

**THE SOLUTION TO THE DILEMMA PRESENTED BY THE GUILTY PLEA
DISCOUNT: THE QUALIFIED GUILTY PLEA - 'I'm pleading guilty *only*
because of the discount...'**

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Summary: The guilty plea sentencing discount is arguably a triumph of expediency over principle. Strong utilitarian reasons favour providing less severe sentences to defendants who plead guilty. However, an unsavoury by-product of the guilty plea discount is that some innocent people are pressured into pleading guilty. This article suggests that a possible solution to the problems caused by the discount is to permit defendants to enter a 'qualified guilty plea'. While formally amounting to a guilty of plea, the defendant would be permitted to advance submissions consistent with innocence as part of the plea in mitigation. If the sentencer is persuaded that the defendant had a tenable chance of an acquittal a penalty discount in excess of that available for merely pleading guilty would be conferred.

1 Introduction and Overview of Reform Proposal

The guilty plea discount remains one of the most controversial aspects of sentencing. There is no *obvious* principled criminological basis for punishing offenders who plead guilty less severely than those who elect to proceed to trial. As John Willis has noted, the consequence of the discount is that 'the final product after allowing for the guilty plea is not the appropriate sentence according to traditional penological criteria'.¹ There are, however, strong pragmatic reasons in favour of encouraging defendants to plead guilty. A guilty plea saves the community the expense of a contested hearing, reduces court delays and spares witnesses the stress of giving evidence. However, the discount comes at a high price, placing pressure on some innocent defendants to plead guilty. The High Court of Australia in *Cameron*² recently approved of the discount and, in the process, the majority of the Court rejected a number of arguments against the discount, including that it constitutes a form of discrimination against offenders who elect to pursue their 'right' to a trial.

The purpose of this paper is to suggest a different approach to the dilemma caused by the guilty plea discount. It is important to note that this article focuses on the discount for a guilty plea *per se*, as opposed to a discount for an expression of remorse or cooperation with investigating officials which often (but not always) coincide with a

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¹ J Willis, 'Sentencing Discount for Guilty Pleas' (1985) 18 *ANZJ Crim* 131, 143.

² *Cameron v R* [2002] 187 ALR 65.

plea of guilty. The desirability of providing a discount where there is remorse or cooperation with authorities raises different issues to the guilty plea discount.³

There are two *obvious* ways in which the problem caused by the guilty plea discount can be resolved. One is formal, the other substantive.

The formal approach is to take the view that the discount does not coerce offenders into pleading guilty and hence deny the existence of a problem. This is most commonly done by invoking the well-known argument that the discount does not in fact punish those who plead not guilty more harshly, but rather simply reduces the sentences of those pleading guilty. We reject this argument as being illogical.⁴

The substantive approach to resolving the problem is to abolish the discount. This appears undesirable as there are strong reasons in favour of its retention. We propose a different solution.

Overview of Proposal

We propose that the concept of a 'qualified guilty plea' be introduced. Formally, this would constitute a plea of guilty. However, it would enable defence counsel to commence the plea on the footing that: 'My client pleads guilty, but only to preserve the guilty plea discount...'. Counsel would then be permitted to make submissions consistent with the innocence of the client during the course of the plea. If the submissions are persuasive, the defendant would be eligible for a discount in excess of that available simply for pleading guilty. This proposal strikes a balance between the competing interests of law enforcers and accused. It does so by ensuring that the utilitarian benefits of preserving the discount are retained, while giving appropriate acknowledgment to the fact that (i) the discount places pressure on defendants to plead guilty; and (ii) all persons who plead guilty are not equally guilty.

Some commentators will dismiss the proposal due its highly revisionary character. The most obvious criticism is that the integrity of the criminal justice system will be impaired by imposing criminal sanctions on people who claim to be innocent. Comments along such lines ignore the fact that the system is already broken - and seriously so. Any legal system that deals with policies or practices that lead to the punishment of innocent people, by denying or ignoring the problem, is in need of significant reform.

The proposal urged in this paper will not cure many of the ills of the current sentencing system. It is suggested, however, that it will make the system more transparent and, ultimately, better. A system that permits innocent people (where innocence means an unsustainable prosecution case) to assert their innocence in a limited sense, and receive a reduced sentence because of this, is not as bad a system which induces innocent people to plead guilty and receive only the same discount as those who plead guilty as a result of being caught red-handed.⁵ The basic maxim

³ For comments regarding the relevance of remorse, see M Bagaric and K Amarasekara, 'Feeling Sorry? Tell Someone Who Cares: the Irrelevance of Remorse in Sentencing' (2001) 40 *Howard Journal of Criminal Justice* (UK) 364.

⁴ This issue is expanded in section 3.

⁵ In many cases, the discount for the innocent will in fact be less because they are unable to claim additional discounts based on a show of remorse.

underpinning the suggested reform is that usually the most satisfactory solution to life's dilemmas, even legal ones, is simply to be honest.

Advantages and Disadvantages of the Proposed Reform

The proposed reform would have three main advantages:

- 1 It would make the sentencing system more transparent, by acknowledging that the guilty plea discount puts pressure on the innocent to plead guilty - in some cases invariably leading to the conviction of the innocent.
- 2 It would acknowledge that all defendants who plead guilty are not 'equally guilty'. Defendants who have a tenable defence would be eligible for a discount in excess of the thirty per cent, or so, currently available for pleading guilty.
- 3 A higher portion of cases are likely to be finalised by way of guilty pleas - equating to more cost savings to the community.

The principal disadvantages are as follows:

- 1 The time taken to establish that a defendant has a tenable defence threatens to undermine the cost and efficiency rationale for the reform.
- 2 Providing an even greater discount will place even greater pressure on defendants to plead guilty.

It is argued that the advantages outweigh the disadvantages and that consideration should be given to trialing the proposed reforms.

Prior to canvassing reform issues, we briefly overview the way in which the guilty plea discount currently operates. This is followed by an analysis of the arguments for and against retention of the guilty plea discount. Finally we consider how the discount can operate in the most desirable manner possible by explaining our proposal for reform.

2 Present Legal Position

In the United Kingdom and all Australian jurisdictions (other than Tasmania) accused who plead guilty are given a sentencing discount.⁶ This is so irrespective of whether the plea is coupled with remorse. For example, in *Morton* the Victorian Court of Criminal Appeal stated that:

⁶ See section 152 of the *Powers of Criminal Courts (Sentencing) Act 2000* (UK) (this replaced section 48 of the *Criminal Justice and Public Order Act 1994* (UK) which was expressed in the same terms). The relevant statutory provisions in Australia are: *Crimes Act 1914* (Cth), s 16A(2)(g); *Crimes Act 1900* (ACT), s 429A(1)(u); *Penalties and Sentences Act 1992* (Qld), s 13; *Crimes (Sentencing Procedure) Act 1999* (NSW), s 22; *Sentencing Act* (NT), s 5(2)(j); *Criminal Law (Sentencing) Act 1988* (SA), s 10(g); *Sentencing Act 1991* (Vic) s 5(2)(e); *Sentencing Act 1995* (WA), s 8(2).

A plea of guilty may be taken into account regardless of whether or not it is also indicative of some other quality or attribute such as remorse ... A court may always take a plea of guilty into account in mitigation of sentence even though it is solely motivated by self-interest'.⁷

While courts are normally reluctant to state the exact amount of the discount,⁸ the normal range appears to be between one-quarter and one-third, depending on the circumstances of the case.⁹ The general rule is, the earlier the plea, the greater the discount.¹⁰ The weight of decisions support this, indicating that the timeliness of the

⁷ [1986] VR 863, 867. This approach was also adopted by the Spigelman CJ (with whom other members of the Court agreed) in *R v Thomson* (2000) 49 NSWLR 383 who stated that there are 'benefits to the criminal justice system as a whole' that result from a guilty plea (at 411, para 115). His Honour further noted that the 'public interest served by encouraging pleas of guilty for their utilitarian value is a distinct interest' (at 412, para 122). Note, however, that in *Cameron v R* (2002) 187 ALR 65 the majority of the High Court was unwilling to accept *objective* utilitarian benefits as worthy of a sentence reduction. Instead, they allowed a reduction of sentence for the administrative value of an early guilty plea based on the *subjective* notion that an accused, in pleading guilty, is demonstrating a 'willingness to facilitate the course of justice'.

