

Review of the Sentence Reduction Scheme - Part 2 Division 2

Subdivision 4 of the *Sentencing Act 2017* (SA)

Interim Report to the Attorney-General

Hon Brian Ross Martin AO QC

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Introduction

- [1] On 12 September 2018 I was appointed by the Hon Vickie Chapman MP, Deputy Premier and Attorney-General, to conduct a Review and provide a written report concerning the operation and effectiveness of the sentencing reductions regime which operates in South Australia pursuant to Part 2 Division 2 Subdivision 4 of the *Sentencing Act 2017* (the Sentencing Act).
- [2] The Terms of Reference governing my Review are:

Terms of Reference

The *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* and the *Criminal Law (Sentencing) (Supergrass) Amendment Act 2012* (the Amending Acts), which came into operation on 11 March 2013, amended the *Criminal Law (Sentencing) Act 1988* (SA) (now repealed) to create a legislative scheme for the reduction of sentences (the 2013 Scheme).

On 23 October 2015 you provided the then Attorney-General with a report concerning the operation of the 2013 Scheme as a result of a review completed in accordance with Schedule 1 of the *Criminal Law (Sentencing) Act 1988* (SA) (copy provided).

The *Summary Procedure (Indictable Offences) Amendment Act 2017*, which commenced operation on 5 March 2018, made a number of amendments to the *Criminal Law (Sentencing) Act 1988* (SA) regarding the reduction of sentences.

On 30 April 2018 the *Sentencing Act 2017* (SA) commenced operation, adopting those amendments.

The operation of the reduction of sentences schemes is now contained in Part 2 Division 2 Subdivision 4 of the *Sentencing Act 2017* (SA) (the Current Scheme).

Accordingly, you are asked to inquire into, and to report to the Attorney-General on:

- the operation of the 2013 Scheme as necessary;

- the application of the 2013 Scheme and the Current Scheme within the South Australian criminal justice system, including judicial consideration of the relevant provisions;
- whether or not the Current Scheme has achieved the appropriate balance between the benefit to the community of an early guilty plea by a defendant and the need to ensure that a defendant is adequately punished for the offending behaviour and held accountable to the community for the offending behaviour, and in particular whether the factors listed in sections 37(3), 38(2), 39(4), 40(5) and 43(5) are sufficient so as to ensure that balance; and
- whether, in comparison to the 2013 Scheme, the Current Scheme has improved the operation and effectiveness of the South Australian criminal justice system and provided transparency in respect of sentences given to offenders;
- recommendations regarding:
 - improvements to the Current Scheme; and
 - any others matters you see fit.

For the purposes of your inquiry:

- you may consult with such experts, interested parties or persons as you see fit;
- you may seek such information and data from the Attorney-General's Department as required; and
- it is confirmed that you are not required to disclose any information in your report that identifies, or could tend to identify, a person if, in your opinion, disclosure of the information would put at the risk the safety of any person or would otherwise not be in the public interest.

[3] In announcing the current Review, the Attorney-General referred to “community concerns regarding large sentence discounts being given to offenders”. While the Terms of Reference require me to consider the overall operation of the sentence reduction scheme, and various aspects of the scheme, specific attention is directed to

whether the scheme “has achieved the appropriate balance between the benefit to the community of an early guilty plea by a defendant and the need to ensure that a defendant is adequately punished for the offending behaviour and held accountable to the community for the offending behaviour...”.

- [4] It should be noted that the Terms of Reference are limited to the operation of the legislative sentence reduction scheme and do not include a review of the role of victims in sentencing proceedings. Nor do they include a review of the adequacy or otherwise of sentences for specific crimes or generally.
- [5] In conducting this Review, through public advertisement and direct communication, I sought assistance from the community and I requested assistance from the persons and organisations listed in Annexure 1 to this Report. For reasons of privacy I have not included the victims who I invited to make a submission. I sought statistics, information and views which might contribute to an understanding of the operation of the Current Scheme and issues that have arisen with respect to the scheme. In addition, I met with a number of victims and other persons involved in the administration of the criminal justice system
- [6] A summary of points made by respondents and persons I consulted appears in [43] - [91]. My conclusions and recommendations are set out in [344] - [393].¹

Background

- [7] The *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (“Guilty Pleas Act”) and the *Criminal Law (Sentencing) (Supergrass) Amendment Act 2012* (“Supergrass Act”) came into operation on 11 March 2013. Together the Acts amended the *Criminal Law Sentencing Act 1988* and created a legislative scheme for the reduction of sentences following pleas of guilty and co-operation with law

¹ A list of recommendations is Annexure 7.

enforcement agencies (the 2013 Scheme).

- [8] The 1988 Sentencing Act required that after two years of operation, the Minister appoint a person to conduct an Inquiry into the operation of the legislative scheme and to report on the effect, if any, of the scheme in providing transparency in respect of sentences and “improving the operation and effectiveness of the criminal justice system”. I was appointed to conduct the Inquiry and on 23 October 2015 I provided my Report to the former Attorney-General, the Hon John Rau MP. That Report is Annexure 2 to this Report.
- [9] Prior to the 2015 Report, the Office of Crime Statistics and Research provided me with a copy of its Evaluation Report of August 2015 concerning the impact of the Guilty Pleas Act. The Evaluation Report was particularly helpful and the relevant section of the executive summary of that Report was Annexure 3 to the 2015 Report. A summary of the main points from the Evaluation Report was provided in [59].
- [10] In the 2015 Report, I set out the background to the reductions scheme as it existed in October 2015. I also dealt with the purposes of the scheme. The relevant sections concerning the background and purpose of the scheme as it existed in 2015 were as follows:

Background

- [6] As noted in the Evaluation Report, it has been a long-standing practice in the criminal courts in South Australia, and in other Australian jurisdictions, to recognise the value of guilty pleas by reducing sentences that would otherwise be imposed. Various reasons underpin the practice, including the interests of victims and practical considerations centred on time and resources. Commonly, pleas of guilty were considered in conjunction with the offender's contrition or lack thereof.
- [7] The extent of the reduction was determined by the sentencing court in the exercise of the sentencing discretion and varied with the multitude of circumstances that accompany crimes and pleas of guilty. For example, usually

a plea indicated or entered early in the proceedings attracted a larger reduction than a plea entered shortly before trial. A plea in the face of overwhelming prosecution evidence attracted a lesser reduction than an early plea volunteered in the context of a weak prosecution case. A plea accompanied by genuine contrition was recognised with a greater reduction than a plea entered solely for pragmatic purposes.

- [8] Similarly, it has been a longstanding practice to recognise the value of assistance to law enforcement authorities through significant reduction of sentences. Such reductions were made regardless of whether the offender pleaded guilty, but those accompanied by a plea of guilty and contrition attracted greater reductions.
- [9] It was in the context of these long-standing practices that the Legislature created the new scheme which provides for a sliding scale of reductions, primarily dependent upon the stage at which a plea is entered. In summary, and in broad terms, the main features of the scheme are as follows:
- Section 9(1) of the Sentencing Act directs a sentencing court to state its reasons for imposing a particular sentence, “including...any reason why a sentence that would otherwise have been imposed...has been reduced.”
 - If a plea of guilty is entered not more than four weeks after the defendant has first appeared in court, the sentencing court may reduce the sentence “by up to 40%”.
 - If a plea is entered more than four weeks after the first appearance in court, the maximum reduction available decreases in accordance with prescribed periods to the lowest maximum of 10%.
 - In each prescribed period, the percentage reduction for a plea is specified as the maximum reduction which the sentencing court is permitted to apply.
 - The only exceptions which allow for a maximum reduction notwithstanding a failure to plea in a particular prescribed period are based on the failure or inability of the court to hear a matter in a

particular period.

- In determining the extent of a reduction for a guilty plea, the sentencing court is directed to have regard to a number of factors specified in sections 10B(4) and 10C(4).
- In respect of co-operation with law enforcement authorities, the extent of the maximum reduction is not specified. Section 10A(2) of the Sentencing Act empowers the court to reduce the sentence "by such percentage as the court thinks appropriate in the circumstances."
- Section 10A(2) applies only if the court is satisfied that the defendant has co-operated or undertaken to co-operate with a law enforcement agency and the co-operation:

"(a) relates directly to combating serious and organised criminal activity; and

(b) is provided in exceptional circumstances; and

(c) contributes significantly to the public interest."

- Various criteria are specified to which the court must have regard in determining the extent of the reduction under section 10A(3) given for co-operation.
- If an offender receives the benefit of a reduction given on the basis of an undertaking to co-operate, but subsequently fails to co-operate in accordance with terms of the undertaking, the Director of Public Prosecutions may seek permission to have the sentence quashed and a new sentence imposed. The new sentence cannot exceed the sentence that would have been imposed but for the reduction by reason of the undertaking to co-operate.

Purpose of Scheme

[10] In his Second Reading speech on 11 July 2012, the Deputy Premier identified

the purpose of the Guilty Pleas Act and features of the legislative scheme in the following passages:

“The [Guilty Pleas Act] regulates and makes transparent the sentencing discounts given to offenders who plead guilty. The main objective of the Bill is to improve the operation and effectiveness of the criminal justice system by reducing current delays and backlogs in cases coming to trial. It encourages offenders who are minded to plead guilty to do so in a timely way.

...

The Bill provides for a graduated series of discounts for pleas of guilty. The quantum of the discounts are dependent on the timing and circumstances of the guilty plea. The earlier the plea the higher the discount. The Bill restricts the conferral of discounts for late guilty pleas but permits adequate discretion to a court to ensure that defendants who may plead guilty at a late stage through no fault on their own part, or some good reason, are not unfairly prejudiced.

Any perception that the Bill will allow offenders to escape their ‘just desserts’ and appropriate punishment by pleading guilty is mistaken. The figures for the discounts in the Bill are not intended to be overly rigid or mechanically applied. They merely provide the upper limit at which a discount for a guilty plea can be set. Though there may be debate as to what should be the precise upper limits, the figures in the Bill are not overly generous. They are consistent with existing sentencing practice.

What the Bill achieves is the codification of the rule that the earlier the guilty plea the greater the discount.

...

...Such a reform helps tackle delay and thus assists all parties in the criminal justice process, especially victims and witnesses.”

[11] The Deputy Premier stated that the legislation “should not result in the granting of unduly lenient sentences for offenders through excessive discounts.” He added that the figures for the maximum discounts were “consistent with existing common law guidelines.”

[12] After describing the existing practice with respect to reduction of sentences by reason of pleas of guilty as “unsatisfactory”, the Deputy Premier said:

“There does not appear to be sufficient difference in practice between the reductions for early guilty pleas and those much closer to trial. The trend of belated guilty pleas is undesirable and should be actively discouraged.”

[13] As to the Supergrass Act, the Deputy Premier made the following observations concerning the purpose of the legislative scheme:

“The acute problem posed to our community by organised criminal gangs cannot be exaggerated.

These criminal gangs consider that they are above the reach of the law, and conventional law enforcement is often ineffectual in dealing with them because of the strong fears that their thuggery engenders and the resulting unwillingness of many witnesses to testify or assist the authorities in the investigation and prosecution of such criminals. This Bill is an integral part of a comprehensive series of linked measures that the government is taking to help tackle the very real problems posed by organised criminal gangs involved in serious crime.

...

The present Bill is intended to challenge any notion of ‘honour amongst thieves’. The Bill confers the power on a court [to] grant “at large” discount to a sentence given to an offender in return for that offender’s valuable co-operation with the authorities. The Bill encourages offenders involved in serious and organised crime to turn on their criminal associates and to assist the authorities in the investigation and prosecution of other offenders and/or

other crimes. Such offenders are often known as 'supergrassers'. Such co-operation can, and in fact does, play an important role in combating crime, especially in bringing to justice the leaders of organised gangs involved in serious crime.

The policy of the Bill is deliberate and is not something revolutionary. For many years the courts have sought through substantial reductions in sentence where appropriate to discourage the notion of 'honour among thieves' ... and to encourage offenders to assist the authorities, especially in serious and organised crime ...

...

... To successfully prosecute the pivotal figures involved in serious and organised crime, there is a very real need to encourage individuals who may very well be criminals themselves to help the authorities.

...

... [The Bill] sends a strong signal to criminals involved in serious and organised crime to assist the authorities. The Bill does not cover normal or routine co-operation and is confined to exceptional co-operation or undertakings of exceptional co-operation given prior to sentence...

...

... The Bill is not, as some have claimed, a 'get out of jail free' card for offenders who will somehow escape unpunished if they co-operate with the authorities. This is simply not the case. Offenders who provide exceptional co-operation to the authorities in the investigation and prosecution of serious and organised crime will still receive what the court regards in a particular case as the appropriate punishment, balancing the nature and gravity of the crime that they have committed, with the benefit and nature of their co-operation with the authorities."

[14] The Deputy Premier explained that the legislation introduced a new procedure to permit offenders previously sentenced to apply to be re-sentenced after their “exceptional co-operation”. He also explained that that the legislation applied to a supergrass whether they pleaded guilty or were convicted following a trial. However, he suggested it would be appropriate only in “rare circumstances” for the discount to be given to a supergrass who did not plead guilty.

[11] In response to the 2015 Report, provision was made to ensure that, from the outset, defendants are made aware of the sentence reduction scheme. To ameliorate the effect of a late change in the offence charged reinstating the entitlement to up to 40% reduction, provision was made for the court to have regard to whether the offender was initially charged with a different offence and whether, and at what stage in the proceedings, negotiations occurred in relation to the offence charged.² Other minor amendments were made, but significant changes were brought about through amendments to the operation of the *Sentencing Act 1998* with respect to the reduction of sentences through the *Summary Procedure (Indictable Offences) Amendment Act 2017*. Those amendments were subsequently adopted by the *Sentencing Act 2017* which came into operation on 30 April 2018 (the 2018 amendments)(the Current Scheme).

[12] The 2018 amendments to the sentence reduction scheme were enacted in the context of an extensive package of reforms to the major indictable processes brought into operation through the *Summary Procedure (Indictable Offences) Amendment Act 2017*. The *Summary Procedure Act 1921* was renamed the *Criminal Procedure Act 1921*.

[13] In considering the operation of the major indictable reforms, it is necessary to understand the procedures that were in place prior to the commencement of the reforms.

[14] As will be seen later, although the Director of Public Prosecutions (DPP) is currently

² Now s 40(5)(c)

involved in a brief adjudication process following an arrest for a major indictable offence, thereafter SA Police are charged with the responsibility of conducting each matter through the processes in the Magistrates Court until shortly before the committal hearing. Prior to the reforms, following an arrest for a major indictable offence, the DPP would undertake an adjudication process and would remain in control of each matter throughout the processes in the Magistrates Court. Following an adjudication advice, there was an internal triggering of a direction/request to the investigating office to prepare and submit declarations required for a committal.

[15] In a very helpful background document, the DPP summarised the processes as follows:

3.2. First appearance

At a defendant's first appearance in the Magistrates Court the matter would be adjourned to a declarations date within 13 weeks, but usually in 10 weeks' time, followed by an answer charge date at least 14 days, but usually 4 weeks, thereafter.³ This timeframe applied irrespective of the nature and number of charges, the number of defendants, the legal and/or factual complexities of the case or the nature of the evidence anticipated to be obtained in proof of the charge(s).

3.3. Compilation of the declaration file

The investigating officer would be required to make a return on the PD90 [a form issued to the investigating officer] direction/request by submitting the original declarations and copies of exhibits and other relevant documentary material (the declaration file) to the SAPOL State Committal and Disclosure Unit (SCDU).⁴ The functions of the SCDU included the vetting of the declaration file, filing of the original evidence in the Magistrates Court and provision of the declaration file to the DPP with a copy for the DPP to serve on the defendant's legal representative at the declarations hearing.

Any further evidentiary material required or obtained in the course of the committal

³ SPA s 104(1); Magistrates Court Rules 1992 (Criminal) pre actions 5 March 2018 Rule 20.01.

⁴ This unit no longer exists.

proceedings would be vetted, filed in court and prepared for service by the SCDU notwithstanding that much material obtained or generated in the course of the committal proceedings would be requested by the DPP.

[16] In the experience of the DPP, the quality of the declaration files was “extremely variable”. Frequently the DPP solicitor attending court was required to request adjournments for the purpose of completing the declaration files. The DPP statistics reveal that for briefs received during the period 1 January - 31 December 2017, there was an average of 1.15 declaration hearings.

[17] In the background document, the DPP summarised proceedings with respect to the answer charge hearing:

3.5. Answer charge hearing

The statutory timeframe for a defendant to answer the charge was at least 14 days but usually 4 weeks after the declarations date (and originally set at the first appearance). In practice, it followed that where multiple declarations dates were set, the original answer charge date was naturally vacated and delayed.

It was common for the answer charge date to be adjourned, at the request of prosecution and/or defence, leading to further additional appearances in the Magistrates Court.

For briefs received during the period 1 January 2017 to 31 December 2017, there was an average of 2.65 answer charge hearings.

Therefore, there were on average 3.8 hearings per brief.⁵ These figures do not include separate listings for bail, Rule 20, no case to answer submissions or for mention only listings.

The 2016 figures were similar: average declarations 1.09, average answer charge 2.55, total 3.64 hearings per brief (less bail etc).

[18] It is apparent from the summary provided by the DPP that prior to the major indictable reforms, proceedings in the Magistrates Court to committal involved multiple hearings.

⁵ This is not a precise figure because there are some declaration dates which will not have had an answer charge date (due to discontinuance or guilty plea) and some answer charge dates will not have had a declarations date recorded (due to transfer from a country or circuit court).

It is not unkind to suggest that, not infrequently, the procedures were less than efficient. One of the aims of the major indictable reforms was to reduce the number of hearings in the Magistrates Court.

[19] Against that background, under the major indictable reforms, and speaking broadly, the major features of the new processes can be summarised as follows⁶:

- Where SA Police have been the investigating authority, the laying of an information charging an indictable offence, and the conduct of the initial proceedings in the Magistrates Court, are the responsibility of SA Police.
- Following the laying of an information charging an indictable offence, and at or before the defendant's first appearance in the Magistrates Court, SA Police must provide the defendant with a number of documents including a document containing a brief description of the alleged offending ("factual summary") and a notice providing the defendant with information concerning the sentence reduction scheme.
- It is the responsibility of SA Police to prepare a "preliminary brief" to be provided to the DPP. This brief is to contain sufficient information to enable the DPP to make a determination as to the appropriate charge or charges (the charge determination). In this context, when a defendant first appears in the Magistrates Court, in substance SA Police seek an adjournment for such period as is necessary to obtain witness statements and other material required for the completion of the preliminary brief, plus 4 weeks to enable the DPP to make a charge determination.
- The practical effect of this procedure is intended to reduce the number of appearances in the Magistrates Court, but in cases involving the

⁶ On 12 March 2019 the Attorney-General appointed me to undertake a review of Major Indictable Reforms. Details of the reforms will appear in my Report following completion of that review.

preparation of forensic evidence and, for example, the preparation of transcripts of recordings or the investigation of telephonic material, SA Police are required to seek lengthy adjournments at the first appearance. Not uncommonly, notwithstanding a lengthy adjournment, a further application is made when the defendant appears on the second occasion.

- If the DPP has not made the charge determination by the time of the defendant's second appearance in the Magistrates Court, SA Police may seek an adjournment and the magistrate may either grant the adjournment or dismiss the charge. The fact that a charge has been dismissed in these circumstances does not prevent the charge being laid again.
- At the time a preliminary brief is provided to the DPP, SA Police are required to provide a copy of the preliminary brief to the defendant and to file a copy of that brief in the Magistrates Court. Once the DPP has made a charge determination the DPP takes over conduct of the prosecution.
- If a matter is to proceed to committal, the Criminal Procedure Act provides that committal proceedings will consist of a "committal appearance" and an "answer charge hearing".
- At the committal appearance, a defendant may plead guilty and the magistrate may either impose sentence or commit the defendant to a superior court for sentence. If the defendant does not plead guilty, the prosecution is required to prepare a committal brief. At the committal appearance the prosecution must advise the court as to statements and other material to be obtained for the purpose of completing the committal brief and the court is required to adjourn the proceedings to a

date for the answer charge hearing. On the occasion of the committal appearance, the defendant must be given an opportunity to advise the court whether any negotiations are taking place with the prosecution. If the defendant advises that negotiations are occurring, at any time within a period of 4 weeks after the committal appearance the defendant is entitled to have the matter called on in the Magistrates Court for the purpose of entering a guilty plea. In that situation, the plea is treated as having occurred at the committal appearance.

- If a matter is to proceed to an answer charge hearing, the prosecutor is required to file a committal brief at least 4 weeks before the date appointed for the hearing. The committal brief must contain statements and documents upon which the prosecutor will rely and other materials specified in the Criminal Procedure Act.
- Various provisions in the Criminal Procedure Act deal with the procedure at the answer charge hearing.
- Following committal for trial, not less than 6 weeks before the date fixed for the arraignment of the defendant in the District or Supreme Court, the prosecution is required to file, and provide to the accused, a “prosecution case statement”. In essence, the statement must include a summary of the alleged facts, a description of the evidence to be led by the prosecution, a list of all witnesses to be called and other material intended to provide an accused person with full knowledge of the extent of a case against them. In addition, not more than 4 weeks after being given the prosecution case statement, the accused is required to file in court, and give to the prosecution, a “defence case statement”. In essence the defence case statement is intended to identify the issues in the trial and facts which the defendant admits.

[20] Under the 2013 Scheme, prior to the major indictable reforms, the maximum percentage reductions in the Supreme and District Courts were fixed by reference to the stages of the court proceedings at which pleas of guilty were entered. In summary:

Reduction	Period for Guilty Plea
Up to 40%	Not more than 4 weeks after first court appearance.
Up to 30%	i. More than 4 weeks after first court appearance, but before the defendant was committed for trial. ii. From the day of committal for trial, but before the commencement of the trial, if the defendant satisfied the court that they could not have pleaded guilty at an early stage because of circumstances outside their control.
Up to 20%	From the day of committal for trial until 12 weeks after the first date fixed for the arraignment.
Up to 15%	Within 7 days immediately following an unsuccessful application to quash or stay the proceedings or a ruling adverse to the defendant during the period between committal for trial and up to 5 weeks before the commencement of the trial.
Up to 10%	In circumstances other than those relating to the above if the sentencing court was satisfied that there was good reason to do so.

[21] As with the previous Scheme, under the Current Scheme the range of percentage reductions available to the Supreme and District sentencing courts is tied to the various stages of the court procedures during which the guilty plea is entered. In summary:

Reduction	Period for Guilty Plea
Up to 40%	Not more than 4 weeks after first court appearance.
Up to 30%	More than 4 weeks after first court appearance, but on or before the committal appearance.
Up to 20%	From the day after the committal appearance to before committal for trial.
Up to 15%	From committal for trial to immediately after arraignment appearance in the Supreme or District Court.
Up to 10%	From immediately after the arraignment appearance to the commencement of the trial.

Sentencing Context

[22] The operation of the sentence reduction scheme found in Division 2 of the Sentencing Act is to be considered in the context of the overall sentencing regime under which sentencing courts operate. The primary purpose of imposing a sentence has always been the protection of the public. This primary purpose is now enshrined in s 3 of the Sentencing Act which provides that the “primary purpose” for imposing a sentence is to “protect the safety of the community (whether as individuals or in general)”. Section 9 states that in order to avoid doubt, the primary purpose of protecting the safety of the community “must be the paramount consideration when a court is determining and imposing the sentence”.

[23] Purposes described as “secondary” in the sentencing process are set out in s 4(1):

4—Secondary sentencing purposes

(1) The secondary purposes for sentencing a defendant for an offence are as follows:

(a) to ensure that the defendant—

- (i) is punished for the offending behaviour; and
 - (ii) is held accountable to the community for the offending behaviour;
 - (b) to publicly denounce the offending behaviour;
 - (c) to publicly recognise the harm done to the community and to any victim of the offending behaviour;
 - (d) to deter the defendant and others in the community from committing offences;
 - (e) to promote the rehabilitation of the defendant.
- (2) Nothing about the order in which the secondary purposes are listed in subsection (1) implies that any one of those secondary purposes is to be given greater weight than any other secondary purpose.

[24] General principles of sentencing to be applied by the sentencing court are set out in s 10 of the Sentencing Act. Section 10 directs the court to apply the common law concepts reflected in the principles of proportionality, parity, totality and the rule that an offender must not be sentenced in respect of an offence of which the offender has not been convicted. Further, s 10(2) directs that a court must not impose a sentence of imprisonment unless the court decides that by reason of the seriousness of the offence, imprisonment is the only penalty that is justified or is the penalty required to be imposed in order to protect the safety of the community. Section 11 then directs the court to take into account various individual factors to the extent that such factors are known and relevant:

- (a) the nature, circumstances and seriousness of the offence;
- (b) the personal circumstances and vulnerability of any victim of the offence whether because of the victim's age, occupation, relationship to the defendant, disability or otherwise;

- (c) the extent of any injury, emotional harm, loss or damage resulting from the offence or any significant risk or danger created by the offence, including any risk to national security;
- (d) the defendant's character, general background and offending history;
- (e) the likelihood of the defendant re-offending;
- (f) the defendant's age, and physical and mental condition (including any cognitive impairment);
- (g) the extent of the defendant's remorse for the offence, having regard in particular as to whether—
 - i. the defendant has provided evidence that the defendant has accepted responsibility for the defendant's actions; and
 - ii. the defendant has acknowledged any injury, loss or damage caused by the defendant's actions, or voluntarily made reparation for any such injury, loss or damage, or both;
- (h) the defendant's prospects of rehabilitation.

[25] The individual factors set out in s 11 are not exclusive of any other matters which might be relevant to the exercise of the sentencing discretion. For example, if an offender has participated in an intervention program, the court may treat the participation and the offender's achievements in the program as relevant to sentence. Further, special provisions may apply when a court is sentencing an Aboriginal and Torres Strait Islander person.

Current Scheme

[26] Within this overall sentencing framework, Subdivision 4 of Division 2 of the Sentencing Act is concerned with the sentence reduction scheme. Four broad categories of reductions are identified, the first being the reduction of sentences by reason of co-operation with a law enforcement agency. Section 37 empowers a court to reduce the sentence it would otherwise have imposed "by such percentage as the court thinks

appropriate in the circumstances” where the court is satisfied that the offender has co-operated, or undertaken to co-operate, with a law enforcement agency, but only where the co-operation:

- a) relates directly to combating serious and organised criminal activity; and
- b) is provided in exceptional circumstances; and
- c) contributes significantly to the public interest.

