

Spot the difference: Exploring the practicalities of the discount for pleading guilty

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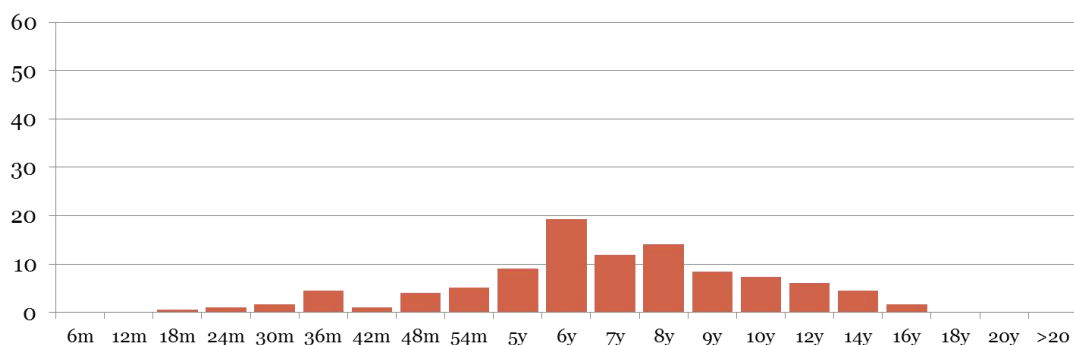
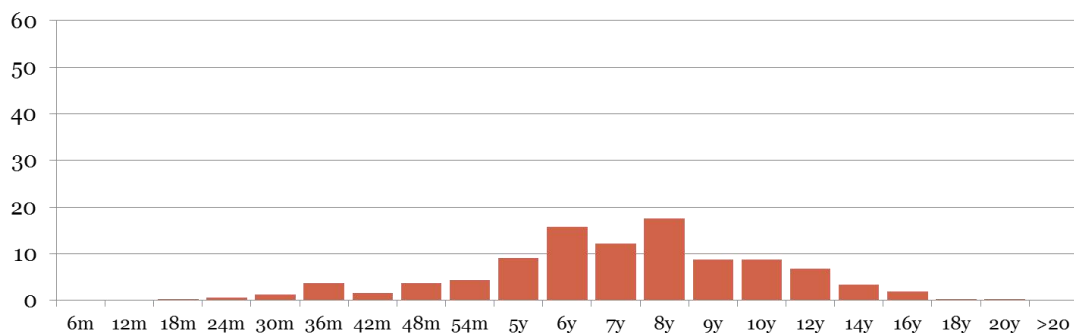
The Genesis

Most here, would have gone through the process (innumerable times) of examining, printing off, and then copying JIRS statistics in the lead up to a sentencing hearing.

Often fulltime imprisonment is inevitable and one confines oneself to “Term of Sentence” and / or “Non-parole period” for either the “Principal Offences Only” or “Aggregate / Effective” sentence subsets.

Likewise, commonly one reproduces both the “all offenders” option and, if you have the benefit of a plea of guilty, the “guilty plea” graph as well. Less commonly perhaps you print off the “not guilty plea” graph.

After comparing the landscapes (in my experience anyway) you’re often left with the impression you’re looking at the same image. An example:



So the question: *Is the 25% discount real (Are offenders actually getting the benefit promised)?*

The Pedigree

The issue has some pedigree. In his leading judgment in *R v Thompson; R v Houlton* (2000) 49 NSWLR 383, Spigelman CJ observed, while discussing the need for a guideline judgment (at [25]):

“The Court was supplied with a number of statistics on sentencing outcomes for various offences from both the District Court and the Local Court, designed to establish that there was a pattern of inconsistency in sentencing after a guilty plea. Those statistics were presented in the form of the median sentence involving full time custody for a range of offences, comparing those in which there was a plea of guilty with those in which there was a plea of not guilty. **With respect to a significant number of offences there was no apparent difference between the two categories. Indeed, in a number of cases, the median sentence for those pleading guilty was in fact greater than the median sentence for those pleading not guilty.**” (emphasis added)

Approach

Absent an exhaustive, case-by-case analysis, there is probably no way of ever accurately measuring the difference or answering the question with precision (*Is the 25% discount real (Are offenders actually getting the benefit promised by the system)?*). The starting point of any sentence is “notional”. We live in a world where, properly, the sentencing discretion is exercised via a process of “instinctive synthesis”.

However, analysis of the JIRS statistics might shed some light on the question, and perhaps support (or contradict) the impressionistic view that offenders who plea guilty don’t get the appropriate benefit: *R v Thompson; R v Houlton*. The analysis is probably more useful since the “mid-point” function was removed from the JIRS program some years ago.

In practical terms the statistical analysis undertaken amounted to little more than identifying (again), the mid-point (or median) sentence. The median was calculated by:

$$\frac{\text{Sum of years imposed on all offenders}}{\text{Total number of offenders}}$$

The results were varied.

