime. Applications for extended supervision orders are made before an offender's sentence expires and can apply for up to 15 years. New orders can be applied for before an existing order ends. Conditions include: reporting to, and receiving visits from, Corrections officers, not leaving the state or moving to a new address without permission and notifying any changes of name or employment. Other conditions can include conditions about where the offender can live, curfew conditions and treatment and rehabilitation conditions There are now moves in Victoria to extend this scheme to include the power to detain offenders post-sentence. For a discussion of the operation of the existing scheme, see Sentencing Advisory Council, *High-Risk Offenders: Post-Sentence Supervision and Detention Final Report* (2007).

518 Spears, Poletti and MacKinnell (1994), above n 294, 35 (Table 12).

Measures taken to expedite proceedings involving sexual offences

A number of initiatives have been introduced since the commencement of this inquiry to improve the management of cases involving sexual offences and to alleviate the stress encountered by complainants in these matters. In October 2005, in line with the Victorian Law Reform Commission's recommendations concerning reforms to ensure the criminal justice system is responsive to the needs of complainants in sexual offence cases,[519] the County Court introduced a specialist list for sexual offences. Cases involving defendants committed or directly presented for trial in relation to sexual offences are listed within 28 days of committal for a first directions hearing before the Sexual Offences Listing Judge, who either confirms the trial date or fixes a plea date.[520] The creation of a specialist list has multiple purposes, but the main ones are to ensure that these proceedings are expedited with minimum trauma to the victims and to focus more attention on the early resolution of disputed matters. For similar purposes, the Magistrates' Court has also introduced a sexual offences list to manage the preparation and resolution of cases involving sexual offences in advance of the committal hearing.[521]

During 2006, amendments were made to the laws and rules governing the prosecution of sexual offences to reduce the pressure on victims, especially child victims. These reforms remove the need for child witnesses to appear at committal hearings and institute safeguards to alleviate the stress that vulnerable complainants experience in the course of the proceedings.[522]

Sexual offences and sentence indication

The proposed process for sentence indication would remove the evidentiary risks associated with the use of sentence indication in matters where the victim is a witness, and especially where the offence is a crime of violence, such as a sexual assault. Further, the proposed process gives the prosecution the responsibility in sentence indication, as in other stages of the proceedings, for consulting with the victim.

Notwithstanding these safeguards, participants expressed differing views on the value that a sentence indication process would have for victims/survivors of sexual assaults. As noted earlier in this report, advocates for the welfare and interests of victims/survivors of sexual assault considered that the victims' perceptions of the value of this process would vary considerably, depending on their circumstances.

For some victims, the prime consideration may be to secure the defendant's admission of guilt and acknowledgment of the impact that the conduct has had, and therefore the opportunity to present their views in a victim impact statement may be less important. In these circumstances, sentence indication may succeed in resolving the case and provide a clear benefit to the victim. For others, the trial provides their day in court: the opportunity to recount their experiences.

However, there will be certain cases where, due to the circumstances of the offending or the effect on the victim, it would not be appropriate for the judge to give even a general indication without the benefit of a victim impact statement. In these circumstances, the appropriateness of sentence indication in matters in which the victim would be required to give evidence at the trial, especially in cases involving sexual assaults and other crimes of violence, will need to be considered on a case-by-case basis in consultation with the victim.

519 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure - Final Report* (2004).

520 County Court of Victoria, *2005–06 Annual Report,* 16.

521 Chief Magistrate, Magistrates' Court of Victoria, *Sexual Offences List*, Practice Directions 2–4 of 2007.

522 Schedule 5, Clause 11A of the *Magistrates' Court Act 1989* (Vic) provides that a complainant in a sexual offence matter who is a child or a person with a cognitive impairment cannot be cross-examined at a committal hearing. This, together with Practice Note No. PNCR 1-2007, 'Sexual Offences List', issued by the Chief Judge of the County Court of Victoria on 29 March 2007, gives effect to provisions inserted by the *Crimes (Sexual Offences) Act* 2006 (Vic) and the *Crimes (Sexual Offences) (Further Amendment) Act* 2006 (Vic).

Bearing in mind the number of initiatives recently introduced to improve the prosecution of sexual offences and the potentially heightened impact of sentence indication on victims of these types of offences, the Council considers that it would not be appropriate to pilot a sentence indication process in proceedings of this type.