⁸ For example, see *O'Brien* (1991) 55 A Crim R 411; *Nagy* (1991) 57 A Crim R 65; *Winchester* (1992) A Crim R 345. But see *Nixon* (1993) 66 A Crim R 83; *Harris* (1992) SASR 300. In the United Kingdom, section 152 of the *Powers of Criminal Courts (Sentencing) Act 2000* requires the sentencer to state that it has given a discount, but does not require the sentencer to state the size of the reduction. A similar requirement exists in Western Australia (*Sentencing Act 1995* (WA), s 8(4)), although recently courts have also encouraged judges to 'quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. ... particular encouragement is given to the quantification of the [utilitarian value of the plea]' (*R v Thomson* (2000) 49 NSWLR 383, 419 (para 160) (Spigelman CJ)). In New South Wales and Queensland the Court must indicate if it *does not* award a sentencing discount in recognition of a guilty plea (*Crimes (Sentencing Procedure) Act 1999* (NSW), s 22(2) and *Penalties and Sentences Act 1992* (Qld), s 13(3)). See also *R Henham* (1999) 'Bargain Justice of Justice Denied? Sentence Discounts and the Criminal Process' 62 *MLR* 515.

⁹ For example, see *Buffrey* (1992) 14 Cr App Rep (S) 511. See also, *Sharkey and Daniels* [1994] *Crim LR* 866. The New South Wales Court of Appeal recently issued a guideline judgement stating that a guilty plea will generally be reflected in a 10 to 25 per cent discount on sentence, depending on how early the plea is entered and the complexity of the case: *R v Thomson* (2000) 49 NSWLR 383 (this suggested range relates only to the utilitarian value of a guilty plea to the criminal justice system and does not including additional discounts that may be available – for example, where the guilty plea may be said to evidence remorse). In Western Australia the discount often ranges from 20-35% under the state's 'fast track system' (see, for example, *Trescuri v The Queen* [1999] WASCA 172); in South Australia the common range is between 15-25%, with 25% regularly given for an early plea (*R v Thomson* (2000) 49 NSWLR 383, 418 (para 149)); in New Zealand authorities the authorities indicate a range of 10-33%, with the majority being between 20-25% (*R v Thomson* (2000) 49 NSWLR 383, 417 (para 147)); in the United Kingdom, for offences in which guilty pleas attract a lower average sentence 'the implied discount [for 2000] was commonly around 30 per cent although for some offences (eg criminal damage or drugs) it was much larger' (Home Office, *Criminal Statistics, England and Wales 2000*, 149 (para 7.26)). Other than the NSW figures, these discount ranges include consideration of factors other than pure utilitarian benefits.

¹⁰ See also *R v Thomson* (2000) 49 NSWLR 383. This case considered section 22 of the *Crimes (Sentencing Procedure) Act 1999* which requires a court, in sentencing an offender, to take into consideration the fact that the offender has pleaded guilty and *when* the offender pleaded guilty. Several other jurisdictions also require express consideration be given to the timeliness of the plea in applying the discount: *Powers of Criminal Courts (Sentencing) Act 2000* (UK), s 152; *Crimes Act 1900* (ACT), s 429A(1)(u); *Penalties and Sentences Act 1992* (Qld), s 13(2); *Sentencing Act* (NT), s 5(2)(j); *Sentencing Act 1991* (Vic) s 5(2)(e); *Sentencing Act 1995* (WA), s 8(2). In relation to Western Australian, however, the Court of Appeal recently rejected submissions of the appellant that a full 'discount of the order of 30 per cent will *automatically*

plea is, in fact, the main variable relevant to the size of the discount.¹¹ Thus, theoretically the full discount is available to offender who pleads guilty at the first reasonable opportunity, despite the absence of a legitimate defence.¹² It has been noted in this regard that an accused will only be encouraged to give early pleas of guilty 'if they lead (and are seen to lead) to a substantial reduction in the sentence imposed'.¹³

It has also been suggested that the discount is greatest when the prosecution case is weak.¹⁴ However, this does not seem to reflect the state of the law.¹⁵ As was noted by Byrne J (with whom McPherson and Moynihan JJ agreed) in the Queensland Court of Criminal Appeal, such an approach is contrary to the rationale for the discount:

I remain to be convinced that this reluctance to make any allowance for guilty pleas in apparently indefensible cases is justified. If administrative expediency resulting from a guilty plea is a sufficient basis for moderation in sentencing, it ought not to be decisive against a lesser sentence that conviction seems certain in the event of a trial. Unless there is an incentive for an offender to admit guilt, there is always the prospect the trial will proceed to a verdict... Another intended benefit of a submission to conviction, one frequently mentioned in sexual cases, is sparing the witnesses the ordeal of a trial. That advantage is no less valuable in seemingly irresistible cases.¹⁶

be afforded for a fast-track plea of guilty without more.' (emphasis added): *Cameron v The Queen* [2002] WASCA 81 (para 19).

¹¹ The situation may, however, be different in practice. A recent Australian study shows that most practitioners do not feel that there is a benefit from entering a plea at an early stage of proceedings: D Weatherburn and J Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court* (2000). This is supported by statistics from the New South Wales Bureau of Crime Statistics and Research which indicate that there is no benefit from an early plea: cited in *R v Thomson* (2000) 49 NSWLR 383, 391-393. There is also some research that suggests that pleas of guilty at the last moment seem to get a larger discount than earlier pleas: D Moxon, *Sentencing Practice in the Crown Court*, Home Office Research Study No 103 (London, HMSO, 1988). However, more recently this practice seems to be changing: C Flood-Page and A Mackie (1998), *Sentencing Practice: an examination of decisions in magistrates' courts and the Crown Court in the mid-1990s*, Home Office Research Study 180, Home Office, p 91-92.

¹² This is especially so where the trial would have been lengthy and complex: *R v Thomson* (2000) 49 NSWLR 383, 418. However, a recent Australian study shows that most practitioners do not feel that there is a benefit from entering a plea at an early stage of proceedings: D Weatherburn and J Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court* (2000). Other factors which are relevant include the seriousness of the crime: see, for example, *Higgins v Fricker* (1992) A Crim R 473, 479; and the need to protect the community: Costen (1989) 11 Cr App Rep (S) 182; *R v Thomson* (2000) 49 NSWLR 383, 418 (para 156).

¹³ *Winchester* (1992) 58 A Crim R 345, 350. A recent report of the New South Wales Bureau of Crime Statistics and Research found that '... The statutory sentence discounts for guilty pleas obviously have an important role to play in encouraging *early* guilty pleas. However, there needs to be a significant discount for early guilty pleas and this needs to be applied consistently across different kinds of offences.': D Weatherburn and J Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court* (2000) 38.

¹⁴ See K Mack and S Anleu, 'Sentence Discount for a Guilty Plea: Time for a New Look' (1997) *FJLR* 123, 128 and *Pereira* (1991) 57 A Crim R 46.

¹⁵ In the United Kingdom several decisions have noted that where the defendant has no possible defence that the discount should not be conferred, for example, see *Yates* (1993) 15 Cr App Rep (S) 400; *Landy* (1995) 16 Cr App R (S) 908. But more recently, see *Fearon* [1996] 2 Cr App R (S) 25.

