

# ABOLISHING THE CURIOUS SENTENCING ANOMALY BETWEEN THE VOLUNTARY DISCLOSURE OF ONE'S OWN OFFENDING AND ASSISTING AUTHORITIES WITH THE OFFENDING OF OTHERS

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*Offenders who help authorities by providing information that can assist the investigation or prosecution of another person are accorded the most substantial sentencing discount in our system of law. The key reason for this is the utilitarian benefit associated with apprehending and prosecuting criminals. Offenders who voluntarily disclose their own crimes also normally receive a sentencing discount. However, the size of the discount is not quantified and in most instances seems to be less than the penalty reduction for assisting authorities with the crimes of others. From a normative perspective, voluntary disclosure of one's own offending is at least as commendable as providing information about the crimes of others. Moreover, in most instances voluntary disclosure of one's own crime or crimes confers greater benefits than does the provision of information about the crimes of others. Voluntary disclosure, for example, is more likely to save the state the expense of a trial. In this article, I argue that sentencing law should be reformed so that offenders who self-report their crimes receive a discount at least equal to (and in some instances greater than) offenders who provide information about the crimes of others. I also argue that this discount should be precisely quantified.*

## I INTRODUCTION

Admitting one's own criminal guilt is no less commendable than providing information that assists in the apprehension or prosecution of other offenders. In fact, for a number of reasons voluntary disclosure of one's own offending is arguably more laudable and beneficial to the community than assisting authorities with the investigation or prosecution of other people. Cooperating with authorities regarding the crimes of others is often an expedient decision, in response to being arrested or charged, and is motivated by a desire to minimise the penalty that would otherwise be imposed. By contrast, voluntary disclosure of one's own offending is often motivated by a genuine recognition of the wrongness of one's actions, especially in circumstances where it is unlikely that the offence would otherwise have been reported.<sup>1</sup>

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<sup>1</sup> This is discussed further in Part V below, but it is notable that a similar view was recently expressed by Adams J in *Panetta v The Queen* [2016] NSWCCA 85 (13 May 2016) [50].

In addition, from a pragmatic perspective, pleading guilty to crimes committed by oneself invariably results in a finding of guilt. This does not occur as often when an offender provides information about the alleged criminal acts of other people. Indeed, the provision of such information frequently does not result in a conviction because the information may be inadmissible or insufficient to establish guilt beyond reasonable doubt.

Despite this, offenders who help authorities to resolve the crimes of others are normally given a more significant discount than those who admit their own guilt. Offenders who cooperate with authorities in the investigation or prosecution of the crimes of others can receive a sentencing discount up to (and in rare cases exceeding) 50 per cent.<sup>2</sup> This is the most substantial sentencing discount that has been quantified by sentencing courts. The criminal justice system is less generous to offenders who voluntarily disclose their own crime. There is no set discount for voluntary disclosure of one's own offending, however, and in practice such discounts seem to be considerably less than 50 per cent.<sup>3</sup> Further, the circumstances in which a significant discount for voluntary disclosure of offending are available are relatively tightly circumscribed.

In this article, I argue that the sentencing discount accorded for voluntary disclosure of one's own offending (the 'disclosure discount') should be aligned more closely with the discount for cooperating with authorities in relation to the crimes of other people (the 'informer discount').

There are three key ways in which these discounts should be harmonised. First, the disclosure discount should generally be at least as substantial as the informer discount. Second, the discounts in both situations should be precisely quantified. Courts often precisely set out the amount by which a sentence is reduced on account of providing authorities with information about the crimes of other offenders. This does not occur in relation to cases of voluntary disclosure of one's own criminal conduct, where the courts merely indicate that a discount has been granted, without any indication of the magnitude of the reduction. The third way that the informer and disclosure discounts should be harmonised would be to ensure that both discounts are always dealt with by way of a quantitative sentencing reduction, instead of being subsumed within the conventional approach to sentencing, which is termed the 'instinctive synthesis'.<sup>4</sup> The implementation of all three of these recommendations will make this aspect of sentencing law more coherent and potentially encourage more offenders to come forward and disclose their crimes to authorities.

This article has several key objectives. The first is to establish that the disclosure discount should attract at least the same and arguably more mitigatory weight than the informer discount. The second is to propose that both of these discounts should customarily be accorded in quantified sentence reductions. The third aim of the article is to set out the manner in which multiple quantitative sentencing

2 See Part III.C below.

3 See Part IV.C below.

4 This is explained further in Part II of this article.

discounts should be calibrated by the courts. A fourth objective arises incidentally from these three aims: to critique the orthodox rationales for the informer and disclosure discounts and clarify the justifications of these sentencing discounts.

In the next part of this article, I provide a brief overview of the current methodology for making sentencing determinations. I also discuss the sentencing reduction that is accorded for pleading guilty. This reduction is important to any discussion of the informer and disclosure discounts, given that offenders who disclose their own offences or assist authorities with the crimes of others invariably plead guilty. Further, to fully grasp the rationales for my proposed recommendations regarding the informer and disclosure discounts, it is necessary to understand the manner in which pleading guilty is dealt with in the sentencing calculus. This is followed in Part III by an analysis of the current manner in which assisting authorities is dealt with by sentencing law. Part IV analyses the existing law relating to the informer discount. In Parts III and IV, I outline the existing law in relation to the informer and disclosure discounts and also attempt to clarify uncertainties relating to the operation of these discounts. In Part V, I argue that there is a greater need to align the discounts. My concluding remarks summarise the recommendations in the article.

## **II THE SENTENCING METHODOLOGY AND GUILTY PLEA DISCOUNT**

### ***A Sentencing is Principally an 'Instinctive' Process***

A key aspect of my proposal to more closely align the informer and disclosure discounts is that they should both carry a quantitative sentencing reduction. This is a departure from the conventional approach to sentencing determinations. In order to properly understand the nature and significance of this aspect of the proposal it is necessary to briefly outline the framework of sentencing law, and in particular the methodology employed in sentencing decisions.