The Council's view

The Council has considered the data on defendants' plea behaviour and the evidence put to this inquiry by stakeholders and members of the public on the matters that might be most or least suitable for inclusion in such a project.

While we do not recommend there be any formal restrictions on the types of cases in which sentence indication is available, given the particular sensitivity of proceedings relating to sexual offences, the Council cautions against the inclusion of sexual offence proceedings in a pilot sentence indication scheme. However, the Council believes that there are other types of cases that may be particularly suitable for inclusion in a pilot scheme, such as cases involving fraud, other property offences, and illicit drug offences.

Illicit drug and fraud cases are generally time-consuming, due to the complex nature of the evidence involved.[523] The Director and Office of Public Prosecutions observed during this inquiry that there would be scope to reduce its requirements for forensic analysis in cases where the benefits gained from an early guilty plea outweighed the forensic utility of this type of evidence.[524] As noted above, a significant number of drug (93%) and fraud (86%) cases in which defendants initially reserve their plea ultimately resolve as guilty pleas.[525] In matters that fall beyond the ambit of the confiscation provisions—that is, matters at the lower end of the scale of offending—there appears to be a strong commitment to early resolution, and therefore a strong likelihood that sentence indication could give rise to early guilty pleas.

Recommendation 9: Eligibility criteria

There should be no formal restrictions on the types of cases in which sentence indication can be made available.

The Council cautions against the inclusion of sexual offence proceedings in a pilot sentence indication scheme and suggests that proceedings in relation to fraud, other property and illicit drug offences may be particularly suitable for inclusion in a pilot project.

523 Some members of the legal community have suggested other means to reduce the preparation time for trials involving drug offences, such as the parties' willingness to reduce the amount of material subjected to forensic analysis.

524 Meeting with the Director and Solicitor of Public Prosecutions (24 July 2007).

525 See Figure 2 above.

6.9 Monitoring and evaluation of a pilot scheme

Measures intended to expedite or streamline criminal proceedings have sometimes been evaluated primarily to establish the extent to which they achieve their stated goals. This form of evaluation tends to focus on the impact of the provision or process on the courts, and specifically on the courts' key performance indicators, rather than on the justice system as a whole.

In this inquiry, the Council has considered the potential impact of the sentence indication process on sentencing outcomes as well as on case flow, and has also been alert to the implications of such a process for counsel. It has crafted this proposal on the basis that it will promote the earlier identification of guilty pleas without compounding counsel's preparation time. Nevertheless, it must be recognised that not all cases in which sentence indication is offered will necessarily resolve with a guilty plea and that not all cases that resolve with a guilty plea will be safe from appeal. The Council therefore believes that the pilot project should be carefully monitored to assess its effect not only on the courts involved, but also on sentencing outcomes and the operation of the key participating agencies, such as the OPP and Victoria Legal Aid.

There are currently limitations on the capacity of the courts and key stakeholders to undertake this task. It is not yet possible to correlate data showing the stage at which plea decisions are made (the initial and final pleas), the method by which the case was finalised (guilty plea, finding of guilt, acquittal or withdrawal), and the sentencing outcome. There will therefore be no established benchmarks of plea behaviour, case duration and sentencing outcomes against which the conduct of the sentence indication process can be compared.

The Department of Justice has established a unit to take responsibility for the development of a coordinated approach to data collection. The unit will develop the capacity of the ICMS, a network for the collection of court-related data across the justice system. This project should ultimately produce the type of data that the courts will need in order to establish benchmarks and to assess changes in case flow and case duration if the measures proposed in this report are adopted.

The evaluation of the pilot project would require cases in which sentence indication is sought to be tracked during the course of the ensuing proceedings so that the duration of the cases, methods of finalisation and sentencing outcomes can be monitored. The Sentencing Advisory Council could contribute to this process by analysing sentencing outcomes for cases involving sentence indication. Further, the evaluation would need to consider the impact on the Office of Public Prosecutions and Victoria Legal Aid. Accordingly, we suggest that the sentence indication process should be subject to careful evaluation and that the Department of Justice coordinate this aspect of the project.