¹⁶ *Bulger* (1990) A Crim R 162, 170. This view was also endorsed by the New South Law Reform Commission in its paper: *Sentencing* (Discussion Paper 33 (1996) 201). See also *Fearon* [1996]

The view that the size of the discount should depend on the strength of the prosecution case is also incompatible with present sentencing law and practice, given that, from the material presented at a sentencing plea, sentencers are rarely in a position to meaningfully evaluate the strength of the prosecution case.¹⁷ As is noted by Ashworth, 'the idea of being caught red-handed refers only to factual situations, and there may be more to them than meets the eye - for example, a possible defence such as duress of circumstances, automatism, or whatever'.¹⁸

There is some evidence that the plea discount makes very little difference to the ultimate penalty, especially in the lower courts, with sentencers merely paying lip service to it as a mitigating consideration.¹⁹ On the other hand, surveys of sentences handed down in the Crown Court show that the average reduction in prison sentence for pleading guilty was 22% in one study; 31% in another; and most recently 40% in another.²⁰ A curious aspect of the most recent study was that for some offences, such as indecent assaults and causing death by dangerous driving, the average sentence after a plea of guilty was higher than following conviction after trial.²¹ That there would be little correlation between theory and practice and so much diversity in practice is not surprising. Legislative action in the United Kingdom and Australia has done little to curb what Andrew Ashworth described almost a decade ago as the 'cafeteria system'²² of sentencing, which permits sentencers to pick and choose a rationale or objective of sentencing which seems appropriate at the time with little constraint.²³

3 Does the Discount Penalise those who Elect to Proceed to Trial?

As indicated earlier, some commentators have attempted to circumvent the conceptual and normative problems associated with penalising those who exercise their right to trial by urging that it is not that the system punishes those who plead not guilty *more*;

2 Cr App R (S) 25. The strength of the prosecution case is more relevant to the weight to be given to pleas of guilty as being indicative of remorse: *Winchester* (1992) 52 A Crim R 345, 350; *Bond* (1990) 48 A Crim R 1.

¹⁷ See also *Bulger* (1990) 48 A Crim R 239.

¹⁸ A Ashworth, *Sentencing and Criminal Justice* (3rd ed, Butterworths, London, 2000) 144.

¹⁹ See for example, R Douglas and K Laster, *Victim Information and the Criminal Justice System* (School of Law and Legal Studies, La Trobe University, June 1994); P Robertshaw and A Milne, 'The Guilty Plea Discount: Rule of Law or Role of Chance?' (1992) 31 *Howard Journal of Criminal Justice* 53.

²⁰ See studies cited in Ashworth, above n 18, 145-46. However, the most recent study recorded net sentences already include the affect of previous convictions or other mitigating factors.

²¹ Ashworth, above n 18, 145, referring to *Criminal Statistics, England and Wales* (1996), pp 158-159 which indicated that in relation causing death by dangerous driving and indecent assault those who pleaded guilty, on average, received longer sentences than those electing to proceed to trial and are convicted. It has been suggested that the reasons for this 'reflect a number of factors including the timeliness of the guilty plea, the nature of the offence, and the circumstances and criminal history of the offender. In particular, it is likely that for some offences, such as indecent assault on a female, those pleading guilty may originally have been charged with a more serious offence ...': Home Office, *Criminal Statistics, England and Wales 2000*, 149 (para 7.26)

²² A Ashworth, *Sentencing and Criminal Justice* (2nd ed, Butterworths, London, 1995) 331.

²³ In fact in Australia the sentencing discretion has received a recent boost with most members of the High Court recently endorsing the 'instinctive synthesis' approach to sentencing: see *Wong v R* (2001) 185 ALR 233.

rather it simply punishes those who plead guilty *less*.²⁴ Framed in this way, the guilty plea discount is more palatable and it can be used to counter the argument that some offenders are coerced into pleading guilty.

In *Cameron*, it was a view endorsed by all members of the Court, except McHugh J. In their joint judgment, Gaudron, Gummow and Callinan JJ stated:

Although a plea of guilty may be taken into account in mitigation, a convicted person may not be penalised for having insisted on his or her right to trial. The distinction *between allowing a reduction for a plea of guilty and not penalising a convicted person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction* (emphasis added).²⁵

Similarly Kirby J stated:

An accused who insists upon such rights must not be penalised. An accused must not have the sentence increased to mark the sentencing judge's conclusion that the prisoner has wasted the court's time or the public's resources by insisting on a trial. Yet, necessarily, reliance on such rights will deprive the accused of any mitigation that might otherwise have resulted from a plea of guilty. (footnotes omitted)²⁶

This is a common form of argument. It places semantics over reality.²⁷ Perhaps it is not surprising that it is frequently used in the legal domain. For example, it is often used to justify the extra punishment meted out to recidivists: it is not, so the argument runs, that we punish repeat offenders more harshly; rather we give a discount to first offenders.²⁸ Arguments of this nature are logically flawed, and constitute no more than an appeal to confusion by invoking the perennial glass is half empty or half full subterfuge. There is, however, a ready solution to such dilemmas; simply change the point of reference to an objective measure. The correct question is: How *much* water is in the glass? And to get to the crux of the matter hand, all that needs to be asked is: Do offenders who plead not guilty who commit *identical* offences to offenders who plead guilty receive *harsher* sentences?

²⁴ For example, see the judgment of Gaudron, Gummow and Callinan JJ in *Cameron v R* (2002) 187 ALR 65, 68 (para 12).

²⁵ *Cameron v R* (2002) 187 ALR 65, 68 (para 12). See also, *Dodge* (1988) 34 A Crim R 325, 331; *Winchester* (1992) 58 A Crim R 345; *Slater* (1984) 14 A Crim R 346. See also Australian Law Reform Commission, *Sentencing* (Report 44, Canberra, 1987) 93 which also agreed with these reasons. A similar approach was adopted in *Siganto v The Queen* (1998) 194 CLR 656, 663 (para 22) (Gleeson CJ, Gummow, Hayne and Callinan JJ) where the High Court held that '[a] person charged with a criminal offence is entitled to plead not guilty and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed. On the other hand, a plea of guilty is ordinarily a matter to be taken into account in mitigation; ...' The Court went on to note that the failure of the accused to plead guilty in this case meant that there had simply been an absence of a mitigating circumstance, but that 'does not mean that the judge is indicating the presence of a circumstance of aggravation.' (at 665 (para 27)).

²⁶ *Cameron v R* (2002) 187 ALR 65, 80 (para 65).

²⁷ In *Siganto v The Queen* (1998) 194 CLR 658, 667 (para 34), the High Court stated that 'to some, it may appear a matter of semantics to distinguish between denying the existence of a circumstance of mitigation and asserting the existence of circumstances of aggravation ... However, the distinction can be important'. The Court did not, however, elaborate on how the distinction was made or why it was important.

²⁸ See M Bagaric, 'Double Punishment and Punishing Character - The Unfairness of Prior Convictions' (2000) 19 *Criminal Justice Ethics* (USA) 10.

McHugh J was the only member of the Court in *Cameron* who appeared to accept that the *effect* of the discount is to penalise those who plead not guilty more severely. He stated that:

The result [of the guilty plea discount] is that a person who pleads guilty at the earliest possible time almost always obtains a shorter sentence than a person who pleads not guilty and is convicted. The courts are well aware that it "is impermissible to increase what is a proper sentence for the offence committed in order to mark the court's disapproval of the accused's having put the issue to proof or having presented a time-wasting or even scurrilous defence." But the courts maintain that the accused who pleads not guilty is not being punished and given an increased sentence for pleading not guilty. Rather, the accused who pleads guilty merely gets a lighter sentence than he or she otherwise deserves. The subtlety of this scholastic argument has not escaped criticism from those who see legal issues in terms of substance rather than form. In Shannon, Cox J said that a defendant "will need a very subtle mind, unusually sympathetic to the ways of the law" to accept this argument. And, speaking extra-judicially, Pincus J has said that "people are being punished for insisting on a trial, at least in the sense that they may receive a longer sentence if they plead not guilty than they would if they pleaded guilty".²⁹ (references omitted; emphasis added).

Thus, there seems little question that providing a discount to offenders who plead guilty logically entails that accused who are found guilty after exercising their right to a trial are punished more severely. Not surprisingly, this is the way defendants, who are not versed in the 'logical intricacies of the law', see things. Following interviews with defendants who pleaded guilty, Balwin and McConville note that 'as far as we can tell, the sentencing differential is viewed by virtually all defendants as a penalty imposed on those who unsuccessfully contest their case'.³⁰

4 Reasons in Favour of Retaining the Discount

Prior to elaborating on the proposed reform, we first indicate the shortcomings of the most obvious solution to the problems raised by the guilty plea discount – that is, to simply abolish the discount. We do this by considering the main arguments raised for and against the discount.

