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# **Sentencing discounts for guilty pleas and the principle of non-discrimination**

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# Introduction

## Introduction

- The absolute right of any person accused of a crime to plead “*not guilty*” and thereby require the prosecution to prove his or her guilt, beyond reasonable doubt, is, of course, fundamental to our system of justice.
- Indeed, the right to deny guilt and put the prosecution to proof, no matter how strong the prosecution case may seem to be, is fundamental not just to the presumption of innocence, but to any good system of justice and to any society worth living in.
- A necessarily corollary of that right is that a person who pleads not guilty should not be penalised merely for exercising that right, relative to someone who does not exercise that right, because that would constitute impermissible discrimination.



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# Introduction

- There is an inherent stress between the interests of an accused who pleads guilty in getting the best and biggest discount on sentence he or she can for the plea, and the interests of an accused who pleads not guilty not being penalised for exercising that right.
- This presentation addresses the question of whether the present law in relation to discounts for guilty pleas in either federal and State matters in NSW fails – in principle or in application – to maintain the right balance and thereby breaches the principle of discrimination.
- The conclusion I reach is that in NSW State matters such discrimination is sanctioned, and that in federal matters such discrimination is forbidden. Whether that is so in practice is beyond the scope of this presentation.



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# Discussion

- A question that arises for consideration is whether the clock should be reset on the issue of discrimination in sentencing in NSW in the interests of the better and fairer administration of criminal justice.
- It is acknowledged that any such resetting of the clock is problematic because maintaining and improving actual and perceived discounts for the objective utilitarian benefit of saving the time and cost of trials is a centrepiece of NSW Law Reform Commission report number 141 on *“Encouraging appropriate early guilty pleas”*, December 2014, tabled in NSW Parliament on 23 June 2015 (NSWLRC Report 141).
- However discussion of these issues may be relevant to how the implementation of NSWLRC Report 141 proceeds.



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# Discussion

In *Siganto v The Queen* [1998] HCA 74; (1998) 194 CLR 656 at 663 [21], 667 [34], the High Court endorsed long-standing Victorian appellate authority in *R v Gray* [1977] VR 225 in which it had been said at 231:

*“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 issues to proof or having presented a time-wasting or even scurrilous defence.”*



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# Discussion

However in the next paragraph in *Siganto*, it was said (at 663 [22]):

*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; first, because it is usually evidence of some remorse on the part of the offender, and secondly, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case. It is also sometimes relevant to the aspect of remorse that a victim has been spared the necessity of undergoing the painful procedure of giving evidence.*  
[Emphasis added]



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# Discussion

- The inconsistency between adopting *Ryan* and allowing for discounting for the objective utilitarian benefit of saving the expense of a contested trial was addressed just over three years later in *Cameron v The Queen* [2002] HCA 6; (2002) 209 CLR 339 at 343-6 [11]-[22].
- In particular at [11], the portion of the quote underlined on the last slide was reproduced, prefaced by the words “*it was said*” and followed by:

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



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# Discussion

- Thus the High Court was identifying three subjective factors relevant to mitigation of sentence on a guilty plea:
  1. Remorse
  2. Acceptance of responsibility
  3. Willingness to facilitate the court of justice
- A “*significant consideration*” the issue of the extent to which the plea is indicative of any of those factors is “*whether the plea was entered at the first reasonable opportunity*”: *Cameron* at 346 [22].
- A little later I will come back to what those three subjective factors might mean.



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# Discussion

- In the next three paragraphs in *Cameron* ([12-[14]), the above statement in *Siganto* at [22] was qualified, and the phrase “*on the pragmatic ground that the community is spared the expense of a contested trial*” effectively removed, by making it clear:
  - > That although a guilty plea may be mitigatory, there must be no penalty for insisting on a right to trial, a distinction which although subtle was real and in need of “*refinement in expression*” if the distinction is to be seen as non-discriminatory: *Cameron* at [12].



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# Discussion

- > It was: “*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*”: *Cameron* at [13] (emphasis added).
- > Reconciliation of the competing requirements of mitigation for a plea and absence of penalty for pleading not guilty “*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*”: *Cameron* at [14].



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# Discussion

- The rationale for this approach was derived from a constitutional case, *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, concerning s 92 of the Constitution, which prohibits discriminatory burdens in inter-State trade.
- In *Cameron* at [15], *Castlemaine Tooheys* was relied on for the principle that the legal notion of discrimination “*lies in the unequal treatment of equals*” and that the equals here were those who pleaded guilty or not guilty.
- The differential treatment and unequal outcomes that would result from a discount for those who pleaded guilty was the product of a distinction appropriate and adopted to the attainment of a proper objective, namely the **subjective** willingness to facilitate the course of justice.