Selection of statistics:

- Like *Thompson v R; Houlton v R*, the statistical analysis focused on the median sentence for an offence. As noted already, the statistical analysis largely involved identifying the mid-point again.
- Looked at “TERM OF SENTENCE – PRINCIPAL OFFENCE ONLY” and “NON-PAROLE PERIOD – PRINCIPLE OFFENCE ONLY): see criticisms in

Tweedie [[2015] NSWCCA 71 at [47], *Knight* [2015] NSWCCA 222 at [2] – [13].

- Selected offences that usually result in full-time custody.
- Selected common offences with larger sample sizes (“Total cases”).
- Endeavoured to cover a range of offences.
- Used District Court statistics only: *Tweedie* [2015] NSWCCA 71 at [46].
- Used only “post-muldock” results up until 23 September 2018 (the later date being the commencement of the ‘Early Appropriate Guilty Plea’ (EAGP) regime).

Conscious:

- Statistics don’t record timing of plea or precise discount: *Moore* [2019] NSWCCA 264 @ [77] (although one would have thought that this will be relatively simple under the EAGP regime. It is understood that the Bureau of Crime Statistics (NSW) is endeavouring to track statistics in that way).
- Disproportionate numbers of not guilty or guilty pleas might skew results.
- Statistics are a blunt tool. They don’t record facts or subjective circumstances. However, speaking generally, the larger sample size the more that can be made of them.

Results (median length of sentence - principle offence only)

s61I (Sexual intercourse w/o consent)

Term of Sentence

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
237	4.8yrs	102	5.16yrs	128	4.56yrs

4.56 years is 88.37% of 5.16 years **(just under 12% less for PG)**.

Non-parole period

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
229	2.88yrs	100	3.34	122	2.74

2.74 years is 82% of 3.34 years **(18% less for PG)**

s61J (Aggravated sexual intercourse w/o consent)

Term of sentence

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
323	7.57yrs	140	8yrs	176	7.25yrs

7.25 years is 90.625% of 8 years **(just over 9% less for PG).**

Non-parole period

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
298	4.89yrs	133	6.77	161	4.5yrs

4.5 years is 66.5% of 6.77 years **(23.5% less for PG)**

s61M(2) (Aggravated indecent assault)

Term of sentence

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
145	3.3yrs	40	3.7yrs	105	3.23yrs

3.23 years is 87.3% of 3.7 years **(just under 13% less for PG).**

Non-parole period

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
136	2.01yrs	39	2.37yrs	97	1.87yrs

1.87 years is 79% of 2.37 years **(21% less for PG)**

s35(4) (Reckless wounding)

Term of sentence

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
288	2.76yrs	20	3yrs	264	2.74yrs

2.74 years is 91.3% of 3 years **(just under 9% less)**.

Non-parole period

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
276	1.58yrs	19	1.95yrs	253	1.56yrs

1.56 years is 80% of 1.95 years **(or 20% less)**

s97(2) (Agg Robbery etc, armed with dangerous weapon)

Term of sentence

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
467	5.44yrs	67	6.62yrs	400	5.25yrs

5.25 years is 79.3% of 6.62 years **(just over 21% less)**.

Non-parole period

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
367	3.09yrs	47	4.02yrs	320	2.94yrs

2.94 years is 73% of 4.02 years **(27% less)**.

s112(2) (Aggravated break, enter & commit SI offence)

Term of sentence

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
1640		97	4.26yrs	1539	3.15yrs

3.15 years is 73.9% of 4.26 years **(26% less for PG)**.

Non-parole period

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
1,640	3.22yrs	97	4.35	1,539	3.15yrs

3.15 years is 72.4% of 4.35 years **(just over 27% less for PG)**

s52A(1)(c) (Drive manner dangerous causing death)

Term of sentence

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
139	3.09yrs	22	2.977yrs	117	3.1yrs

3.1 years is 104.1% of 2.977 years **(or just over 4% more for PG)**.

Non-parole period

All offenders		Plea Not Guilty		Plea Guilty	
Total Cases	Mid-point	Total Cases	Mid-point	Total Cases	Mid-point
130	1.66yrs	22	1.63yrs	108	1.75yrs

1.75 years is 107% of 1.63 years **(or just over 7% more for PG)**.

Significance in the EAGP world

As already noted, in preparing this paper, contact was made with the Bureau of Crime Statistics (NSW). It is understood they are tracking trends post-EAGP.

Presumably at least one of the current limitations (inability to identify precise discount given in each case) will be removed. As we all know, under the EAGP regime you can only get 25%, 10% or 5%. No more **20%**, **15%**, **17.5%** (*Nguyen, Kathy v R* [2015] NSWCCA 209), **22.5%** (*R v Pearson* [2004] NSWCCA 129), 18% (*R v Petrie* [2003] NSWCCA 208), or **11%** (*R v Lim Yok Peng* [2002] NSWCCA 208).

One might anticipate then that the EAGP regime will increase the value of statistics, at least in the context of measuring (in real terms) the reduction in sentence given for the utilitarian value of a plea of guilty.

Finally, when appearing at first instance, the role of statistics in identifying an appropriate range is, more often than not, significant. That is, both as to type of disposition and, where custody is inevitable, length of overall term and NPP. This is likely to remain the position regardless of what the CCA has said (or will say).

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