4.1 Utilitarian Reasons - Cost savings

The most persuasive consideration in favour of the discount is economics. Trials and contested hearings take time, which in turn amounts to community money - and lots of it.³¹ The guilty plea discount provides offenders a pragmatic incentive to plead guilty and thereby eliminate, or at least reduce, these costs.³² In essence, it serves the

²⁹ *Cameron v R* (2002) 187 ALR 65, 74 (para 41).

³⁰ J Balwin and McConville, 'The Influence of the Sentencing Discount in Inducing Guilty Pleas' in J Balwin and A K Bottomley (eds) *Criminal Justice Selected Readings* (Martin Robertson, London) as cited in Willis, above n 1 (1985) 131, 139.

³¹ Figures from 1998 provide that in the Crown Court the average cost of an average trial is 16,650 pounds; 6,300 pounds for a late guilty plea, and 2,100 for a timely guilty plea: D Moxon (1998) [THERE IS NO MOXON 1998??], as cited in Asworth, above n 18, 143 (n 7)

³² In *R v Thomson* (2000) 49 NSWLR 383, 412 (para 122), the Court noted that the 'public interest served by encouraging pleas of guilty for their utilitarian value is a distinct interest' and that utilitarian benefits 'require acknowledgment of some character by way of an incentive, so that the benefits [of 'the efficiency and effectiveness of the criminal justice system as a whole'] will in fact be derived by the system.' (at page 411 (para 115)).

same purpose as costs orders in civil cases.³³ There are several other reasons for providing the discount which are summarised in the joint judgment of Gaudron, Gummow and Callinan JJ in *Cameron*:

Australian courts have enthusiastically embraced the proposition that a person who pleads guilty should receive a lesser sentence than one who pleads not guilty and is convicted. In so far as a plea of guilty indicates remorse and contrition on the part of the defendant, the courts have long recognised it as a mitigating factor of importance. But in recent years, under the pressure of delayed hearings and ever increasing court lists, Australian courts have indicated that they will regard a plea of guilty as a mitigating factor even when no remorse or contrition is present. They *have taken the pragmatic view that giving sentence "discounts" to those who plead guilty at the earliest available opportunity encourages pleas of guilty, reduces the expense of the criminal justice system, reduces court delays, avoids inconvenience to witnesses and prevents the misuse of legal aid funds by the guilty.*³⁴ (references omitted; emphasis added)

Similar observations were made by Kirby J:

The main features of the public interest, relevant to the discount for a plea of guilty, are "purely utilitarian". They include the fact that a *plea of guilty saves the community the cost and inconvenience of the trial* of the prisoner which must otherwise be undertaken. It also involves a *saving in costs* that must otherwise be expended upon the provision of judicial and court facilities; prosecutorial operations; the supply of legal aid to accused persons; witness fees; and the fees paid, and inconvenience caused, to any jurors summoned to perform jury service. Even a plea at a late stage, indeed even one offered on the day of trial or during a trial, may, to some extent, involve savings of all these kinds. ... [I]t is in the public interest to facilitate pleas of guilty by those who are guilty and to conserve the trial process substantially to cases where there is a real contest about guilt. Doing this helps *ease the congestion in the courts* that delay the hearing of such trials as must be held. It also encourages the clear-up rate for crime and so vindicates public confidence in the processes established to protect the community and uphold its laws. A plea of guilty may also *help the victims of crime* to put their experience behind them; to receive vindication and support from their families and friends and possibly assistance from the community for injuries they have suffered.³⁵ (references omitted; emphasis added).

The time and cost savings stemming from guilty pleas provide powerful arguments in favour of maintaining the discount. If all persons charged with a criminal offence pleaded not guilty the criminal justice system would literally grind to a halt - the delay between charge and trial would blow out to many years.³⁶

Absent the guilty plea discount there is no incentive for accused persons to plead guilty - no matter how compelling the case against them. It would, in fact, be contrary to the best interests of the accused to plead guilty. This was a point noted in *Shannon*; 'If a plea of guilty ... cannot be regarded as a factor in mitigation of penalty, there is no incentive ... for an accused to admit ... guilt... If the offender has nothing to gain by admitting guilt, he will see no reason for doing so'.³⁷

³³ Costs order also have other objectives, such as compensating the winning party for unjustifiably incurred legal costs.

³⁴ *Cameron v R* (2002) 187 ALR 65, 73-74 (para 39).

³⁵ *Cameron v R* (2002) 187 ALR 65, 82 (paras 66-67). See also *Bond* (1990) 48 A Crim R 1; *Winchester* (1992) 58 A Crim R 46.

³⁶ In most jurisdictions about two thirds of the matters are finalised by guilty plea in the Higher Courts. The figure is higher in the Magistrates' Court: K Mack and S Anleu, 'Reform of Pre-Trial Criminal Procedure: Guilty Pleas' (1998) 22 *CLJ* 263, 264.

³⁷ (1979) 21 SASR 442, 452-53.

If the discount did not exist, prudent counsel should encourage client's to pursue even remote or theoretical chances of acquittal. To this end, it is noteworthy that, in virtually every criminal prosecution, there is some possibility of acquittal. The technicalities of evidence law and the inability to predict with total certainty how a witness will come across when giving evidence ensure this. Sometimes the best prospect of acquittal may rest in the hope that a key witness will not appear. However, even such desperate defences should be pursued in the best interests of the accused if the guilty plea discount is abolished. In this regard, it is noteworthy that the guilty plea discount seems to be an effective inducement. The weight of empirical evidence suggests that the sentence discount is a relevant consideration to the decision to plead guilty.³⁸

4.2 Avoiding Inconvenience to Witnesses

Apart from time and cost savings (and the consequential reduction in court delays), the main reason advanced for according the discount is that it avoids inconvenience to witnesses.³⁹ In *Thomson* the Court noted:

A plea permits the healing process to commence. A victim does not have to endure the uncertainty of not knowing whether he or she will be believed, nor the skepticism sometimes displayed by friends and even family prior to a conviction. A victim will also be spared the personal rumination of the events ... Like the element of remorse, this consideration depends on the specific circumstances of the offence and overlaps to a substantial extent with other aspects of the specific case which are relevant to the sentencing task.⁴⁰

Similarly, in *Cameron*, Kirby J stated:

A plea of guilty may also help the victims of crime to put their experience behind them; to receive vindication and support from their families and friends and possibly assistance from the community for injuries they have suffered. Especially in cases of homicide and sexual offences, a plea of guilty may spare the victim or the victim's family and friends the ordeal of having to give evidence. (footnotes omitted)⁴¹

The persuasiveness of this justification involves a degree of speculation. The Court in *Thomson* recognized that this 'is a consideration which varies to a significant degree with the nature of, and circumstances of, an offence. ...'.⁴² Studies have also shown

³⁸ A Crown Court study by Zander and Henderson revealed that 85% of defendants who aware of the discount and pleaded guilty said that the discount was very or rather important: as cited in Mack and Anleu, above n 14, 139; D Lynch, 'The Impropriety of Plea Agreements: A Tale of Two Contries' (1994) 19 *L and Soc Inq* 115. Ashworth suggests that counsel's advice is far more important than the discount: A Ashworth, *The English Criminal Process: A Review of Empirical Research* (Centre for Criminological Research, University of Oxford, 1984) 80-82. However, as is note above if the discount is removed counsel would be remiss in most circumstances to recommend pleading guilty.

³⁹ See also *Osmond* [1987] 1 Qd R 429; *Schumacher* (1981) 3 A Crim R 441; Fisher (1989) 40 ACrim R 442; and *R v Thomson* (2000) 49 NSWLR 383, 386 (para 3) where the Court noted that, especially in 'sexual assault cases, crimes involving children and, often, elderly victims – there is a particular value in avoiding the need to call witnesses, especially victims, to give evidence.'