[27] Although reduction of sentences by reason of co-operation with a law enforcement agency is part of the Current Scheme and covered by the Terms of Reference, no submissions were addressed to this aspect of the scheme and it differs from the balance of the scheme which provides for a fixed range of percentage reductions to which an offender might be entitled. This first category of the scheme leaves determination of the percentage reduction to the discretion of the sentencing court and the fact that an offender has pleaded guilty is only one of many factors to which the court is directed by s 37(3) to have regard. In these circumstances I have not endeavoured to undertake a review of the operation of this aspect of the Current Scheme.

[28] The second category of sentence reduction concerns offenders who have not pleaded guilty to an indictable offence, but who the court is satisfied have “complied with all statutory or court ordered requirements relating to pre-trial disclosure and procedures” and who have “conducted the case in a co-operative and expeditious manner”. In such circumstances, s 38 of the Sentencing Act empowers the court to reduce the sentence it would otherwise have imposed by up to 10%.

[29] Section 38(2) directs that when a court is determining the percentage by which the sentence is to be reduced for this type of co-operation, the court must have regard to the impact of the proceedings of any victim of the offence and the utilitarian benefit to the community of the offender's conduct in relation to the proceedings. In addition, s 38(2) provides that the court may have regard to “any factor or principle the court thinks relevant”.

[30] The third and fourth categories of reduction relate to offenders who plead guilty.

Specific provision is made in s 39 with respect to offenders who plead guilty in the Magistrates Court to summary or minor indictable offences that have been tried in the same way as a summary offence. Broadly speaking, the scheme in the Magistrates Court is as follows:

- A reduction of up to 40% may be given if an offender pleads guilty not more than 4 weeks after the first court appearance.
- If the plea of guilty is entered more than 4 weeks after the first court appearance, but not less than 4 weeks before the day set for the trial, a reduction of up to 30% may be given.
- If a plea is entered less than 4 weeks before the day set for trial, but an offender satisfies the court that the offender could not reasonably have pleaded guilty at an earlier stage because of circumstances outside of the offender's control, the court may reduce the sentence it would otherwise have imposed by up to 30%.
- In other circumstances, if satisfied there is good reason to do so, the court may reduce the sentence by up to 10%.
- If a particular maximum reduction is not available because the plea was not entered within the relevant period, but the court is satisfied that the failure to plead occurred by reason of the unavailability of the court or the inability of the prosecution to finalise negotiations, the court may nevertheless reduce the sentence by the percentage which would have been applicable if the plea of guilty had been entered during the relevant period.
- A number of matters are identified in s 39(4) to which the court must have regard in determining the percentage by which a sentence is to be reduced, including the question whether the reduction by the

percentage contemplated “would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would, or may, affect public confidence in the administration of justice”.

[31] The fourth category relates to offenders who plead guilty to offences other than summary offences or offences tried in the same way as a summary offence. This category encompasses the more serious offences dealt with in the District and Supreme Courts. The reduction scheme is similar to the scheme in the Magistrates Court and the essence of the scheme is found in s 40 of the Sentencing Act. The relevant parts of s 40 are as follows:

- (3) If a defendant has pleaded guilty to an offence or offences—
 - (a) not more than 4 weeks after the defendant's first court appearance in relation to the relevant offence or offences—the sentencing court may reduce the sentence that it would otherwise have imposed by up to 40%;
 - (b) more than 4 weeks after the defendant's first court appearance in relation to the relevant offence or offences but on the day of, or before, the defendant's committal appearance in relation to the relevant offence or offences—the sentencing court may reduce the sentence that it would otherwise have imposed by up to 30%;
 - (c) during the period commencing on the day after the defendant's committal appearance in relation to the relevant offence or offences and ending immediately before the defendant is committed for trial for the offence or offences—the sentencing court may reduce the sentence that it would otherwise have imposed by up to 20%;

Note—

See also section 110(3) of the *Criminal Procedure Act 1921*⁷

- (d) during the period commencing immediately after the defendant is committed for trial for the relevant offence or offences and ending immediately after the first date fixed for the arraignment⁸ of the defendant in a superior court—the sentencing court may reduce the sentence that it would otherwise have imposed by up to 15%;
 - (e) during the period commencing immediately after the first date fixed for the arraignment of the defendant⁹ in a superior court in relation to the relevant offence or offences and ending at the commencement of the defendant's trial for the relevant offence or offences—the sentencing court may, if satisfied that there is good reason to do so, reduce the sentence that it would otherwise have imposed by up to 10%.
- (4) If—
- (a) a maximum reduction available under subsection (3) does not apply in relation to a defendant's plea of guilty because the defendant did not plead guilty within the relevant period; and
 - (b) the court is satisfied that the only reason that the defendant did not plead guilty within the relevant period was because—
 - (i) the court did not sit during that period; or
 - (ii) the court did not sit during that period at a place where the

⁷ Section 110(3) applies to sentencing in all courts:

- (3) If the defendant advises the Court that negotiations are taking place with the prosecution, the defendant may, at any time within the period of 4 weeks after the committal appearance, have the matter called on in the Magistrates Court for the purpose of entering a guilty plea in relation to the charge (and in such a case the defendant will, for the purposes of this Act and the sentencing law, be treated as if the defendant had pleaded guilty at the committal appearance).

⁸ Note minor amendment introduced by s 5 of the *Sentencing (Miscellaneous) Amendment Act 2018* effective 28 February 2019.

⁹ Ibid.

defendant could reasonably have been expected to attend; or

- (iii) the court did not list the defendant's matter for hearing during that period; or
- (iv) the court was, for any other reason outside of the control of the defendant, unable to hear the defendant's matter during that period; or
- (v) after the making of the charge determination (within the meaning of section 106 of the *Criminal Procedure Act 1921*)—the prosecution was, for any reason outside of the control of the defendant, unable to finalise negotiations with the defendant in relation to the plea during that period,

the court may nevertheless reduce the sentence that it would otherwise have imposed as if the defendant had pleaded guilty during the relevant period.

- (5) In determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made within a particular period, a court must have regard to such of the following as may be relevant:
 - (a) whether the reduction of the defendant's sentence by the percentage contemplated would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would, or may, affect public confidence in the administration of justice;
 - (b) the stage in the proceedings for the offence at which the defendant indicated an intention to plead guilty (including whether it would, in the opinion of the court, have been reasonable to expect the defendant to have done so at an earlier stage in the proceedings);
 - (c) whether the defendant was initially charged with a different offence in respect of the same conduct and whether (and at what stage in the proceedings) negotiations occurred with the prosecution in relation to the offence charged;

- (d) in the case where the defendant has been charged with more than 1 offence—whether the defendant pleaded guilty to all of the offences;
- (e) if the defendant satisfies the court that the defendant could not reasonably have been expected to plead guilty at an earlier stage in the proceedings because of circumstances outside of the defendant's control—that fact;
- (f) whether or not the defendant was made aware of any relevant matter that would have enabled the defendant to plead guilty at an earlier stage in the proceedings,

and may have regard to any other factor or principle the court thinks relevant.

[32] In summary, the essential features of the scheme to be applied to more serious offending for which sentence is imposed in the District and Supreme Courts is as follows:

- The scheme provides for a sliding scale of reductions, primarily dependent upon the stage at which a plea of guilty is entered.
- At each stage, the sentencing court is empowered to allow a reduction of “up to” the specified percentage which is the maximum reduction which the court is permitted to give.
- The court is not required automatically to allow the maximum available percentage reduction. Section 41(1)(c) directs the court to apply the percentage reduction that is, in the opinion of the court, “appropriate in the particular case”.
- If a plea is entered within 4 weeks after the first court appearance in the Magistrates Court, a reduction of up to 40% may be given.
- If a plea is entered more than 4 weeks after the first court appearance, but before or on the day of the offender’s committal appearance¹⁰, a reduction of up to 30% may be given.

¹⁰ As explained earlier the committal appearance occurs after the preliminary brief has been provided by SA Police to the DPP and the DPP has made a charge determination.

- Subject to s 110(3) of the Criminal Procedure Act, if a plea is entered in the period commencing the day after the offender's committal appearance and ending immediately before committal for trial, a reduction of up to 20% may be given. Section 110(3) provides an opportunity to seek a reduction of up to 30% for a plea in this period (see footnote 7).
- If a plea is entered during the period commencing immediately after the offender is committed for trial and ending immediately after the first date fixed for arraignment in the superior court, a reduction of up to 15% may be given.
- If a plea is entered during the period commencing immediately after the first date fixed for arraignment and ending at the commencement of the offender's trial, a reduction of up to 10% may be given, but only if the court is "satisfied that there is good reason to do so".
- If an offender has pleaded not guilty to an indictable offence, but the court is satisfied the offender has complied with matters such as pre-trial disclosure and has otherwise conducted the case in a "co-operative" and "expeditious manner", a reduction of up to 10% may be given. In this regard, the court is required to consider the impact of the proceedings on any victim and the utilitarian benefit of the offender's conduct in the proceedings.
- Once the maximum reduction available to an offender is known, in determining the percentage reduction that the court considers is "appropriate in the particular case" the court is directed to have regard to such of the factors set out in s 40(5) as may be relevant" (s 40(5) is set out in [31]). Of particular importance in the more serious cases is the direction in s 40(5)(a) that the court have regard to:
 - (a) whether the reduction of the defendant's sentence by the percentage contemplated would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would, or may, affect public confidence in the administration of justice.

- As in the Magistrates Court, if a particular maximum reduction is not available because the plea was not entered within the relevant period, a number of matters are identified in s 40(4)(b) which might provide the basis for a reduction by the full percentage that would have been available if the offender had pleaded guilty during the relevant period. These include the unavailability of the court and the inability of the prosecution to finalise negotiations with an offender after the making of a charge determination.

Non-parole Periods

- [33] When a sentence of imprisonment for a specified period (other than life) is imposed, the reductions scheme operates in respect of that head sentence. It does not operate with respect to the non-parole period fixed in relation to that head sentence. The non-parole period is fixed as a proportion of that head sentence.
- [34] If a sentence of imprisonment for life is imposed, however, obviously the reductions scheme cannot have any operation in respect of that life sentence. In this situation, because the fixing, extending or negating of a non-parole period is a “sentence” for the purposes of the Sentencing Act, the reductions scheme operates with respect to the fixing of the non-parole period.
- [35] Offences for which the maximum sentence is imprisonment for life include treason, murder, manslaughter and rape. If the maximum penalty of life imprisonment is imposed for any of these crimes, the scheme applies to the fixing of the non-parole period in respect of that life sentence.
- [36] In the case of murder, the operation of the reductions scheme to the fixing of a non-parole period is more complicated. Not only has the legislature prescribed that the mandatory head sentence is imprisonment for life, it has directed through s 47(5)(b) of the Sentencing Act that in fixing a non-parole period in respect of a sentence of life imposed for the crime of murder, the mandatory minimum non-parole

period to be fixed is 20 years. This raises the question as to what the court is required to do if the application of the reductions scheme would result in a non-parole period less than the mandatory minimum of 20 years. How is that apparent conflict to be resolved?

- [37] Although the legislation prescribes that the mandatory minimum non-parole period in respect of a sentence of life imprisonment imposed for the crime of murder is 20 years, if satisfied that special reasons exist, the court is empowered to fix a period shorter than 20 years. The court is also empowered to fix a period longer than 20 years if satisfied that a longer period is “warranted because of any objective or subjective factors affecting the relative seriousness of the offence”. These powers exist in the context of a legislative prescription that the mandatory minimum non-parole period of 20 years “represents the non-parole period for an offence [murder] at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies”.
- [38] In deciding whether special reasons exist which would justify the fixing of a shorter period than 20 years, the court is directed by s 48(3) to have regard to “the following matters and only those matters”:

- (a) the offence was committed in circumstances in which the victim's conduct or condition substantially mitigated the offender's conduct;
- (b) if the offender pleaded guilty to the charge of the offence—that fact and the circumstances surrounding the plea;
- (c) the degree to which the offender has co-operated in the investigation or prosecution of that or any other offence and the circumstances surrounding, and likely consequences of, any such co-operation.

- [39] The application of the sentence reduction scheme to the mandatory minimum non-parole period of 20 years has been the subject of a number of decisions of the South

Australian Court of Criminal Appeal.¹¹ In summary, some of the relevant points that emerge from the decisions are as follows:

- The mandatory minimum period of 20 years is a “benchmark” or “yardstick” to be applied by the sentencing court, but it is a benchmark specified “for an offence at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies”.
- It is against this purely objective benchmark that the court is then required to undertake the process of considering whether, if all of the subjective and objective factors are taken into account, a longer or shorter non-parole period would otherwise be appropriate.
- Having arrived at a notional non-parole period, the court is then required to consider the operation of the sentence reduction scheme.
- In deciding whether special reasons exist to fix a period less than 20 years, the court must have regard to the fact of, and circumstances surrounding the plea of guilty. However, the entry of the plea of guilty is, in itself, insufficient to establish the existence of special reasons.
- If the statutory minimum of 20 years prevents the court from giving “full effect to the reduction it would otherwise have made on account of the offender’s plea of guilty”, the inability to give effect to such reduction will amount to a special reason to fix a period shorter than the statutory minimum “if the failure to do so would result in a sentence so manifestly disproportionate to all of the circumstances of the case that the case should be treated as an exception to the rule”.¹²
- In determining the percentage reduction of the notional non-parole

¹¹ For example more recently *R v Hallcroft* [2016] SASCFC 137, (2016) 126 SASR 145; *R v Davey* [2017] SASCFC 151; *R v Peet* [2018] SASCFC 91.

¹² *R v Hallcroft* at [70].

period that would otherwise be appropriate, of significance is the operation of s 40(5)(a) which requires the court to consider whether the reduction by the percentage available will be “so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would, or may, affect public confidence in the administration of justice”. Put another way, the court is required to consider whether the end result would be “a non-parole period unacceptably disproportionate to the seriousness of the offending which would not vindicate the dignity of the victims”.¹³

Submissions

- [40] Submissions to the Inquiry were invited from a number of persons and organisations listed in Annexure 1. I received the written responses found in Annexure 3. In addition, I met with Mr Adam Kimber SC, who was the Director of Public Prosecutions (the Director), and with representatives of the Aboriginal Legal Rights Movement, the Bar Association and the Law Society. I consulted the Chief Justice, the Chief Judge of the District Court, the Senior Judge of the Youth Court, the Chief Magistrate and Ms Bronwyn Killmier (Commissioner for Victims' Rights).
- [41] I also met with a number of victims of crime whose family members or friends had been murdered or unlawfully killed in the course of a crime other than murder. I met with a victim whose young children were the subject of serious sexual assaults. These victims have all suffered highly traumatic and devastating experiences. I am grateful to each of them for their assistance. Without exception, they were well informed, polite and helpful. For many of them, media attention has added to their trauma and distress. In their interests I have decided not to name those persons with whom I have spoken,

¹³ *R v Peet* at [90].

but a list of those persons has been provided to the Attorney-General.

- [42] The fact of the Inquiry and an invitation to present submissions was the subject of a notice in *The Advertiser* and the YourSAy website. I received 10 written submissions from members of the public, some of whom expressly stated that they did not wish their identities to be revealed. In these circumstances I have decided not to publish the names of those persons who provided written submissions. Again, a list of those persons has been provided to the Attorney-General.

Submissions from the Public

- [43] A number of the submissions from members of the public were directed to the prevention of crime and the adequacy or otherwise of sentences. As explained earlier in this Report, I have not been asked to inquire into those matters.

- [44] As to reduction of sentences by reason of guilty pleas, in summary the following themes emerged:

- The reductions scheme was introduced for practical reasons with little consideration for victims and their families.
- No reductions should be allowed for pleas of guilty. The legal system is not a supermarket. Offenders must be held accountable.
- Offenders are manipulating the system by bargaining for “rewards”. It is abhorrent that a criminal receives “a very liberal act of clemency” from the very society they have abused merely for co-operating. Community safety is not served by such a “naïve” indulgence.
- 40% is offensive to victims. The maximum should be 10%. Public safety and victims’ rights are “paramount”.
- Large reductions in cases of serious crime are out of touch with community opinions and expectations.

Victims

[45] A number of victims accepted that there is a benefit to the community if offenders can be encouraged to plead guilty. These victims appreciated the basic purpose of the sentence reduction scheme, but during discussions with victims a number of common themes were apparent:

- The reduction scheme leaves victims feeling “devalued”, particularly in the more serious cases and when repeat offenders are involved who appear to be manipulating the system.
- The right of an offender to a reduction by reason of a plea of guilty detracts from the right of victims to know that a court has imposed a just sentence.
- Some offences are too serious to allow any reduction other than a very small percentage.
- In the face of an overwhelming prosecution case, no reduction should be given for a plea of guilty which simply recognises the inevitable result.
- The emphasis in the entire criminal justice system appears to be on the rights of the offender and fairness to the offender, as opposed to the rights of, and fairness to, victims. An entitlement to a reduction by reason of a plea of guilty is another such right in favour of the offender which detracts from the rights of the victim and results in an offender receiving less punishment than the offender deserves.
- Large reductions are not fair. It feels like the offender is getting off. If there is an immediate acknowledgement of guilt, perhaps a small reduction is appropriate, but if an offender takes significant time to acknowledge guilt, no reduction should be granted. A plea at the last

minute should not attract any reduction.

- If an offender faces an overwhelming prosecution case, why should any reduction be granted for entering a plea? It is confusing to victims and to members of the wider community.
- Repeat offenders should not be entitled to any reduction. They are manipulating/playing the system.
- 10% for co-operating in the course of a trial after a plea of guilty is absurd and bizarre.
- Really serious cases are a small percentage of the criminal cases that come before the court. Removing or reducing the reduction available for a plea of guilty would not have a great impact on the efficiency of the criminal justice system.
- The entire reduction scheme is confusing for members of the public. It is confusing for victims to hear a judge determine an appropriate sentence, but then reduce it because of a plea of guilty which is merely of practical assistance.
- Of particular importance to victims is the need to know that offenders receive the appropriate punishment. This fundamental requirement is undermined when a reduction is given for a plea of guilty, particularly when the plea is not entered at the very first opportunity and when it is entered in the face of an overwhelming prosecution case.
- For many victims, resolution without extensive delay or having to give evidence is of significant benefit. To others, the prospect of a delay or giving evidence is preferred to the granting of such large reductions.
- The reduction scheme should only apply to minor offences.

Aboriginal Legal Rights Movement (ALRM)

- [46] The ALRM emphasised that many of their clients were rarely able to plead guilty within the first 4 weeks in order to attract the possibility of a 40% reduction. Too little information is available in that period. Many clients live in remote areas and do not speak English as their first language. Practical problems exist in securing the availability of appropriate interpreters. Mental health issues and difficulty in understanding concepts and procedures are not uncommon.
- [47] For these reasons, more time is needed to qualify for the 40% reduction. Alternatively a court should possess a discretion to allow the full reduction in special circumstances notwithstanding that it was not entered in the prescribed time period.
- [48] Generally speaking, from the perspective of ALRM and their particular clients, the timelines involved at each stage are too tight.

Bar Association

- [49] Representatives of the Bar Association were of the view that the current system is working well. Acknowledging that the reduction of 40% is a big reduction, nevertheless they emphasised that only a large reduction of that type provides sufficient incentive to enter a plea of guilty at the very early stage when little is known about the strength of the prosecution case.
- [50] Under the latest major indictable reforms, scant information is provided to an accused person in the first 4 weeks. This makes the availability of a 40% reduction in that period even more important.
- [51] If the 40% figure was reduced, in the view of the representatives the effect on the court lists could be catastrophic. Many of those who would otherwise plead would wait and take their chances.

Law Society

- [52] Representatives of the Law Society were also of the view that the reduction of 40% is an important factor and is working well. However, they recognised that a disconnect between the system which is working and community expectations or perceptions is undesirable.
- [53] The procedures introduced in the major indictable reform package are causing difficulties when an early plea is entered. SA Police still insist on obtaining declarations and gathering other material, and there is no place in the existing system for a statement of agreed facts upon which an offender can be committed for sentence.
- [54] In essence, the existence of the 40% reduction is the only way to persuade many offenders to plead guilty at the earliest possible opportunity. In the absence of that percentage reduction, many offenders will take the view that they might as well wait and take their chances.

Judiciary

- [55] Members of the judiciary did not express any personal opinions with respect to the operation of the sentence reduction scheme. This was an entirely proper approach. The judiciary was concerned to provide accurate statistical material for the assistance of the Inquiry.
- [56] In addition, the judiciary identified a practical problem when offenders are sentenced for multiple offences. This practical issue is discussed later in the Report.

Written Submissions

- [57] The written submissions, other than those from members of the public to which I have referred, are in Annexure 3. I set out below a summary of the major points made and

issues raised.

Professors Mack and Roach Anleu

[58] Professors Kathy Mack and Sharyn Roach Anleu provided a written submission in which they expressed personal views that the current system is wrong in both principle and practice. Following extensive research, the authors produced a major report in 1995 concerning the practices associated with pleading guilty to crimes in Australian courts¹⁴. The authors note that the reductions scheme is “justified primarily on the basis that it will encourage guilty pleas, especially early pleas”, but summarise their views in the following passage taken from their previous publication:

“It is our conclusion that the sentence reduction for a guilty plea as it currently operates in Australia is wrong in principle and in practice and should not be supported. When a judge advises an accused person of the availability of the sentence discount, this judicial offer of a lesser sentence in return for a plea of guilty is in effect, a plea bargain in its crudest form. It puts an inappropriate burden on the accused’s choice to plead guilty, undermines proper sentencing principles, risks inducing a guilty plea from the innocent, undermines judicial neutrality and independence, and does not directly address problems of time and delay which motivated its introduction by the courts.”

[59] In the view of the authors, the reductions scheme “necessarily undercuts the integrity of sentencing in individual cases and as an aspect of public policy, as it is premised on giving an admitted offender a substantially lesser penalty than the sentencing judge identifies as appropriate”. In their view, this is wrong in principle and affects public confidence in the legitimacy of the sentencing process and outcomes. Notwithstanding the discretion of the court not to impose a full reduction if the result would be “so disproportionate to the seriousness of the offence or so inappropriate in the case of

¹⁴ Kathy Mack and Sharon Roach Anleu, *Pleading Guilty: Issues and Practices* (AIJA, 1995).

that particular defendant, that it would, or may, affect public confidence in the administration of justice”, the authors maintain that the exception does not affect “the fundamental problem of imposing a lesser sentence than is deserved”. They suggest that a “structured, transparent sentence indication” practice is a preferable course to the current sentence reduction scheme.

[60] The authors conclude:

“As the Terms of Reference recognise, the process of sentencing entails multiple goals which may be in conflict. Sentence discounts believed to generate pressure for an early plea and to discourage day of trial pleas necessarily cut against the goal of sentences that adequately reflect criminality.

Different problems need different solutions. Any changes to the sentence discount scheme must be very clear about the desired goals, the priority among them, and whether or how the sentence discount may or may not achieve those goals.

In our view, the primary goal must be to achieve sentences that accurately reflect the criminality of the admitted conduct and the antecedents of the offender, regardless of timing of the guilty plea. It is possible to appropriately and effectively encourage early resolution, using strategies that do not undermine the central principles of sentencing. Processes should be implemented which will enable ‘those persons who will eventually plead guilty, because conviction is inevitable in light of the law and the facts, to make that decision as early as possible.’ Such reforms will also further other important goals such as assisting victims or witnesses who are especially vulnerable to avoid the additional trauma of delay and the trial itself, limit guilty pleas on or shortly before the day of trial, and contribute to reduction in overall trial lists.”

(footnote omitted)

Legal Services Commission

[61] The Director of the Legal Services Commission, Ms Gabrielle Canny, has reported that the Commission adheres to the view expressed in 2015 that the reductions scheme

“can be an effective means of reducing delays in the court system and achieving timely justice for defendants”. From the outset the Commission has supported the scheme through funding arrangements to support practitioners preparing matters for early guilty pleas. When the major indictable reform package was enacted with associated changes to the sentence reduction scheme, the Commission introduced a new cost scale item to provide remuneration to practitioners for preparing early guilty pleas in major indictable matters. As at 30 June 2018 there were 169 successful claims for payment of the new cost scale item, but Ms Canny observes that the number of claims has been lower than anticipated. In Ms Canny’s view the low numbers might reflect the difficulties in attempting to properly advise a defendant in the absence of the full set of declarations. To that I would add that the procedural changes brought about by the major indictable reform package have had the effect of delaying many matters, an issue which is discussed later in this Report.

- [62] The Commission has produced statistics based upon certificates completed by practitioners at the conclusion of legally funded matters. Ms Canny observes that the data demonstrates that 30% is the most commonly received discount. She suggests that this reflects the provision by the prosecution of sufficient particulars to enable proper advice to be given in the period after the initial 4 weeks has expired.

Commissioner for Children and Young People

- [63] Ms Helen Connolly, the Commissioner for Children and Young People, expressed the view in her written submission that while parts of the reduction scheme provide an important incentive for co-operation by adults, “it is not appropriate for children and young people and breaches Article 40 of the United Nations Convention on the Rights of the Child (UNCRC). The written submission continued:

“Therefore, I think this is an opportune time to reconsider sentencing laws in respect to children and young people and ensure that the courts use diversionary measures

consistent to the UNCRC instead of “discount schemes” or anything similar. Any review of sentencing practices for children and young people should consider their unique developmental level. Children and young people face issues of competency, not only in their actions but also in the processes that they may become part of. They are a particularly vulnerable cohort and may be influenced by others, fear and a lack of understanding more so than other offenders. Therefore, they require a specific approach that should be unique to them facilitating their participation and rehabilitation, without soliciting their involvement in any confessional process that they may not be able to fully comprehend.”

[64] Ms Connolly attached to her submission a document headed “Feedback on Sentencing Discount Scheme Review” which emphasised that sentencing laws should distinguish between adults and children. In summary, the following points were made:

- “Discounts that the court may include should be consistent with children’s rights and reflective of their capacity to understand and engage”.
- “Discounts should as such be different for children and young people who are unlikely to be able to think with the same foresight or experience as adults”.
- At best, sentencing reductions should not be used, but if they are used safeguards should be in place to “prevent their potential use in compelling children and young people to confess guilt”.
- Article 40 of the UNCRC expressly states that children should “not be compelled to give testimony or to confess guilt”. The promise of a reward for admitting guilt can be considered a form of compelling a child to confess guilt.
- If reductions schemes “must be used for children and young people they could for example be specifically constructed to expedite the reintegration of young offenders back into society and not be tied to

early guilty pleas”.