Sentencing law in Australia is a combination of statutory and common law. While each jurisdiction has its own statutory scheme, the broad considerations that determine sentencing outcomes are similar throughout the country. The principal sentencing statutes in each jurisdiction set out the objectives of sentencing. Typically they include community protection, general and specific deterrence, rehabilitation and denunciation.<sup>5</sup> In terms of prescribing how much to punish,

5 *Crimes Act 1914* (Cth) ss 16A(1)–(2); *Crimes (Sentencing) Act 2005* (ACT) s 7(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) ss 10(1), (2); *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) s 6.

the main guiding factor is the principle of proportionality, which holds that the severity of the crime should be matched by the hardship of the sanction.<sup>6</sup>

In addition to these considerations, courts also consider various aggravating and mitigating factors. There is a considerable degree of variation in the extent to which these factors are set out in each jurisdiction's legislative schemes. These considerations are set out most expansively in *Crimes (Sentencing Procedure) Act 1999* (NSW),<sup>7</sup> which lists approximately 40 relevant issues. Most sentencing statutes, however, deal only sparingly with these considerations. Yet this does not indicate a legal divergence between the respective jurisdictions; aggravating and mitigating factors are, in fact, mainly defined by the common law in all jurisdictions.<sup>8</sup>

There are more than 200 mitigating and aggravating factors in sentencing law.<sup>9</sup> Mitigating factors can be divided into four categories.<sup>10</sup> The first relate to the offender's response to a charge and include the considerations that are the focus in this article: voluntary disclosure of offending, pleading guilty and cooperating with law enforcement authorities.<sup>11</sup> The second are considerations that relate to the circumstances of the offence, such as degree of harm that is caused by the offence.<sup>12</sup> The third category includes matters personal to the offender, such as youth and previous good character.<sup>13</sup> The impact of the sanction is the fourth broad type of mitigating factor. It includes considerations such as onerous prison

6 In *Hoare v The Queen* (1989) 167 CLR 348, 354 (emphasis altered), the High Court stated that 'a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances'. In *Veen v The Queen* (1979) 143 CLR 458, 467 and *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472, the High Court stated that proportionality is the primary aim of sentencing. Proportionality has also been given statutory recognition in all Australian jurisdictions: *Crimes Act 1914* (Cth) ss 16A(2)(a), (k); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a); *Sentencing Act 1995* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Criminal Law (Sentencing) Act 1988* (SA) ss 10(1)(a), (j); *Sentencing Act 1991* (Vic) ss 5(1)(a), (c)–(d), (2)(c), (3); *Sentencing Act 1995* (WA) s 6(1).

7 See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A, 24.

8 See *Bui v DPP (Cth)* (2012) 244 CLR 638 with particular reference to the federal sentencing regime.

9 Joanna Shapland in *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) 55, identified 229 factors, while Roger Douglas, 'Sentencing' in Legal Studies Department, La Trobe University (ed), *Guilty, Your Worship* (La Trobe University, 1980) 62, in a study of Victorian Magistrates' Courts, identified 292 relevant sentencing factors. For an overview of the operation of mitigating and aggravating factors, see Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) ch 4; Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3<sup>rd</sup> ed, 2014) chs 4–6; Stephen J Odgers, *Sentence: The Law of Sentencing in NSW Courts for State and Federal Offences* (Odgers, 3<sup>rd</sup> ed, 2015) ch 4.

10 See Victorian Sentencing Committee, *Sentencing: Victorian Sentencing Committee Report 1988* (Victorian Attorney-General's Department, 1988) vol 1, 359–60.

11 See Part II of this article.

12 See *DPP (Vic) v Marino* [2011] VSCA 133 (13 May 2011) [30]–[31].

13 *R v Neilson* [2011] QCA 369 (16 December 2011) [13], [22]; *R v Kuzmanovski; Ex parte A-G (Qld)* [2012] QCA 19 (24 February 2012) [11], [15]–[16].

conditions and poor health.<sup>14</sup> Key aggravating factors are: prior criminal record,<sup>15</sup> offences committed while on bail,<sup>16</sup> and breach of trust.<sup>17</sup>

The overarching methodology and conceptual approach that sentencing judges use to make sentencing decisions has been described as an 'instinctive synthesis'.<sup>18</sup> The instinctive synthesis is a process judges use to attempt to give due weight to all the considerations that are relevant to sentencing. In *Muldrock v The Queen*, French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ cited a description of the instinctive synthesis as a process by which 'the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case'.<sup>19</sup>

The hallmark of the instinctive synthesis is that it does not require (nor permit) judges to set out with any particularity the weight (in mathematical or proportional terms) accorded to any particular consideration. A global judgment is made without recourse to a step-wise process that demarcates precisely how any given factor has influenced the judgment. Accordingly, a degree of subjectivity is incorporated into the sentencing calculus. Current orthodoxy maintains that there is 'no single correct sentence',<sup>20</sup> and that the 'instinctive synthesis will by definition produce outcomes upon which reasonable minds will differ'.<sup>21</sup> Courts can therefore impose a sentence within an available range of penalties. The spectrum of this range is not clearly designated. However, if the 'tariff' that has developed through other cases is not observed, the sentence can be overturned on appellate review as being either 'manifestly excessive'<sup>22</sup> or 'manifestly inadequate'.<sup>23</sup>

14 *Western Australia v O'Kane* [2011] WASCA 24 (4 February 2011) [62]–[70]; *R v Puc* [2008] VSCA 159 (28 August 2008) [32]; *Tognolini v The Queen [No 2]* [2012] VSCA 311 (14 December 2012) [22]–[27].