⁴⁰ *R v Thomson* (2000) 49 NSWLR 383, 412 (paras 120-121)

⁴¹ *Cameron v R* (2002) 187 ALR 65, 82 (para 67)

⁴² *R v Thomson* (2000) 49 NSWLR 383, 412 (para's 120)

that some witnesses, especially complainants want 'their day in court'.⁴³ Nevertheless, at least in some circumstances, the avoidance of inconvenience and distress to witnesses may have a value worth rewarding through a guilty plea discount.

4.3 Facilitation of the Course of Justice

In their joint judgement Gaudron, Gummow and Callinan JJ took a novel approach to justifying the discount. Their Honours noted that the discount potentially discriminated against defendants who plead guilty. However, they ultimately denied that this was the case because there was a relevant difference between them and the guilty pleaders - the latter facilitated the course of justice.

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

Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to *facilitate the course of justice* and not on the basis that the plea has saved the community the expense of a contested hearing.⁴⁴ (emphasis added)

Thus, the manner in which their Honours seek to justify the discount is not by reference to time and cost savings, but rather by the fact that it shows a willingness on behalf of the offender to *facilitate the course of justice*. This phrase is not without its difficulties.

First, it is so open ended and nebulous to be arguably incapable of serving as a justificatory ideal. Secondly, the corollary of the justification for the discount advanced by their Honours is that an offender who exercises his or her *right* to trial has in some way thwarted or acted contrary to the interests of justice.

This appears to be at odds with the latitude the High Court of Australia has, on other occasions, accorded to accused persons who exercise their legal rights. For example, in the context of the pre-trial right of silence the High Court has stated '*an incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer questions or provide information. To*

⁴³ G Flatman and M Bagaric, 'The Victim and the Prosecutor' 6 (2001) *Deakin University Law Review* 1. Further, the focus of arguments supporting this as a mitigating factor refer predominantly to sexual assault cases as the type in which avoidance of inconvenience and stress to witnesses is most appropriate. Yet, statistics suggest, perhaps not surprisingly, that it is sexual assault cases in which accused are *least* likely to plead guilty, with only 31% of accused pleading guilty compared to an average of 60% of all accused pleading guilty: Home Office, *Criminal Statistics, England and Wales 2000*, 141-142.

⁴⁴ *Cameron v R* (2002) 187 ALR 65, 68 (para 13-14). Recently, the New South Wales Court of Criminal Appeal, in *R v. Sharma* [2002] NSWCCA 142 (paras 36-38 and 67) (Spigelman CJ) held that they were not bound by the High Court's 'facilitating the course of justice' reasoning, because the legislation in New South Wales permits consideration of objective benefits.

draw such an adverse inference would *be to erode the right of silence or to render it valueless*' (emphasis added).⁴⁵

It is not necessarily contradictory to assert that one should suffer a disadvantage as a result of exercising a right. As is discussed below, no right is absolute. At the conceptual level 'the fact a right exists does not mean that no disadvantage may flow from its exercise'.⁴⁶ However, where the practical effect of a legal principle (in this case to offer a discount to those who plead guilty) is to limit or attenuate the scope of a right (the right to trial) the soundest and most transparent manner in which to justify the limitation is not to purport that the right has not been curtailed, but to indicate the nature of the limitation and the reasons for the limitation.

Thus, 'facilitating the course of justice' does not constitute an additional reason for preserving the discount.

Incompatibility with Sentencing Principle

Most probably the reason that the majority of the High Court in *Cameron* refused to accept incidental considerations, such as pleading guilty, as being relevant to sentence was the underlying concern that the efficient running of the criminal justice system has nothing to do with sentencing principle. This has been expressed as a reason for rejecting the guilty plea discount: 'with the sentence discount, the outcome is determined by administrative considerations, rather than appropriate sentencing principles'.⁴⁷

This argument fails to appreciate that criminal justice and sentencing do not occur in a vacuum. Sentencing 'principles' are not stand alone constructs. Sentencing involves the deliberate infliction by the State of unpleasantness on its citizens. Hence, it must be justified by reference to a broader moral theory.⁴⁸ One theory which is clearly capable of justifying our system of punishment is the utilitarian theory of punishment.⁴⁹ Hence, unless critics are capable of dismissing utilitarianism as a coherent theory of criminal punishment it is premature to simply assert that the discount is inconsistent with sentencing principle. For those inclined towards a retributive (or just deserts) theory of punishment the sentencing discount may yet be justified. Acceptance of the discount merely reflects the reality that the community is unprepared to spend inexhaustible resources on any public institution, whether it be health, transport or sentencing. It is a case of making the (retributive) system the best it can be given the resources available. If retributivists are not willing to accept the discount, assuming that the amount of government funding for the criminal justice

⁴⁵ *Petty and Maiden v R* (1991) 173 CLR 95, 99.

⁴⁶ C R Williams, "Silence in Australia: Probative Force and Rights in the Law of Evidence" (1994) 110 *LQR* 629 at 637.

⁴⁷ Mack and Anleu, above n 14, 132. See also Jabaltjari (1989) 64 *NTR* 1, 15.

⁴⁸ For example, Zimring and Hawkins note that: 'the need to justify punishment is reflected in moral logic as well as history. Since penal practices are by definition unpleasant, the world is a poorer place for their presence unless the positive functions achieved by them outweigh the negative elements inherent in the policies': F E Zimring and G Hawkins, *Incapacitation* (Oxford University Press, New York, 1995) 5. The need for a justification of punishment is also discussed by T Honderich, in *Punishment: The Supposed Justifications* (Penguin Books, Harmondsworth, 1984) 11-15

⁴⁹ See J Bentham, *An Introduction to the Principles of Morals and Legislation*, (1781). More recently, see M Bagaric, *Punishment and Sentencing: A Rational Approach* (Cavendish Publishing, London, 2001).

will not substantially increase, they must then suggest other reforms which can make up for the efficiencies lost as result of abolishing the discount.

5 Reasons for Abolishing the Discount

5.1 Pressure to Plead Guilty

It has been noted that 'it is a paradox [that] courts are diligent to prevent ... pressure or inducement ... to bring about an admission, .. and yet with ... the plea of guilty such inducements have become institutionalised'.⁵⁰ The main reason for abolishing the discount is the risk that it may cross the threshold between providing an *incentive* to plead guilty and *coercing* accused persons to forego their right to a hearing. For those who place a premium on substance and outcomes, this is not necessarily troubling - the discount merely serves to expedite the punishment of the guilty. However, the luster of the discount readily diminishes if the pressure it exerts is so great that it results in some people that are actually innocent pleading guilty.⁵¹ This would constitute a violation of perhaps the most important right in our legal system - the right against wrongful conviction.⁵²

There has been little empirical research done to ascertain the number of innocent people who plead guilty for fear of losing the discount. There is, however, evidence which suggests that some accused are so perturbed about the prospect of losing the discount that they plead guilty *for this reason*. Research carried out in the United Kingdom for the Royal Commission on Criminal Justice suggests that up to 11 per cent of people who plead guilty claim innocence.⁵³ The report by the Royal Commission ultimately held that this risk must be balanced 'against the benefits to the system of encouraging those who are in fact guilty to plead guilty'.⁵⁴

Some offenders, even after their matter has been dealt with in court, have an interest in protesting their innocence - it may be seen as a way of minimising the damage to their reputation. Thus, it is not possible to ascertain what portion of the 11 per cent were actually innocent. However, one can be confident that the discount coerces at least some innocent offenders to plead guilty. As Willis has noted, it is certainly understandable that some innocent offenders would plead guilty. For the defendant 'the stakes will be generally high - acquittal or imprisonment; the outcome uncertain; a plea of not guilty likely to lead to further delays in the determination of the case; and

⁵⁰ M Findaly, S Odgers and S Yeo, *Australian Criminal Justice* (OUP, Melbourne, 1994) 114-5. See also Alschuler, 'The Changing Plea Bargaining Debate' (1981) 69 *Cal LR* 652, 688-90.