Commissioner for Victims’ Rights

- [65] Ms Bronwyn Killmier, the Commissioner for Victims’ Rights, acknowledged that the task facing judicial officers in achieving a balance between the benefit to the community of an early guilty plea, and the need to ensure that an offender is adequately punished and held accountable to the community for the offending behaviour, is both difficult and complex. She observed that while victims “generally understand and recognise the aims of the sentence discount scheme”, many victims are left “frustrated and disenfranchised”. At the heart of views expressed by many victims to Ms Killmier is the belief that the sentencing reductions “are indicative of an unbalanced criminal justice system where offenders have more rights and victims are not fully recognised.”
- [66] Ms Killmier observed that the sentence reduction scheme “assumes that it is in the victim’s interest to avoid a trial”. She noted, however, that some victims prefer to undergo the ordeal of a court appearance rather than seeing an offender receive a light sentence as a result of a reduction for a plea of guilty.
- [67] From her consultation with victims, Ms Killmier identified a number of common themes:
- While generally supportive of a sentence reduction scheme, significant changes are required.
 - There is a lack of knowledge, advice and consultation about the sentence reduction scheme and many victims are not aware of the scheme until the time of sentencing or just prior to sentencing.
 - The reduction of 40% is too large. The maximum should be 25%.
 - The Current Scheme ties the hands of judges and should be abolished leaving judicial officers to apply their discretion.

- Offenders who genuinely accept responsibility and seek to rehabilitate themselves should be rewarded. However, offenders should be required to demonstrate genuine remorse rather than courts simply believing submissions advanced on behalf of the offender.¹⁵
- An offender who pleads guilty late in the process should not be entitled to any reduction.¹⁶
- An offender who pleads guilty, but disputes the facts, should not be entitled to any reduction by reason of the plea.
- The most serious offences should be exempt from the sentence reduction scheme.
- An offender who pleads guilty in the face of overwhelming prosecution evidence should not be entitled to a reduction.
- Recidivist offenders should not be entitled to any reduction by reason of a plea of guilty. Alternatively, the amount of reduction available should be significantly reduced. The system should reflect the unwillingness of a recidivist offender to change behaviour in line with community expectations.
- Offenders unwilling or incapable of controlling sexual instincts should be excluded.
- From the perspective of victims, reductions for pleas of guilty which are given in the context of earlier plea-bargaining result in “discount built upon an existing discount”. In this way the sentences fail to adequately reflect the gravity of the criminal offending.
- An offender who fails to disclose the location of a body at the earliest

¹⁵ “Victims were upset that immediately after the victim impact statement was given, the defence argued for their client, and in doing so, the victims’ views were diminished.”

¹⁶ Some victims believe that offenders who plead guilty late in the process should be penalised for the delay.

opportunity should not be entitled to any reduction by reason of a plea of guilty.

- The operation of the sentence reduction scheme should be transparent. Judicial officers should outline in their sentencing remarks the extent of the reduction and why that particular reduction has been given.
- Victims should be consulted about both plea-bargaining and sentence reductions. Provided a victim consents, “the prosecution should record and report to the court on whether or not the victim agreed to the plea-bargaining or sentence reduction.” While a court would not be obliged to act on the view of a victim, this process would acknowledge the participation of the victim more fully in the sentencing proceedings. It would also amount to an acknowledgement that the views of the victim had been considered (and sentencing courts should acknowledge the views of the victim in sentencing remarks). In this context the timing of the presentation of a victim impact statement should be considered “as many victims anguished over their statement and reading it, but felt it was devalued by the defence submissions immediately after the readings.”
- Victims believe “offenders are being rewarded for simply telling the truth and admitting their guilt.”

Commonwealth Director of Public Prosecutions

[68] The Commonwealth Director of Public Prosecutions advised that the Director considers the sentence reduction scheme does not apply to sentencing of federal offenders in South Australia.

Homicide Victims Support Group of SA

- [69] The Homicide Victims Support Group submitted that the maximum allowable reduction for early guilty pleas to the crimes of manslaughter and murder should be reduced. In the view of the members, 40% is too high for this type of offending.

South Australia Police

- [70] Mr Grant Stevens, the Commissioner of Police, wrote that little of substance has altered in the operation of the reduction scheme in the Magistrates Court since the 2015 Review. Mr Stevens acknowledged that the success or failure of the scheme “rests on a delicate balance between efficient disposition of cases and adequate punishment”. In the view of the Commissioner, there is a general sense within SA Police that the Current Scheme has brought benefits of efficiency to SA Police and, by extension, to the courts.

Director of Public Prosecutions

- [71] The Director pointed out that the Sentencing Act only came into operation on 30 April 2018, and the new provisions concerning sentence reduction only apply in relation to proceedings commenced under the major indictable reforms which came into operation on 5 March 2018. In these circumstances there are a limited number of cases in which offenders have been sentenced under the new provisions. However, the Director believes that overall trends can be identified.
- [72] The Director continues to support the sentence reduction scheme “in principle and in practice” and believes that the scheme has “contributed to an increase in effective and early resolution of matters, as well as assisting with transparency and certainty in the sentencing process”.
- [73] Statistics provided by the Director contain a helpful overview of the periods in which

pleas have been entered. For example, in metropolitan courts, from 1 May 2015 to 31 December 2015, 7.25% of matters were resolved by a plea of guilty in the first 4 week period. Between 1 January 2016 to 31 December 2016, the figure dropped to 4.14%. A further drop to 2.53% occurred in the 7 month period 1 January 2017 to 31 July 2017.

[74] In metropolitan courts, between the expiry of the first 4 weeks and committal, in the period 1 May - 31 December 2015, 51.88% were resolved by plea. That figure increased to 63.85% between 1 January 2016 and 31 December 2016. A further small increase to 66.84% occurred between 1 January 2017 and 31 July 2017.

[75] The Director has concluded that the trend upon which he commented in 2015 has continued in that the number of pleas entered between committal and trial has decreased, "with an apparently corresponding increase in the number of pleas being entered into prior to committal". This also applies to circuit and country courts, although the percentage of cases resolved by plea prior to committal is lower in country and circuit courts than in metropolitan courts. This differential existed in 2015.

[76] Appendix C to the Director's submission provides statistics for the combined operation of metropolitan and circuit/country courts for the period 1 January 2018 to 30 June 2018. In that period 3.28% were resolved in the first 4 weeks and 57.08% after the expiration of 4 weeks until committal. In the view of the Director, overall the statistics indicate that the previous trend has continued across all courts.

[77] Referring to the 2015 Report, pages 27-29, the Director expressed the following overall view:

"I agree that it can most likely be concluded that the increase in the number of pleas at earlier stages of proceedings indicates that more matters are being dealt with efficiently in terms of their progression through the committal processes. I observe, though do so without any data beyond what is extracted above, that the larger number of pleas entered prior to committal may indicate that, correspondingly, matters are spending an extended time in the committal process. If a longer committal process allows more fulsome negotiation and resolution then I do not

necessarily regard that as a problem.”

- [78] In the context of providing opportunities for negotiation between the Director and defendant, the Director commented on the addition of s 110(3) of the Criminal Procedure Act. As mentioned, if the defendant advises the court at the committal appearance that negotiations are taking place with the prosecution, at any time in the period of 4 weeks after the committal appearance, the defendant can have the matter called on the purpose of entering a guilty plea in the Magistrates Court. If that procedure is followed, the defendant will be entitled to a discount of up to 30% rather than the lower percentage of 20% which ordinarily applies to a plea entered after the committal appearance. The Director supports this amendment as it is an additional measure which is capable of encouraging early and effective resolution of matters.
- [79] Other issues raised by the Director include the “operational consequences” of the inability of a magistrate to accept a guilty plea to an offence that is not a common law alternative to the offence charged on the Information. A magistrate does not have the power to accept a plea of guilty to an offence which is only a statutory alternative to the offence charged in the Information¹⁷.
- [80] By way of contrast, if the offence to which the offender eventually pleads guilty is a common law alternative to the original offence charged, time runs from the first appearance in the Magistrates Court because, at any time, a magistrate could have accepted a plea of guilty to that common law alternative.
- [81] In the District or Supreme Court, if the Director files a new Information containing a statutory alternative to the original charge, and the offender pleads guilty to that statutory alternative, for the purposes of time running in relation to the available reduction, time starts again. In that situation, notwithstanding that the offender did not enter a plea until many months after the first appearance in the Magistrates Court, if the plea was entered within 4 weeks of the first appearance on the new Information,

¹⁷ *R v Muldoon* [2015] 123 SASR 1; *R v Brusnahan* [2017] SASFC 117.

the offender would be entitled to a reduction of up to 40%.

[82] In 2015 I expressed the view that there was force in the submission of the Director that permitting the full reduction to be available following a late plea to an alternative charge tended to undermine the purpose of the legislative scheme and should be discouraged. I referred to the ability of a defendant, from the outset, to offer to plead guilty to a charge different from the charge laid by the prosecution, regardless of whether the different offence is an automatic alternative to the offence charged or not. I observed that permitting a full reduction in this situation discouraged proactive involvement from the early stage and encouraged a defendant to keep the options open with the view to negotiating a plea to a different charge later in the proceedings. I recommended that consideration be given to amending the legislation to remove this anomaly.

[83] In his 2018 submission, the Director noted that the same difficulty exists when a circumstance of aggravation, originally charged on the Information, is deleted and replaced with a different circumstance of aggravation. In these circumstances time starts again.

[84] In this context, s 40(5)(c) of the Sentencing Act did not exist in 2015. It provides:

(5) In determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made within a particular period, a court must have regard to such of the following as may be relevant:

...

(c) whether the defendant was initially charged with a different offence in respect of the same conduct and whether (and at what stage in the proceedings) negotiations occurred with the prosecution in relation to the offence charged;

[85] The Director expects that this provision will “go some way to incorporate more flexibility into assessing whether or not the defendant ought to receive the full discount”.

[86] In 2015 the Director referred to decisions which, in substance, directed sentencing courts to grant the maximum reduction permitted unless there was “good reason” for giving less than the maximum¹⁸. More recently Kourakis CJ, with whom Stanley and Hinton JJ agreed, noted that the Sentencing Act does not “mandate” that the maximum reduction available be given, but observed that the utilitarian purpose of the scheme will not be achieved unless there is a “reasonable degree of certainty that a reduction approaching the maximum will be made”. His Honour continued:

“In particular, the statutory purpose would be substantially undermined unless, on pleading guilty in one period, a defendant could be reasonably confident that the reduction will be greater than the maximum reduction available for the subsequent statutory period.

Of course the statutory discretion must be exercised on the facts of each case.

However, in order to satisfy the statutory purpose, which is in turn dependent on generating a reasonable degree of certainty in the generality of cases, one would expect there to be significant countervailing circumstances before a defendant will be denied the substantial part of the available reduction.”¹⁹

[87] In this context, the Director noted in his 2018 submission that a degree of flexibility is now acknowledged as appropriate, particularly in the context of “rounding” the reduction. However, “rounding” does not address a concern which the Director expressed in 2015, and repeated in his 2018 submission, that the strength of the prosecution case and the factors of remorse and contrition now carry less weight in deciding the amount of reductions. As the Director has said in his 2018 submission, his concern in 2015 was “the potential unfairness to defendants who are truly remorseful and contrite and who might receive the same discount as those who are not”.

[88] Commenting on the “rounding” authorities, in his 2018 submission the Director said:

“I note that these cases do not appear to go so far as to identify that, for example,

¹⁸ *R v Dwyer* [2015] 121 SASR 587; *R v Capaldo* [2015] SASCF 56; *R v Stavreas* [2015] SASCF 68.

¹⁹ *R v Davey* [2017] SASCF 151 at [46] - [48].

considerations of the lack of any contrition or remorse on the defendant's part or the strength of the prosecution case are bases for awarding less than the maximum. In my view, this should be widely accepted as the appropriate approach. Further, I can say that I have had at least one discussion with a victim who was surprised that an offender caught committing offences on video could receive the maximum discounts available, but that I was unable to appeal the discounts given."

[89] In the context of reasons for departing from the maximum reduction available, the Director canvassed two circumstances in which the courts have awarded substantially less than the maximum reduction:

- in applying the statutory provision which allows it, where any discount would be so inappropriate in the circumstances to (in the words of s10C(4)(a) of the repealed *Criminal Law (Sentencing) Act 1988*) "shock the public conscience", or (in the words of s40(5)(a) of the *Sentencing Act 2017*) "affect public confidence in the administration of justice "; and
- where the defendant has failed to genuinely engage in negotiations. (I assume this has been either in accordance with section 10C(4)(b) of the repealed *Criminal Law (Sentencing) Act 1988*, or by the court having "regard to any other factor or principle the court thinks relevant": s10C(4)).

[90] The approach of the sentencing and appellate courts to these questions is discussed at [192] - [225].

[91] In his 2018 submission, the Director has raised concerns about the practical operation of s 41(2) of the Sentencing Act. The judiciary raised the same concern. The submission succinctly and helpfully explains the situation:

Section 41 of the *Sentencing Act 2017* introduces into the sentencing legislation for the first time a process that the sentencing court must follow when determining and applying the applicable sentencing discount.

Section 41 says:

41 - Application of sentencing reductions

(1) For the purpose of applying section 37, 38, 39 or 40 in sentencing a defendant for

a particular offence, the sentencing court must-

- (a) first determine the sentence that the court would apply but for the existence of those provisions; and
 - (b) then determine the maximum percentage reduction that is applicable to the sentencing in accordance with those provisions; and
 - (c) then determine the percentage reduction that is, in the opinion of the court, appropriate in the particular case (being not more than the maximum percentage determined in accordance with paragraph (b)); and
 - (d) finally, apply the percentage reduction determined in accordance with paragraph (c) to the sentence determined in accordance with paragraph (a).
- (2) A sentencing court that wants to apply section 26 to sentence a defendant to a single penalty for more than 1 offence must, if the court would otherwise be required to apply section 37, 38, 39 or 40 in sentencing the defendant for any 1 or more of those offences (the **discounted offences**), determine, in accordance with subsection (1), the appropriate sentence for each discounted offence before applying section 26 to determine the total sentence (and for the purposes of section 26, a reference to the maximum penalty that could be imposed in respect of an offence will, in the case of each discounted offence, be a reference to the sentence determined, in accordance with subsection (1), for that discounted offence).
- (3) Nothing in this Subdivision affects the operation of sections 23, 24 or 25.

I understand section 41(1) to incorporate into the Act what fell from the Court of Criminal Appeal in *R v Wakefield* (2015) 121 SASR 569 at paragraph [38], as to the correct approach for the sentencing court when imposing sentencing in circumstances where different applicable discounts apply to different offences. Further, that section 41(2) might be designed to incorporate what the CCA said in that case at paragraph [39], about the sentencing court's approach in those circumstances and where the court seeks also to utilise section 26 (previously s 18A) to impose a global sentence.

However, I am concerned that compliance with section 41(2) will mean the court

will be faced with an overly complex task, which will involve a large degree of artificiality, and that there is considerable scope for the sentencing court to fall into error.

Section 41(2) requires the sentencing court, in circumstances where it is sentencing for more than 1 offence and seeks to utilise section 26 to impose a global penalty, to follow the process provided for in section 41(1) with respect to determining the applicable discount for *each offence*.

My concern is the terms of section 41(2) demonstrate that regard has not been had to what the Court of Criminal Appeal said subsequently in *R v Donald; R v Pitt; R v Whitaker* (2016) 26 SASR 276, about how *R v Wakefield* was to be understood to apply in cases where there are multiple offences. In such cases, *Donald* being one, identifying sentences for all offences will promote error.

In *Donald*, the sentencing court approached the task of sentencing each of the three defendants for multiple drug offences by allocating a notional sentence to each offence and then applying the appropriate discount to each notional sentence, and finally accumulating the notional sentences. In relation to two of the defendants, different maximum discounts applied to different offences. The Court of Criminal Appeal agreed with the applicants that, in such circumstances, the "approach rendered meaningless the statutory discount to which each applicant was entitled. The utility of employing section 18A was also lost. Further it is not clear how [the sentencing judge] applied concurrency and totality." (at [45]).

The Court determined that the better approach is one that enables offences attracting the same discount to be "grouped", with a single notional sentence, or sentence, being able to be identified for each.

With respect, in my view the approach mandated by section 41(2) will have the same result in cases involving multiple offences. The risk of error will be amplified, and the process will, as the Court said in *Donald*, lead to an "air of unreality" (at [31]). In my opinion the law in this area is currently clear, change in the form of section 41(2) will serve no purpose and, indeed, will be

counterproductive.

I believe the "better approach" identified by the Court of Criminal Appeal in *Donald* is one that should be adopted. However, on my reading it is precluded by section 41(2).

[92] The operation of s 41(2) is discussed in [261] - [263].

Sentence Reduction Scheme - Rationale

[93] The criminal justice system, of which the power granted to judicial officers to impose punishment on persons who offend against the criminal law is a central feature, exists to serve the interests of the community. In order for the system to serve the community interests, and to operate with the confidence and support of the community, in determining sentences judicial officers must properly apply the law and impose sentences which appropriately reflect the criminality of the offender's conduct, considered in the light of matters personal to the offender. Of course, the criminality of the conduct includes the effects of that conduct on direct and indirect victims.

[94] Professors Mack and Roach Anleu have correctly observed that "principled sentencing is important to the accused, to victims and to the community at large". They argue that a reduction for a guilty plea on the basis that it serves a utilitarian purpose is in conflict with the fundamental principle that the sentence should be based upon the criminal conduct and matters personal to the offender.²⁰ The authors contend:

"When punishment is varied substantially for reasons unrelated to the conduct giving rise to the right to punish, confidence in the criminal justice system can be lost. There is a risk that the process will be seen simply as a bargain unrelated to the defendants or their conduct." (Footnotes omitted)²¹

[95] In 1979 a South Australian Full Court of five judges was convened to provide

²⁰ Kathy Mack and Sharyn Roach Anleu; *Sentencing Discount for a Guilty Plea: Time for a New Look*; (1997) 1(2) Flinders Journal of Law Reform 123.

²¹ Refers to the same article 132 and 133.

authorative determination as to the principles governing the relevance of a plea of guilty in sentencing. The leading judgment of the majority was given by King CJ. His Honour noted that it had been the practice throughout the professional lives of the members of the bench for counsel for offenders to submit, as a factor attracting leniency, that the offender had pleaded guilty. His Honour observed that it was “necessary to consider the basis in principle for this practice of the courts”.²²

[96] King CJ explained that an offender’s remorse, contrition or repentance had “always been regarded as a matter making for leniency”, and that the plea of guilty in some cases might be an indication of “repentance”. His Honour noted that at times the plea of guilty as a mitigating factor had “been subsumed under the heading of remorse, contrition or repentance”.

[97] The Chief Justice then dealt with two lines of authority which, to some extent, were in conflict. One line of authority considered that only a plea of guilty which proceeded from contrition, repentance or remorse could properly be regarded as a mitigating factor. Another group of authorities considered that the plea of guilty, in itself, was clearly in the public interest and an offender was entitled to a degree of credit on that basis, regardless of the motivation for the plea.

[98] Ultimately King CJ enunciated the following propositions²³:

- (1) A plea of guilty may be taken into account in mitigation of sentence where-
 - (a) it results from genuine remorse, repentance or contrition, or
 - (b) it results from a willingness to co-operate in the administration of justice by saving the expense and inconvenience of a trial, or the necessity of witnesses giving evidence, or results from some other consideration which is in the public interest; notwithstanding that the motive, or one of the motives, for such co-operation may be a desire to earn leniency, and where to allow the plea a mitigatory effect would be conducive to the public purposes which the

²² *The Queen v Shannon* [1979] 21 SASR 442 at 443.

²³ At 452.

sentencing judge is seeking to achieve.

- (2) A plea of guilty is not of itself a matter of mitigation where it does not result from any of the above motives, but only from a recognition of the inevitable, or is entered as the means of inducing the prosecution not to proceed with a more serious charge.
- (3) In cases falling within (1), the judge is not bound to make a reduction, but should consider the plea with all the other relevant factors in arriving at a proper sentence.
- (4) In assessing the weight to be attached to a plea of guilty as a factor making for leniency, it is proper for the judge to bear in mind that it is important to the administration of justice that guilty persons should not cause expense to the public and delay to other cases by putting forward false stories and on the basis of such false stories contesting the charges against them.
- (5) The above propositions are not to be taken as weakening in any way the principle that there must be no increase in the sentence which is appropriate to the crime because the offender has contested the charge.

[99] In view of subsequent developments, it is appropriate to note the following features from the propositions laid down by the Chief Justice:

- In proposition (2), King CJ held that the plea of guilty was not, of itself, a matter of mitigation if it did not result from the motives identified in proposition (1) related to contrition and a willingness to co-operate in the administration of justice. If the plea emanated “only from a recognition of the inevitable, or [was] entered as the means of inducing the prosecution not to proceed with a more serious charge”, the plea itself was not a matter of mitigation.
- Even in cases where the plea resulted from genuine contrition or a willingness to co-operate etc, the sentencing judge was not bound to make a reduction.

[100] Although King CJ connected the benefit of a plea to the motivation for entering the

plea, in the course of his judgment his Honour identified the increasing importance of those aspects of the public interest concerned with minimising the ordeal for victims and improving the efficiency of the criminal justice system.²⁴

The public interest in avoiding or minimizing the ordeal for victims of sexual assault involved in giving evidence has been the subject of much public discussion. This has resulted in legislation in this State designed to avoid or reduce embarrassment and unnecessary intrusion into the private lives of victims (*Evidence Act Amendment Act, 1976*, inserting s. 34i into the principal Act). The public interest in saving the expense of trial has been increased by the pressures on the legal aid system. The resources available for legal aid are severely strained by the number and length of criminal trials. In many cases these trials and the consequent depletion of legal aid funds are brought about by guilty persons contesting their guilt by means of false stories. The volume of criminal business has placed the court system under stress and has resulted in unfortunate delays in bringing accused persons to trial. Congestion is greatly contributed to by offenders who put forward false stories and make use of legal aid in an effort to escape conviction. The growth in the importance of these factors points, in my opinion, to the desirability of providing some encouragement to guilty persons to admit their guilt.

[101] Nearly 23 years after the decision in *Shannon*, another bench of five judges considered a number of issues, including the practice of giving reductions following pleas of guilty.²⁵ The majority judgment of 4 judges, with which the fifth judge agreed, referred to the remarks of Kirby J in *Cameron*²⁶ that:

“The true foundation for the discount for a plea of guilty is not a reward for remorse or its anticipated consequences but acceptance that it is in the public interest to provide the discount.”

[102] As to the “public interest”, Kirby J said:

“The main features of the public interest, relevant to the discount for a plea of guilty,

²⁴ At 448.

²⁵ *R v Place* (2002) 81 SASR 395.

²⁶ *Cameron v The Queen* (2002) 209 CLR 339 at [65].

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 provision of judicial and court facilities; prosecutorial operations; supply of legal aid to the accused person; witness fees; and the fees paid, and the inconvenience caused, to any jurors summonsed to perform jury service. Even a plea at a late stage, indeed even one on the date of trial or during a trial, may, to some extent, involve savings of all these kinds."

[103] The majority in *Place* observed that the remarks of Kirby J concerning the public interest echoed the "theme of the judgment of King CJ in *Shannon*". After referring to the judgment of King CJ, the majority said:²⁷

"The issue of the rationale was not the subject of submissions. We tend to favour the views expressed by Kirby J and King CJ that, in the absence of subjective criteria such as contrition, the sufficient rationale is found in the public interest based upon 'purely utilitarian' considerations. The considerations to which Kirby J and King CJ refer are compelling. However, it is not necessary to decide this issue."

[104] Over time the law moved to take into account in a meaningful way the increasing importance to the public interest of practical considerations related to the efficiency of the criminal justice system. Ultimately, the 2013 sentence reduction scheme was enacted. In the second reading speech on 11 July 2012, the Deputy Premier stated plainly that the main objective of the legislation was to "improve the operation and effectiveness of the criminal justice system by reducing current delays and backlogs in cases coming to trial". The legislation sought to achieve this utilitarian objective through encouragement to offenders to plead guilty at the earliest possible time.

[105] In March 2018 the Tasmania Sentencing Advisory Council released a very helpful consultation paper which the Council described as providing "an overview of the current approach taken to reduction of sentence for a guilty plea in Tasmania and

²⁷ *R v Place* at [78].

examines legislative approaches to sentencing discounts for pleas of guilty in other Australian jurisdictions and comparable international jurisdictions: *Statutory Sentencing Discounts for pleas of guilty: Consultation Paper*.” That paper is Annexure 4 to this Report.

[106] The Council described the shift from earlier cases to allow reductions for pleas regardless of motivation, as a “paradigm shift”.²⁸ It is apparent that some members of the community, including victims and a number of authors/commentators, do not support this shift. However, it has occurred, and it must be recognised that in addition to the public interest in ensuring that offenders are appropriately punished, the interests of the community also include economic considerations. The public interest includes interest in an efficient criminal justice system which is fair, not only to an accused, but also to victims and witnesses. To this end, encouragement to offenders to plead guilty at an early stage in proceedings is a legitimate objective.

[107] It is not uncommon for tension to exist between different aspects of the public interest. It is a matter of achieving the appropriate balance between those competing interests. This balance necessarily involves a compromise. Hence the Term of Reference that I inquire into, and report to the Attorney-General, on whether the Current Scheme has achieved an appropriate balance between the benefit to the community of an early guilty plea and the need to ensure that an offender is adequately punished for offending behaviour.

Issues - Summary

[108] In 2015, the Review was conducted pursuant to Schedule 1 of the *Sentencing Act 1988*. Schedule 1 required a report as to the effect, if any, that the operation of the

²⁸ Sentencing Advisory Council: *Statutory Sentencing Discounts for Pleas of Guilty: Consultation Paper*; March 2018 at [1.3.1]. Available on the Sentencing Council's website at www.sentencingcouncil.tas.gov.au.

2013 sentence reduction scheme had, in its two years of operation, on the issues of transparency in respect of sentences and improvement in the operation and effectiveness of the criminal justice system. I concluded that the scheme had a “significant impact on the number of guilty pleas entered in respect of major indictable matters at an early stage of the proceedings”. Further, speaking generally, the increase in the number of early pleas was improving the operation and effectiveness of the criminal justice system simply because more pleas of guilty were being entered or indicated at earlier stages of the procedures. In addition, the scheme was providing transparency with respect to reductions allowed in recognition of pleas of guilty. However, at that time the increase in the number of early pleas had not produced a flow-on effect to the District Court.