15 See generally *R v Field* [2011] NSWCCA 13 (16 February 2011); *Saunders v The Queen* [2010] VSCA 93 (15 April 2010).

16 See generally *R v Gray* [1977] VR 225; *R v Basso* (1999) 108 A Crim R 392; *R v AD* (2008) 191 A Crim R 409.

17 See generally *DPP v Truong* [2004] VSCA 172 (24 September 2004); *Carreras v The Queen* (1992) 60 A Crim R 402; *A-G (Tas) v Saunders* [2000] TASSC 22 (22 March 2000); *Hill v The Queen* [1999] TASSC 29 (19 March 1999); *R v Ottobriano* [1999] WASCA 207 (14 July 1999); *R v Black* [2002] WASCA 26 (18 February 2002).

18 The term originates from the Full Court of the Supreme Court of Victoria decision of *R v Williscroft* [1975] VR 292, 300, where Adam and Crockett JJ stated: 'Now, ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process.'

19 (2011) 244 CLR 120, 131–2 [26] (emphasis altered), citing *Markarian v The Queen* (2005) 228 CLR 357, 378 [51].

20 *Markarian v The Queen* (2005) 228 CLR 357, 405 [133].

21 *Hudson v The Queen* (2010) 30 VR 610, 616 [27].

22 *Melham v The Queen* [2011] NSWCCA 121 (2 June 2011) [83]. The Court stated, at [85]: 'The relevant test for the applicant to succeed on this ground [manifest excess] requires the applicant to demonstrate that the sentence was unreasonable or plainly unjust', citing *Dinsdale v The Queen* (2000) 202 CLR 321, 325 [6] (Gleeson CJ and Hayne J).

23 For discussion of this concept, see *R v Creighton* [2011] ACTCA 13 (22 July 2011); *R v Hill* [2010] SASFC 79 (24 December 2010); *R v Holland* (2011) 205 A Crim R 429, 441–2 [60]; *R v Sukkar* [2011] NSWCCA 140 (24 June 2011); *R v McHarg* [2011] NSWCCA 115 (25 May 2011) [122]–[125].

The alternative approach to instinctive synthesis is termed the two-tier or two-step approach. It involves a court setting a sentence commensurate with the severity of the offence and then making adjustments for relevant aggravating and mitigating circumstances.<sup>24</sup> The two-step approach was firmly rejected by the High Court in *Markarian v The Queen*.<sup>25</sup>

Despite the near unwavering support by the courts for instinctive synthesis, there are two sentencing considerations that often attract a quantitative discount and hence involve a departure from instinctive synthesis methodology. As noted above, one of them is the informer discount. The other is a penalty reduction that is accorded for pleading guilty. From a pragmatic perspective, the guilty plea discount often interacts with the informer and disclosure discounts, given that offenders who assist authorities with the crimes of others or their own crimes normally plead guilty.<sup>26</sup> My reform proposals for the disclosure and informer discounts can only be understood in the context of the existing approach to offenders who plead guilty. Accordingly, the next section of this paper outlines the operation of the guilty plea discount.

## B Guilty Plea Discount

Pleading guilty is a mitigating factor in all Australian jurisdictions.<sup>27</sup> There is no clear *principled* criminological basis for punishing offenders who plead guilty less severely than those who elect to proceed to trial. As John Willis notes, the consequence of the discount is that ‘the final product after allowing for the guilty plea is not the appropriate sentence according to traditional penological criteria’.<sup>28</sup> Further, there are several conceptual challenges associated with reductions in sentences due to guilty pleas. The guilty plea discount arguably penalises

24 The two-step approach is described by McHugh J in *Markarian v The Queen* (2005) 228 CLR 357, 377–8 [51].

25 (2005) 228 CLR 357. The main supposed shortcomings of the two-tier approach, as set out by McHugh J, are that it involves a judge setting the notional penalty by reference to other offences (not the offence committed by the accused) and the first tier of the two-step process is itself supposedly an intuitive process: at 377–90 [50]–[84].

26 See Odgers, *Sentence*, above n 9, 350.

27 In New South Wales and Queensland, the court must indicate if it does not award a sentencing discount in recognition of a guilty plea: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2); *Penalties and Sentences Act 1992* (Qld) s 13(3). In South Australia, Western Australia and New South Wales, the courts often specify the size of the discount given. In Victoria, s 6AAA of the *Sentencing Act 1991* (Vic) states that when courts provide a discount for a plea of guilty, they must specify the sentence that would have been given in the absence of that discount. In Western Australia, s 9AA of the *Sentencing Act 1995* (WA) permits a court to reduce a sentence by up to 25 per cent for a plea entered into at the first reasonable opportunity. In South Australia, recent legislative changes allow for a guilty plea reduction of up to 40 per cent for an early guilty plea: *Criminal Law (Sentencing) Act 1988* (SA) s 10C. The rationale and size of the typical discount in Victoria is discussed in *Phillips v The Queen* (2012) 37 VR 594, [32]–[74]. There has been some judicial comment as to the artificiality of s 6AAA given the instinctive synthesis that produces the actual sentence: see *Scerri v The Queen* (2010) 206 A Crim R 1, 5–6 [23]–[25]; *R v Flaherty [No 2]* (2008) 19 VR 305. For a recent discussion, see Elizabeth Wren and Lorana Bartels, ‘“Guilty, Your Honour”: Recent Legislative Developments on the Guilty Plea Discount and an Australian Capital Territory Case Study on its Operation’ (2014) 35 *Adelaide Law Review* 361.