⁵¹ As noted by Spigelman CJ (with whom the other Members of the Court agreed) in *R v Thomson* (2000) 49 NSWLR 383, 414 (para 130) that 'The legitimacy of our criminal justice system would be undermined if persons who were not in truth guilty of offences were encouraged to plead guilty. ...'

⁵² As is discussed by Dennis, the strength of the right is shown by the fact that the correctness of the conviction can be reopened many years after the original appeal process has been exhausted: I H Dennis, *The Law of Evidence* (Sweet & Maxwell, London, 1999) 29.

⁵³ *Royal Commission on Criminal Justice*, (UK, 1993). See also R Hood, *Race and Sentencing* (OUP, London, 1992) 125.

⁵⁴ *Royal Commission on Criminal Justice*, (UK, 1993) (para 7.44), as cited in A Ashworth, *Sentencing & Criminal Justice* (3rd ed, Butterworths, London, 1995) 148. The balance reached by Royal Commission was met with heavy criticism. Ashworth described it as the nadir of the commission's report: A Ashworth, 'Plea, Venue and Discontinuance' [1993] *Criminal Law Review* 830, 837.

the actual trial a lengthy ordeal to be endured ... even for an innocent defendant, the guilty plea with an expectation of leniency can be an attractive soft option.⁵⁵ In a similar vein, the Royal Commission also concluded that the risk of innocent people being pressured into pleading guilty 'cannot be avoided and although there can be no certainty as to the numbers ... it would be naive to suppose' that it does not happen.⁵⁶

It follows that the discount will inevitably result in some innocent people being convicted. Despite this, in section 6, we argue that it is still desirable to preserve the discount while at the same time implementing measures that minimise the amount of punishment inflicted on defendants that are actually innocent, as well as those who have a defence which is at least tenable.

5.2 The Argument that the Discount Discriminates Against Non-guilty pleaders

The other main argument against the discount is that it potentially discriminates against offenders who elect to pursue their legal right to a hearing. This was a point addressed, unsatisfactorily, by the majority in *Cameron*.⁵⁷ It was also of concern to McHugh J, who indicated that it could lay the foundation for a future constitutional challenge⁵⁸ to the discount:

[I]t is at least arguable that it is relevantly discriminatory to treat convicted persons differently when the only difference in their circumstances is that one group has been convicted on pleas of guilty and the other group has been convicted after pleas of not guilty. As Gaudron, Gummow and Hayne JJ pointed out in *Wong v The Queen* (2001) 76 ALJR 79 at 92:

"Equal justice requires identity of outcome in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect."⁵⁹

The discrimination argument is not a strong one. The guilty plea does not discriminate against non-guilty pleaders because there is an obvious relevant difference between them and guilty pleaders: only the latter conducted their affairs in a manner which saved the community thousands of dollars. For this, they are rewarded. The reason that the High Court got into difficulty concerning the concept of discrimination, and had to rely on such desperate arguments as facilitating the interests of justice to find a relevant difference, was that it assumed that a relevant difference between the parties (in terms of evaluating their respective merits and deserts) could only be found by contrasting the intrinsic features of their respective cases - such as nature of the crime and factors personal to the offenders. For some reason, the Court did not accept that

⁵⁵ Willis, above n 1, 141.

⁵⁶ *Royal Commission on Criminal Justice*, (UK, 1993) (para 7.42). See also M Zander, 'A Reply to Bridges and McConville on the Report of the Royal Commission' (1994) 57 *Modern Law Review* 264. Further, in 'A Brief Rejoinder to Michael Zander (by Lee Bridges and Mike McConville)' (1994) 57 *Modern Law Review* 267, 268 the authors note that the Royal Commission 'accepted that "it would be naïve to suppose that innocent persons never plead guilty because of the prospect of the sentencing discount" and that "to face defendants with a choice between what they might get on an immediate plea of guilty and what they might get if found guilty by a jury does amount to unacceptable pressure."' (footnotes omitted)

⁵⁷ As we have seen, the majority invoked the 'facilitating the interests of justice' argument to distinguish the different treatment of guilty pleaders and not-guilty pleaders.

⁵⁸ The constitutional argument was not pursued by either party in *Cameron*. It was a matter, however, that the Court flagged would be pursued in a future case.

⁵⁹ *Cameron v R* (2002) 187 ALR 65, 75 (para 44).

incidental consequences which are caused by a person are relevant to an assessment of the person's merits and deserts. The Court was wrong to miss the point. The law recognises that incidental consequences or considerations clearly count as relevant considerations. Thus for example, informers are usually given a significant sentencing discount; discounts may be given where the sentence will have an exceptional impact on the offender⁶⁰ (and in some cases even third parties, such as family members⁶¹); and recidivists are normally punished more severely.⁶²

Discrimination on the Basis of Race

A stronger foundation for the discrimination argument (which was not raised in *Cameron*) is not that the guilty plea discount discriminates against non-guilty pleaders, but rather that it discriminates against socially disadvantaged minority groups. Chief Justice Spigelman of the New South Wales Court of Criminal Appeal has commented that '[s]ome parts of the community, like Aboriginal accused, may be particularly vulnerable to inappropriate pressures to plead guilty. A sizeable discount for a [guilty] plea may increase such pressures.'⁶³ The reverse trend appears to be evident in the United Kingdom. Research by Roger Hood suggests that Afro-Caribbean offenders plead guilty less than white offenders.⁶⁴ This too has been claimed as potentially discriminatory on the basis that 'a general principle (the sentence discount) has a disproportionate impact on members of ethnic minorities simply because they more frequently exercise a right (the right to be presumed innocent until convicted).'⁶⁵

The curious point to emerge from these comments is that there seems to be a tenable argument for claiming that the discount discriminates where a group utilises it too much *or* too little. This underlies the complexity of the discount; in particular the uncertainty regarding whether or not it is a desirable principle.

Ultimately, however, the notion of discrimination is more than simply a numbers issue. The fact that a certain group are disproportionately affected by a certain principle does not mean that the principle is necessarily discriminatory. Otherwise, it would be open for men to claim that the law of murder discriminates against them. If there is a defensible rationale consistent with the objectives of sentencing and criminal justice for conferring the guilty plea then the discount will not be relevantly discriminatory. As is noted earlier, the utilitarian theory of criminal justice and sentencing supports the discount on the basis of the cost savings to the community.

⁶⁰ For example, see *Richards* (1980) 2 Cr App Rep (S) 119 - sentence discount where conviction ended medical career.

⁶¹ For example, see *Franklyn* (1981) 3 Cr App Rep (S) 65. But see *Botfield* (1982) 4 Cr App Rep (S) 132.

⁶² For example, see *Queen* (1981) 3 Cr App Rep (S) 245. See also *Cohen* (1984) 6 Cr App Rep (S) 131; For example, see *Baumer* (1988) 166 CLR 51, 58; *Veen* (No 2) (1988) 164 CLR, 477; *Mulholland* (1991) 102 FLR 465, 478.

⁶³ *R v Thomson* (2000) 49 NSWLR 383, 388 (para 12). This is consistent with preliminary research that indicates that the most likely to plead guilty are 'aboriginal people; men; inarticulate defendants who would not stand up very well in court; and those who are at high risk of receiving a custodial sentence if they go to trial': Mack and Anleu, above n , 139. See also J Willis, 'New Wine in Old Bottles: The Sentencing Discount for Pleading Guilty' (1995) 13 *Law in Context* 39.

⁶⁴ R Hood, *Race and Sentencing* (OUP, 1992).

⁶⁵ Ashworth, above n 18, 148.