Chapter 7 Conclusions: The Way Forward

Chapter 7 Conclusions: The Way Forward

7.1 A note of caution

The Terms of Reference require the Council to consider the likely impact of the introduction of a sentence indication scheme, with or without a specified sentence discount. There are clear constraints on our capacity to do this.

The Council is cautious about predicting the extent to which defendants will choose to make earlier plea decisions because of a law that requires the courts to state the effect that the guilty plea has had on the sentence imposed. During our program of consultation, we have encountered a wide range of opinions and concerns among the other key stakeholders in the Victorian criminal justice system. The diversity of opinion among offenders, despite their shared experiences of the justice system, makes it impossible to characterise a single point of view as being typically 'the offender's perspective'.

Predicting the extent to which victims involved in indictable proceedings will support the prosecution's involvement in a sentence indication process is also difficult. We have detected wide variation in the views of victims of crime, their families, their counsellors and their advocates. Some differences of opinion clearly stem from the very different experiences that they have undergone. Victims of sexual assault who have endured a traumatic crime of violence and then faced a prolonged and confrontational case brought quite different concerns to the discussions than the families of deceased victims, for example, in cases where the perpetrator's identity and guilt were not at issue.

Further, the data available from other jurisdictions on the impact of sentence indication are incomplete and inconclusive, and Victorian court statistics are not yet able to provide the details needed to build a complete and reliable benchmark against which to predict or monitor changes.

Nevertheless, we have found that the available data, while admittedly limited, have invariably confirmed the anecdotal evidence supplied by members of the Victorian legal community. In this inquiry, for example, legal stakeholders' perceptions of the likely trends in plea behaviour and the potential to shift defendants' plea decisions have been borne out by our own consultation with defendants and the studies of case flow and plea behaviour by the Australian Institute of Criminology and the Scottish Executive.

However, we wish to emphasise the limitations of these measures as strategies to combat delay. While delay was in part the impetus for this inquiry, a desire to clear the backlog of pending trials should not dictate changes to law and procedure. The demise of the sentence indication project in New South Wales, introduced with the express purpose of attracting guilty pleas in matters committed for trial, illustrates the risks associated with adjusting criminal procedure and sentencing practices to meet administrative goals or targets. The Council emphasises that in striving for greater efficiency across the criminal justice system, the participants' and the agencies' legal rights and duties must be respected and preserved, and a certain level of delay, resulting from the interaction of the different participating agencies, must be recognised and tolerated.

7.2 Estimating the likely impact of the proposed measures

The possible impact on sentencing practices

It is difficult to identify the actual impact of the current guilty plea provisions on sentencing in Victoria and elsewhere. As a guilty plea is only one of many factors taken into account at sentence, judicial officers' sentencing remarks do not always reveal whether the guilty plea was taken into account and never reveal the effect on the sentence. Even where the effect of the guilty plea has been identified at sentencing, it may not be possible to isolate this as the sole or even main cause of any differences between the sentences imposed on offenders who have pleaded and been found guilty. It is therefore

not possible to find out the extent to which sentences imposed in Victorian courts already incorporate a discount. Because the weight given to the guilty plea is not separately identified, it is not yet possible to establish a benchmark against which to measure the effect of the proposed changes.

There is similarly scant evidence about the effect of provisions encouraging early guilty pleas on defendants' plea decisions or sentencing. We have found very little research on the effect that changes in this area of law have had elsewhere. The limited data available on the results of similar changes in Scottish and NSW law suggest, however, that it is possible to encourage earlier guilty pleas without changing the proportion of defendants pleading guilty: to alter the timing of the guilty plea without inducing defendants to change their plea. This, in our view, would be the optimum outcome.

It is therefore difficult to estimate the effect that requiring the court to state the effect of the guilty plea on the sentence will have on sentencing. It will depend on the extent to which sentences already incorporate a discount for a guilty plea. Bearing in mind that courts are already required to have regard to the fact that a guilty plea has been entered and the stage at which it has been entered, sentencers are generally providing (but not articulating) a reduction in sentence for a timely plea of guilty. In these cases, requiring the court to specify its effect may make very little difference to sentencing practices.