28 J E Willis, ‘The Sentencing Discount for Guilty Pleas’ (1985) 18 *Australian & New Zealand Journal of Criminology* 131, 143.

offenders who elect to contest a charge and exercise their right to a fair trial.<sup>29</sup> The High Court has attempted to circumvent this problem by stating that the guilty plea discount does not penalise those who elect to go to trial, but simply punishes those who plead guilty less. Yet the plausibility of this distinction is debatable. In *Cameron v The Queen*, Gaudron, Gummow and Callinan JJ were unable to account for the distinction other than to state that '[t]he distinction between allowing a reduction for a plea of guilty and not penalising a convicted person for not pleading guilty is not without its subtleties, but it is, nonetheless, a real distinction'.<sup>30</sup>

This view contrasts sharply with that given by McHugh J in *Cameron v The Queen*, when his Honour noted that the *effect* of the discount is to penalise those who plead not guilty more severely.<sup>31</sup>

The potential iniquities associated with guilty plea sentence reductions have not, however, curtailed the importance that has been placed on the practice by the courts and legislatures. The pragmatic advantages associated with guilty pleas were noted by McHugh J in *Cameron v The Queen*, who stated:

Australian courts have indicated that they will regard a plea of guilty as a mitigating factor even when no remorse or contrition is present. They have taken the pragmatic view that giving sentence 'discounts' to those who plead guilty at the earliest available opportunity encourages pleas of guilty, reduces the expense of the criminal justice system, reduces court delays, avoids inconvenience to witnesses and prevents the misuse of legal aid funds by the guilty.<sup>32</sup>

The importance with which the guilty plea discount is regarded is further illustrated by the scope of its operation.<sup>33</sup> To begin with, offenders will receive a discount for pleading guilty, irrespective of the reasons for the plea, largely on account of the utilitarian benefits associated with the plea.<sup>34</sup> In addition, the availability and magnitude of the discount does not depend on the strength of the prosecution case and hence the full discount is available even when the

29 See *Cameron v The Queen* (2002) 209 CLR 339, 343 [12].

30 Ibid (emphasis added).

31 Ibid 351–2 [41].

32 Ibid 350–1 [39] (citations omitted).

33 For a discussion of the guilty plea discount, see Mackenzie and Stobbs, above n 9, 91–4; Freiberg, above n 9, 375–84; Odgers, *Sentence*, above n 9, 325–36.

34 The only exception to this is the federal jurisdiction, where s 16A(2)(g) of the *Crimes Act 1914* (Cth) states that, in sentencing, a court must take into account 'if the person has pleaded guilty to the charge in respect of the offence—that fact'. This has been interpreted to justify a discount only to the extent that the plea evinces a desire by the offender to 'facilitate the course of justice': *Cameron v The Queen* (2002) 209 CLR 339, 343 [11]. Thus, a plea purely for expedient reasons does not attract the discount. A relevant consideration in ascertaining the accused's motive is the strength of the prosecution case. A plea in the context of the strong case can attract no discount because it could be regarded as 'recognition of the inevitable': *Tyler v The Queen* (2007) 173 A Crim R 458, 477 [114].

evidence against the defendant is compelling.<sup>35</sup> Further, the motivation for the plea of guilty is irrelevant. If there is evidence that the guilty plea is motivated by remorse, this will result in a larger reduction given that remorse is an independent mitigating factor.<sup>36</sup> Similarly, a guilty plea that spares witnesses from giving evidence can also result in a larger sentence reduction if and simply because this has occurred.<sup>37</sup> The discount is also conferred when an offer to plead guilty is rejected by the Crown but a jury returns a verdict consistent with the offer.<sup>38</sup> Further, it applies even when the offender makes the Crown prove sentencing facts unless the prosecution succeeds in establishing the disputed facts.<sup>39</sup>

The principle of rewarding guilty pleas with reduced sentences is so important that it generally attracts a quantitative discount and hence is a departure from the instinctive synthesis approach. In some jurisdictions, a mathematical discount for pleading guilty is accorded as a matter of practice, while in Victoria and Western Australia it is a statutory requirement for the discount to be quantified.<sup>40</sup> The quantitative discount for pleading guilty can be provided in two ways. First, the court can set out the discount in percentage terms. Second, the judge can set out the penalty that would have been imposed had the assistance not been provided or promised. In the second instance, the percentage discount can readily be ascertained simply by comparing the prospective with the actual sentence.<sup>41</sup>

The rationale for quantitative discounting for guilty pleas is to encourage such pleas, especially at early stages of proceedings. To this end, Justice McClellan, writing extra-judicially, states:

Having an identifiable and easily understood parameter for guilty plea discounts has had enormous benefit for the administration of criminal justice. One only has to compare the state of the criminal lists in countries where a plea brings no discount

- 35 See *Phillips v The Queen* (2012) 37 VR 594, 604–5 [36] (Redlich JA and Curtin AJA, Maxwell P agreeing). In this case, the Court summarised the key principles relating to the guilty plea discount. An extensive summary of essentially the same principle is also set out in *Morton v The Queen* [2014] NSWCCA 8 (20 February 2014) [33], quoting *R v Borkowski* (2009) 195 A Crim R 1, 10 [32]. However, a greater discount may be provided if the plea confers considerable cost or other community savings or is accompanied by remorse.
- 36 *Phillips v The Queen* (2012) 37 VR 594, 614 [68]–[69]; *Fusimalohi v The Queen* [2012] ACTCA 49 (12 December 2012) [27]–[34]; *CD v The Queen* [2013] VSCA 95 (3 May 2013) [36]–[38]; *Barbaro v The Queen* (2012) 226 A Crim R 354, 365–6 [36]–[41].
- 37 *Morton v The Queen* [2014] NSWCCA 8 (20 February 2014) [33], quoting *R v Borkowski* (2009) 195 A Crim R 1, 10 [32]. Further, if the the prosecution case is weak, this may be indicative of remorse or a desire to facilitate the course of justice: *Phillips v The Queen* (2012) 37 VR 594, 605 [36].
- 38 *Phillips v The Queen* (2012) 37 VR 594, 613 [66]; *Morton v The Queen* [2014] NSWCCA 8 (20 February 2014) [33], quoting *R v Borkowski* (2009) 195 A Crim R 1, 10 [32].
- 39 *Morton v The Queen* [2014] NSWCCA 8 (20 February 2014) [34], quoting *R v AB* [2011] NSWCCA 229 (14 October 2011) [30]. The main qualification to the discount is that some crimes might be too serious to attract the discount: see *Bahar v The Queen* (2011) 45 WAR 100, 110–11 [43]; *Keating v Western Australia* (2007) 35 WAR 1, 12–3 [39]–[40]; *Nand v The Queen* [2014] NSWCCA 293 (5 December 2014) [64], quoting *R v Thomson*; *R v Houlton* [2000] 49 NSWLR 383 [156]–[158].
- 40 *Sentencing Act 1991* (Vic) s 6AAA(1); *Sentencing Act 1995* (WA) s 9AA(5). The New South Wales Law Reform Commission in *Sentencing*, Report No 139 (2013) 126 [5.29], recommended a transparent approach to the size of the guilty plea discount.
- 41 Unless a different sanction is imposed (for example a prison term is reduced to a fine); see the discussion below regarding the lack of guidance regarding the substantiation of discounts.