[109] The current Inquiry is occurring after the commencement of the major indictable reforms in March 2018 and the subsequent changes to the Sentencing Act which commenced in April 2018. Against the background of the 2013 Scheme which was reviewed in 2015, I am asked to consider whether, in comparison to the 2013 Scheme, the Current Scheme has improved the operation and effectiveness of the criminal justice system and provided transparency with respect to sentences.

[110] Significantly, the Terms of Reference direct me to inquire whether or not the Current Scheme “has achieved the appropriate balance between the benefit to the community of an early guilty plea by a defendant and the need to ensure that a defendant is adequately punished for the offending behaviour and held accountable to the community for the offending behaviour”. In this context I am required to consider whether factors listed in ss 37(3), 38(2), 39(4), 40(5), and 43(5) of the Sentencing Act are “sufficient so as to ensure that balance”.

[111] Underpinning the entire operation of the criminal justice system is the fundamental requirement that the system serve the public interest. Bearing in mind that critical requirement, and having regard to the Terms of Reference which include a direction that I inquire into and report concerning the operation of the scheme generally, in very

broad terms the primary issues that arise for consideration can be summarised as follows:

1. Is there a basis for concluding that the Current Scheme is not meeting community expectations and, if so, in what way? Is the scheme generally, or in particular aspects, a source of disquiet among reasonably minded members of the community?
2. How is the Current Scheme working in practice? Is it achieving the purpose of improving the operation and effectiveness of the criminal justice system? In this context, has any increase in the number of pleas entered before committal for trial had any positive flow-on effect in the Supreme and District Courts? If not, how can this be improved?
3. Is there a case for wholesale change? If so, is there a viable alternative? If not, to what extent are changes required or desirable to improve the system, assuage community concerns or align the scheme more closely with community expectations?
4. Are all or any of the current maximum reductions excessive, either generally or in particular circumstances. For example, should a reduction of 40% be available only for a plea at the very first opportunity which is accompanied by valuable co-operation with the authorities in connection with other criminal activities? Are all or any of the percentage reductions too high in cases of serious crimes of violence or commission of serious crimes by repeat offenders?
5. Would a lowering of all or any of the percentage reductions reduce the effectiveness of the sentence reduction scheme?
6. Are there aspects of the scheme, as interpreted by the court, which should be changed in any way? For example:
 - Are time periods too tight?
 - Have the changes brought about as part of the major indictable

reform package had any impact and, if so, are any amendments required?

- What role, if any, should factors such as contrition and the strength of the Crown case play in assessing the amount of the reduction?
- Is the current interpretation as to entitlement to the maximum reduction a matter of community concern? In this context, what is the effect, if any, of s 40(5)? In particular, is s 40(5)(a), which requires the court to consider whether the reduction by the percentage contemplated “would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would, or may, affect public confidence in the administration of justice”, operating effectively?

7. Are there practical issues which require attention? For example, does the operation of s 41 with respect to sentencing for multiple offences cause difficulty, and is the inability of a magistrate to take a plea to an offence which is only a statutory alternative to the offence charged on the information an issue which should be addressed?

[112] The issues I have listed are not intended to provide an exhaustive list of matters that require consideration. They are intended to highlight matters of importance, in association with which numerous other issues arise.

Community Expectations/Concerns

[113] Prior to the announcement of this Inquiry, a number of traumatic and distressing criminal cases gave rise to significant publicity, including publicity adverse to aspects

of the sentence reduction scheme. In announcing the Review, the Attorney-General acknowledged the existence of community concerns regarding large reduction of sentences being given to offenders by reason of early guilty pleas. As one section of our community, and an important section in the context of the criminal justice system, victims of crime are undoubtedly experiencing significant disquiet, and at times anger, as a consequence of such reductions. From the perspective of victims, the ranges of reductions potentially available are far too high generally. In particular, a significant number of victims believe that the size of reductions should be reduced dramatically in the case of more serious offences causing death or physical harm; in the face of an overwhelming prosecution case; and when crimes are committed by repeat offenders.

[114] The small number of submissions received from members of the public, other than victims, may or may not represent the views of the majority of reasonably minded members of the wider community. However, leaving aside members of the legal profession, there is a strong overall impression that the wider community disagrees with the size of the reductions available under the Current Scheme. In particular, the availability of a 40% reduction is not supported.

[115] The concerns of the wider community, including victims, are understandable. In particular, 40% for merely entering a plea of guilty is a very large reduction. It reduces the sentence that the judicial officer considers to be appropriate by almost 50%. Prior to the introduction of the 2013 sentence reduction scheme, such a large reduction would have been given only if the offender had provided, at their own risk, valuable assistance to the authorities in respect of other serious criminal activities.

[116] As many judges and commentators have previously observed, large reductions for pleas of guilty not only provide an incentive for guilty persons to acknowledge their guilt, but they also provide a strong incentive for innocent persons to falsely admit guilt. In *Shannon*, King CJ referred to “fear” that had been expressed in this regard and said:

“I do not think that this is a realistic fear where the leniency extended on the ground amounts to no more than (in Cross’s words) ‘moderate encouragement to plead’. I

suppose if confronted by the dilemma of severe punishment if found guilty and no punishment on a plea of guilty, an innocent person might be tempted to make a false admission of guilt, but I do not believe that the 'moderate encouragement' used in practice by courts constitutes such a temptation."²⁹

[117] In referring to "moderate encouragement to plead" which was given in 1979, in my view the Chief Justice did not have in mind a reduction of anywhere near 40%. At that time, it was not the practice of judges to specify the extent of the reduction given in recognition of a plea of guilty, but in my experience, even later when it became more common to specify reductions given for pleas of guilty, in other than exceptional cases those reductions were well below 40%.

[118] It is also understandable that members of the community look askance at significant reductions given to repeat offenders or offenders who are faced with an overwhelming prosecution case. For many reasonably minded persons in the wider community, it does not sit well with common sense to give a reduction of 40% to an offender who is caught on camera committing the particular crime. Similarly, to those persons it does not sit well with common sense that a repeat offender, who knows the system and is willing to exploit it, should almost automatically receive a large reduction for an early guilty plea.

[119] Notwithstanding the limited material from the wider community, and having regard to the views of victims with whom I have consulted, I am confident that reasonably minded members of the community accept that there is benefit to the community in providing incentive for offenders to acknowledge their guilt at the earliest possible time. However, I am also confident that the Current Scheme causes disquiet among such persons. Necessarily, the tension between the practical aim of the scheme and the disquiet about some features of the scheme brings into focus the efficacy or otherwise of the current sentence reduction scheme.

²⁹ At 449.

Current Scheme in Practice - Efficacy

[120] Consideration of the efficacy of the sentence reduction scheme requires analysis of two aspects. First, in 2015 there was a clear trend under the 2013 Scheme to earlier pleas. Did that trend continue under the 2013 Scheme after 2015? What impact, if any, has the 2018 major indictable reform had (or is it too early to assess)?

[121] Secondly, has the advent of an increase in the number of early pleas, coupled with a decrease in the number of late pleas, had a positive flow-on effect within the criminal justice system, particularly upon the criminal trial lists? In 2015 I concluded that the increase in the number of early pleas, and the reduction in the number of late pleas, had not resulted in a reduction in the median number of days to finalise a major indictable matter in the District Court. Nor had there been a reduction in the District Court backlogs. I observed, however, that other factors might have been having a significant impact in these areas.

[122] As discussed, members of the legal profession, who are experienced in the operation of the criminal justice system, firmly believe that the sentence reduction scheme has worked in practice. In particular, they believe the 40% reduction is an essential incentive in the first 4 weeks.

[123] However, there is concern within the profession that the major indictable reforms in 2018 have had an unintended adverse impact on the sentence reduction scheme. In their view, so little information is now provided within the first 4 week period that it has led to more defendants waiting and being prepared to qualify for only 30%. The absence of information in the first 4 weeks was identified as a major impediment to the entry of a plea in that period in the 2015 Report.

[124] In addition, it has been suggested that as a consequence of the 2018 amendments, lengthy delays are occurring after the first appearance while SA Police prepare preliminary briefs to enable the DPP to make charge determinations. Throughout this period the defendant is qualified for a 30% reduction and, as many defendants are

content for their matters to be delayed, there is no incentive for the defendants to pursue negotiations with a view to entering an early plea. Once the initial 4 week period has expired, there is no incentive for counsel for a defendant to do anything other than let the file sit until the next appearance. The DPP is not required to take any action because the DPP is waiting for the preliminary brief from SA Police in order to make a charge determination. By way of contrast, under the previous system the DPP was involved at an earlier stage and there were more regular court appearances. As a consequence matters were kept within the attention span of both the DPP and the defence creating more incentive and opportunities for negotiations.

[125] The Director acknowledged the potential for the current system to result in less contact between the DPP and counsel for a defendant during the period between the first appearance and the presentation of the preliminary brief and charge determination. However, it was the Director's impression that there had not been any drop off in the rate of early pleas entitling an offender to a reduction of 40%. The Director pointed out that the DPP is involved immediately after every arrest for a major indictable offence because investigating police provide to the DPP a copy of the draft Information and a factual summary immediately following arrest. It is the task of the DPP to provide an adjudication in the form of advice as to whether each matter should proceed on information with the draft or other charges laid, or whether a matter should proceed as a minor indictable or summary matter in the Magistrates Court. In addition, under the 2018 system, the DPP now gives advice as to the type of evidence required, which includes advice as to whether or not expert evidence is required. Obviously this advice is provided on the basis of only very limited information.

[126] My immediate concern in this Review is with the impact of the major indictable reforms upon the sentence reduction scheme. The overall operation of the major indictable reforms is being examined in another inquiry and will be the subject of a separate report. However, it is appropriate to note a common view within the legal profession that the reforms have led to lengthy delays and should be amended or repealed. In the

context of the sentence reduction scheme, experience has demonstrated that the early involvement of the DPP encourages the early resolution of major indictable matters. While the major indictable reforms are intended to reduce the number of appearances in the Magistrates Court, it has been suggested that the new procedures might delay the resolution of matters capable of earlier resolution if the DPP was involved from the outset. In this regard, leaving major indictable matters in the hands of SA Police until a preliminary brief has been prepared to the satisfaction of the DPP, and a charge determination is made by the DPP, might be counterproductive to the aim of early resolution, but that issue will be examined in the second Inquiry.

Efficacy - Tasmania Consultation Paper

[127] In the context of the impact of early pleas by way of a flow-on effect on trial lists, the March 2018 consultation paper by the Tasmania Sentencing Advisory Council provides a helpful summary of modelling undertaken in NSW by BOCSAR³⁰:

“However, modelling would suggest that, in isolation, even a significant change in plea behaviour (a reduction by 75% of late pleas) will not necessarily be effective in reducing court backlogs. In 2017, BOCSAR released a paper that presented a simulation model that sought to determine the effect of various possible reforms on the pending case backlog in the Sydney Registry of the District Court, specifically to determine what (if any) intervention could reduce the case backlog from 702 cases to 430 cases by the end of 2019. It considered the effect of the following scenarios: (1) an increase in the number of judges available to preside over trials; (2) a reduction in the number of late/trial-day guilty pleas by defendants; (3) a reduction in the number of adjournments occurring on the morning of a trial; (4) elimination of the mid-year vacation period; and (5) a combination of scenarios (1) through (4). It found that the only intervention that could reduce the backlog to 430 cases or less was the addition

³⁰ Bureau of Crime Statistics and Research NSW.

of five or more judges to the Sydney Registry. In relation to guilty pleas, the modelling indicated that even a 75% reduction in later guilty pleas did not result in the backlog decreasing; rather, it indicated that the average backlog would rise to 725 cases in December 2019 despite the reduction. Accordingly, it was observed that 'the effects from reducing the late guilty pleas are much weaker than the effects from adding additional judges, and that the guilty plea reform would only slow the rate of increase in the size of the backlog, rather than cause a decline'. In terms of a combination of scenarios, it was found that a combination of two additional judges, a 50% reduction in later guilty pleas, a 33% reduction in adjournments and the elimination of the mid-year vacation would achieve a smaller but still significant reduction in the backlog to 564 cases.

Other research released by BOCSAR in 2018 suggests that changes in pre-trial procedure can be highly effective in altering a defendant's plea behaviour (separate from any reform to statutory discounts for guilty pleas). This research evaluated a new case management approach trialled in the NSW District Criminal Courts, where cases allocated to a special 'rolling list court' (RCL) were dealt with from start to finish by the same judge and defence and prosecution lawyers instead of the usual arrangements where cases may be dealt with by different judges and lawyers at different points in the progress of a case. Significant findings were that the RCL resulted in more early guilty pleas. Specifically, the research found that:

- More than half (58%) of the matters resolved in a guilty plea before the trial date in the RCL compared to 22% of matters randomised to the general list of the NSW District Criminal Court.
- The average time from committal to finalisation for cases in the RLC was 262 days, compared with 364 days for cases randomly assigned to the general list, a reduction of 28%.
- The average time taken to enter a guilty plea in the RLC (151 days) was 31% lower than among cases balloted to the general list (220 days).

In interviews with prosecution and defence, the greater number of early pleas was attributed to the involvement of senior prosecutors early in the process and the

confidence that this gave to defence counsel that 'nothing would change closer to the trial date' and that 'incentives to delay in pleading guilty were removed as no better deal could be obtained by holding out until the day of the trial.' (footnotes omitted).

[128] It is interesting to note the views expressed by prosecutors and defence practitioners in NSW attributing the greater numbers of early pleas to "the involvement of senior prosecutors early in the process...".

Efficacy - Statistics

[129] At my request the Justice Policy and Analytics, Policy and Community Division (JPD) undertook the substantial exercise of gathering and collating information and statistics concerning the operation of the sentence reduction scheme since the 2015 Report. In very helpful reports, two areas were addressed³¹:

- Information on sentencing discounts applied to sentences handed down for serious offences such as murder (and other homicide offences) and serious sexual offences – including whether sentence reductions are being applied to non-parole periods for defendants with a head sentence of life imprisonment (Stage 1); and
- An update to the statistics included in the report from the previous Martin review (the previous report) provided to the (then) Attorney-General on 23 October 2015 (refer paragraph 59 of the previous report) (Stage 2).

[130] Both reports, Stages 1 and 2, are Annexures 5 and 6 to this Report.

[131] The efficacy of the current sentence reduction scheme is ultimately to be determined by assessing the overall effect of the scheme on the criminal justice system. However, there are a number of criteria relevant to that assessment. Speaking broadly, in the Magistrates Court the critical questions are:

- Has the scheme led to an increase in the number of guilty pleas being

³¹ JPD page 2

entered in the first 4 weeks?

- Has the scheme led to an increase in the number of pleas entered prior to dates fixed for trial?
- Has the scheme led to a decrease in the number of pleas entered shortly before, or on the date fixed for, trial?
- As a consequence of more pleas of guilty being entered earlier in the process, has the scheme led to an improvement in times taken to complete matters in the Magistrates Court?

[132] With respect to charges of indictable offences to be dealt with by the Supreme and District Courts, in summary the critical questions to be addressed are:

- Has the scheme led to an increase in the number of pleas of guilty entered in the first 4 weeks?
- Has the scheme led to an increase in the number of pleas of guilty entered in the Magistrates Court prior to committal to the Supreme or District Courts (and a corresponding decrease in the number committed for trial)?
- Has the scheme led to an increase in the number of pleas entered in the Supreme and District Courts ahead of trial?
- Has the scheme led to a decrease in the number of pleas entered shortly before or on the date fixed for trial?
- Through the entry of earlier pleas of guilty, and the decrease in the number of late pleas, has the scheme led to an improvement in the time taken in the Supreme and District Courts to complete matters committed for sentence and trial in those courts?

[133] In summarising the relevant criteria and discussing the impact of the sentence reduction scheme upon the administration of criminal justice, in this part of the Report I am considering these matters from a purely objective point of view. I am leaving aside

issues such as whether the scheme is appropriate as a matter of principle and whether it is fair both to those involved in the criminal justice system, and to the wider community. I have already discussed the rationale for the scheme and issues such as community expectations and concerns.

[134] In 2015 I concluded that the 2013 Scheme had a “significant impact” on the number of guilty pleas entered in respect of major indictable matters at an early stage of the proceedings. Speaking broadly, that impact has been sustained, but there appear to be worrying trends. It should also be noted that, for a number of reasons, caution must be exercised in interpretation of the statistical information.

[135] In Stage 2 of the report, JPD noted that in February 2014 the Fines Enforcement and Recovery Unit commenced operation and in December 2016 SA Police introduced the process of “adult cautioning”. Both these changes removed minor matters from the Magistrates Court, being matters which were likely to have been resolved in a relatively short period. As a consequence, statistics concerning early resolution might falsely appear to indicate a deterioration.

[136] Secondly, it is too early to assess confidently the impact of the major indictable reforms which commenced in March 2018.

[137] As to summary and minor indictable matters in the Magistrates Court, JPD reported that up to 2015/16 “the proportion of matters with a guilty plea within 4 weeks was stable” and ranged between 44% and 46.1%. From 2016/17 onwards, the proportion dropped to 38.1% to 38.7%. However, in the view of JPD, “this sudden decrease is also likely due to the removal of minor matters from the Magistrates Court”. By “minor matters”, JPD was referring to the operation of the Fines Enforcement and Recovery Unit and the introduction of adult cautioning by SA Police.

[138] As to major indictable matters and the entry of guilty pleas within the first 4 weeks, JPD reported as follows:

Similarly, the proportion of major indictable matters with a guilty plea recorded within

four weeks of the first hearing increased in the 12 months following the introduction of the *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* in March 2013 (from 8.8% in the 12 months prior to introduction to 13.6% in the 12 months post introduction) and again in 2014/15 (up to 21.6%) with the proportion remaining relatively stable since then. This suggests that the guilty plea sentencing reduction legislation has resulted in a sustained increase in the proportion of major indictable matters with a guilty plea in the first four weeks.

[139] It appears, therefore, that the incentive of a reduction of up to 40% if a plea is entered within the first 4 weeks has continued to have a significant impact.

[140] Although separate statistics have not been extracted for pleas entered after the first 4 weeks and before committal to the Supreme or District Courts, it is apparent from the overall statistics relating to pleas entered in the Magistrates Court before committal that the incentive to plead in this period has produced positive results. JPD has reported that in the 3 periods from 2010/11 to 2012/13, between 18.2% and 19.9% of matters were committed for sentence. After the 2013 Scheme was introduced, in 2013/14 the percentage committed for sentence increased “sharply” to 27% and that number has “continued to increase steadily, up to 44.1% in the first half of 2018/19”. This has resulted in a reduction of the number of matters committed for trial which has decreased from 80.1% in 2010/11 to 55.9% in 2018/19.

[141] JPD has suggested that the increase in the percentage of matters committed for sentence in 2017/18, and in the first 6 months of 2018/19, might be due to the commencement in March 2018 of the major indictable reforms. Those reforms reduced the maximum reduction for a plea entered after committal for trial from 20% to 15% for the period between committal and arraignment. After arraignment, and up to the commencement of trial, the maximum reduction available is 10%.

[142] As to the time taken to finalise major indictable matters in the Magistrates Court, JPD has reported that there was a steady increase from 2015/16 onwards in the median number of weeks taken to finalise such matters. In particular, the time taken “jumped

from 22 weeks in 2017/18 to 24 weeks in the first half of 2018/19". JPD concluded that while the reason for the long term increase is not clear, the rise in the first 6 months of 2018/19 "may be due to major indictable reforms commencing in March 2018".

[143] The long-term increase in time to resolve major indictable matters in the Magistrates Court is surprising. Once a plea of guilty is entered, either the magistrate imposes sentence or the offender is committed to the Supreme or District Court for sentence. Simple logic would suggest that these matters are finalised more quickly than matters committed for trial and, therefore, an improvement in the average time taken to finalise major indictable matters in the Magistrates Court should follow.

[144] In this context, as noted earlier in this Report, the representatives of the Law Society suggested that notwithstanding early pleas of guilty in the Magistrates Court, SA Police still insist on obtaining declarations and gathering other material. They also pointed out that there is no place in the existing system for a statement of agreed facts upon which an offender can be committed for sentence.

[145] In addition, in a submission to the second review concerning the major indictable reforms, the Law Society reported as follows:

- "The early guilty plea scheme was intended to resolve matters faster and reduce the District Court backlog. The early resolution of matters is in the interest of the entire system and particularly victims. However, the Society is informed that in relation to a number of early guilty plea matters, SAPOL are insisting on continuing to work on a file. Consequently, these matters are remaining in the Magistrates Court, notwithstanding the plea of guilty being made by the defendant."
- In a drug matter where both the prosecution and defence had agreed that the matter should be forwarded to the District Court following a plea of guilty, "the Chief Judge held the view that the matter could not be forwarded at that time as there was no charge determination as required by the Act." As a consequence, rather than the matter being committed to

the District Court in September, the matter was committed to 21 December 2018 for a guilty plea.

[146] The approach to which the Law Society has referred tends to defeat the purpose of the legislation. The reforms seek to reduce the workload of investigators, legal counsel and courts, and to improve the efficiency of the criminal justice system. If an offender pleads guilty in the Magistrates Court, it is obviously in everyone's best interest for the matter to be disposed of as soon as reasonably possible without the necessity of further work being undertaken by investigators, and without further appearances in the Magistrates Court. In particular, a plea having been entered, it should not be necessary for SA Police to prepare a preliminary brief or for the DPP to make a charge determination.

[147] The Criminal Procedure Act does not specifically deal with the situation under consideration. It provides that upon the first appearance, the Magistrates Court "must" appoint a time and place for the defendant's second appearance. By combination of ss 105 and 106, the legislation contemplates that between the first and second appearance, SA Police will provide the DPP with a preliminary brief and the DPP will make a charge determination. Section 106(1)(e) provides that the Magistrates Court "must not commence committal proceedings" unless the court has been advised by the prosecution that the DPP has made a charge determination. If the DPP has not made a charge determination by the time of the second appearance, the court may adjourn to enable that to occur or dismiss the charge.

[148] Section 108(2) provides that if a defendant charged with a major indictable offence pleads guilty "before the commencement of committal proceedings", the Magistrates Court may commit the defendant to the superior court for sentence or, in appropriate circumstances identified in s 116, impose sentence. Section 108(2) does not define the time of the plea beyond identifying a plea of guilty made "before the commencement of committal proceedings".

[149] Given the purpose of the legislation, in my opinion there is no reason to restrict the

operation of s 108 by imposing a requirement that, notwithstanding a plea of guilty, a preliminary brief and charge determination must be made before an offender can be dealt with by a magistrate or committed for sentence in the superior court. Once the plea is entered, s 108(2) operates in conjunction with s 116 to authorise the magistrate to either impose sentence or commit the offender to the superior court for sentence.

[150] From a practical point of view, if an offender pleads guilty early in the processes of the Magistrates Court, obviously it would assist the sentencing court if materials needed for sentencing were provided to the court as part of the file coming from the Magistrates Court. However, this is not a requirement of the legislation which is silent on this particular issue. In my view, the preferable course is for the prosecution and offender to file in the Magistrates Court an agreed statement of facts to accompany the file to the superior court. However, if preparation of such an agreed statement of facts is likely to be delayed, or no agreement has been reached, I suggest the preferable course is to commit the offender for sentence very shortly after the plea is entered and leave the details for sentencing to be sorted out in the superior court.

[151] In considering the efficacy of the sentence reduction scheme, it is also helpful to examine the statistics concerning pleas of guilty entered in the superior courts after committal for trial. In the District Court, the number of major indictable matters committed for trial which resulted in a guilty plea in the District Court increased by 80% between 2011/12 and 2012/13 (from 164 to 295). As JPD has reported, these figures suggest that the introduction of the 2013 Scheme had an impact on the number of offenders who pleaded guilty in the District Court. However, as figure 12 in the Stage 2 Report demonstrates, although the number who pleaded guilty increased in 2013/14 and 2014/15, a downward trend commenced in 2015/16 and continued thereafter. JPD reported that although the driver for this decline is unknown, it may be due to the increase in the number of matters being committed for sentence rather than trial.

[152] Table 8 and figure 13 in the Stage 2 JPD Report provide interesting figures with respect to the timing of pleas of guilty in the District Court. The number pleading within

the first 4 weeks, or after 4 weeks but before the trial date was set, reached over 90% in the period up to 2013/14. However, the number subsequently dropped dramatically in 2016/17 and again in 2017/18 down to 62.2% in 2017/18.

[153] This drop in the number pleading guilty in the early stages of District Court proceedings was accompanied by significant increases in the number of offenders pleading guilty later in the proceedings and after commencement of the trial. In 2012/13, 2.4% pleaded guilty after commencement of the trial, but that figure increased to 17.1% in 2017/18.

[154] JPD has expressed the view that one possible explanation for these trends is that the types of matters previously resulting in guilty pleas in the early stages of the District Court proceedings are now more likely to have resulted in pleas in the Magistrates Court in order to obtain the benefit of the higher reductions. In JPD's view, the remaining matters "may be those that are more complex or contested, and are more likely to enter a guilty plea at a later stage".

[155] In addition to considering matters committed for trial which resulted in a guilty plea in the District Court, JPD examined the number of hearings, time to finalisation and trial lists in the District Court. As to the number of hearings, JPD reported:

Table 5 and Figure 6 provide information on the number of hearings to finalisation for criminal matters in the District Court from 1 July 2010 to 31 December 2018.

While there was very little change in the median number of hearings to finalise a criminal matter in the District Court, the mean has decreased slightly from 3.3 in 2010/11 and 2011/12 to between 2.7 and 2.9 between 2013/14 and 2018/19 (first six months) (see Table 5).

Figure 6 provides more detail on the proportion of matters finalised in 1 to 2, 3 to 5, 6 to 10 and 11 or more hearings to determine where change may have occurred.

This shows there was a substantial increase in the proportion of matters finalised in 1 or 2 hearings from 51.9% in 2012/13 (around the time of the introduction of the guilty plea sentence reduction legislation in March 2013) to 61.6% in 2016/17. This

trend appears to have reversed in 2017/18 and the first six months of 2018/19 (59.0% and 56.7% respectively). The increase (and subsequent decrease) in the proportion of matters dealt with in 1 to 2 hearings appear to have shifted from (or to) the 3 to 5 hearings category with this category showing a similar pattern only in reverse.

It is unclear whether the major indictable reform changes introduced in March 2018 have influenced the 2017/18 and 2018/19 figures due to the time lag involved for matters being sent up to the District Court.