5.3 Interference with Legal Rights

The third main criticism of the discount is that it dilutes several rights and freedoms including 'the right to require the prosecution to prove guilt, the right to trial in open court, and most fundamentally the right not to be subjected to unfair pressure in determining how to plead to the charges.'⁶⁶ Some of these rights are now contained in the *Human Rights Act 1998* (UK).⁶⁷

This criticism of the discount is not persuasive. All rights, whether moral or legal, including those supposedly being founded on a deontological picture on morality, are subject to some qualification.⁶⁸ Even Ronald Dworkin, perhaps the leading deontological rights philosopher, who urges us to take rights ever so seriously, accepts that it is appropriate to infringe on a right when it is necessary to protect a more important right, or to ward off some great threat to society.⁶⁹ Similarly, Robert Nozick, another leading rights proponent, acknowledges that consequentialist considerations can take over in certain circumstances.⁷⁰

Mere assertion of an interest in the language of rights (that is prefacing an interest - such as life, property, employment or putting the prosecution to the proof of its case) with the words 'right to'), does not therefore substantiate the validity of the claim in all circumstances. In each case, the claim must be balanced against other competing interests to ascertain its validity. The community has a legitimate interest in establishing an efficient criminal justice system. We agree that the criminal justice system does not presently strike a correct balance between the interests of the accused and that of the community so far as the discount is concerned. However, we suggest that the reform discussed below will better strike this balance.

6 Proposed Reform

6.1 Details of Reform Proposal

The present situation concerning the guilty plea discount is unsatisfactory. The State has a strong interest in ensuring that criminal cases are finalised expeditiously and efficiently. Thus, it makes sense to structure the sentencing system so that defendants have an incentive to promote this interest. However, one side-effect of the guilty plea discount is unacceptable. A system that punishes the innocent violates one of the most, if not the most, cardinal norms of the criminal justice system. A system which

⁶⁶ A Ashworth, as cited in Mack and Anleu, above n 14, 141.

⁶⁷ See A Ashworth, *Sentencing & Criminal Justice* (3rd ed, Butterworths, 1995) 138-49; A Ashworth, 'Plea, Venue and Discontinuance' [1993] *Criminal Law Review* 830, 836-38.

⁶⁸ The fact that no right is absolute is evidenced by the extreme and fanciful lengths some have gone to in order to justify a claim to the contrary. For example, A Gerwith, in *Human Rights: Essays on Justification and Applications* (1982) at 232-233, in search of an absolute right, states that the right of a mother not to be tortured to death by her son is absolute. However even such extreme examples fail. One could hardly begrudge a son torturing his mother to death if this was the only means to save the lives of all of his innocent relatives whom the mother was about to execute.

⁶⁹ Gerwith, above n 68, 221-223.

⁷⁰ Robert Nozick, *Philosophical Explanations* (1981) 495.

refuses to acknowledge that it has deliberately implemented principles and practices which significantly increase the chance of innocent people being punished is even more offensive. Worse still, is a system which fails to recognise that not all guilty pleaders are equally guilty. There is a vast difference between the defendant who pleads guilty after being caught red-handed and the defendant who pleads guilty despite a tenable or even strong chance of acquittal - the latter has sacrificed an opportunity to avoid any criminal sanctions whatsoever.

A different balance needs to be struck between the interests of the State in ensuring the efficient treatment of criminal cases and the pressure on defendants to advance their case without penalty. Possible reform in this area is constrained by the reality that any discount will place pressure on some innocent accused to plead guilty. We believe that, alarming as it might sound, the system must accept that some innocent people will plead guilty as a result of the discount. In light of this, the issue becomes how to best reduce the harm caused by this unwanted outcome.

We suggest that the compromise is found in the truth. Defendant's who feel pressured to plead guilty should be permitted to inform the court of the reality of the situation and put in a qualified guilty plea. While formally amounting to a plea of guilty, defendants would be permitted to advance reasons consistent with innocence. A successful submission would make the defendant eligible to receive a sentence reduction in excess of the standard thirty per cent, or so, that is available in most jurisdictions for pleading guilty.

The plea would commence with the proposition that the reason the defendant pleads guilty is because of the guilty plea discount. The defendant would then be able to advance arguments consistent with innocence as part of the plea material. This material would obviously vary considerably in each case, but would include submissions that certain items of evidence were not cogent (for example, in the case of identification evidence) or were inadmissible (for example records of interview).

Size of Discount to be Stated

We also suggest that when a discount is conferred that that fact and the size of the discount should be expressly acknowledged by the sentencer. To this end, we endorse the reasons advanced by Kirby J:

I remain of the opinion that where a "discount" for a particular consideration relevant to sentencing is appropriate, it is desirable that the fact and measure of the discount should be expressly identified. Unless this happens, *there will be a danger that the lack of transparency, effectively concealed by judicial "instinct", will render it impossible to know whether proper sentencing principles have been applied.* Moreover, 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,* although this is in the public interest as I have shown. Knowing that such a discount will be made represents one purpose of such discounts. Unless it is known it may not be possible for an appellate court to compare the sentence imposed with other sentences for like offences or to check disputed questions of parity (emphasis added).⁷¹

Size of Discount

⁷¹ *Cameron v R* (2002) 187 ALR 65,83 (para 70). The Court in *R v Thomson* (2000) 49 NSWLR 383, 411 (para 115) (Spigelman CJ) noted that the benefits derived from early guilty pleas 'require acknowledgment of some character by way of incentive, so that the benefits will in fact be derived by the system'.

Further, consistent with the rationale for the discount, the biggest discounts should be given for the early pleas. In terms of the size of the discount, the practice of a discount in the order of one-third for an early guilty plea should continue. Where a defendant enters a qualified guilty plea and establishes a reasonable defence we suggest that a discount in the order of *another one-third* should be available. Thus, cumulatively a discount in the order of two-thirds would be available where an offender enters an early guilty plea and has a reasonable chance of acquittal. Where the strength of the defence is less than reasonable, the size of the discount (for the qualified plea component) would obviously be less than one-third.

A discount in the order of two-thirds may seem excessive. However, a defendant who at early stage gives up his or her chance of acquittal sacrifices much. Further, it should be noted that it is not extreme on the basis of current sentencing practice. Although, sentencers do not state the size of a discount where mitigatory factors are established, at least in theory, a similar discount would apply to, say, a defendant who pleads guilty at an early stage and assists authorities⁷² or enters an early guilty plea and is remorseful.⁷³

Admittedly, this solution is less than the ideal. But it is more ideal than the current system.

6.2 Response to Likely Criticisms of Reform

Punishing those claiming to be Innocent

Three main criticisms are likely to be made of the proposed reform. The first is theoretical, the other two are pragmatic. We deal with the theoretical one first.

At the jurisprudential level, it will to many seem indefensible that a sentencer can inflict punishment on a person who refuses to acknowledge his or her guilt. In most cases, an admission of guilt is, at least ostensibly, a necessary precursor to sentencing. The need for this is most readily explicable by the desire to avoid punishing the innocent. A system which acknowledges that it sometimes punishes people who have not committed criminal offences seems unacceptably flawed.

There are several responses to this. First, the criminal law already punishes people who *claim* to be innocent. Sentencers have no difficulty inflicting punishment on accused who proclaim their innocence even after an adverse verdict is reached against them. Granted that in such circumstances defendants have been 'found' guilty following an assessment of the relevant evidence. However, in principle this is not a relevant basis for differentiating from those who plead guilty because of the discount. In both cases the defendants maintain innocence in the real sense, but are either deemed guilty or ultimately plead guilty as a result of principles or practices of the criminal justice system.

⁷² For example, see *Rose and Sapino* (1980) 2 Cr App Rep (S) 239.

⁷³ In *Claydon* (1994) 15 Cr App Rep (S) 526, 528 the Court of Appeal stated that the accused who gave himself up showed great courage and 'considerable remorse and repentance for what he had done' and as a result a significant penalty discount was given. In *Norman* (1993) 15 Cr App R (S) 165 the accused's sentence was reduced from seven to five years, largely as a result of remorse.

Secondly, it is illusory to pretend that the criminal process does not at times punish the innocent. It is inevitable, given the fallibility of any institution, that any criminal justice system will at times inflict punishment on the innocent. A recent scandal centered upon a corrupt Los Angeles police officer Rafael Perez provides a spectacular recent example of this. As part of a plea bargain with prosecution authorities after Perez was caught stealing cocaine from a police evidence, Perez admitted that he 'perjured himself at least 100 times in court, wrote more than 100 false reports and stole as much as \$80,000 from the people he arrested'.⁷⁴ As a result of Perez's admissions dozens of convictions were set aside.⁷⁵ Most of the convictions involved charges of possession of drugs or firearms. According to Perez, during the mid to late 1990s, he and his partner Nino Durden regularly planted drugs and weapons on innocent people and then lied on their reports and in court to secure convictions.