to understand the benefits of a structured sentencing approach. ... Quantified discounts make the reasoning of sentencing judges more comprehensible to offenders, victims, the public, and the appellate courts.<sup>42</sup>

While there is no precise or uniform discount for pleading guilty, the discount is normally considerable. The New South Wales Court of Criminal Appeal in 2000 in *R v Thomson* issued a guideline judgment stating that a guilty plea will generally be reflected in a 10–25 per cent reduction of a sentence.<sup>43</sup> Since that time, several jurisdictions have enacted statutory provisions to designate the appropriate range of guilt plea sentence discounts. Generally, the range is similar to that stipulated in *Thomson*. But the penalty reduction for pleading guilty can be up to 30 per cent, and even up to 40 per cent in South Australia.<sup>44</sup> This discount does not incorporate the penalty reduction that is accorded for disclosing one's own offences or those of others to authorities.<sup>45</sup> The most important variable regarding the size of the discount is the time of plea; early pleas attract the greatest penalty reduction.<sup>46</sup>

There is, of course, a degree of approximation in the courts' application of guilty plea discounts. First, the impact of the discount sometimes reduces the penalty from a custodial term to another sanction, such as a fine or community-based order. Yet there is no accepted methodology nor even approximate formula for substituting criminal sanctions.<sup>47</sup> Thus, when a court reduces a term of imprisonment to another type of sanction as a result of a guilty plea, it is not feasible to ascertain the weight that has been accorded to this consideration. Further, as we have seen above, sentencing law is an imprecise process (there is no singularly correct penalty for an offence) and hence there is an inescapable degree of artificiality associated with injecting exactness into a process that is inherently approximate in nature.

These difficulties are illustrated in a relatively recent and comprehensive analysis of the operation of the guilty plea discount by the Victorian Sentencing Advisory

42 Justice Peter McClellan, 'Sentencing in the 21st Century' (Paper presented at the Crown Prosecutors' Conference, Pokolbin, 10 April 2012) 17–18, cited in New South Wales Law Reform Commission, above n 40, 125 [5.27].

43 (2000) 49 NSWLR 383, 419 [160].

44 *Criminal Law (Sentencing) Act 1988* (SA) s 10C.

45 *R v Ngata* [2015] ACTSC 356 [73], where the offender was given a discount for pleading guilty after a discount for cooperating with authorities was already conferred.

46 *R v Thomson* (2000) 49 NSWLR 383, 418 [155]; *Cahyadi v The Queen* (2007) 168 A Crim R 41 [2], quoting *R v Thomson* (2000) 49 NSWLR 383, 419 [160]; *Phillips v The Queen* (2012) 37 VR 594 [86]; *R v Hall* (1994) 76 A Crim R 454, 470 [9]–[10], cited in *Phillips v The Queen* (2012) 37 VR 594 [45]; *Morton v The Queen* [2014] NSWCCA 8 (20 February 2014) [32], quoting *R v Stambolis* [2006] NSWCCA 56. See also *Sentencing Act 1995* (NT) s 5(2)(j); *Penalties and Sentences Act 1992* (Qld) s 13(2); *Sentencing Act 1991* (Vic) s 5(2)(e); *Sentencing Act 1995* (WA) ss 9AA(2)–(3). *JNB v The Queen* [2011] NTCCA 5 (19 May 2011) is an example of a case where a substantial reduction for a plea of guilty was given despite the fact that it was entered well after the commencement of the trial.

47 For discussion regarding the interchangeability of sanctions, see Andrew von Hirsch, Martin Wasik and Judith Greene, 'Punishments in the Community and the Principles of Desert' (1989) 20 *Rutgers Law Journal* 595; Michael Tonry, 'Interchangeability, Desert Limits and Equivalence of Function' in Andrew von Hirsch and Andrew Ashworth (eds), *Principled Sentencing: Readings on Theory & Policy* (Hart Publishing, 2<sup>nd</sup> ed, 1998) 291.

Council.<sup>48</sup> Its 2015 report examined 9618 cases and noted that in 7073 of these cases, it was possible to discern the impact of a guilty plea on sentence.<sup>49</sup> In about one-third (33.5 per cent) of these 7073 cases, the type of sanction that was imposed changed as a result of the plea, for example, from a prison term to a community correction order.<sup>50</sup> In cases where a term of imprisonment was imposed, the average discount for pleading guilty varied considerably. For sentences of imprisonment of two years or less the average reduction was 39.3 per cent, whereas for sentences of more than 10 years the average reduction was less than half this amount: 17.7 per cent.<sup>51</sup> This conflicts with the view that ‘the more serious the crimes, the greater the weight to be given to a guilty plea’,<sup>52</sup> as well as the abstract understanding that discounts for pleading guilty should be in the range of 25 per cent.<sup>53</sup> The Council also noted that there was only a small difference in the discount depending on the timing of the plea,<sup>54</sup> despite the fact the timeliness of the plea is supposedly the most important factor influencing the size of a guilty plea discount.<sup>55</sup>

Despite these anomalies and complexities, it is clear that the guilty plea discount is an entrenched mitigating factor in sentencing, which results in considerable penalty reductions. With this in mind, I now examine the manner in which the courts deal with the informer discount.