However, in cases where the plea was entered late in the proceedings or where other factors, such as the seriousness of the offence, had greater weight, requiring the court to reveal the relatively slight weight given to the guilty plea may spark a change in sentencing practices. Some participants in this inquiry suggested that articulating the reduction provided for a guilty plea could result in more severe sentencing. They considered it possible that judicial officers might elevate the 'starting point' to ensure that the reduction given for the guilty plea does not give rise to a perception of leniency. A higher starting point will affect the sentencing of all offenders, not just those who are sentenced on a guilty plea. As Victoria currently has a relatively low custody rate, compared to other Australian jurisdictions,[526] it is therefore conceivable that articulating the value of the guilty plea may increase the sentences imposed on all offenders, with a resultant increase in the proportion and length of custodial sentences.

The potential impact on plea decisions and case flow

Specifying the reduction in sentence available or given for a guilty plea is intended to encourage defendants who are intending to plead guilty to do so as early as possible without inducing or coercing defendants to change their plea decision on that account. The optimum result would be no change in the proportion of cases resolved by a guilty plea, but an increase in the proportion of guilty pleas entered at an early stage of the proceedings. Two recent studies, discussed in Chapter 3, have suggested that it is possible to advance the timing of pleas entered late in the proceedings without providing a specified incentive to plead guilty. However, a certain proportion of defendants are unlikely to be influenced by any form of encouragement to change their plea behaviour.

Not enough is known about the timing of plea decisions in summary proceedings to predict the impact of a consolidation sentence indication process and a stronger obligation on the court to identify the effect of the guilty plea on the sentence.

Stating the effect of the guilty plea at sentencing will make it clear that the plea is being taken into account, and providing an indication of the type of sentence should alleviate some defendants' concerns about entering a guilty plea. It is therefore reasonable to expect that these measures will resolve matters that otherwise would have proceeded to trial. This should reduce the demand for court time, especially in the County Court, and have flow-on benefits for the listing of other criminal matters. However, it is also likely that these measures will require additional resources.

526 Sentencing Advisory Council (2007), above n 508.

In the County Court, where approximately 28 per cent of guilty pleas are entered at or after the directions hearings, there is clearly scope for a significant reduction in the proportion of late-resolving pleas. Even accepting, based on the experience in Scotland and New South Wales, that 7–10 per cent of defendants will nevertheless enter a guilty plea at a very late stage of the proceedings, it is reasonable to expect some reduction in the proportion of late-resolving pleas.

Resource implications

Most of the legal stakeholders who participated in this inquiry noted that the introduction of sentence indication in the County Court would have cost implications. The Victorian Bar Council and the Federation of Community Legal Centres believed that the expanded use of sentence indication would at least initially require additional funding.[527] The Judges of the Criminal Division of the Supreme Court also noted that if sentence indication were introduced in that court, 'considerable additional resources would be required to conduct sentence indication hearings'.[528]

As many participants in this inquiry have observed, encouraging early plea decisions requires an investment in preparation at an early stage of the proceedings. This has resource implications for the Office of Public Prosecutions (in relation to indictable matters), police prosecutors (in relation to summary matters), and Victoria Legal Aid. It would be important to ensure, for example, that counsel engaged to advise on sentence indication matters could be adequately reimbursed for this.

7.3 Implementation issues

None of the proposed measures involves any extensive reconfiguration of existing laws or processes. The Council has been conscious of the need to be practical: to consider not only whether the proposed measure is acceptable, in theory, but also whether it is likely to be useful and effective.

The importance of concerted action

There have been many reforms to criminal procedure in recent years. Typically, the new measures result in a clear and significant improvement followed by a decline that seems to occur when the new rule or procedure becomes an established part of the formal framework, rather than a novel means of resolving the issue or matter in dispute. Since the measures we propose are intended to expedite and not to complicate criminal proceedings, the Council has been careful not to recommend procedural changes that are likely to become a burden rather than an aid to the resolution of contested criminal matters.

The single most important requirement for effective implementation of any changes arising out of this inquiry is concerted action: the parties' unequivocal commitment to make their best efforts to attend to criminal matters as early as possible. Achieving an enduring improvement will require a shift in legal culture, to encourage judicial officers and counsel to be prepared to assess the prospects of their case at an early stage of the proceedings. It will also require community acceptance of the crucial role that informal professional discussions between counsel play in case management.