The problem of punishing the innocent could be largely circumvented by increasing the amount and level of safeguards in the criminal justice process. For example, the standard of proof could be raised from beyond reasonable doubt to, say, beyond any possible doubt; admissible evidence could be limited to direct observations of the relevant act; and a confession could be made a mandatory pre-condition to a finding of guilt. However, such a response is not feasible. It would be self-defeating since it would result in more innocent people being harmed than is presently the case as a result of our imperfect criminal justice system. A justifiable system of criminal law and punishment should have at its foundation some theory of morality, given that the prohibition against punishing the innocent is not a freestanding principle. The broader principle which logically flows from this prohibition is that people who are not blameworthy in any way should not be harmed. The effect of radically increasing the amount of legal safeguards in criminal cases would result in very few guilty people being punished and thereby an increase in the amount of crime and innocent people being harmed.

The unpreparedness of the system to implement more extensive safeguards to prevent punishing the innocent signifies tacit acceptance of the fact that sometimes the good of the community outweighs the damage caused by punishing some innocent people. There is no reason in principle that this determination and sentiment should be confined to the operation of criminal procedure and rules of evidence and not extend to sentencing principles and practices, such as the guilty plea discount.

It should be noted that tacit endorsement of the preparedness to punish the innocent in some circumstances applies irrespective of whether one adopts a utilitarian or retributive theory of punishment.⁷⁶

⁷⁴ 'Exonerated Officers Say Perez Squeezed On Them For Plea Bargain': 13 May 2000: <http://www.channel2000.com/news/stories/news-20000513-184114.html>. See also M Andrews, 'One hundred frame-ups admitted in widening Los Angeles police scandal', 28 January 2000.: http://www.wsws.org/articles/2000/jan2000/lapd-j28_prn.shtml.

⁷⁵ By 4 August 2000, there had been in fact 98 convictions that had been set aside due to the police corruption scandal that stemmed from Perez's admissions: 'Another conviction overturned in LAPD scandal', August 4, 2000: <http://www.cnn.com/2000/LAW/08/04/lapd.conviction>.

⁷⁶ A common retributive response to the problem of punishing the innocent is that offered by R A Duff, who denies that punishing the innocent is a concern for the retributivist, since, unlike the utilitarian situation, punishment of the innocent is *not intended* and occurs despite the aims of a retributive system of punishment. For example, see R A Duff, *Trials and Punishments*

Retributivists who advocate punishment are relevantly like utilitarians who will sacrifice the welfare of innocents for the greater good, since retributivists are willing to trade the welfare of the innocent who are punished by mistake for the greater good of the punishment of the guilty. While never intending to punish the innocent, they nevertheless do not choose to withdraw their support for arrangements that have this result.⁷⁷

Acknowledging the fact that some innocent people will be punished and that as a community we, at least implicitly, accept this state of affairs is a first step to implementing meaningful and constructive sentencing reform.

For those who still refuse to accept a system that punishes those who assert their innocence, they can presumably take some solace in fact that accused who enter a qualified plea have 'formally' acknowledged guilt.

Increased Court Time Establishing Tenable Defence

The first pragmatic potential difficulty with the reform proposal is that the amount of court time involved in ascertaining the merits of the defence case might be so extensive as to undermine the efficiency justification for the guilty plea discount. This problem could be circumvented by placing a ceiling on the length of time available to defence counsel to outline weaknesses of the defence case. However, it is unlikely that this would be necessary. An extensive hearing into the exact strength of the defendant's case would be wasteful and unnecessary. The purpose of the inquiry is not to determine guilt or innocence - this has already been resolved by the plea of guilty. The aim is simply to determine if the accused has a tenable defence. In most circumstances this can be determined quite readily by submissions from the bar table. In other cases it might require the tendering of evidence in rebuttal of key prosecution evidence. However, this is no different to the manner in which mitigating considerations are already advanced.⁷⁸ And even though some pleas in mitigation already take several hours, and sometimes even days, the vast majority of pleas are finalised expeditiously. It is not anticipated this will change as a result of the proposed reform.

Reform Could Result in More Guilty Pleas

The availability of even a more substantial discount for pleading guilty would logically place even more pressure on offenders to plead guilty. However, this is not necessarily undesirable. The weighing process, between the harm caused by wrongful

(Cambridge University Press, Cambridge, 1985). The same point is made by M Moore, 'Justifying Retributivism' (1993) 27 *Israel Law Review* 15, 20. The credibility of this response turns on the persuasiveness of the doctrine of double effect. It has been argued that this doctrine is unsound: See M Bagaric and K Amarasakera, 'The Errors of Retributivism' (2000) 24 *Melbourne University Law Review* 124. For a response, see A Duff, 'In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasakera' (2000) 24 *Melbourne University Law Review* 411.

⁷⁷ G Schedler, 'Can Retributivists Support Legal Punishment?' (1980) 63 *The Monist* 185, 189. For this reason he concluded that retributivists simply cannot support the institution of punishment. However, it must be noted that there are a large number of different retributive theories. For an overview of many of the theories, see C L Ten, *Crime, Guilt and Punishment* (Clarendon Press, Oxford, 1987) 38-65; J Cottingham, 'Varieties of Retributivism' (1979) 29 *Philosophical Quarterly* 238 (Cottingham identifies nine different theories of punishment that have been classified as retributive); T Honderich, *Punishment: The Supposed Justifications* (rev ed, Penguin Books, Harmondsworth, 1984) 211; Bagaric, above n 49.

⁷⁸ For example, character witnesses are often called on behalf of the defendant.

convictions and cost savings to the community, has already been conducted earlier. While the risk of punishing the innocent is increased, the other side of the scales is also considerably heavier - even more guilty people are likely to plead guilty and hence greater costs savings are likely to be experienced by the community. There is now also the additional consolation that the innocent will be punished less severely.

7 Conclusion

The manner in which the guilty plea discount operates is unsatisfactory. While there are strong reasons for maintaining the discount, it is wrong that the system does not acknowledge that the effect of the plea places pressure on defendants to plead guilty. This wrong is compounded by the fact that the system has no mechanism for providing an extra discount to defendants who have a tenable defence.

The system would be improved by introducing the notion of a qualified guilty plea. While formally amounting to a guilty plea, the defendant would be permitted to advance submissions consistent with innocence as part of the plea in mitigation. If the sentencer is persuaded that the defendant had a tenable chance of an acquittal, a penalty discount in excess of that available for merely pleading guilty would be conferred.

Admittedly, the proposed reform is not without its difficulties. Most notably, it would result in even more pressure on defendants to plead guilty. However, this disadvantage would be outweighed by the benefits of the reform, which are considerable. The proposed reform would make the sentencing system more transparent, by acknowledging that the guilty plea discount does put pressure on the innocent to plead guilty - in some cases invariably leading to the conviction of the innocent. It would acknowledge that all defendants who plead guilty are not 'equally guilty'. Finally, it would result in a higher portion of cases finalised by way of guilty plea - equating to more cost savings to the community.

There is of course a degree of speculation concerning whether the advantages of the proposed reform will outweigh disadvantages. This is the case with every reform proposal. One can never be certain of how it will work until after it is implemented. The proposal suggested in this paper concerns fundamental human interests. Hence, it obviously makes sense to tread slowly. Thus, we suggest that the reform should be introduced on a trial basis in a controlled manner. Consideration could be given to, for example, trialing the process for a defined period, say 12 months, in a designated Magistrates' Court. After the trial period, relevant data from the Court (including the guilty plea rate, the average time spent on each plea, and the severity of sentences that are imposed) should be compared to that of Magistrates' Courts in the region. Interviews with lawyers, magistrates, prosecution officials and defendants should also be conducted to gain insight into how the reforms were received.