### III ASSISTANCE TO LAW ENFORCEMENT AUTHORITIES

#### A *The (Three) Rationales for the Informer Discount*

As stated earlier, the guilty plea discount is normally applied in tandem with the informer discount because informers usually plead guilty.<sup>56</sup> Before discussing the manner in which the dual operation of these discounts is dealt with by the courts, I will first examine the nature and scope of the informer discount.

48 Sentencing Advisory Council (Vic), *Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts* (11 August 2015) <<https://www.sentencingcouncil.vic.gov.au/publications/guilty-pleas-higher-courts-rates-timing-and-discounts>>.

49 *Ibid* 7 [1.34], 61 [5.8].

50 *Ibid* 64 [5.18].

51 *Ibid* 68.

52 *Ibid* 68 [5.31], quoting Freiberg, above n 9, 379 (citation omitted).

53 In *Phillips v The Queen* (2012) 37 VR 594, 606 [42] n 38, the Court did not commit to the appropriate discount but merely stated: ‘The extent of the discount varies between jurisdictions. In NSW it appears to be in the order of 20–25%; in WA, 30–35%; 25% in SA and 10–33% in NZ. In the United Kingdom, the Sentencing Guidelines . . . provide that the level of reduction will be gauged on a sliding scale ranging from 33% where the plea was entered at the first reasonable opportunity, to 10% where it was entered at the door of the court.’

54 Sentencing Advisory Council (Vic), above n 48, 71–2.

55 *Sentencing Act 1991* (Vic) s 5(2)(e).

56 A rare exception is *Z v The Queen* [2014] NSWCCA 323 (18 December 2014), where the offender pleaded not guilty to two out of three offences for which he was found guilty, yet still received a 50 per cent discount for cooperating with authorities.

Cooperating with law enforcement authorities is a well-established mitigating factor at common law.<sup>57</sup> It also has a statutory foundation in several jurisdictions. Section 23(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides:

A court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.<sup>58</sup>

Section 36(2) of the *Crimes (Sentencing) Act 2005* (ACT) is similarly worded. Section 16A(2)(h) of the *Crimes Act 1914* (Cth) and s 10(1)(h) of the *Criminal Law (Sentencing) Act 1988* (SA) also expressly provide that cooperation with authorities is a relevant sentencing consideration.<sup>59</sup>

There are a number of rationales that have been advanced for conferring a discount to offenders who cooperate with authorities.<sup>60</sup> First, from a utilitarian perspective, the provision of evidence that can assist in the apprehension and prosecution of criminal offences brings substantial benefit to the community. Solving crime and prosecuting offenders enhances community safety. To this end, the New South Wales Court of Criminal Appeal in *R v Cartwright* stated that '[i]t is clearly in the public interest that offenders should be encouraged to supply information to the authorities which will assist them to bring other offenders to justice, and to give evidence against those other offenders in relation to whom they have given such information'.<sup>61</sup>

Providing a sentencing discount to offenders who cooperate with authorities gives them a pragmatic reason to provide such cooperation and hence makes it more likely that these benefits will be secured. Bray CJ explained in *R v Barber*: '[w]e have, I think, to accept that the courts have acted on the view that it is

57 In *Ungureanu v The Queen* (2012) 272 FLR 84, 99–100 [67]–[77], it was held that cooperation in this context means voluntary cooperation and does not include information provided in the context of compulsory examination unless the person goes beyond the provision of information which is necessary pursuant to the terms of the forced examination.

58 Section 23(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) sets out the considerations relevant to the discount including '(b) the significance and usefulness of the offender's assistance to the authority or authorities concerned, taking into consideration any evaluation by the authority or authorities of the assistance rendered or undertaken to be rendered, (c) the truthfulness, completeness and reliability of any information or evidence provided by the offender, (d) the nature and extent of the offender's assistance or promised assistance, (e) the timeliness of the assistance or undertaking to assist, [and] (f) any benefits that the offender has gained or may gain by reason of the assistance or undertaking to assist'.

59 Section 10A of the *Criminal Law (Sentencing) Act 1988* (SA) provides scope for additional mitigation where the disclosure relates to 'serious and organised criminal activity'. See also *Penalties and Sentences Act 1992* (Qld) s 9(2)(i) which applies to past cooperation, while s 13A applies to promised cooperation and mandates that a discount be prescribed; *Sentencing Act 1995* (WA) s 8(5); *Crimes Act 1914* (Cth) s 16A(2)(h) applies for past cooperation while s 16AC (formerly s 21E) applies for past cooperation and requires the court to state the penalty that would have been otherwise imposed; *Sentencing Act 1991* (Vic) ss 5(2AB)–(2AC) expressly stipulate that a discount can be given for a promise to assist authorities and that a court can indicate the sentence that would have otherwise been imposed — but that it is *not* necessary to stipulate that sentence.

60 For an overview of the operation of the informer discount, see Mackenzie and Stobbs, above n 9, 93–4; Odgers, *Sentence*, above n 9, 337–59.