[156] The time taken to finalise matters in the District Court is an important issue. JPD concluded that overall the figures suggest a deterioration in this regard in the District Court:

Between 2010/11 and 2012/13 the median number of weeks to finalisation remained relatively stable at between 15.6 and 16.6. The median then decreased to 13.9 weeks in 2014/15 and subsequently increased considerably with the remaining three and a half years being between 17.6 weeks in 2016/17 and 21 weeks in 2018/19 (first six months).

[157] In a similar vein, the number of cases in the District Court older than 12 months has increased from a low of 14% in 2012/13, to 19% in 2017/18 and 18% in 2018/19 (a 6 month period). However, care must be taken in interpreting these figures because of the impact of the major indictable reforms and the limited period of 6 months reflected in the 2018/19 figures.

[158] The same trend has occurred with respect to cases in the District Court older than 24 months. The number has increased from a low of 3% in 2012/13, to 7% in 2017/18. There was a further small increase in 2018/19 to 8%, but this increase might be reflecting the initial impact of the major indictable reforms and the limited period of 6 months from which that figure has emerged.

[159] After considering these matters, JPD reported the following conclusion:

The above results for the number of hearings, time to finalisation and number of criminal matters in the District Court appear contradictory to the trend toward a greater proportion of matters being committed for sentence (as opposed to trial) from the Magistrates Court (see Figure 5). This is assuming matters committed for sentence are dealt with in relatively short timeframes compared with matters committed for trial. It is noted, however, that a change in the timing of guilty pleas is only one of a number of factors that may influence the time to finalise a court matter. Other factors include the number of court lodgements, the availability of judicial officers and courtrooms and the number of matters dismissed or withdrawn.

[160] Further statistics of assistance are being provided in connection with the review of the major indictable reforms which will be the subject of a second report. In addition, the Chief Magistrate of the Magistrates Court, her Honour Judge Mary-Louise Hribal, has provided the following information:

- “Pre reform data shows that in the period 3 October 2017 to 4 March 2018 there were 1,326 lodgements and 1,279 were finalised (96.5%).”
- “In the post reform period 5 March 2018 to 4 March 2019 there were 2,697 lodgements and 1,268 were finalised (47%). The time periods are different, but this could indicate that matters are remaining in the Magistrates Court longer.”
- Of the 2,697 lodgements in the 12 month period 5 March 2018 to 4 March 2019, 68 offenders were sentenced in the Magistrates Court, 123 were committed for sentence and 185 were committed for trial.
- In the 5 month period 3 October 2017 to 4 March 2018, of 1,326 lodgements, 114 offenders were sentenced in the Magistrates Court, 203 were committed for sentence and 307 were committed for trial. In percentage terms, in the 5 month period leading to the commencement of the major indictable reforms, significantly more offenders pleaded guilty and were sentenced in the Magistrates Court. Similarly, significantly more

offenders pleaded guilty in the Magistrates Court and were committed to the superior court for sentence.

[161] In summary, the statistical information leads to the following conclusions:

- In summary and minor indictable matters, the number of offenders pleading guilty in the first 4 weeks started falling before the major indictable reforms. The removal of minor matters from the Magistrates Court is likely to have had an impact in this regard.
- In major indictable matters, the number of offenders pleading guilty in the first 4 weeks increased dramatically following the commencement of the 2013 sentence reduction scheme and that increase has been maintained. The advent of the major indictable reforms has not adversely affected this aspect of the sentence reduction scheme.
- Similarly, the scheme has resulted in a significant increase in the number of offenders being committed for sentence (rather than trial) and the major indictable reforms have not adversely affected this result.
- Notwithstanding the increase in the number of pleas entered in the Magistrates Court, the time taken to finalise major indictable matters in the Magistrates Court has increased. The largest increase occurred after the introduction of the major indictable reforms, but the upward trend commenced earlier.
- In the District Court, after the 2013 Scheme commenced, the number of offenders who pleaded guilty, and did so early in their proceedings, increased significantly. However, a downward trend began in 2015/16 and has continued.
- In association with the above downward trend, there has been a significant increase in the number of pleas entered later in the District Court proceedings, including pleas entered after commencement of trials.

- In recent years, commencing before the major indictable reforms, the average number of hearings to finalise criminal matters in the District Court has increased, as have the number of matters in that court older than 12 and 24 months.

[162] In some aspects the results of the objective statistics are not encouraging. They suggest that the advent of the major indictable reforms might have had an adverse effect on some aspects of the sentence reduction scheme. However, some adverse trends commenced before the reforms and it is too early to assess confidently the time impact of the reforms on the scheme.

[163] To the extent that the sentence reduction scheme seeks to encourage offenders to plead guilty in the Magistrates Court or early in District Court proceedings, the scheme has had, and continues to have, a significant positive impact. However, in recent years the number of offenders delaying pleas until later in proceedings has increased. In addition, as reported 2015, the scheme has not demonstrated any impact on the average time taken to finalise matters in the Magistrates or District Courts.

Case for Change?

[164] Is there a case for major change to the sentence reduction scheme? To some extent this question can be addressed independently of the impact of the 2018 changes to the major indictable processes, but they are closely connected. The issue of whether charges are required is to be addressed in the context of the nature and purpose of the sentence reduction scheme, and armed with information as to the efficacy or otherwise of the scheme and as to community expectations and concerns.

[165] A major change has been urged by Professors Mack and Roach Anleu. They are not alone in their view that this and other such schemes are wrong in principle. However, the fundamental premise that the overall public interest is best served by providing an

incentive to offenders to admit their guilt early in the proceedings, is well entrenched. Put bluntly, from a number of points of view, the community cannot afford to revert to a system in which an offender has no incentive to plead guilty. Further, in my view the majority of reasonably minded members of the community agree that providing incentives best serves the overall public interest.

[166] In the context of these conclusions, consideration must be given to community expectations and concerns discussed earlier at [113] - [119]. These concerns, coupled with the statistical information concerning the efficacy of the Current Scheme, suggest that changes are necessary to achieve the appropriate balance between the benefit to the community of an early guilty plea and the need to ensure that an offender is adequately punished and held accountable to the public.

Other Jurisdictions

[167] In addressing the issue of possible changes, it is helpful to compare the Current Scheme with the approaches in other jurisdictions.

[168] In Australia, all jurisdictions except Tasmania have legislative provisions which require a sentencing court to take into account the fact that an offender has pleaded guilty. This is also the position in England, Wales and New Zealand. There are significant differences between jurisdictions, however, as to how a sentencing court is required to take into account a guilty plea and the extent of reductions.

[169] In its Consultation Paper, the Tasmania Sentencing Advisory Council provided a table of comparisons between various jurisdictions. Since the release of the Paper, amendments have been made in more than one jurisdiction. The following table is, therefore, adapted from the table prepared by the Council and provides an overview of the approaches of jurisdictions other than South Australia to the relevance of pleas of guilty in sentencing. As the table has been adapted, and the original Paper is

Annexure 4, footnotes and cross-references have been omitted in this adaption:

	Court must take into account	Discretionary impact of plea on sentence	Specifying the reduction	Other
NSW	Fact of plea. Timing of plea.	Must impose the reduction unless exception applies (level of culpability, disputed facts and life sentences).	Court must record how the sentence was calculated if the sentencing reduction is applied and must record reasons for determination if determines not to apply or to reduce the reduction.	Sliding scale from 5% up to 25% depending on timing of the plea (specific periods and percentages outlined in legislation).
Victoria	Fact of plea. Timing of plea or indication of intention to plead guilty.	May impose a less severe sentence.	Court must or may (depending on sentence imposed) state the sentence it would have imposed but for the guilty plea.	No legislatively stated reduction but statistical evidence is that the average is around 25–33%.
Queensland	Fact of plea. Timing of plea or indication of intention to plead guilty.	May reduce sentence.	Court must state that took into account guilty plea and must state the reasons if it did not reduce the sentence.	No legislatively stated reduction but reduction of 30% ordinarily granted where plea is entered or indicated at an early stage.
WA	Fact of plea. Timing of plea (the earlier in proceedings, the greater the reduction in sentence).	May reduce the head sentence to recognise the benefits to the State and to any victims or witness to the offence.	Court must state reduction in sentence and extent of reduction.	Reduction of up to 25% (set out in legislation).
ACT	Fact of plea. Timing of plea or indication of intention to plead guilty. Whether the plea was related to negotiations between the prosecution and defence about the charge to which the offender pleaded guilty. The seriousness of the offence. The effect of offence on anyone who can make a victim impact statement (including the victim or victims' family). Must not make any significant reduction if the court considers that the prosecution's case was overwhelmingly strong.	May impose a lesser sentence (but must not impose a lesser penalty that is unreasonably disproportionate to the nature and circumstances of offence).	Must state penalty it would have otherwise imposed.	No legislatively stated reduction but generally applies NSW guideline judgment re quantum of reduction. Applies if there is a real likelihood that the court will sentence the offender to imprisonment.
NT	Fact of plea. Timing of plea or indication of intention to plead guilty.	May reduce sentence.	Desirable for the court to indicate the extent to which a plea of guilty has been given weight as a mitigating factor.	A reduction of 25% will normally be given in circumstances where there has been an early guilty plea which is indicative of true remorse and resipiscence. However, there is no set range or tariff and needs to be determined in the circumstances of the case.
England / Wales	Timing of indication of intention to plead guilty. Circumstances of indication to plead guilty.	Limited exceptions set out in guideline.	Court must state that imposed lesser penalty. Court should state the amount of the reduction.	Sliding scale from 1/10th to 1/3rd based on timing of the plea (details set out in Guideline judgment).
NZ	Fact of plea. Timing of plea.	May reduce sentence.	Should set out reduction.	Should not exceed 25%.

[170] In Australia, South Australia stands out with regard to the 40% maximum available reduction that a sentencing court may grant. The other jurisdictions that provide a sliding scale are NSW and Western Australia where the maximum is specified as 25%. Of other jurisdictions without legislative sliding scales, statistical evidence in Victoria suggests an average of between 25 and 33%, while in Queensland it appears that a reduction of approximately 30% is often given where a plea is entered or indicated at an early stage.

[171] In England and Wales, a legislative sliding scale provides for reductions between one tenth and one third of the sentence. In New Zealand, ordinarily the reduction does not exceed 25%.

Utilitarian Emphasis

[172] Speaking generally, in all jurisdictions emphasis is placed upon the utilitarian value of a plea of guilty. As discussed earlier in this Report, when the former Attorney-General introduced the Bill establishing the 2013 Scheme, he described the “main objective” as improving “the operation and effectiveness of the criminal justice system by reducing current delays and backlogs in cases coming to trial.” This was the view taken by the South Australian Court of Criminal Appeal in *R v Dwyer*.³² In the following passages from the judgement of Stanley J, with whose judgement Kourakis CJ and Gray J agreed, not only is the utilitarian purpose of the scheme emphasised, the strength of the prosecution case is identified as a factor carrying less weight than previously:³³

[34] In my view, the learned sentencing judge erred in failing to afford the appellant the entire discount permitted by s 10C(2)(b). As I have noted, the learned sentencing judge reduced the head sentence he would otherwise have imposed by reason of the appellant’s pleas of guilty by 25 per cent. Pursuant

³² (2015) 121 SASR 587.

³³ At [34] - [37].

to s 10C(2)(b) a discretion is conferred permitting the judge to reduce the appellant's sentence by up to 30 per cent. In my view, the learned sentencing judge failed to explain adequately why he did not reduce the sentence he would otherwise have imposed by the maximum available. In this context it is important to recognise the basis of the scheme enacted pursuant to s 10C. There is no doubt that s 10C, like s 10B, confers a discretion upon a sentencing court.³⁴ **Recognition that the power conferred by s 10C is discretionary does not detract from the utilitarian purpose of the provision.** The purpose of s 10C is to regulate and make transparent sentencing discounts for guilty pleas and to encourage offenders to plead early, thereby decreasing delays in the criminal justice system. The power conferred must be construed accordingly. In *R v McPhee*³⁵ Nicholson J, with whom Vanstone and Blue JJ agreed, said:³⁶

In my view, sentencing judges should take a robust view with respect to pleas which satisfy the various criteria set out in s10C relevant to the different maxima provided for. Ultimately, the actual discount provided remains discretionary and each case will need to be determined according to its own facts. Nevertheless, if guilty persons are to be encouraged to plead early so as to provide the utilitarian benefits to the administration of justice contemplated, they will need to be confident that their expectations of a substantial discount in accordance with the requirements of the legislative regime will be met. Related to this is the need for defence counsel to be in a position to advise their clients on this topic with confidence.

[35] If the sentencing judge, exercising the discretion conferred by s 10C, is not to allow the maximum discount permitted by the provision for a guilty plea, it is incumbent upon the judge to provide adequate reasons for the departure from the maximum allowed. The efficacy of the scheme will be undermined if defence counsel and their clients cannot be confident in their expectations of the advantage of an early guilty plea. None of this detracts from the power

³⁴ *Mead v Police* [2014] SASC 61 at [37], (2014) 119 SASR 223 at 233.

³⁵ [2014] SASCFC 107.

³⁶ [2014] SASCFC 107 at [46].

undoubtedly reposed in the sentencing judge to depart from the maximum where good reason exists but if that is to occur, the sentencing judge must explain why.

- [36] Section 10C(4) prescribes the matters which the court must consider in determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea. **While the prescribed matters are not exhaustive, they do not include any consideration of the strength of the prosecution case.** It is to be noted that although the prescribed factors include whether a reduction of the sentence would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of a particular defendant that it would shock the public conscience, the remaining factors are directed to the timing and the circumstances surrounding the guilty plea. To my mind, that serves to highlight the focus of the scheme established by s 10C upon the utilitarian considerations which underpin the scheme.³⁷
- [37] In discounting the notional head sentence by 25 per cent the sentencing judge explained that he adopted a process of "instinctive synthesis". That concept is somewhat opaque. The sentencing judge did explain earlier in his remarks that the appellant was facing a very strong prosecution case in relation to his crimes at the hairdresser's and there was an air of bowing to the inevitable in relation to those pleas, however the pleas to the other two charges carried greater weight. **Commonly, prior to the enactment of s 10C, sentencing judges would refer to the strength of a prosecution case for the purposes of fixing a percentage by which a notional head sentence would be discounted to reflect a guilty plea. But s 10C effects a change in sentencing principles. In my view, under the sentencing regime established pursuant to s 10C, the strength of the prosecution case is a factor which must carry less weight in deciding the discount for an early guilty plea.** As discussed earlier, the scheme envisages that in order to obtain the maximum discount an accused person will often have to enter a plea

³⁷ *R v Wakefield* [2015] SASFC 10 at [53] - [56].

before he or she can know the strength of the prosecution case. The scheme will operate most efficaciously the earlier the plea is entered. The sliding scale of discounts reflects this intent. Depriving an accused person of the full benefit of the discounting regime simply because he or she recognises the strength of the case against him or her so as to deprive the accused person of the full measure of the scheme, seems to me counterintuitive. After all, as I have said, the scheme operates on the basis that a defendant, in order to obtain the maximum discount for which the scheme provides, will usually have to enter a guilty plea before he or she knows the strength of the prosecution case. **While I do not suggest that the strength of the prosecution case is irrelevant in all cases** to fixing the appropriate discount in the proper exercise of the discretion conferred, in this case I do not consider the reasons for denying the appellant of the full benefit of the discount prescribed by s 10C are adequate. The judge did not refer to the matters prescribed by s 10C(4). Neither did he refer to the utilitarian considerations which underpin the scheme established by the section. In my view, the strength of the prosecution case in relation to counts 3 and 4 did not justify, in this case, reducing the sentence by anything less than the maximum allowable pursuant to s 10C(2)(b). Accordingly, the sentencing judge fell into error. The learned sentencing judge erred in not reducing the sentence he would otherwise have imposed by 30 per cent. (My emphasis).

[173] The same view of the relevance of the strength of the prosecution case was taken by the majority of the Victorian Court of Appeal in *Phillips v R*.³⁸ In a joint judgement with which Maxwell P agreed, Redlich JJA and Curtain AJA summarised the matters relevant to a determination of the reduction to be allowed for a plea of guilty:³⁹

[36] For the reasons which hereafter appear, the following are the relevant matters which should inform a determination of the extent of the discount to be given for a plea of guilty:

³⁸ (2012) 37 VR 594.

³⁹ At [36].

1. A discount for the utilitarian benefit of the plea must always be allowed on the sentence to be imposed, save for the exceptional category of case.
2. The exceptional case arises where the gravity of the offending conduct is of such an order that no discount from the maximum sentence is appropriate.
3. The strength of the Crown case is irrelevant to the discount to be allowed for the utilitarian benefit of the plea as it does not bear upon the objective benefits of the plea.⁴⁰
4. A greater discount for the utilitarian benefit may be justified where the plea involves very considerable savings of costs to the community or where some other very significant benefit can be seen to flow from the plea.
5. It is always a question for the sentencing judge whether remorse, a willingness to facilitate the course of justice and an acceptance of responsibility are to be inferred from a plea of guilty.
6. Where there is evidence or a submission accepted by the sentencing judge as to the unqualified existence of these subjective criteria, they should be fully reflected in the discount.
7. The utilitarian benefits which flow from the plea may also inform the extent of the discount to be allowed for the offender's willingness to facilitate the course of justice.
8. The weakness of the Crown case, if apparent, may also inform the extent of the offender's willingness to facilitate the course of justice.
9. The sentencing judge will not need to separately deal with the objective criteria of the utilitarian benefit of the plea and the subjective criteria, unless there is reason to conclude that less than the full discount should be allowed for the subjective criteria.
10. The strength of the Crown case can only support an inference that

⁴⁰ *Chalmers v The Queen* [2011] VSCA 436, [51].

these subjective criteria played little or no, role in the decision to plead guilty where the state of the contextual evidence on the plea permits such a conclusion.

[174] Later in their judgment, their Honours emphasised the importance of the plea from the utilitarian perspective:⁴¹

[55] Even where the Crown case is strong and a guilty plea may be thought to be inevitable, it will, save in rare and quite exceptional cases, be appropriate to reduce the sentence to take account of the plea of guilty because the State has been saved the expense of a trial, witnesses have been spared the necessity of attending court and giving evidence, and resources have been released to other duties.

[175] As to the exceptional circumstances in which no reduction should be given for a plea of guilty, their Honours explained:⁴²

[67] The exceptional case arises where the gravity or aggravating features of the offending conduct are of such an order that even allowing the mitigatory effect of the plea, the maximum sentence remains appropriate. That is because the offender's criminality so outweighs any circumstances of mitigation that are present. For example, for the offence of murder, a sentence of life imprisonment is sometimes imposed, notwithstanding a plea of guilty, because of the degree of criminality of the offence. In such cases the enormity of the offender's criminality may be such as to require that, albeit exceptionally, the mitigatory effect of the utilitarian benefit yield to considerations of greater weight such as proper protection of the public, and the maintenance of the rule of law. The exception may also arise in the case of lesser offences where imposition of the maximum sentence for that offence is considered necessary notwithstanding the plea or other mitigatory factors. (Footnotes omitted).

[176] Prior to specific legislation, the NSW Court of Criminal Appeal took the same view that the reduction for the utilitarian value of a plea applies irrespective of the strength of the

⁴¹ At [55].

⁴² At [67].

prosecution case.⁴³ The fundamental importance of the utilitarian value of a plea is now reflected in the NSW legislation which took effect on 30 April 2018.⁴⁴ The legislation provides for a sliding scale from 5% to 25%, depending on the timing of the plea. Significantly, the legislation identifies the reduction as given for the utilitarian value of the plea and, if an offender qualifies for a reduction, the court must apply the relevant reduction. The direction to apply the reduction is a mandatory direction, subject only to the following two exceptions:

- “The court may determine not to apply the sentencing discount, or to apply a reduced sentencing discount, if the court determines, on its own motion or on the application of the prosecution, that the discount should not be applied or should be reduced because the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can be met only by imposition of a penalty with no allowance for, or a reduction of, that discount.”⁴⁵
- “The court may determine not to apply the sentencing discount, or to apply a reduced sentencing discount, if the court determines that the discount should not be applied or should be reduced because the utilitarian value of the plea of guilty has been eroded by a dispute as to facts that was not determined in favour of the offender.”⁴⁶

[177] The NSW legislation also provides that the burden of establishing the existence of grounds for a sentencing reduction lies on the offender and the grounds must be proved on the balance of probabilities.⁴⁷

[178] In Western Australia, the Court of Appeal in *Abraham v Western Australia*⁴⁸ decided that the terms of the Western Australian legislation were significantly different from the

⁴³ *R v Borkowski* [2009] NSWCCA 102; *Morton v R* [2014] NSWCCA 8.

⁴⁴ *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* (NSW), *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 3, Division 1A, ss 25A - 25F.

⁴⁵ s 25F(2).

⁴⁶ s 25F(4).

⁴⁷ s 25F(5).

⁴⁸ [2014] 244 A Crim R 1

relevant legislation in other jurisdictions, particularly in NSW and Victoria. In the context of a provision permitting a court to reduce a sentence by reason of a plea in order to “recognise the benefits to the State” of the plea, the court held that the strength of the prosecution case was relevant to the prospect of securing a conviction which was a benefit to the State:⁴⁹

In general, the stronger the prosecution case, the higher the prospect of a judgement of conviction absent a guilty plea. Conversely, in general, the weaker the prosecution case, the lower the prospect of a judgement of conviction absent a guilty plea. Ordinarily, as a matter of fact, the strength of a prosecution case will be directly relevant to the extent of the benefits received or derived by the State as a consequence of the offender entering a guilty plea.

[179] In the ACT, s 35 of the *Crimes (Sentencing) Act 2005* directs the court to take into account the fact that an offender pleaded guilty and the time at which the offender pleaded or indicated an intention to plead. In this context, however, the ACT sentencing court is also directed to take into account the seriousness of the offence. In addition, although the court may impose a lesser penalty than it would otherwise have imposed if the offender had not pleaded guilty, subsection (4) directs that the court “must not make any significant reduction for the fact that the offender pleaded guilty if, based upon established facts, the court considers that the prosecution’s case for the offence was overwhelmingly strong.”

[180] The Tasmania Sentencing Council commented that “from a policy perspective, there would appear to be no basis to deny an offender a reduction in sentence for a guilty plea in the face of a strong prosecution case given that the purpose of the discount is to encourage an early plea.”⁵⁰ The Council commented that it has been suggested that it would be “rather absurd result that those who are caught red-handed do not merit a

⁴⁹ At [58].

⁵⁰ Consultation Paper at [74].

sentence discount, when these are the very people who, on the grounds of efficiency, should be encouraged to plead guilty at the earliest possible stage”.⁵¹

[181] In the Northern Territory, there is no legislative prescription as to how a plea of guilty should be taken into account. Recently the Court of Criminal Appeal had occasion to consider the role of a guilty plea in the sentencing process on an appeal against sentence by an appellant who had pleaded guilty to 3 counts of maintaining a sexual relationship with a child under the age of 16 years.⁵² After a reduction of 25% in recognition of the pleas of guilty, a total effective sentence of imprisonment for 15 years was imposed.

[182] The appellant argued that as the law stood, although the sentencing judge had not erred in applying a reduction of 25%, the appellate court should, for the first time, establish a principle that substantially larger reductions should be given in child sexual assault cases in order to encourage guilty pleas “because of the difficulties of proof in child sex cases, and the considerable additional value of a plea in such cases in sparing victims the trauma of having to give evidence”.⁵³

[183] In determining that it should not establish such a special principle, the court noted that it was common among criminal lawyers “on and off the bench to speak, in a shorthand way...of ‘the usual 25% discount’”. The court observed, however, that there is “no standard or maximum reduction in recognition of a plea of guilty” and the judges in the Northern Territory exercise a “wide discretion” in this regard.⁵⁴ The court referred to previous authorities which included the following statements of principle:

- “There is no doubt however, that pleas of guilty or indication of pleas of guilty at the earliest possible opportunity accompanied by true remorse are entitled to attract a greater reduction than late pleas which are not accompanied by true

⁵¹ Consultation Paper at [74].

⁵² *Turley v The Queen* [2019] NTCCA 4.

⁵³ At [6].

⁵⁴ At [21].

remorse.”⁵⁵

- “The value of the reduction to be given for any plea of guilty is a matter of discretion. The value is dependent on the circumstances of the particular case and the extent to which it demonstrates remorse, the acceptance of responsibility and resipiscence, the willingness to facilitate the course of justice, the extent to which a witness who may find the procedure painful has been spared the necessity to give evidence, and the utilitarian benefits that flow from the plea. In the Northern Territory a reduction of 25% will normally be given in circumstances where there has been an early guilty plea which is indicative of true remorse and resipiscence.”

[184] After referring to those authorities, the court identified some of the “infinitely various” circumstances which affect the weight to be given to a plea of guilty.⁵⁶

The circumstances affecting the weight to be given to the plea as a mitigating factor are almost infinitely various. They include the time at which the offender indicates that he will plead guilty (and thus saving in time and money effected by the plea); the extent and nature of co-operation given to authorities and whether that co-operation includes the voluntary disclosure to the authorities of offending which may not otherwise have come to light; the strength of the Crown case and any difficulties in proof there may have been had the matter gone to trial; the extent to which the plea is indicative of genuine remorse as distinct from a mere acknowledgement of the inevitable; the extent to which the plea serves the self-interest of the accused and other factors affecting the utilitarian and what might be called the humanitarian value of the plea including the value of sparing complainants and other witnesses the trauma of having to give evidence and the other benefits to victims mentioned by the sentencing judge in the remarks quoted above. It is clear that these are not independent factors. They are inter-related in complex ways.

[185] I have referred to the decision in *Turley* because, unlike other jurisdictions, although

⁵⁵ *Wright v The Queen* [2000] NTCCA 5 at [32].

⁵⁶ At [26].

the utilitarian value of a plea is relevant, considerations affecting the weight to be given to the plea and the size of the reduction, include the motivation for the plea and the strength of the prosecution case. In other jurisdictions, including South Australia, the underlying purpose of the sentence reduction schemes lies in the practical consideration of the utilitarian benefit of the plea. Speaking broadly, the strength of the prosecution case and the motivation for entering the plea play little or no role in determining the reduction for the plea. In those jurisdictions the reduction is based almost exclusively upon the utilitarian value which is not influenced by motivation. Hence the submission of the Director in 2015 that, as less weight is now put on remorse and contrition, the Director was “concerned that defendants who are truly remorseful and contrite might receive the same discount as those who are not”. In the Director’s view, “such an approach can be unfair to the remorseful and contrite defendant.”