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# Discussion

- In *Cameron*, McHugh J went a bit further and suggested (at 352 [44]) that it may not be constitutionally valid for a federal law to permit discrimination on sentence of the kind that was not permitted at common law, because such discrimination may not be compatible with the exercise of the judicial power of the Commonwealth.
- That is because “*If there is one principle that lies at the heart of the judicial power of the Commonwealth, it is that courts, exercising federal jurisdiction, cannot act in a way that is relevantly discriminatory*”.
- Denial of that principle would be to “*deny that equal justice under the law is one of the central concerns of the judicial power of the Commonwealth*”.
- McHugh J quoted from Wong at 608 [65]: “*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.*” (emphasis in Wong)



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# Discussion

Thus, to reiterate, the common law as declared by the High Court in *Cameron*, reconciles the competing considerations of allowing mitigation for a guilty plea while not allowing discrimination for a not guilty plea, by **permitting** the mitigation to be only for the three subjective considerations of:

1. Remorse;
2. Acceptance of responsibility; and
3. Willingness to facilitate the court of justice,

but **not** allowing any mitigation for the objective consideration of saving the time and expense of a trial.



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# Discussion

- As sometimes happens when the High Court takes a few years to revise its position, the earlier view is relied upon by intermediate appeal courts.
- In NSW that took place in the guideline judgment case of *R v Thomson & Houlton* [2000] NSWCCA 309; (2000) 49 NSWLR 383.
- *Thomson* and the cases that followed it developed a jurisprudence that was fine with the approach in *Siganto*, but not with qualification or correction in *Cameron*.



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# Discussion

- The timeline of the key cases in this area is as follows:

Timeline	Cases
3 December 1998	<i>Siganto</i> , High Court
17 August 2000	<i>Thomson</i> , NSWCCA
15 November 2001	<i>Wong</i> , High Court
14 February 2002	<i>Cameron</i> , High Court
24 April 2002	<i>Sharma</i> , NSWCCA
15 August 2007	<i>Tyler</i> , NSWCCA



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# Discussion

- In *Thomson*, Spigelman CJ (with whom the rest of the Court agreed) quoted and embraced *Siganto* with some enthusiasm, finding it compatible with s 22 of the *Crimes (Sentencing Procedure)* Act 1999.
- The Crown and the intervening Attorney-General argued in *Thomson* that the discount range sought to be identified should encompass all considerations involved in the plea, whereas the PDs and defence counsel said the discount should relate only to the utilitarian aspects, leaving the question of remorse or contrition to be dealt with together with other subjective considerations: [16(iv)], [114].
- The defence position prevailed ([122-3], [135]), with the important dimension that the strength of the Crown case was held to be relevant only to the subjective question of contrition or remorse, not to the objective utilitarian benefit: [136-7].



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# Discussion

- A real issue and concern expressed by Spigelman CJ in *Thomson* was whether a substantial discount was in fact given by all sentencing judges and in particular whether an early plea was being appropriately recognised: [17].
- This latter concern ended up being a dominant reason for the guideline judgment that ensued.
- In the result, the utilitarian value of a plea to the criminal justice system was adopted as 10-25%, with timing as the primary consideration: [160(iv)].
- Up to a 35% discount encompassing all aspects of a plea was appropriate: [162].



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# Discussion

- In November 2001, *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 was handed down, striking down a guideline judgement for federal drug importation offences as being contrary to s 16A of the *Crimes Act 1914* (Cth).
- In February 2002, *Cameron* was handed down, holding that at common law discounts for the utilitarian benefit of a guilty plea was not permissible, and finding that common law position had been retained by State sentencing law in Western Australia.
- Two live questions then arose:
  - > Was *Thomson* correctly decided for NSW offences?
  - > What was the position for federal offences in NSW?



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# Discussion

- The first question – was *Thomson* correctly decided for NSW offences? – was answered in the affirmative in *R v Sharma* [2002] NSWCCA 142; (2002) 54 NSWLR 300, only a few months after *Cameron*.
- Spigelman CJ (with whom the other judges again agreed) considered at some length the question of whether *Thomson* remained an appropriate guidance after *Wong* and *Cameron* in the High Court and held that s 22 of the *Crimes (Sentencing Procedure) Act 1999* modified the principle in *Cameron*: 304 [20] to 316 [68], especially at [67-8].
- This permitted continued application of the guideline judgment in *Thomson*, and continuation of the objective utilitarian discount for a guilty plea.



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# Discussion

- The second question – what was the position for federal offences in NSW? – was answered in *Tyler v The Queen* [2007] NSWCCA 247; (2007) 173 A Crim R 458 per Simpson J (with whom Spigelman CJ, the author of *Sharma*, and Harrison J, agreed), upholding the application of *Cameron* to federal offences.
- That is, the application of the *Cameron* ban on the objective utilitarian benefit of a guilty plea being relied upon in mitigation was maintained for federal offences; meaning that *Thomson* cannot apply even by parity of reasoning to federal offences.
- The continued application of *Tyler* and thus *Cameron* to federal offences has recently been confirmed by Beech-Jones J in *R v Saleh* [2015] NSWCCA 299 at [5]; but cf *DPP (Cth) v Gow* [2015] NSWCCA 208; (2015) 298 FLR 397 at [26]-[28].