61 (1989) 17 NSWLR 243, 252. See also *R v Ngata* [2015] ACTSC 356 (3 November 2015).

not expedient that there should be honour amongst thieves and have therefore sometimes rewarded the informer and encouraged other potential informers by an appropriate mitigation of his sentence'.<sup>62</sup>

Secondly, holding offenders to account for their crimes not only provides an overall community benefit, but it can also provide a degree of satisfaction and comfort to victims of crimes against the person and property.<sup>63</sup>

A third rationale for conferring the informer discount is that cooperating with authorities will often put the offender at risk of being harmed by those he or she is giving information about, as well as other criminal elements. Criminals will obviously not be favourably disposed to people that are partly responsible for their apprehension and prosecution and hence will have a reason to harm informers. Even if the particular targets of the information provided to the authorities have no inclination or capacity to harm the informer, there is a risk that the offender will be targeted by criminal elements in prison.<sup>64</sup>

However, in evaluating the desirability and magnitude of the informer discount, I argue for several reasons that this third rationale for conferring the discount should cease to inform sentencing decisions. First, harsh prison conditions are in themselves a stand-alone mitigating factor.<sup>65</sup> This is particularly so in cases where the offender will have to serve his or her time in protective custody to reduce the chance of being harmed by other prisoners.<sup>66</sup> Second, the courts have noted that those informers spending time in protective custody are no longer entitled to an automatic discount, given that conditions in these facilities are not necessarily worse than those in mainstream prisons.<sup>67</sup> Third, if an informer is harmed by criminal elements for providing information to authorities, this incidental punishment could in itself be a discrete mitigating consideration.<sup>68</sup> Fourth, informers will not always be sentenced to prison or face any risk of reprisal in the community. For example, providing information against people working in the finance industry for financial crimes in circumstances where the offenders have no links to other criminals is not likely to imperil the safety of informers, especially if the informer is not sentenced to imprisonment.

62 (1976) 14 SASR 388, 390.

63 For a discussion of the importance of satisfying victims from the perspectives of the objectives of the punishment, see Ted Honderich, *Punishment: The Supposed Justifications* (Penguin Books, revised ed, 1984) 42–5. See also *R v Amituanai* (1995) 78 A Crim R 588, 596; *Woolnough* (Unreported, Victorian Court of Criminal Appeal, McGarvie J, 4 June 1981), cited in Richard G Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2<sup>nd</sup> ed, 1999) 204 [3.402].

64 *R v Barci* (1994) 76 A Crim R 103; *Silvano v The Queen* (2008) 184 A Crim R 593.

65 *DPP (Vic) v Faure* (2005) 12 VR 115, 121 [28]; *Tognolini v The Queen* [2012] VSCA 311 (14 December 2012).

66 *R v Smith* (1987) 44 SASR 587; *AWP v The Queen* [2012] VSCA 41 (8 March 2012); *R v Van Boxtel* (2005) 11 VR 258, 267; *Simmons (a Pseudonym) v The Queen* [2015] VSCA 339 (9 December 2015).

67 *Geddes v The Queen* [2012] NSWCCA 94 (15 May 2012) [44]; *Carroll v The Queen* [2011] VSCA 150 (19 May 2011) [38]–[39].

68 *R v Noble* [1996] 1 Qd R 329, 330; *R v Webb* (2004) 149 A Crim R 167, 171 [22]–[23].

Additional reasons advanced for the informer discount relate to the informer's motivation for providing the information. The willingness to cooperate with authorities can be an indication of contrition for crime and a repudiation by the offender of a criminal lifestyle, expressing a desire to become a law-abiding member of the community. In sentencing terms this can equate to remorse and an indication that the offender has sound prospects of rehabilitation.<sup>69</sup> However, remorse<sup>70</sup> and rehabilitation<sup>71</sup> are both discrete considerations and often are irrelevant to the informer discount (given that the motivation to provide information can be purely expedient, to receive the discount). Thus, these two factors are not relevant in evaluating the discount,<sup>72</sup> as Refshauge J noted in *R v Ngata*: '[t]he motive of the offender providing the assistance is irrelevant ... [and] [g]reater leniency may be given where the offender shows genuine remorse and contrition, but that is a function of ordinary sentencing principles and is not required for this discount'.<sup>73</sup>

A sixth rationale that has been advanced for the informer discount is that it will weaken the trust that offenders have in each other.<sup>74</sup> This could potentially lead to more crimes being solved and prosecuted (and hence overlaps with the first rationale) and also potentially has a forward-looking benefit in terms of less crimes being committed. In any event, this is not a discrete sentencing consideration and hence needs to be factored into the range of actions taken by an informer that may attract the informer discount.

The second rationale (victim satisfaction) is strictly speaking a separate rationale to the primary (solving crime) reason accorded for the informer discount. However, this is not of itself a discrete mitigating factor and many offences have identifiable victims (with the notable exception of drug distribution crimes) and hence this too underpins and is a justification for the informer discount.

Thus it emerges that there are in fact three discrete rationales justifying the informer discount: apprehending criminals; victim satisfaction; and eroding the trust that sometimes exists between offenders. The importance of these considerations is further discussed in Part V below, in the context of contrasting the informer and disclosure discounts.

## **B The (Wide) Scope of Operation of the Informer Discount**

At this point in my argument it is sufficient to note that the community has a strong interest in detecting crime, prosecuting offenders and providing a degree

69 *A Child v Western Australia* [2007] WASCA 285 (24 December 2007) [12].

70 See, eg, *R v Whyte* (2004) 7 VR 397; *Phillips v The Queen* (2012) 37 VR 594.

71 *R v Skilbeck* [2010] SASFC 35 (24 September 2010); *Elyard v The Queen* [2006] NSWCCA 43 (6 March 2006).

72 See, eg, *R v Kohunui* [2009] VSCA 31 (11 March 2009) [24], quoting *R v Duncan* [1998] 3 VR 208, 214–5.

73 *R v Ngata* [2015] ACTSC 356 (3 November 2015) [57], citing *R v Cartwright* (1989) 17 NSWLR 243, 252–3.