[186] The fact that the motivation for the plea is irrelevant in determining the extent of the reduction for the plea does not mean that the motivation for the plea cannot be taken into account by a sentencing court in other ways. For example, subjective criteria such as remorse are taken into account in arriving at an appropriate sentence before any reduction is made by reason of the plea of guilty. In turn, factors such as the strength of the Crown case might reflect upon a claim by an offender that the offender is remorseful and has experienced genuine contrition.

Specific Issues of Concern

[187] Against the background of the Current Scheme and its comparison with other jurisdictions, and armed with statistical information as to the impact of the scheme, I turn to specific issues of concern.

Size of Reductions/Efficacy

- [188] It is apparent from formal and informal discussions, and from submissions, that there is significant disquiet among victims and the wider community about the size of reductions available at each stage of the proceedings. Regardless of the nature of the offending, or the offender's motivation for entering a plea of guilty, 40% is regarded widely as "too much". This view flows through to other percentages available at the later stages and is intensified when the offending involves the more serious crimes.
- [189] It is not difficult to understand this disquiet. After a sentencing court has reached a view as to the appropriate sentence which reflects the criminality of the conduct and the personal circumstances of the offender, for purely practical reasons unconnected with the crime or the offender, the sentence is reduced by almost 50%. This reduction is not supported by any principle of sentencing, but is given for purely pragmatic reasons. It is a level of reduction previously reserved in South Australia for exceptional cases such as offenders who provide valuable assistance to authorities in connection with serious crimes, often at risk to themselves or family.
- [190] Through this process, many victims feel let down and believe that justice has not been achieved. It is not difficult to conclude that this is a view shared by many in the wider community. As a matter of common sense, the community would expect that strong reasons must exist before such a high reduction of a sentence is given solely because an offender pleaded guilty at a very early stage in the proceedings.
- [191] As discussed earlier, there is a public interest in the early resolution of criminal proceedings. There is an economic interest. In most cases, the interests of direct and indirect victims are best served by an early resolution. One of the issues discussed later is whether reducing the maximum percentage reductions would have an adverse impact upon the economic interests which the system seeks to achieve through early resolution.

Entitlement - Exceptions - s 40(5)(a)

[192] In 2015 I concluded that, in substance, the Court had determined that in the absence of good reason, a reduction close to the maximum should ordinarily be given. On 16 November 2017 the Court of Criminal Appeal delivered its decision in *R v Davey*.⁵⁷ The Court was concerned with a non-parole period for murder, but in considering the operation of s 10C of the *Sentencing Act 1988*, Kourakis CJ, with whose judgment Stanley and Hinton JJ agreed, made the following relevant observations:

“It can be accepted that s 10C of the Sentencing Act provides a discretion to reduce a sentence by a proportion up to the maximum proportion prescribed for each relevant stage of the proceedings but does not mandate it. However, in *R v McPhee*, Nicholson J (Vanstone and Blue JJ agreeing) explained why a robust approach to reductions should be taken:

[46] I add one more observation. In my view, sentencing judges should take a robust view with respect to pleas which satisfy the various criteria set out in s10C relevant to the different maxima provided for. Ultimately, the actual discount provided remains discretionary and each case will need to be determined according to its own facts. Nevertheless, if guilty persons are to be encouraged to plead early so as to provide the utilitarian benefits to the administration of justice contemplated, they will need to be confident that their expectations of a substantial discount in accordance with the requirements of the legislative regime will be met. Related to this is the need for defence counsel to be in a position to advise their clients on this topic with confidence.

The burden of that observation is that the utilitarian purpose of the statute is a relatively weighty consideration which cannot be achieved unless there is a reasonable degree of certainty that a reduction approaching the maximum will be

⁵⁷ [2017] SASCFC 151.

made. In particular, the statutory purpose would be substantially undermined unless, on pleading guilty in one period, a defendant could be reasonably confident that the reduction will be greater than the maximum reduction available for the subsequent statutory period.

Of course the statutory discretion must be exercised on the facts of each case. However, in order to satisfy the statutory purpose, which is in turn dependent on generating a reasonable degree of certainty in the generality of cases, **one would expect there to be significant countervailing circumstances before a defendant would be denied the substantial part of the available reduction.**" (footnotes omitted) (my emphasis).

[193] Broadly speaking, the position remains the same that in the absence of good reason, the maximum reduction, or a reduction close to the maximum, should ordinarily be given. For these purposes, s 10C of the *Sentencing Act 1988* with which the court was concerned in *Davey* is not significantly different from s 40 of the *Sentencing Act* which currently applies.

[194] As to good reason/"significant countervailing circumstances", in *Davey* s 10C(4)(a) required the court to have regard to "whether the reduction of the defendant's sentence by the percentage contemplated would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would shock the public conscience." The Chief Justice explained that this provision demonstrated that "public policy reasons favouring a reduction must, in some circumstances, give way to competing public policy considerations", and that the particular provision recognises there may be "some offences in respect of which the utilitarian benefit must give way to the need to impose a sentence which is proportionate to the offence and which properly meets the needs for the personal deterrence of a particular defendant."⁵⁸

⁵⁸ *Davey* at [49].

[195] The provision that applied in *Davey* has been replaced by s 40(5)(a) of the current Sentencing Act and the test is no longer whether the proposed reduction would “shock the public conscience”. Section 40(5)(a) provides that the court must have regard to:

- (a) whether the reduction of the defendant's sentence by the percentage contemplated would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would, or may, affect public confidence in the administration of justice;⁵⁹

[196] Two changes should be noted. First, the test of shocking the public conscience has been replaced by a test of affecting public confidence in the administration of justice. Given the special meaning in sentencing which was applied to the expression “shock the public conscience”, in practice there is unlikely to be any significant difference between the two tests in this regard.

[197] There is a second change, however, of more significance. The old test was whether the proposed reduction “would” shock the public conscience. The new test is whether the proposed reduction “would, or may”, affect public confidence in the administration of justice.

[198] It is relevant to consider how this provision is working in practice. Of course, if the starting point is seen as an excessive reduction, the end result is likely to be seen as an excessive reduction, even after taking into account the effect on public confidence in the administration of justice. However, it is helpful to consider cases in which the exception has been applied to lower the reduction given for a plea of guilty.

[199] The most common application of this exception has occurred in the fixing of non-parole periods for murder. Some examples were identified by the Court of Criminal Appeal in *R v Peet*.⁶⁰

⁵⁹ Section 10C(4)(a) finished with the words “would shock the public conscience”.

⁶⁰ *R v Peet* [2018] SASCF 91 at [62] - [66]

"In *R v Downie* the 18 year old defendant raped and murdered a 16 year old girl with whom he was infatuated in addition to killing both of her parents. A non-parole period of 35 years was imposed, reduced from 42 years on account of the defendant's pleas of guilty. [17%]

...

In *R v Omonte-Extrada* the 19 year old defendant murdered two victims by stabbing and wounding with an axe. The defendant cooperated with police. A non-parole period of 33 years was fixed, reduced from 44 years on account of the defendant's pleas of guilty. [25%]

In *R v Olsson* the 62 year old defendant murdered his partner and her mother while under the influence of methylamphetamine. The defendant went to the police station and confessed. A non-parole period of 26 years was fixed, reduced from 35 years on account of the defendant's pleas of guilty. [A little over 25%]

In *R v Shove* the defendant shot and killed two victims. The defendant was drug affected and feared harm. A non-parole period of 26 years was fixed, reduced from 33 years on account of the defendant's pleas of guilty. [A little over 20%]

In *R v Tran* the defendant murdered his former wife and her 22 month-old son. He pleaded guilty at the earliest opportunity but was considered to be lacking in remorse. A non-parole period of 27 years was fixed, reduced from 32 years on account of the defendant's pleas of guilty." [A little over 15%]

[200] In *Peet*, following pleas of guilty to the murder of a female victim and her two young children, pleas which entitled the offender to a reduction of up to 10%, the sentencing judge fixed a non-parole period of 30 years after deducting 3 years by reason of the plea (a little less than 10%). The Court of Criminal Appeal increased the non-parole period to 36 years, having allowed a reduction of 3 years for the pleas (approximately 7.75%).

[201] As the Chief Justice observed in *Davey*, the exception is more likely to apply to very serious offences and, in particular, to the crime of murder. Another example is found in a sentence imposed in the District Court for a number of offences, including causing death by dangerous driving.⁶¹ The offending driving which caused the death of the victim was correctly described by the sentencing judge as “horrendous”. For that crime the offender was entitled to up to 40% reduction because he had pleaded guilty at the earliest stage, but her Honour applied the exception and ordered the lesser reduction of 25%.

[202] Less than the maximum percentage reduction has also been given in two particularly serious cases of sexual offending. In August 2015, for 18 offences involving sexual offending against children and the production, dissemination and possession of child pornography, the maximum percentage reduction available was 40%. The sentencing judge applied a reduction 30%.

[203] In 2018, for very serious sexual offending against young teenagers who the offender took into his home for the purpose of caring for them, the maximum percentage available was 40%. The sentencing judge allowed a little less than 10%.

[204] These cases provide examples of the court utilising the power to apply less than the maximum percentage reduction available because reducing the sentence to that extent would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the particular offender, that it would, or may, affect public confidence in the administration of justice (or, previously, shock the public conscience). Greater detail of the application of this exception is provided in stage one of the review by the JPD.

[205] JPD identified 61 “homicide” cases as finalised in the 2017 and 2018 calendar years.

⁶¹ *R v Lyle Leonard Morrison*; *R v JW*; sentence imposed 12 October 2018.

These cases involved crimes of Murder, Manslaughter and Causing Death by Dangerous Driving. Sentencing remarks were obtained for 56 of those cases. Thirty-six (64%) of the offenders pleaded guilty.

[206] Of the 11 cases of murder, from the non-parole periods 3 offenders received the full reduction available, but 8 received lesser reductions ranging from 7% to 33%. Seven offenders pleaded guilty to murder within the first 4 weeks, but only 4 received the full reduction of 40%.

[207] JPD summarised the reasons given by sentencing judges for giving the full available reduction from the non-parole period fixed for murder as follows:

- Previous good character;
- Good prospects of rehabilitation;
- Unlikely to reoffend;
- Lack of convictions;
- Poor health; and
- The defendant's age (1 was a youth and another was in their late 60's).

[208] As to reasons for only allowing a part reduction from the non-parole period, JPD summarised those reasons:

- That it would shock the public conscience;
- That it would affect public confidence in the administration of justice;
- The defendant's lack of remorse; and
- That the sentence would be manifestly disproportionate to all of the circumstances of the case.

[209] Three of 4 offenders who pleaded guilty to manslaughter received the maximum available reduction. For causing death by dangerous driving, 13 of 18 offenders received the maximum available reduction.

[210] JPD summarised the reasons given by sentencing courts for allowing full reductions from the head sentences as follows:

- Previous good character;
- Good prospects of rehabilitation;
- Unlikely to reoffend; and
- The defendant's young age.

[211] As to reasons for not giving a full percentage reduction:

- General deterrence (including deterring both the defendants themselves and others); and
- That it would affect public confidence in the administration of justice.

[212] JPD examined the sentencing remarks of 131 aggravated sexual assault cases finalised in 2018. Ninety (69%) pleaded guilty. Eleven also pleaded guilty to offences carrying greater maximum penalties than the aggravated sexual assault.

[213] Of the 90 pleas of guilty to aggravated sexual assault, sentencing remarks in 13 did not identify what reduction, if any, had been applied. Fifty-nine of 77 offenders received the full reduction available. Eighteen received less than the full reduction.

[214] JPD summarised the reasons given for allowing full percentage reductions in aggravated sexual assault cases:

- Previous good character;
- Good prospects of rehabilitation;
- Unlikely to reoffend;
- Remorse and contrition;
- The defendant's young age;
- Very early plea; and
- Saving: the victims distress; police resources; and court time.

[215] Full details of the reductions across various stages of proceedings are found in the tables within the Stage 1 JPD report. For present purposes, it is sufficient to note that in matters of murder, the majority of offenders received less than the maximum reduction available. However, this position was reversed in cases of manslaughter, causing death by dangerous driving and aggravated sexual assault.

[216] JPD found that in the majority of cases, “clear reasons “ were given by sentencing courts for fixing the particular percentage reductions.

[217] I do not have information as to cases in which it might reasonably be argued that the court failed to apply, or apply adequately, the exception contained in s 45(5)a). It is, therefore, not possible to comment meaningfully as to whether the exception contained in s 40(5)(a) is working well in practice. Each case must be decided according to its particular circumstances and judges must apply the law in a principled manner, not being influenced by emotional considerations. No doubt counsel who act for offenders will possess a view as to how the exception is working which is significantly different from the views of victims.

Exceptions - Other Provisions

[218] In addition to s 40(5)(a), s 40(5) directs a sentencing court to have regard to other factors which possess the potential to lead a court to apply less than the maximum percentage reduction available. For example, under the previous legislation, the court was directed to consider the “circumstances surrounding the plea” (this provision no longer exists). In *R v Siviour*⁶² the court was concerned with an offender who, on the day the trial was due to commence, pleaded guilty to charges involving violence and dishonesty. As the charges to which the offender pleaded guilty were presented on a

⁶² [2016] SASCFC 51

fresh information, the offender was entitled to up to 40% reduction by reason of the plea notwithstanding that it was entered on the day the trial was scheduled to commence. By reason of other errors and uncertainty, the Court of Criminal Appeal exercised its discretion afresh with respect to sentence, but reduced the sentence by only 20%. In reaching the view that the offender should not receive the full reduction of 40%, the Court regarded the following factors as of significance:

- Although the plea resulted in some utilitarian benefit, the fresh information “did not represent any significant alteration in the Crown’s position or allegations”⁶³
- In view of the similarity between the old information and the fresh information on which the offender pleaded, the offender “could have taken steps to plead, or otherwise enter into negotiations, in relation to [the offence to which he pleaded] earlier than he apparently did and well ahead of the trial.”

[219] In *Siviour*, the court relied upon the provision that required the court to take into account “the circumstances surrounding the plea”. Under the current provisions, these circumstances would fall within s 40(5)(b) which requires the court to have regard to:

“the stage in the proceeding for the offence at which the defendant indicated an intention to plead guilty (including whether it would, in the opinion of the court, have been reasonable to expect the defendant to have done so at an earlier stage in the proceedings)”.

[220] In addition, subsection (c) of s 40(5) requires the court to have regard to whether the offender was charged with a different offence in respect of the same conduct and the stage in the proceedings at which negotiations occurred.

⁶³ At [34].

[221] In *Siviour*, the court also observed that the circumstances under consideration would have been within the “catch-all reference” that the court “may have regard to any other factor or principle the court thinks relevant”. That provision exists in the current section.

[222] The decision of the Court of Criminal Appeal in *R v Ballam*⁶⁴ provides another example of the court applying the predecessor to s 40(5)(b) to give less than the maximum percentage reduction. The offender had pleaded not guilty to a charge of attempted aggravated serious criminal trespass and, on the second day of the trial, the prosecution deleted the alleged circumstance of aggravation and replaced it with another circumstance of aggravation. The offender changed his plea and the Court of Criminal Appeal determined that, because of the change with respect to the circumstance of aggravation, the offender was entitled to up to 40% reduction. However, it had always been open to the offender to acknowledge his guilt of the basic offence of attempted serious criminal trespass, particularly as he was found at the scene by police. In those circumstances, a court determined that the offender should receive only a 20% reduction.

[223] As to the failure to engage in negotiations, the Director has discovered two cases in the District Court, and one in the Supreme Court, where less than the maximum percentage reductions were applied, apparently because of a failure by the offender to engage in negotiations. In the Supreme Court matter, the percentage reduction was 5% lower than the maximum. In the two District Court matters, one was 10% lower and the other 20%.

[224] In *R v Bridgland*⁶⁵, a majority in the Court of Criminal Appeal determined that the circumstances accompanying the offender’s plea of guilty warranted a reduction of 25% rather than 40%. Although the offender pleaded guilty as soon as amended

⁶⁴ [2016] SASFC 110.

⁶⁵ [2016] SASFC 28.

charges were laid, negotiations commenced only shortly before the trial and the offender did not dispute any of the facts which had been put forward at the committal. Lovell J concluded that it was open to the sentencing judge to take the view that “the utilitarian purpose of s 10C had been reduced by the way the matter proceeded and the fact that negotiations commenced only shortly before the trial”.⁶⁶

[225] It is readily apparent that the exception found in s 40(5)(a), and other factors identified in s 40(5), provide the court with a discretion to apply less than the maximum percentage reduction available. However, the exercise of the discretion is governed by the specific terms of the legislation and the decision of the Court of Criminal Appeal which requires “significant countervailing circumstances” to exist before an offender can properly “be denied the substantial part of the available reduction”. In other words, in the absence of good reason, the maximum reduction, or a reduction close to the maximum, should ordinarily be given. This principle underlies the exercise of the discretion to deprive an offender of the maximum reduction available.

Non-Parole Periods

[226] As discussed ([33] - [39]), there are particular complications associated with the application of the sentence reduction scheme to the fixing of non-parole periods for murder. These complications are caused by the application of s 47(5)(b) of the Sentencing Act which prescribes a mandatory minimum non-parole period of 20 years. That period is specified as representing “the non-parole period for an offence [murder] at the lower end of the range of objective seriousness for offences to which the mandatory minimum non-parole period applies”.

[227] The complexities associated with the application of the sentence reduction scheme to

⁶⁶ At [82].

the fixing of a non-parole period for murder are well illustrated in the judgement of Kourakis CJ in *R v Hallcroft*.⁶⁷ It is unnecessary to discuss the judgment in detail, but I note the following aspects of his Honour's reasoning concerning special reasons to fix a period less than the statutory minimum of 20 years:

- If the statutory minimum non-parole period of 20 years would prevent a court from reducing the non-parole period by the percentage reduction for a plea otherwise applicable, the inability to give the appropriate reduction "will only amount to a special reason to depart from the statutory minimum [of 20 years] if the failure to do so would result in a sentence so manifestly disproportionate to all of the circumstances of the case that the case should be treated as an exception to the rule."⁶⁸
- In speaking of disproportion, the Chief Justice was primarily concerned with the "extent of the reduction" denied by the application of the statutory minimum.
- His Honour indicated it was also necessary to consider qualitative factors such as the seriousness of the offence, degree of contrition and the reasons for and circumstances surrounding the entry of the guilty plea.
- His Honour described the ultimate question in the following terms:⁶⁹

The ultimate question in the exercise of the discretion is whether:

- The quantitative difference between the minimum non-parole period and the non-parole period which would have been fixed if a period of twenty years was a benchmark only; and
- the qualitative evaluation of the seriousness of the

⁶⁷ [2016] SASCFC 137.

⁶⁸ At [70].

⁶⁹ At [74].

offence and the circumstances of the guilty plea require that the case be treated as an exception to the rule.

- In the circumstances of that case, the Chief Justice concluded that “to deny the respondent that reduction below the statutory minimum on account of his guilty plea would be disproportionately harsh in all of the circumstances of his case”.⁷⁰

[228] In my view there is a tension between the approach of the Chief Justice and the underlying premise that the sentencing judge first fixes a non-parole period which the judge considers appropriate in all the circumstances of the case, having regard to the legislative direction that 20 years is the benchmark or yardstick for an offence at the lower range of objective seriousness. By definition, that non-parole period, fixed after consideration of all the objective and subjective factors, and after assessment against the 20 year benchmark, is the appropriate non-parole period in all the circumstances of the case. If factors other than a percentage reduction for a plea would not justify a reduction below the statutory minimum of 20 years, can it realistically be said that to deny the reduction for the plea because of the statutory minimum results in a non-parole period that is manifestly disproportionate to the circumstances of the case? The non-parole period has been found to be proportionate to the circumstances of the case, having regard to the benchmark. There is a harshness in the result because the offender is denied the benefit, otherwise available, of the reduction by reason of the plea, but the period is, through the application of the relevant principles, not manifestly disproportionate to the criminal conduct. It is the period that would be fixed if the offender had not pleaded guilty.

⁷⁰ The principles in *Hallcroft* were applied on 4 June 2019 in *R v Kirchner*. For a murder committed with an intention to kill by an offender with a record of prior violent offending, and in the absence of remorse, by reason of the guilty plea the non-parole period was reduced from 23 to 18 years (a reduction of approximately 22%: maximum available was 30%).

[229] The “special reasons” provision, s 48(3), was already in force when the sentence reduction scheme was introduced. In my view, Parliament did not intend that the sentence reduction scheme could operate as a special reason to reduce a non-parole period below the statutory minimum of 20 years. The operation in this way was an unintended consequence.

[230] This is a particularly difficult issue. At the heart of it is the concept of “special reasons” under s 48(3). As enacted, s 48(3) centred attention on the conduct or condition of the victim substantially mitigating the offender’s conduct; the fact and circumstances of the plea; and the conduct of the offender in co-operating with the authorities. These are specified as the only criteria to be taken into account and, in my view, they do not sit well with applying a reduction for utilitarian purposes not connected to the offender’s criminal conduct or matters personal to the offender.

[231] Further, in my view the reasoning of the Chief Justice in *Hallcroft* does not sit well with the direction in s 48(3) that, in considering whether special reasons exist, the court must have regard only to the criteria specified in s 48(3). Those criteria do not include reference to the concepts of “manifest disproportion” or a “disproportionally harsh” result as discussed by the Chief Justice.

[232] In these circumstances, complicated as it is, the legislation could remain in its current form. Alternatively, it could be amended to specify that in determining whether special reasons exist, the court is not to take into account that, but for the mandatory minimum of 20 years, the application of the reduction for a plea would result in a period of less than 20 years.

[233] Excluding the operation of the sentence reduction scheme from the fixing of a non-parole period in respect of a life sentence imposed for murder would be applauded by victims and others who, understandably, believe the crime is so serious that the scheme should not apply. This option would sit well with the decision of the

community, through Parliament, that the crime of murder is so serious that, absent specified special reasons, the minimum non-parole period must be 20 years. It should be recognised, however, that this option would remove an incentive for many persons charged with murder to plead guilty.

[234] Alternatively, the sentence reduction scheme could continue to apply to the fixing of these non-parole periods, but in a modified form by specifying that the scheme can never apply to reduce a non-parole period below the statutory minimum of 20 years. If this option is adopted, it would result in different treatment of offenders sentenced for the crime of murder.

[235] The difference in treatment would occur as follows:

- In every case the court would first fix a notional non-parole period having regard to all the objective and subjective factors and the 20 year benchmark.
- The court would then determine a notional reduction of the sentence by reason of the plea of guilty.
- If the notional reduction would reduce the notional non-parole period to a period in excess of 20 years, that reduction could be applied in full and the non-parole period fixed accordingly.
- If a notional reduction would reduce the notional non-parole period below 20 years, the non-parole period would be fixed at 20 years, unless special reasons exist. In other words, the offender would receive none or only part of the sentence reduction to which the offender would have been entitled but for the mandatory minimum of 20 years.
- If, by reason of existence of the special reasons, the notional non-parole period would have been less than 20 years, the offender would be entitled to the full reduction by reason of the plea.

[236] In other words, the limited application of the scheme would result in some offenders receiving the full benefit of reductions for pleas, but others being deprived of that benefit. Obviously, unequal treatment of offenders is contrary to the principles governing the administration of justice.

[237] These options fall squarely within the realm of policy, ultimately to be determined by Parliament. In my view I should not make any recommendation in this regard.

More Serious Cases

[238] As discussed earlier, there is a firm and common view among victims that the maximum percentage reductions potentially available are too high, particularly the 40% reduction. Associated with this view is the strong opinion among victims that in cases of more serious crimes of violence, either no reduction should be permitted for an early plea or the percentages should be significantly lower than those currently available. The crimes most frequently mentioned in this context are murder, manslaughter, serious crimes causing physical harm, causing death by dangerous driving and sexual crimes. Although s 40(5)(a) gives the Court a discretion to reduce the percentage otherwise available to a particular defendant if the result would be “so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would, or may, affect public confidence in the administration of justice”, in the view of victims the reductions being allowed for pleas to these serious crimes are excessive.

[239] Even if the maximum percentages at various stages were reduced, the concerns of some victims in respect of the more serious cases would remain. It is their view, and I suspect the view of many in the wider community, that the more serious cases should not attract the same percentage reductions as less serious cases. In their view, those

who commit the more serious crimes have forfeited the right to seek mitigation or leniency through co-operation within the criminal justice system. In these circumstances, it is argued that punishment, deterrence, denunciation and vindication of victims should prevail over the utilitarian considerations that underpin the granting of reductions. At the least, it is contended that maximum percentages available should be reduced.

[240] If a suggestion of this nature was adopted, the lowering of the percentages in cases of more serious crimes could occur either in the context of the current percentages, or against new percentages if the existing levels are reduced overall. If this approach was adopted, under the Current Scheme the tiers could look as follows:

Reduction	Period for Guilty Plea	More Serious Cases
Up to 40%	Not more than 4 weeks after first court appearance.	Up to 30%
Up to 30%	More than 4 weeks after first court appearance, but on or before the committal appearance.	Up to 20%
Up to 20%	From the day after the committal appearance to before committal for trial.	Up to 15%
Up to 15%	From committal for trial to immediately after arraignment appearance in the Supreme or District Court.	Up to 10%
Up to 10%	From immediately after the arraignment appearance to the commencement of the trial.	Up to 5%

[241] Although distinguishing more serious cases would add a layer of complexity, it would reflect a genuine and understandable community concern that in cases of more serious offending, factors of mitigation must give way to considerations of general

deterrence, punishment, denunciation and vindication of victims. All of these factors fall under the umbrella of protection of the public.

[242] As to the potential impact of reducing the maximum percentages in cases of more serious crimes, depending on the level to which percentages are lowered, there is obviously a risk that more offenders will plead not guilty and take their chances at trial. However, while it is impossible to predict the impact with any degree of certainty, I suspect that moderate reductions in cases of more serious crimes would not result in a large impact.

[243] If the maximum percentages were lowered for cases of more serious crimes, consideration could be given to permitting a court to apply a higher percentage of reduction, up to the level available for other offences, if the court is satisfied that exceptional circumstances exist. Such an exception could cater, for example, for the first offender who pleads guilty at the earliest opportunity and provides valuable assistance with respect to serious criminal activity. It could also cater for the offender where mental capacity places them in an exceptional category.

Strength of Crown Case

[244] As discussed earlier in this Report, from the perspective of victims it is an affront to common sense that an offender facing an overwhelming prosecution case, such as being caught committing the crime on CCTV, should be entitled to a reduction merely for acknowledging the inevitable result. In their view it is confusing to victims and members of the wider community that a reduction should be given in such circumstances. In the passage earlier cited from the judgment of King CJ in *Shannon*, it is clear that his Honour was of the view that a plea of guilty resulting “only from a recognition of the inevitable” was not, of itself, a matter of mitigation.