An evolutionary approach

The Council recognises that many interrelated laws and processes affect the conduct of criminal proceedings, and has chosen to recommend incremental changes to sentencing law and criminal procedure. In proposing that the courts state the value of the guilty plea, we have recommended a change that we believe will remove doctrinal obstacles to more transparent and accountable sentencing. In so doing, we leave open the possibility that the courts will provide further guidance on this matter at some later stage.

527 Submission 24.

528 Submission 15.

At this stage, however, the doctrine of instinctive synthesis is so deeply embedded in Victorian sentencing law that it would be difficult to do more than articulate the value of the guilty plea without altering the definition and weight of other related sentencing factors. Further, until the courts are permitted to state the effect of the plea on the sentence, the weight currently being given to the guilty plea is impossible to determine.

Similarly, we are recommending legislation to authorise judicial officers to indicate to defendants, within stringent guidelines, the likelihood of an immediately servable term of imprisonment being imposed if the defendant pleaded guilty at that stage of the proceedings. This recommendation provides statutory authority for the informal process already in operation in summary proceedings and establishes the statutory support for a pilot sentence indication project in the County Court.

The proposed extension of sentence indication to indictable proceedings is a cautious step, based on the solid and successful experience of sentence indication in the Victorian Magistrates' Court and our assessment of the factors that encourage and impede early plea decisions in indictable proceedings. The Council is recommending a formal evaluation of the pilot scheme to assess its impact on the criminal justice system.

If the proposed sentence indication scheme is implemented and found to be effective in encouraging earlier guilty pleas, there may be merit in reviewing the scope of the indication and considering whether judicial officers should be permitted to provide a more specific indication of the likely sentence. Such a development, however, would need to be considered in conjunction with the implications of specifying the maximum reduction permissible for a guilty plea and the circumstances in which such a reduction could be allowed.

Appendix 1: Questions canvassed in the Discussion Paper

Specified sentence discounts

In deciding to reduce an offender's sentence because of the guilty plea, a court considers two separate but related questions: whether a reduction in sentence should be permitted and if so, by how much the sentence should be reduced. Currently the court has an unfettered discretion to determine both of these matters. The Council invites comment on different ways in which more explicit guidance could be provided for either or both of these decisions.

Question 1

(i) 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?

(ii) Should the circumstances in which a reduction in sentence is not available be defined or left to the court's discretion?

Question 2

How should the amount of any reduction in sentence be determined, and how much discretion should the court have in this matter?

(i) Should there be a cap on the amount by which a sentence can be reduced for a guilty plea?

(ii) Should a sliding scale be introduced, with the maximum reduction provided for a guilty plea entered at the first reasonable opportunity?

Question 3

Should the court be required to state how much weight has been given to the guilty plea and its effect, if any, on the sentence imposed?

Question 4

What model for law reform would provide the fairest and most effective means of recognising the value of a defendant's guilty plea at sentencing?

Sentence indication

Sentence indication is a process that requires a magistrate or judge to indicate a sentence in advance of a contested hearing being conducted or a plea of guilty being entered. The use of sentence indication raises issues of policy and practice and has implications for the roles of the judicial officer, prosecution and defence counsel, as well as evidentiary and procedural issues for the management of cases in which sentence indication may be available. The Council invites comments on the wider policy issues relating to the use of sentence indication, as well as specific comment on the merits of formalising the current arrangements operating in the Magistrates' Court and/or introducing a formal process for indictable proceedings.

Question 5

Is it appropriate for a judicial officer to provide an indicative sentence before the defendant has entered a guilty plea or a contested hearing has been conducted?

Question 6

What safeguards would be required in a formal sentence indication process:

(i) to ensure that the provision of an indicative sentence does not serve to coerce or induce defendants (including unrepresented defendants) to enter a guilty plea?

(ii) to ensure that victims' views and interests are recognised and taken into account?

Question 7

Should there be any restrictions on the type of proceedings or sentences for which sentence indication could be sought or provided?

Question 8

When providing an indicative sentence, should the court be required to incorporate a reduction in the indicative sentence for a plea?

Question 9

(i) To what extent would the effectiveness of sentence indication be due to the fact that it offers a significant sentence discount for an early guilty plea? What other feature(s) of sentence indication might help to resolve contested matters early?

(ii) Would a formal sentence indication scheme be necessary if Victoria introduced more specific laws for the reduction in sentence for a guilty plea?