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# Discussion

- Thus the terms of s 22 of the Crimes (Sentencing Procedure) Act 1999 exclude the principle in Cameron.
- But the terms of s 16A(2)(g) of the Crimes Act 1914 do not exclude the principle in Cameron.
- Let's compare them!



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# Discussion

Section 22(1) <i>Crimes (Sentencing Procedure) Act 1999 (NSW)</i>	Section 16A(2)(g) <i>Crimes Act 1914 (Cth)</i>
<p><b>22 Guilty plea to be taken into account</b></p> <p>(1) In passing sentence for an offence on an offender who has pleaded guilty to the offence, a court must take into account:</p> <ul style="list-style-type: none"><li>(a) the fact that the offender has pleaded guilty, and</li><li>(b) when the offender pleaded guilty or indicated an intention to plead guilty, and</li><li>(c) the circumstances in which the offender indicated an intention to plead guilty, and may accordingly impose a lesser penalty than it would otherwise have imposed.</li></ul> <p>(1A) A lesser penalty imposed under this section must not be unreasonably disproportionate to the nature and circumstances of the offence.</p> <p>...</p>	<p><b>16A Matters to which court to have regard when passing sentence etc.—federal offences</b></p> <p>(1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.</p> <p>(2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:</p> <p>...</p> <ul style="list-style-type: none"><li>(g) if the person has pleaded guilty to the charge in respect of the offence—that fact;</li></ul> <p>...</p>



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# Discussion

- While the distinction between Section 22(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and Section 16A(2)(g) of the *Crimes Act 1914* (Cth) may seem to afford a slender basis for distinguishing when *Cameron* does or does not apply, that is the current state of the law.
- Questions then arise as to:
  - > How should the federal position work in practice?
  - > How should the NSW State position work in practice?
  - > Which is preferable?



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# Discussion

- How should the federal position work in practice?
- May help to conceptualise the **subjective** points of mitigation – that is, what the plea and any supporting evidence about the plea indicates about the offender's attitude towards his or her offending:
  - > **Remorse or contrition** – the right kind of sorry – sorry for what he or she did, not sorry he or she was caught
  - > **Acceptance of responsibility** – he or she committed this offence, no excuses and no blame shifting or downplaying



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# Discussion

## > Willingness to facilitate the course of justice:

- The offender wanting to make amends – wanting the court to deal with the offender for what they have done
- sparing victims and other witnesses from the stress or trauma of giving evidence – specifically allowed in *Siganto* as an aspect of subjective remorse in a part not questioned in *Cameron*;
- forgoing the personal right to have the Crown prove its case in favour of acceptance of the sanction of the court on behalf of the community – allowed to have regard to weaknesses in the Crown case, **but without** regard to how long that would have taken, how complicated it would have been, or how much it would have cost as they are objective, not subjective – it cannot be that a person who commits a complicated or long duration offence for which more evidence and time is needed gets a bigger discount



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# Discussion

- For federal offences, it is all meant to be about subjective factors; and nothing about objective benefits
- Importantly:
  - > it is not just in fact and objectively facilitating the course of justice – that is the forbidden objective benefit – rather the focus has to be on the offender's subjective position, an admittedly fine distinction in at least some cases
  - > have to be very careful that there no sophistry in dressing up the objective aspect to make it look like subjective. If that is permitted, the fundamental equality before the law principle is lost.



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# Conclusion

- How should the NSW State position work in practice?
- Following *Thomson*, just the objective utilitarian benefit of the guilty plea should be in the approximate range of 10-25%, depending on timing.
- The other three subjective factors should then be added on top, to produce a possible maximum discount of around 35%.
- That is, *Thomson* not only allowed the objective utilitarian benefit to be taken into account, but provided for it to dominate.
- Is this what actually happens? The NSWLR encountered scepticism that there was in fact any real objective utilitarian discount being applied in many cases: see NSWLRC Report 141 at [9.25 – 9.27].



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# Conclusion

- Which is preferable – objective utilitarian discount or not?
- The federal approach of not allowing the objective utilitarian discount is arguably preferable because that constitutes improper discrimination, and undermines the presumption of innocence and the right to put the Crown to proof.
- If the discounts for federal offences are not any less than for State offences, then they are properly reflecting the subjective considerations approved by the High Court in *Cameron*.
- Equality before the law, which the non-discrimination principle upholds, remains a central concern for federal offence sentencing.

**Thank you**