[245] If it is accepted that the underlying purpose of the sentence reduction scheme is purely utilitarian, logically the strength of the prosecution case is, at best, of marginal relevance. It might reasonably be said that the utilitarian impact through savings is modest in cases where the prosecution evidence would be brief and overwhelming. However, in my view it would be undesirable to require a court to embark on a separate inquiry concerning the strength of the prosecution case in order to make an assessment in each matter of the particular utilitarian value.

[246] As with motivation for entering a plea, the strength of the prosecution case may be relevant in other ways. For example, it might reflect on the motivation for entering a plea and, in turn, on claims of remorse and good prospects of rehabilitation. This issue is discussed further at [312] - [319].

Motivation for Plea

[247] As discussed earlier in this Report, in *Shannon* King CJ connected the benefit of a plea to the motivation for entering it. This approach is strongly supported by victims. However, it has not survived the introduction of the 2013 sentence reduction scheme. Nor has it survived in a number of other jurisdictions. If the underlying purpose of the scheme is accepted as utilitarian, the motivation for entering a plea is irrelevant. Motivation can, however, reflect on subjective matters relevant to sentence. This issue is discussed further at [312] - [319].

Repeat Offenders

[248] Speaking broadly, the fact that an offender has previously offended against the criminal law is not relevant to an assessment of the extent of the reduction allowed for

an early plea of guilty. However, s 40(5)(a) permits the court to take into account the prior offending because the Court is directed to consider whether the reduction by the available percentage would be “so inappropriate in the case of that particular defendant” that it would or may affect public confidence in the administration of justice. This issue is discussed further at [319].

Timing

[249] Bearing in mind that within the first 4 weeks an offender is unlikely to receive any detailed information as to the evidence available to the prosecution, it is obvious that the initial period of 4 weeks does not give an offender, or the offender’s legal advisers, much time to consider their various options. On the other hand, 40% is a very large reduction and is intended to apply only to those offenders who are willing to enter a plea of guilty before they know the full extent of the prosecution case and before the State is put to the trouble and expense of gathering the evidence. As I noted in 2015, defendants are to be discouraged from “keeping their options open” while they wait to see the strength of the prosecution case. I also observed:

[71] “While there are genuine cases where guilt generally, or guilt of a particular offence, might be an issue notwithstanding that a defendant admits a particular course of conduct, in the vast majority of cases the defendant is aware of the conduct and whether the conduct amounted to a criminal offence. Having made that observation, however, it is important to recognise that before a defendant is in a position to make an informed decision as to whether to plead, the defendant is entitled to information as to the essential allegations which form the basis of the charge and will inform the court of the factual basis upon which the sentence is to be imposed.”

[250] I followed those remarks with an observation concerning the role of the DPP:

[72] "Allied with this issue is the role of the ODPP in being involved at the earliest possible opportunity and in ensuring that officers with the conduct of the files either possess the authority to negotiate appropriate settlement of charges or have access to immediate instructions in that regard."

[251] As was the case in 2015, the 4 week period poses particular difficulties for the Aboriginal Legal Rights Movement and any legal practitioner who represents clients who live in remote areas or who follow an itinerant lifestyle. It can also pose a significant difficulty in respect of defendants for whom English is not their first language. Coupled with the absence of any significant indication as to the evidence available to the prosecution, almost inevitably defendants in these circumstances do not plead within the first 4 weeks.

[252] It was in this context that I recommended in 2015 that consideration be given to empowering magistrates to grant an extension of the 4 week period in strictly limited circumstances. The power to extend would have the capacity to cater for indigenous defendants whose lifestyle or other circumstances, or the absence of interpreters, prevent practitioners from obtaining instructions at the very early stages. The exercise of the power would enable negotiations to be undertaken where a defendant indicates a plea of guilty, but extensions are required to settle upon the precise offence or the factual basis of the plea. To some extent, of course, the addition of s 110(3) of the *Criminal Procedure Act* assists with respect to the period immediately after the committal appearance, but it has no application to the initial 4 week period.

Not Guilty Plea - Co-operation

[253] A feature of the scheme that has received little attention, but is a source of angst for victims, concerns s 38 of the Sentencing Act. Section 38 confers power to reduce a sentence by up to 10% for an offender who has pleaded not guilty, but who the court is

satisfied has “complied with all statutory or court ordered requirements relating to pre-trial disclosure and procedures” and who has “conducted the case in a co-operative and expeditious manner.” In the view of victims, an offender who pleads not guilty should not be entitled to any reduction of the sentence.

[254] Table 8 of the JPD Stage 2 Report sets out the number of offenders who pleaded guilty in the District Court after the trials commenced from 2010/11 to 2017/18. Figure 13 shows the graph based on percentages. In recent years there has been a significant increase in the number of offenders pleading guilty after commencement of the trial. From 8 of 322 matters in 2013/14 (8%), the number increased to 38 of 222 matters (17.1%) in 2017/18.

[255] It is not possible to identify with confidence the reasons for this upward trend in recent years. The trend began at almost the time the 2013 Scheme commenced. At that time there was no provision equivalent to s 38.

[256] In my view the availability under s 38 of a reduction of up to 10% following a plea of guilty entered after commencement of a trial might be contributing to the upward trend in the number pleading during a trial. However, I cannot draw any firm conclusions as to likely causes.

Role of Victims

[257] In her submission, Ms Killmier urged that victims should be consulted about both plea-bargaining and sentence reductions. As summarised in [67], Ms Killmier suggested that provided a victim consents, the DPP should inform the court whether a victim agreed or otherwise to a plea-bargain or sentence reduction. In her view this process would acknowledge the views of the victim and engage the victim more fully in sentencing procedures.

[258] In my consultations with victims, without exception they were intelligent and advanced their views logically and reasonably. Not surprisingly, some were more rigid in their views than others. However, it must be recognised that no matter how hard victims might try to approach the various issues in an objective manner, their views are necessarily and understandably influenced by their intimate connection with the events under consideration. In most instances, victims lack a detailed understanding of general sentencing principles and of the sentence reduction scheme and how the appellate court has interpreted various aspects of the scheme.

[259] In these circumstances, bearing in mind that the determination of sentences and the application of the sentence reduction scheme must be approached in a completely impartial manner and with full knowledge of the scheme, I do not favour involving victims in this aspect of the sentencing processes.

[260] Speaking broadly, I strongly favour transparency in sentencing remarks, both as to the application of the sentence reduction scheme and the impact of offending and the criminal justice process on victims.

Multiple Offences - s 41(2)

[261] This issue is discussed at [91] where the submission of the Director is set out in full. I agree with the Director's submission that s 41(2) has added a layer of unnecessary complexity which is time consuming for a sentencing court and possesses the potential to cause error. It poses significant problems in the Magistrates Court where it is common for offenders to be sentenced for multiple offences which attract different percentage reductions because pleas were entered at different stages.

[262] There is another option that could be considered. The Tasmania Sentencing Advisory Council has set out in its consultation paper the relevant provision in the Victorian

Sentencing Act 1991:

“In Victoria, the *Sentencing Act 1991* (Vic) s 6AAA provides clear directions in relation to the approach to be taken in applying a discount for guilty pleas when a general sentence is imposed. Section 6AAA provides that that:

(2) If an offender is sentenced for more than one offence in the same proceeding and subsection (1)(a) and (b) apply, the court must state, in respect of any total effective period of imprisonment —

(a) the sentence; and

(b) the non-parole period, if any—

that it would have imposed but for the plea of guilty and need not state those matters in respect of each offence.

...

(5) For the purposes of this section, an aggregate sentence imposed in respect of two or more offences is to be treated as a sentence imposed in respect of one offence.

This means that:

the court only needs to indicate the sentence that it would have imposed (but for the guilty plea) in relation to the overall sentence and any non-parole period. If the offender is sentenced for more than one offence at the same time, the court does not need to indicate the sentence that it would have imposed for each individual charge.”

[263] After discussing the position in South Australia, which is undoubtedly complex, the Sentencing Council concluded that the approach in Victoria is “much simpler”. I agree.

General Discussion

[264] I emphasise again that the Terms of Reference, pursuant to which I have conducted this Review, do not include a review of the role of victims in sentencing proceedings. Nor do they include a review of the adequacy or otherwise of sentences for specific crimes or generally.

[265] The 2015 Review was undertaken in the context of the previous Sentencing Act which required that after the 2013 sentence reduction scheme had been in operation for 2 years, an inquiry be held and a report be provided on the effect, if any, of the scheme in providing transparency in respect of sentences and “improving the operation and effectiveness of the criminal justice system.” The Terms of Reference governing this Review created a wider inquiry which includes a comparison with the 2013 Scheme. The Terms require a report as to whether or not the Current Scheme has achieved an appropriate balance “between the benefit to the community of an early guilty plea...and the need to ensure that a defendant is adequately punished for the offending behaviour and held accountable to the community for the offending behaviour...”.

[266] As discussed earlier in this Report ([93] - [107]), the criminal justice system exists to serve the interests of the community by protecting the public. There are many facets to protecting the public through the operation of the criminal justice system, but central to the system is the imposition of sentences upon offenders which appropriately reflect the criminality of the offender’s conduct, considered in the light of matters personal to the offender.

[267] The public interest in the imposition of sentences which properly reflect the criminality of an offender’s conduct is not the only public interest that must be considered in the context of the criminal justice system. Other important aspects of the public interest are centred upon the interests of victims of crime and economic considerations attached to the system. Speaking broadly, these sides of the public interest are best served if offenders acknowledge their guilt and do so as soon as possible after their arrest.

[268] In an endeavour to advance these aspects of the public interest, for many years sentencing courts recognised that the entry of an early plea of guilty should be encouraged by treating the plea as a feature of mitigation tending to attract a degree of leniency. This approach has moved to allowing specified reductions determined by the

timing of pleas.

[269] In South Australia, initially the motivation for the plea was significant ([95] - [100]). A plea of guilty was only a matter of mitigation if it resulted from genuine remorse, repentance or contrition, or from a willingness to co-operate in the administration of justice. Motivation provided a link between the plea and matters personal to the offender which were relevant to a determination of the appropriate sentence. However, that approach has not survived legislative intervention. The 2013 sentence reduction scheme, which introduced a sliding scale of specified percentage reductions, was substantially based on the utilitarian value of a guilty plea.

[270] The shift from reduction by reason of a plea motivated by remorse or a willingness to co-operate in the administration of justice, to a reduction based almost entirely on the utilitarian value of a plea, irrespective of motivation, was described by the Tasmania Sentencing Council, as a "paradigm shift".

[271] There is a tension between the public interest in offenders receiving a sentence appropriate for the criminality of the conduct, and the public interest in the economic/utilitarian aspect of the criminal justice system. Reducing an otherwise appropriate sentence, solely for utilitarian purposes, compromises the principle that the sentence should properly reflect the criminality of the offender's conduct. After a sentencing court fixes an appropriate sentence, it is required to reduce that sentence for reasons completely removed from the criminal conduct or matters personal to the offender.

[272] Like all tensions between different aspects of the public interest, through Parliament the community seeks to achieve an appropriate balance between competing interests. In this process it is not unusual for the economic side of the public interest to be in conflict with other aspects of the same interest.

[273] One of the difficulties associated with the Current Scheme is the lack of understanding and confusion that exists within the community about how, and why, the sentence reduction scheme operates. The legislation does not plainly state that the reduction is

given for utilitarian purposes only. It must be recognised that many in the wider community do not read appellate court decisions and, even if they did, they would be justified in concluding that details of the operation of the scheme are complex and confusing. This is not intended as a criticism of either readers or the court decisions. It is simply to recognise that it would not be surprising if such readers do not fully appreciate the reasoning behind the scheme and why courts have excluded, substantially, various matters including motivation and strength of the prosecution case. Understandably, many victims remain of the view that those factors should play a significant role in determining the size of the reduction. From their perspective, their grief is exacerbated when a court “rewards” an insincere apology and tactical plea of guilty.

[274] If it is accepted that the rationale for the sentence reduction scheme is found almost exclusively in the utilitarian value of a plea of guilty, one approach would be to state plainly this rationale in the legislation. In NSW, for example, it is clear from the terms of the legislation that the reduction is given solely by reason of the utilitarian value of the plea. It appears to me that the NSW scheme is simpler and much more readily understood and applied. As discussed previously, in this situation the strength of the prosecution case and motivation for the plea reflect on subjective considerations which come into play in determining the sentence prior to allowing a reduction by reason of a plea.

[275] Alternatively, the legislation could be amended to specify that motivation for the plea, and the strength of the prosecution evidence, are relevant to determining the extent of the reduction. In this way, for example, the offender who is genuinely remorseful will be entitled to a greater reduction than the cynical offender who is sorry because they have been caught, but is not truly remorseful. Similarly, an offender who co-operates by pleading notwithstanding a weak prosecution case will earn a greater reduction than the offender who faces overwhelming prosecution evidence and pleads purely for tactical reasons.

[276] In South Australia, the percentage reductions available for early pleas are higher than in any other Australian jurisdiction. The size of reductions, particularly in serious cases, is a source of significant disquiet among victims and the wider community.

[277] It is not uncommon for victims to say that they would rather put up with delay and the trauma of a trial than the distress and disillusionment which accompanies the granting of large reductions because an offender pleaded guilty. This type of reaction is particularly acute in serious cases and those involving repeat offenders facing overwhelming prosecution evidence.

[278] A reduction of 40% from an otherwise appropriate sentence for serious criminal conduct significantly detracts from the fundamental principle that the sentence should appropriately reflect the criminality of the conduct, considered in the light of the offender's personal circumstances. Such a large reduction, granted solely for utilitarian purposes, possesses the capacity to compromise the fundamental purpose of protecting the public.

[279] A reduction of 40% in serious cases for purely utilitarian purposes also possesses the potential to undermine public confidence in the administration of criminal justice. From information provided to me, coupled with public commentary and anecdotal reports, it appears that this potential has come to fruition.

[280] Legislative provisions, and both sentencing and appellate courts, have long recognised that some crimes are so serious that matters of mitigation must give way, either totally or substantially, to considerations of deterrence, punishment, denunciation and protection of the public. To this list of considerations should be added vindication of victims. This premise underpins s 40(5)(a). It accords with sentencing principles and community expectations. The observations of French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ in *Munda v Western Australia*⁷¹ emphasise the importance of this aspect:

⁷¹ *Munda v Western Australia* (2013) 249 CLR 600 at [54]-[55].

"It may be argued that general deterrence has little rational claim upon the sentencing discretion in relation to crimes which are not premeditated. That argument has special force where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals within those communities to be controlled by rational calculation of the consequences of misconduct. In such cases it may be said that heavy sentences are likely to be of little utility in reducing the general incidence of crimes, especially crimes of passion. That having been said, there are three points to be made in response. First, the proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise **the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.** Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community.

A consideration with a very powerful claim on the sentencing discretion in this case is the need to recognise that the appellant, by his violent conduct, took a human life, and, indeed, the life of his de facto spouse. A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-fuelled destruction of a woman by her partner. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before

the law." (my emphasis).

[281] Once that premise is accepted, the question must be asked whether, in serious cases, any reduction of an otherwise appropriate sentence by reason of pragmatic considerations such as the utilitarian benefit of a plea is justified. If some reduction is justified, should the most serious cases be exempt or subject to lesser percentage reductions?

[282] In this context it is obvious that there is public disquiet about the Current Scheme because the court is imposing sentences which, after reduction for the plea are, by definition, inadequate in the sense that they do not reflect properly the criminality of the conduct considered in the light of matters personal to the offender. When a 40% reduction is applied, the sentences are inadequate by a significant margin.

[283] A determination as to the appropriate balance between competing public interests cannot be made without an assessment of the efficacy or otherwise of the scheme which compromises the fundamental principle of sentencing. In 2015 I concluded that the 2013 Scheme had resulted in an increase in the number of guilty pleas before committal, and a corresponding decrease in guilty pleas after committal to the District Court. I also concluded that despite the changes, there had been no reduction in the time taken to finalise matters in the District Court, and limited change in the Magistrates Court. The current summary from examination of statistical information appears in [151] - [163].

Specific Issues

[284] Against this background I turn to specific issues summarised in [111].

[285] *Is there a basis for concluding that the Current Scheme is not meeting community expectations and, if so, in what way? Is the scheme generally, or in particular aspects, a source of disquiet among reasonably minded members of the community?*

[286] In my view the answer to both questions is in the affirmative. The primary source of concern is the size of the reductions available resulting in sentences that do not meet community expectations. The large reductions cause disquiet among reasonably minded members of the community, particularly in sexual assault matters and in cases involving serious violence, death and serious physical injuries. In addition, the granting of large reductions to repeat offenders, and to offenders who face overwhelming prosecution cases, is a source of significant concern.

[287] How is the Current Scheme working in practice? Is it achieving the purpose of improving the operation and effectiveness of the criminal justice system? In this context, if any increase in the number of pleas entered before committal for trial had any positive flow-on effect in the Supreme and District Courts? If not how can it be improved?

[288] In the District Court the Current Scheme has, broadly speaking, maintained the improvement in the operation of the criminal justice system. This broad conclusion is reached on the basis that more pleas of guilty continue to be entered, and at earlier stages in the process, than occurred prior to the commencement of the 2013 Scheme. Earlier pleas obviously reduce the drain on resources and assist everyone included in the system, including victims.

[289] However, the areas of concern are found in the detail. As discussed earlier ([151] - [163]), there exist worrying trends and the increase in pleas of guilty has not been reflected in improvements in court times and trial lists.

[290] As to any flow-on effect in the Supreme Court, I did not deal with this issue in 2015 because I concentrated on the District Court which is the primary trial and sentencing criminal court. Similarly, for this Inquiry initially I did not request statistics with respect to the Supreme Court, but I decided to do so later after receiving Stages 1 and 2 of the JPD Report. Similarly, statistics are not yet available for inclusion in this Report. I will be providing a supplementary report at the conclusion of the second review concerning the major indictable reforms and I will include the Supreme Court statistics and

conclusions in that supplementary report.

[291] As to the District Court, there were worrying trends prior to the commencement of the Current Scheme. There did not appear to have been a positive flow-on effect to the District Court and the Current Scheme has interrupted the flow of cases to the District Court. It is, therefore, too early to draw any firm conclusions as to the impact of the major indictable reforms upon the current scheme and, in turn, the impact on the District Court of the current sentence reduction scheme. This matter can be revisited at the conclusion of the review concerning the major indictable reforms.

[292] In these circumstances, the issue of how to improve the flow-on effect of the sentence reduction scheme in the District and Supreme Courts is a matter I will endeavour to address following completion of the major indictable reforms review.

[293] *Is there a case for wholesale change? If so, is there a viable alternative? If not, to what extent are changes required or desirable to improve the system, assuage community concerns or align the scheme more closely with community expectations?*

[294] I doubt that there is a case for wholesale change. The underlying aim of encouraging offenders to enter early guilty pleas is an important feature of an affordable criminal justice system. It is well entrenched and has proven to be effective in increasing the number of early pleas. However, in my view there is a case for amending the legislation either to identify specifically that the reductions are granted solely on the basis of the utilitarian benefit of the plea, or to include factors such as the motivation for a plea and strength of the prosecution evidence as relevant to determining the extent of the reduction. The first approach is simpler, but the second recognises the importance in sentencing of the attitudes of offenders towards their offending.

[295] In this context it should not be overlooked that the concept of a utilitarian benefit is not limited to the economic benefit for the State when a plea of guilty saves the State the cost of an investigation and/or a trial. It includes the benefit to victims of an early resolution and relieving victims from giving evidence.

[296] In reaching this view, I appreciate that some reasonably minded members of the

community do not support any sentence reduction scheme based on pleas of guilty, or would limit such a scheme to persons who commit relatively minor offences. However, as I have said, there are strong utilitarian considerations favouring a sentence reduction scheme being available to all offenders. In my view the appropriate balance can be achieved adjusting some components of the existing scheme.

[297] Other changes which in my view are required or desirable to improve the system, assuage community concerns or align the scheme more closely with community expectations, are discussed in the following paragraphs.

[298] Are all or any of the current maximum reductions excessive, either generally or in particular circumstances. For example, should a reduction of 40% be available only for a plea at the very first opportunity which is accompanied by valuable co-operation with the authorities in connection with serious criminal activities? Are all or any of the percentage reductions too high in cases of serious crimes of violence or commission of serious crimes by repeat offenders?

[299] In my opinion the current range of percentage reductions available at various stages of proceedings are out of line with community expectations and are a source of significant disquiet, not only for victims, but across the wider community. In particular, the maximum reductions are a source of great concern when granted in cases of sexual crimes and crimes involving physical violence causing injuries and death ([238] - [243]).

[300] The maximum reductions are out of step with other Australian jurisdictions. At the time of introduction in 2013, they were a significant increase above the percentage reductions currently being given by sentencing courts.

[301] In my view, the current range of maximum percentage reductions should be reduced. At the same time, sentencing courts should be given the discretion to grant more than the maximum reduction in exceptional cases, for example, where an offender has provided valuable co-operation with the authorities in connection with other criminal activities.

[302] Would a lowering of all or any of the percentage reductions reduce the effectiveness of the sentence reduction scheme?

[303] This is a question which is impossible to answer with any confidence. Not surprisingly, legal practitioners who regularly represent persons charged with serious crimes are of the view that maintaining the current maximum levels of 40% and 30% is important, and that any reduction will result in a decrease in the number of offenders availing themselves of the opportunity to enter early pleas. In my view, while some reduction might occur, bearing in mind that offenders who commit serious crimes are facing significant terms of imprisonment, I doubt that a reduction from 40% to 35% or 30%, coupled with reductions at the lower tiers, would result in a significant decrease, but it must be admitted that opinions in this area are little more than speculation.

[304] As discussed ([238] - [243]), a possibility worthy of consideration is creating a two tier system in which the existing maximum reductions are generally maintained, but lower maximum reductions are fixed for specified offences involving serious sexual assault or serious violence accompanied by physical injuries or death (more serious offences). I would include in this category Causing Death or Serious Injury by Dangerous Driving. In other words, the maximum reductions would be less for more serious crimes. However, it must be recognised that this concept would add a layer of complication to sentencing for major indictable offences.

[305] Are there aspects of the scheme, as interpreted by the court, which should be changed in any way? For example:

- *Are time periods too tight?*
- *Have the changes brought about as part of the major indictable reform package had any impact, and if so, are any amendments required?*
- *What role, if any, should factors such as contrition and the strength of the Crown case play in assessing the amount of the reduction?*
- *Is the current interpretation as to entitlement to the maximum reduction a matter*

of community concern? In this context, what is the effect, if any, of s 40(5). In particular, is s 40(5)(a), which requires the court to consider whether the reduction by the percentage contemplated “would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would, or may, affect public confidence in the administration of justice”, operating effectively?

[306] Are time periods too tight?

[307] As indicated in my 2015 Report, and as discussed earlier ([249] - [252]), in my view the initial period of 4 weeks creates significant problems, and potentially unfairness, in circumstances where the offender leads an itinerant lifestyle, particularly in remote communities. In addition, the lack of availability of interpreters creates a problem for many of these offenders. In my view, as I indicated in 2015, consideration should be given to empowering magistrates to extend the 4 week period in special circumstances.

[308] Have the changes brought about as part of the major indictable reform package had any impact and, if so, are any amendments required?

[309] In theory, with one exception, the major indictable reforms should not have adversely affected the sentence reduction scheme. If anything the reforms should have encouraged more pleas prior to committal for trial. The one exception is the addition of up to 10% reduction following a trial if the offender has co-operated pre-trial and in the conduct of the trial. This addition might encourage some offenders to take their chances in a trial.

[310] Having made these observations, I add that in my view it is too soon to assess, confidently and accurately, whether the major indictable reforms have had an appreciable impact on the sentence reduction scheme. More time is needed for the flow of proceedings to “settle in” under the new regime. If, as suggested, files are being delayed in the Magistrates Court, the impact of these delays on the scheme cannot be assessed at this time. In addition, more information is likely to emerge

during the inquiry into these reforms.

[311] *What role, if any, should factors such as contrition and the strength of the Crown case play in assessing the amount of the reduction?*

[312] As discussed ([95] - [100]), prior to legislative intervention, in South Australia the criminal courts treated pleas of guilty, and the motivations for such pleas, as matters of mitigation personal to the offenders. The court was not concerned with striking a balance between competing public interests. However, legislative intervention which based the sentence reduction scheme primarily on the utilitarian value of a plea of guilty, brought competing interests into play. The scheme requires sentencing courts to fix a sentence appropriate to the criminality of the conduct, considered in the light of matters personal to an offender, but to reduce the appropriate sentence for reasons unconnected with the criminality of the conduct and matters personal to the offender. The reduction is given almost solely for pragmatic considerations centred on the economic aspect of the public interest.

[313] Today, motivation for a plea is almost irrelevant, as is the strength of the prosecution evidence. Based almost exclusively upon the utilitarian benefit of a plea, offenders are entitled to specified reductions for pleas entered at particular times, regardless of their motivations.

[314] In this regard, the operation of the sentence reduction scheme is not well understood among victims and the wider community. Confusion, and inevitably disillusionment, exists with respect to the granting of large reductions, regardless of motivation for pleading guilty. The community does not understand why an offender facing overwhelming prosecution evidence, who pleads guilty solely for tactical reasons and selfish purposes, is entitled to the same reduction as an offender who, notwithstanding a weak prosecution case, pleads guilty because of true remorse. Many in the community understand the need to encourage offenders to plead guilty but, understandably, object to giving reductions which are not "earnt" in any way.

[315] One option is to spell out plainly in the legislation that the reductions are given solely

because of the utilitarian value of pleas of guilty, regardless of motivation and the strength of the prosecution case. An alternative option is to amend the legislation to specify that the motivation for the plea, and the strength of the prosecution evidence, are relevant to determining the extent of the reduction. This was discussed earlier ([269] - [275]). Notwithstanding strict logic, the latter option would assist in ameliorating the distress experienced by victims who see the current system as rewarding an insincere apology and a tactical plea of guilty.⁷² In my view it would also assist in maintaining public confidence in the scheme.

[316] It would not be difficult to amend s 40(5) to include motivation for the plea and the strength of the prosecution evidence as factors relevant to the exercise of the discretion to reduce the sentence by reason of a plea of guilty. At the end of s 40(5), immediately following the words “and may have regard to any other factor or principle the court thinks relevant”, the words “including the motivation for the plea and strength of the prosecution evidence” could be added. If thought necessary, specific reference could be made to remorse/contrition.