Sentence indication in summary proceedings

Sentence indication is already available at contest mention hearings for summary proceedings dealt with in the Magistrates' Court. The Discussion Paper examines the current operation and reviews evidence from Victoria and other jurisdictions as to the role and value of providing sentence indication at these hearings. The Paper canvasses a proposal to establish the current arrangements on a statutory basis.

Question 10

Should the provision of sentence indication in the Magistrates' Court be given statutory underpinning?

Sentence indication in indictable proceedings

Sentence indication is not available in indictable proceedings, and its introduction would have implications for case management in all three courts that deal with indictable proceedings: the committal stream of the Magistrates' Court, the County Court and the Supreme Court of Victoria.

Question 11

Should Victoria introduce a sentence indication scheme for indictable offences following the approach in the draft protocol?

Appendix 2: Submissions

No.	Date received	Author/Organisation
1	21/02/2007	Confidential
2	15/02/2007	A. English
3	07/03/2007	A. Flynn PhD student, Department of Criminology, Monash University
4	14/03/2007	K. Davies
5	14/03/2007	Criminal Bar Association
6	15/03/2007	Confidential
7	16/03/2007	Noel McNamara Crime Victims Support Association
8	16/03/2007	R. Paterson
9	16/03/2007	Kathy Mack, Professor of Law, Flinders University Sharyn Roach Anleu, Professor of Sociology, Flinders University
10	19/03/2007	M. Noe
11	20/03/2007	J. Knight
12	21/03/2007	Magistrates' Court of Victoria
13	23/0320/07	Victorian Bar Inc
14	25/03/2007	South Eastern Centre Against Sexual Assault (CASA)
15	25/03/2007	Supreme Court of Victoria
16	26/03/2007	Richard Gattan
17	28/03/2007	Law Institute of Victoria
18	28/03/2007	CASA House (Centre Against Sexual Assault)
19	02/04/2007	B. Pownall
20	03/04/2007	Victorian Aboriginal Legal Service
21	04/04/2007	West Heidelberg Community Legal Centre
22	05/04/2007	Victoria Police
23	09/04/2007	Victoria Legal Aid
24	09/04/2007	Federation of Community Legal Centres
25	12/04/2007	West CASA (Centre Against Sexual Assault)
26	13/04/2007	Mental Health Legal Centre
27	25/04/2007	John Willis, Associate Professor, School of Law, La Trobe University
28	30/04/2007	M. Pedley
29	06/06/2007	Director and Office of Public Prosecutions

Appendix 3: Consultations

Meetings

Date	Organisation
27/02/07	Crime Victims Support Association
27/02/07	Victims' Issues Roundtable
07/03/07	South East CASA
08/03/07	Professor George Hampel, Monash University
08/03/07	Law Institute of Victoria
14/03/07	Federation of Community Legal Centres (FCLC)
15/03/07	Legal Issues Roundtable
20/03/07	Victims of Homicide Support Group, Frankston
20/03/07	Justices Curtain and Bongiorno, Supreme Court of Victoria
21/03/07	Chief Magistrate Ian Gray and Deputy Chief Magistrate Paul Smith, Magistrates' Court of Victoria
21/03/07	CASA West
22/03/07	Victoria Police
11/04/07	Chief Judge Rozenes and Judge Hampel, County Court of Victoria
31/05/07	Victoria Legal Aid
06/06/07	Justice Maxwell, President of the Court of Appeal, Justices Vincent, Nettle, Redlich and Neave, Victorian Court of Appeal
06/06/07	Director and Office of Public Prosecutions
24/07/07	Director and Solicitor of Public Prosecutions

Focus Groups

Date	Group
07/12/06	Offender's Focus Group, Tarrengower Prison
12/12/06	Offender's Focus Group, Dhurringile Prison
14/03/07	VACRO Focus Group
20/03/07	Focus Group 1
21/03/07	Focus Group 2
22/03/07	Focus Group 3
23/03/07	Focus Group 4
23/03/07	Focus Group 5

Information Sessions

Date	Group/Organisation
09/02/2007	Federation of Community Legal Centres (FCLC)
20/02/2007	Public Information Session
22/03/2007	State-wide Steering Committee to reduce sexual assault
23/03/2007	Aboriginal Justice Forum

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