[317] Although the simplicity of a sentence reduction scheme based almost entirely on the utilitarian value of pleas of guilty is attractive, and might assist in removing the current confusion that exists in the community concerning the basis upon which the scheme operates, nevertheless I am attracted to the alternative of including reference to motivation and strength of the prosecution evidence. The community perspective is not governed by the strict logic which has been applied by authorities in South Australia and other jurisdictions when discussing this issue.

[318] Perceptions are important. Understandably, the community does not approve of a system which appears to reward offenders who plead guilty for only tactical or cynical reasons in the face of overwhelming prosecution evidence. In my view, there is force in these concerns and, ultimately, I have reached the view that specific reference should

⁷² As mentioned ([179]), in the ACT the court is directed not to allow any “significant reduction” for a plea in the face of an “overwhelming strong” prosecution case.

be made in s 40(5)(a) to motivation and strength of the prosecution evidence. If this approach is rejected, in my view the Act should be amended to state specifically that reductions are given because of the utilitarian value of pleas of guilty, regardless of motivation and strength of prosecution evidence.

[319] As to a repeat offenders, I understand the view that they should be treated as forfeiting the right to plea reductions, and should not be rewarded for appearing to manipulate the system. However, the system needs to encourage repeat offenders to plead and their pleas carry the same utilitarian benefit as first offenders. In addition, a record of prior offending is relevant under s 40(5)(a). I do not recommend including specific reference to prior offending in this context.

[320] *Is the current interpretation as to entitlement to the maximum reduction a matter of community concern? In this context, what is the effect, if any, of s 40(5). In particular, is s 40(5)(a), which requires the court to consider whether the reduction by the percentage contemplated "would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would, or may, affect public confidence in the administration of justice", operating effectively?*

[321] The answer to the question whether the current interpretation as to entitlement to the maximum reduction is a matter of community concern is a firm affirmative. However, it is influenced by the strong opinion that 40% is too much. If, for example, the maximum percentage available was 35% or less, the current interpretation might not seem so offensive to reasonably minded members of the community.

[322] As to the operation of s 40(5)(a), in the context of the structure of the Current Scheme I find it difficult to envisage a better form of wording which might improve the operation of this particular factor. As worded, s 40(5)(a) requires the court to assess whether, and to what extent, the proposed reduction would be disproportionate to the seriousness of the offence or inappropriate in the case of a particular offender. The court is also required to address the possible impact of a reduction on public confidence in the administration of justice. In my view, these are appropriate

considerations within the current structure. Importantly, a court is not required to be satisfied that public confidence would be effected, only that it may be effected.

[323] Speaking broadly, if the current structure is maintained, in my view the other matters to which the court is directed by s 40(5) are appropriate. Although sentencing courts are required to find that “significant countervailing circumstances” exist before an offender can properly “be denied the substantial part of the available reduction”, the authorities to which I have referred ([218] - [225]) demonstrate that “significant countervailing circumstances” can be found through the operation of s 40(5)(b) - (f) and the “catch-all” provision that the court “may have regard to any other factor or principle the court thinks relevant”.

[324] In my view, the authorities demonstrate a reasonable approach to the operation of these provisions.

[325] The terms of reference direct me to consider “whether the factors listed in ss 37(3), 38(2), 39(4), 40(5) and 43(5) are ‘sufficient so as to ensure’ the appropriate balance between the benefit to the community of an early guilty plea and the need to ensure adequate punishment. For the reasons discussed in this Report, in my view the appropriate balance has not been struck and the balance has not been struck because the maximum percentage reductions available to a court are too high.

[326] As to these provisions in particular, I have indicated my view that the matters to which the court is directed by s 40(5) are appropriate.

[327] Section 37(3) concerns the reduction of sentences for co-operation with law enforcement agencies. As discussed earlier ([27]), this section has not been the subject of any submissions or public attention and I have, therefore, not undertaken a review of this provision. On the face of the section, the criteria specified in s 37(3) are appropriate and there does not appear to be any reason for amendment.

[328] Section 38 is discussed at [253] - [256]. It relates to the power of the court to reduce a sentence by up to 10% even though an offender has pleaded not guilty. Section 38 is intended to encourage co-operation in the conduct of the trial and s 38(2) directs the

court to have regard to the impact of the proceedings on a victim and the utilitarian benefit to the community of the offender's conduct. The court is also empowered to have regard "any factor or principle the court thinks relevant".

[329] If s 38 remains in force, in my view the criteria set out in s 38(2) are appropriate.

However, there is inadequate information available to enable any conclusion to be drawn as to the operation of s 38 and, as will appear later, I recommend that s 38 be repealed.

[330] Section 39(4) operates in the Magistrates Court and is the equivalent of s 40(5). For the reasons discussed, in my view the criteria in s 39(4) are appropriate.

[331] Section 43(5) concerns resentencing an offender who has subsequently co-operated with a law enforcement agency. No information has been provided about the operation of this provision and, therefore, I have not attempted to review it.

[332] *Are there practical issues which require attention? For example, does the operation of s 41 with respect to sentencing for multiple offences cause difficulty, and is the inability of a magistrate to take a plea to an offence which is only a statutory alternative to the offence charged on the information an issue which should be addressed?*

[333] The issue of multiple offences is discussed at [91] and [261] - [263]. This problem is particularly acute in the Magistrates Court and should be rectified. The Victorian approach is both practical and fair.

[334] At [79] and [80] mention is made of the Director's observation concerning the inability of a magistrate to accept a plea to an offence which is a statutory alternative to the offence charged on the Information. This is a practical issue which should be rectified.

Disputed Facts

[335] As discussed ([176]), in NSW the court may decline to reduce a sentence by reason of a plea, or to give less than the maximum percentage available, if the court is of the

view that the “utilitarian value of the plea of guilty has been eroded by a dispute as to facts that was not determined in favour of the offender”. Of course, that provision exists in the context of the scheme which is based almost exclusively upon the utilitarian value of pleas of guilty.

[336] In my view, it is appropriate to discourage false attempts by offenders to reduce their culpability by disputing facts in the course of a sentence hearing. It could be argued that s 40(5) is broad enough to encompass this situation, but an inclusion of a provision similar to the NSW provision would put the matter beyond doubt.

Changes to Information

[337] Late changes to Informations, either in the charges or circumstances of aggravation, cause difficulty. As the authorities discussed earlier demonstrate, they result in time starting again meaning, for example, that even if a change in the charge occurs late in the District Court proceedings, provided an offender pleads guilty within 4 weeks after the change has been made, the offender is entitled to a reduction of up to 40%. This was an issue raised in 2015 where I concluded:

[78] In my view there is force in the submission of the Director that permitting the full reduction to be available in these circumstances tends to undermine the purpose of the legislative scheme and should be discouraged. From the outset it is open to a defendant to offer to plead guilty to a charge different from the charge laid by the prosecution, regardless of whether the different offence is the automatic alternative to the offence charged or not. The present interpretation discourages proactive involvement at the outset and encourages a defendant to keep the options open with a view to negotiating a plea to a different charge later in their proceedings. Further, as the Director has pointed out, the present interpretation provides an incentive for the prosecution to charge more than one offence arising out of a single set of

circumstances in order to avoid the problem of a plea later in the proceedings activating the availability of the 40 per cent reduction. I suggest that consideration be given to amending the legislation to remove this anomaly.

[338] As discussed ([82] - [85]), since the 2015 Report other provisions have been added to s 40(5). In addition, as discussed at [218] - [225], there are decisions of the Court of Criminal Appeal which open the way for reduced reductions if an offender could reasonably have offered to plead guilty to an alternative or different offence, or to an offence without the circumstance of aggravation or accompanied by a different circumstance of aggravation, at an earlier stage of the proceedings. In these circumstances, at this time I do not recommend any specific legislative changes in this regard.

Concealing a Crime

[339] In recent years “cold case” investigations have resulted in charges being laid many years after the commission of the crimes. It is not uncommon for discovery of the fact that a crime has been committed to be delayed for many years. In other words, for a long time the offender has successfully concealed the commission of the crime.

[340] In these circumstances, once the commission of the crime has been discovered, if an offender pleads guilty within the first 4 weeks, should that offender be entitled to the maximum reduction applicable to the first 4 week period? No doubt a court would have regard to the fact that the offender has concealed the crime for many years in deciding whether the offender should be granted a reduction by reason of the plea and, if so, the extent of the reduction. However, it might reasonably be argued that where an offender has concealed the fact of the crime, such conduct should specifically be mentioned in the legislation. It would require only a simple amendment to s 40(5) to include as a relevant factor the fact that the offender concealed the commission of the crime and the period during which concealment occurred.

Children

[341] In [63] and [64] I outlined the submission of Ms Connolly that the sentence reduction scheme is not only inappropriate for children and young people, but breaches Article 40 of the United Nations Convention on the rights of the child. She urged that the scheme should not apply to children, but if it is used safeguards should exist to avoid the potential of false admissions of guilt and the scheme should be “specifically constructed to expedite the reintegration of young offenders back into society and not be tied to early guilty pleas”.

[342] While I understand the concerns of Ms Connolly, and agree that children should not be subjected to any form of direct or indirect compulsion, I respectfully disagree with her submission that the application of the sentence reduction scheme to children breaches Article 40. In this regard the operation of the scheme must be considered in the context of the practical operation of the *Young Offenders Act 1993* (SA).

[343] Speaking broadly, matters move more quickly through the Youth Court than adult courts. The principles governing the sentencing of children differ significantly from those applicable to adult offenders. As a consequence, in the vast majority of cases the sentence reduction scheme is irrelevant because a number of alternative sentencing options are used before detention becomes an option. These alternative options do not involve any form of custody. Only when those options have been exhausted is a sentence of custody in the form of detention appropriate. In such cases, the children are legally represented and, frequently, such children possess experience in the operation of the criminal justice system, as it applies to children.

[344] It is obvious that special care must be taken when advising children and others who might be susceptible to undue influence or who might lack full comprehension of the ramifications of pleading guilty. The Youth Court well understands these issues. In my view it would be unfair to deprive children facing detention of the opportunity of qualifying for a reduced period of detention by pleading guilty.

Conclusions and Recommendations

[345] This Inquiry and Report concern only the operation of the current sentence reduction scheme. Although the legislative sentence reduction scheme commenced in 2013, it has not continued uninterrupted in its original form. The scheme changed in 2018 and those changes occurred in the context of significant changes to the major indictable processes. The Current Scheme is only one aspect of the new processes but, necessarily, there is a close connection with the new major indictable processes.

[346] The major indictable reforms have been in operation for only a little more than 12 months. Further, the operation of the new processes under those reforms is the subject of a second inquiry. In these circumstances, in some respects conclusions in this Report must be broad and tentative. Hopefully, the second inquiry will enable me to reach firmer conclusions.

[347] The Terms of Reference for this Inquiry direct attention to a comparison between the 2013 and current sentence reduction schemes. For the reasons discussed, it is too soon in the operation of the Current Scheme to make a complete comparison, but in my view a number of tentative conclusions can now be drawn.

[348] While the major indictable reforms have altered procedures and appear to have resulted in an interruption to the flow of major indictable cases through the Magistrates Court, the essence of the sentence reduction scheme has not been altered. It remains a scheme based on fixing maximum percentage reductions according to the timing of a guilty plea. While there are differences ([20] and [21]), in my view those differences are unlikely in themselves to have caused any appreciable change in the number and timing of pleas. The major incentives of 40% and 30% have continued to apply at the earlier stages of the proceedings.

[349] Both schemes promote transparency in sentencing. With few exceptions, this aim is being achieved.

[350] As discussed, in my view it is too soon to reach a firm conclusion as to the overall

impact of the major indictable reforms upon the sentence reduction scheme. Whether, in comparison with the previous procedures and the operation of the 2013 Scheme under those procedures, the Current Scheme has “improved the [overall] operation and effectiveness” of the criminal justice system, remains to be assessed during the second inquiry. As presently advised, in respect of the impact on the sentencing aspect, my tentative answer is in the negative. Broadly speaking the statistics suggest that a number of adverse trends commenced before the major indictable reforms came into operation and have continued under the Current Scheme.

[351] I emphasise that these are broad and tentative conclusions which will be revisited at the conclusion of the second inquiry.

[352] The conclusions and recommendations that follow should be read in the context of information and discussion set out earlier in this Report. In these conclusions and recommendations, my personal views have been reached after consideration of information set out in this Report. I have had extensive discussions, both formal and informal, with people engaged in the operation of the legal system and from the wider community.

[353] I emphasise that I do not possess a magic wand containing infallible answers. As will be discussed in the second report, over many years there have been numerous attempts to find answers as to how the efficiency of the criminal justice systems across Australia can be improved. The views I express about issues that are the subject of this Inquiry are views in respect of which reasonable minds differ and, over the years, have differed. No doubt the debate will continue for a long time after this Report.

[354] Earlier in this Report, I discussed the context in which the Current Scheme operates ([22] - [25]) and the rationale of the scheme ([93] - [107] and [266] - [272]). Criminal courts exist to serve the public interest by protecting the public through the imposition of sentences that will best achieve that objective. Sentences must be imposed according to law which requires that sentences appropriately reflect the criminality of the offender’s conduct, considered in the light of matters personal to the offender.

[355] The public interest to which I have referred is not the only public interest in the administration of criminal justice. For over 40 years the criminal courts in South Australia have recognised that there is a public interest in assisting victims and in economic considerations attached to the operation of the criminal justice system. Economic considerations have become increasingly important as competing demands for public funds have grown.

[356] The economic aspect of the public interest is best served if offenders plead guilty, and do so as soon as possible after apprehension. Securing early pleas is a legitimate objective and, within appropriate limits, providing encouragement to plead through sentence reductions is a legitimate process.

[357] There is a tension between the public interests to which I have referred. It is not unusual for different aspects of the public interest to be in conflict with each other. When this tension or conflict exists, through Parliament the community determines where the balance is struck.

[358] Earlier in this Report I discussed the essential nature of the sentence reduction scheme and its foundation in the utilitarian benefit of pleas of guilty ([172] - [174] and [312] - [318]). In that discussion I reached the view that other factors should play a role in the determination of the percentage reduction to be given.

[359] **Recommendation 1** - For the reasons discussed at [32] - [318], I recommend that the legislation be amended, specifically s 40(5), to spell out clearly that motivation for a plea of guilty, and the strength of the prosecution evidence, are relevant to the assessment of the reduction to be given in recognition of the plea.

[360] **Alternative Recommendation** - If Recommendation 1 is not adopted, I recommend amendment to spell out that the sentence reduction scheme is based on the utilitarian value of the plea, regardless of motivation and the strength of the prosecution evidence.

[361] As to the maximum percentage reductions available at various stages, not only is 40% significantly higher than the maxima in other jurisdictions, there is a widespread view

within the community that, put simply, 40% is too high. This is a major source of distress for victims ([114] - [119], [188] - [191] and [276] - [280]).

[362] In other than rare and exceptional cases, I agree that a reduction of 40% from the appropriate sentence, purely for pragmatic reasons, is too much. It detracts significantly from the fundamental principle that the sentence should appropriately reflect the criminality of the conduct, considered in the light of the offender's personal circumstances. It possesses the capacity to compromise the fundamental purpose of protecting the public and the potential to undermine public confidence in the administration of criminal justice.

[363] Notwithstanding this general view, I recognise that there may be cases involving rare and exceptional circumstances in which a 40% reduction is not only justified, but is in the best interests of the community. For example, with specific exceptions, 40% might be appropriate in the case of a first offender who not only pleaded guilty at the earliest opportunity, but from the outset provided complete and valuable assistance to the authorities in respect of other offenders or serious criminal conduct. The mental capacity of an offender might be such as to place the offending in an exceptional category.

[364] It is apparent from my conclusions that, in my view, the sentence reduction scheme is not meeting community expectations and is a source of disquiet among reasonably minded members of the community. Further, in respect of major indictable matters, the scheme has not achieved the appropriate balance between the benefit to the community of an early plea of guilty, and the need to ensure that offenders are adequately punished and held accountable to the community. However, it must be recognised that the disenchantment with the current maximum percentages is primarily experienced in cases of serious crimes. For example, the application of 40% to sentences for summary offending does not attract adverse attention. In my view, there is a good case for maintaining the existing maximum of 40% for summary matters.

[365] **Recommendation 2** - I recommend that with respect to summary matters, the first tier

of 40%, and current percentages at lower tiers, be maintained.

[366] **Recommendation 3** - In respect of indictable matters, in other than “more serious” cases, I recommend that the maximum percentage reduction for a plea entered in the first 4 weeks be reduced from 40% to 35%.

[367] If, in other than more serious cases, the top percentage reduction is reduced from 40% to 35%, in my view there is a need to maintain appropriate gaps to the next and subsequent tiers. If the differences between the tiers are too small, the incentive to plead earlier is reduced.

[368] **Recommendation 4** - In other than “more serious” cases, I recommend the following tiers of reduction:

Reduction	Period for Guilty Plea
Up to 35% (previously 40%)	Not more than 4 weeks after first court appearance.
Up to 25% (previously 30%)	More than 4 weeks after first court appearance, but on or before the committal appearance.
Up to 15% (previously 20%)	From the day after the committal appearance to before committal for trial.
Up to 10% (previously 15%)	From committal for trial to immediately after arraignment appearance in the Supreme or District Court.
Up to 5% (previously 10%)	From immediately after the arraignment appearance to the commencement of the trial.

[369] My recommendations as to the maximum percentage at each tier involve only modest reductions from the current levels. However, in my view the new levels bring the system closer to achieving the appropriate balance between encouraging early pleas and ensuring offenders are adequately punished.

[370] No doubt most victims would urge that the new levels remain too high. However, the scheme is well established and continues to have the desired impact. In my view any greater reduction in the maximum would risk a significant reduction in the number of early pleas.

[371] In recommending even the moderate reductions in the maximum percentages, I recognise the existence of a risk that the numbers pleading guilty might reduce and/or pleas will be entered later. However, although an assessment of the effect necessarily involves considerable speculation, I suspect that the reduction in the number of pleas would not be significant. Similarly, the number delaying their pleas would not be significant. Overall, in my view, the proposed reductions in maximum percentages are unlikely to have an appreciable adverse impact upon the timing of pleas.

[372] Recommendations 3 and 4 relate to indictable matters other than “more serious” cases. By “more serious” cases I am referring to serious sexual crimes and serious crimes of violence causing death or serious physical injury, including dangerous driving causing death or serious injury. Earlier in this Report I discussed distinguishing these types of more serious cases ([238] - [243]). Notwithstanding a degree of complexity which would be added by distinguishing more serious cases, in my view it is an appropriate step toward achieving the appropriate balance between the benefit of an early plea and the need to ensure offenders are adequately punished.

[373] **Recommendation 5** - I recommend that regardless of whether the general maximum percentages are reduced as suggested in Recommendations 3 and 4, in “more serious” cases, namely, serious sexual crimes and serious crimes of violence causing death or serious physical injury, including dangerous driving causing death or serious injury, the maximum percentages at each tier be set at a level lower than maximum percentages for other crimes.

[374] If Recommendations 3 and 4 are adopted, the table could be as follows:

New Maximum Reduction	Period for Guilty Plea	More Serious Cases
Up to 35%	Not more than 4 weeks after first court appearance.	Up to 25%
Up to 25%	More than 4 weeks after first court appearance, but on or before the committal appearance.	Up to 15%
Up to 15%	From the day after the committal appearance to before committal for trial.	Up to 10%
Up to 10%	From committal for trial to immediately after arraignment appearance in the Supreme or District Court.	Up to 5%
Up to 5%	From immediately after the arraignment appearance to the commencement of the trial.	Up to 5%

[375] I appreciate that the last two tiers are proposed at the same percentage. There is a practical issue of allowing a sufficient percentage to provide some incentive to enter a plea rather than choosing the option of a trial. In addition, the main source of concern centres on large reductions by reason of a plea and these lower percentages do not have the same impact.

[376] If the current level of percentages is maintained, the table could be as follows:

Current Maximum Reduction	Period for Guilty Plea	More Serious Cases
Up to 40%	Not more than 4 weeks after first court appearance.	Up to 30%
Up to 30%	More than 4 weeks after first court appearance, but on or before the committal appearance.	Up to 20%
Up to 20%	From the day after the committal appearance to before committal for trial.	Up to 15%
Up to 15%	From committal for trial to immediately after arraignment appearance in the Supreme or District Court.	Up to 10%
Up to 10%	From immediately after the arraignment appearance to the commencement of the trial.	Up to 5%

[377] If the recommendations concerning the lowering of maximum percentages are adopted, in order to maintain a degree of flexibility to meet exceptional circumstances, I recommend that at each tier, if the court is satisfied that a reduction in excess of the percentage otherwise available is appropriate by reason of rare and exceptional circumstances attaching to the offending and/or the offender, the court be empowered to apply a reduction of up to 5% in excess of the maximum otherwise available. This issue was mentioned at [243]. For example, a first offender who pleads guilty at the earliest opportunity and provides valuable assistance to the authorities with respect to criminal activities might be considered as an exceptional case. Similarly, the mental state of a first offender might lead to a finding of rare and exceptional circumstances, particularly if the offender was under the influence of a hardened criminal. These are

just two examples of the infinite variety of circumstances which might lead a court to the view that a higher reduction is appropriate because of the rare and exceptional circumstances attaching to the offending and/or the offender.

[378] **Recommendation 5a** - If the maximum percentages are reduced as recommended, I recommend that the court be empowered to increase the percentage reduction by up to 5% over the percentage otherwise available if satisfied that the additional reduction is appropriate by reason of rare and exceptional circumstances attaching to the offending and/or the offender.

[379] In this context, I have considered whether offenders who have previously been convicted of serious crimes should, under any circumstances, be entitled to the additional 5% reduction. On reflection, I do not recommend that such offenders be denied the ability to qualify for the exception. It is not uncommon for police "informers" to possess a record of prior offending. As discussed ([192] - [217]), the prior offending is relevant to the exception in s 40(5)(a) which empowers the court to give less than the full reduction if to do so would be "so inappropriate" in the case of the particular offender that it "would or may affect public confidence in the administration of justice".

[380] Although a serious repeat offender should be able to seek the extra reduction in an exceptional case, I suggest that the offender's record of prior offending be specified as a factor relevant to whether the discretion to give the extra reduction should be exercised. In my view this specific provision is appropriate notwithstanding the operation of s 40(5)(a).

[381] **Recommendation 6** - If Recommendation 5 is adopted, I recommend that the offender's prior record of offending be specified as a factor relevant to whether any additional percentage reduction should be given in a rare and exceptional case.

[382] As discussed ([176] and [335] - [336]), in NSW if an offender who has pleaded guilty disputes facts, and the dispute is not decided in the favour of the offender, a court is empowered to apply a lesser reduction. For the reasons mentioned, I support that position.

[383] **Recommendation 7** - I recommend providing that the court may apply a lesser reduction if the court determines that such a course is appropriate because the utilitarian value of the plea has been eroded by a dispute as to facts which was not determined in favour of the offender.

[384] The reductions currently available include a reduction of up to 10% under s 38 for an offender who has pleaded not guilty, but complied with pre-trial procedures and co-operated in the conduct of the trial ([253] - [256]). This provision is strongly opposed by victims who regard any reduction after taking a matter to trial is a “slap in the face” for victims. Such a reduction is seen as rewarding an offender for merely complying with procedures and conducting the trial according to law.

[385] I agree with the view of victims. The sentence reduction scheme is founded on encouraging pleas of guilty. Section 38 does not sit well with the rationale of the scheme and, on one view, amounts to an encouragement to plead not guilty. The utilitarian benefit of s 38 is highly questionable.

[386] **Recommendation 8** - I recommend that s 38 be repealed.

[387] As discussed ([226] - [237]), in my view, when Parliament enacted the sentence reduction scheme, Parliament did not intend that it could operate as a special reason to reduce a non-parole period below the mandatory minimum of 20 years. This has been an unintended consequence. However, as explained, this is an issue of policy in respect of which it is not appropriate for me to make a recommendation.

[388] As to the approach of the court, and the operation of s 40(5) ([218] - [225]), for the reasons discussed ([321] - [326]), I do not recommend any change except with respect to an offender who conceals the commission of a crime. For the reasons discussed ([339] and [340]), in my view concealing the commission of a crime should be a specific factor identified in s 40(5).

[389] I recommend that the fact that an offender has concealed the commission of a crime should be specified in s 40(5) as a matter to which the court must have regard.

[390] Two practical issues requiring attention are discussed at [79] - [80], [91], [261] - [263] and [333] - [334].

[391] **Recommendation 9** - I recommend that s 41 be amended to provide that when a court sentences for multiple offences, the court may apply a single reduction from the total sentence notwithstanding that pleas to the offences were entered at different stages of proceedings. The percentage reduction should not exceed the maximum percentage available for any one of the offences.

[392] **Recommendation 10** - I recommend that magistrates be empowered to accept a plea to a statutory alternative to the offence charged on the Information.

[393] Another practical issue concerns the time periods within which a plea must be entered to qualify for a specified reduction. In particular, as discussed ([249] - [252] and [307]), in my view there is a strong case for empowering magistrates to extend the 4 week period in special circumstances. Examples of special circumstances could involve offenders who lead itinerant lifestyles, particularly in remote communities, and the problems created by the lack of interpreters.

[394] **Recommendation 11** - I recommend that magistrates be empowered to extend the 4 week period in special circumstances by up to 4 weeks. An application to extend by reason of special circumstances should not be left to the end of the 4 week period following the first appearance. The amendment should specify that the application must be made within 7 days of the expiration of the 4 week period.

[395] Another practical issue requiring attention concerns procedures for moving a matter from the Magistrates Court to the Supreme or District Court following entry of a plea of guilty in the Magistrates Court. This issue is discussed at [144] - [150]. In other than exceptional cases, once a plea of guilty has been entered it should not be necessary for SA Police to continue their investigative work and, if possible, a statement of facts agreed between the prosecution and the offender should be placed on file. A fast track procedure should be established to move such matters from the Magistrates Court to the sentencing court quickly and, in the sentencing court, procedures should exist to

ensure that matters committed for sentence are dealt with as quickly as reasonably possible.

[396] **Recommendation 12** - I recommend amendments to the legislation to provide specifically that once a plea of guilty has been entered, a magistrate may commit the offender for sentence regardless of the stage of the proceedings at which the plea has been entered, and to establish a fast track procedure for moving the matter from the Magistrates Court to the sentencing court.

Dated: 5 June 2019



Hon Brian Ross Martin AO QC