74 See *Isaac v The Queen* [2012] NSWCCA 195 (14 September 2012) [46].

of satisfaction to victims. Hence the main rationales underpinning the informer discount are persuasive.<sup>75</sup> It is not surprising then that the courts have widely applied the informer discount. Thus we find that an informer's sentence reduction is not contingent upon the information resulting in either an arrest or successful prosecution. In order to attract the discount, it is sufficient that the information could assist authorities. Indeed, 'discount[s] for cooperation may be given even if the information and assistance is of limited value and sometimes where it is of no value'.<sup>76</sup> The discount is also available even if the information that is provided turns out to be objectively false or for other reasons of no practical assistance to the police or prosecutors. Thus in *R v Cartwright*, Hunt and Badgery-Parker JJ stated:

[T]he reward for providing assistance should be granted if the offender has genuinely co-operated with the authorities whether or not the information supplied objectively turns out in fact to have been effective. The information which he gives must be such as *could* significantly assist the authorities. The information must, of course, be true; a false disclosure attracts no discount at all. What is relevant here is the potential of the information to assist the authorities, as comprehended by the offender himself. Information which turns out to be significant, but which is neither comprehended nor intended as such by the offender, has not been given in the spirit of willingness which the discount is designed to achieve. ... As we have already pointed out, the offender will not lose the discount because in fact (unknown to him) the authorities are already in possession of that information. Nor should he lose it if the authorities do not in the end act upon his information, because (for example) they subsequently receive or they have already received more cogent information from another source — or if the offender does not in the end give evidence as promised, because (for example) the person who is the subject of his information has pleaded guilty.<sup>77</sup>

Nevertheless, while the information does not need to be proven to be of tangible use to attract the discount, as a general rule the discount will be more substantial where the information proves to be effective.<sup>78</sup> This approach has a statutory foundation in some jurisdictions. In New South Wales and the Australian Capital Territory, the relationship between the importance of the information and reductions in sentences are governed by statute. Section 23(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) states that a court is required to have regard to the 'significance and usefulness' of the assistance offered or given by the offender.<sup>79</sup> This does not, however, extinguish the discount in relation to non-useful information.<sup>80</sup> Rather, it merely potentially diminishes the extent of the discount.

In order for the discount to apply the information provided does not need to relate to the offence in which the accused is being implicated. The information can be provided in relation to a completely separate offence and also an offence

75 See also *A Child v Western Australia* [2007] WASCA 285 (24 December 2007); *MXP v Western Australia* (2010) 41 WAR 149.

76 *Ungureanu v The Queen* (2012) 272 FLR 84, 85 [2].

77 (1989) 17 NSWLR 243, 253.

78 See also *R v FAF* (2014) 247 A Crim R 572, 574–5 [12]–[13].

79 See also *Zhang v The Queen* [2011] NSWCCA 233 (26 October 2011) [29]–[34]. Section 36(3)(b) of the *Crimes (Sentencing) Act 2005* (ACT) also emphasises the 'significance and usefulness' of the assistance.

80 *R v Ngata* [2015] ACTSC 356 (3 November 2015) [57], citing *R v Cartwright* (1989) 17 NSWLR 243, 252–3; *R v FAF* (2014) 247 A Crim R 572, [12]–[13].

committed against the offender that provides some insight into the circumstances of the offending. In *RJT v The Queen*,<sup>81</sup> for example, the Court held that the discount for assisting authorities applied even when the victim of the reported offence is the accused who is being sentenced; in this case a sex offender informed police that he himself had been sexually abused by his grandfather.

An important limitation to the discount applies in situations where the discount relates to future cooperation as opposed to cooperation that has already been provided. If an accused does not provide the cooperation that was promised, he or she can be resentenced and the mitigatory effect of the cooperation retracted. However, when this occurs, the increased penalty does not always equate to the initial decrease, particularly in cases where the failure to fulfil the undertaking results from illness or threats to the offender or his or her family.<sup>82</sup> Further, courts do not always provide a precise discount for promised future cooperation and hence it is not possible to precisely retract it.<sup>83</sup> The speculative nature of future cooperation has resulted in courts suggesting that a more significant discount be accorded for prior cooperation.<sup>84</sup> In a similar vein, the courts have noted that:

An initial offer to assist, genuinely made, may, of course, be the first step in a continuum of co-operation, which leads to the provision of evidence at a trial. An offer which actually goes through the 'fire of a trial' has a far stronger claim than assistance which an offender was prepared to give, but was not called upon to give.<sup>85</sup>

### **C Informer Discount Importance is Evident because it Attracts a Quantitative and Large Discount**

The importance of the informer discount is illustrated not only by the scope of situations in which it is accorded but even more by (i) the size of the discount and (ii) the distinctive manner in which the size of the reduction is typically quantified. I discuss each of these issues further in this order. First however, I note inconsistencies in the application of the informer discount. Courts do not always provide a quantitative sentencing discount.<sup>86</sup> Not only is the size of the discount not clearly demarcated but there is in fact no imperative to define the size of the discount in any given case. Thus, courts in some cases still do not stipulate the size of the discount, particularly in Western Australia, where the Court of Appeal has previously stated that that instinctive synthesis normally prohibits a specific

81 (2012) 218 A Crim R 490.

82 *R v YZ* (1999) 162 ALR 265.

83 See *DPP v Mann* [2006] VSCA 228 (10 October 2006); *Yang v The Queen* [2011] VSCA 161 (7 June 2011). For examples of where a sentence was increased because of a failure to comply with an undertaking to assist authorities, see *DPP (Cth) v Johnson* [2012] VSCA 38 (23 February 2012); *R v Shahrout* (2014) 241 A Crim R 274.

84 *R v KAO; Ex parte A-G (Qld)* (2015) 253 A Crim R 201.

85 *Ungureanu v The Queen* (2012) 272 FLR 84, 93 [35], citing *R v Sukkar* [2005] NSWCCA 55 (19 May 2005) [52].

86 New South Wales Law Reform Commission, above n 40, 130 [5.49]. In this report, the New South Wales Law Reform Commission stated: '[w]e are strongly of the view that discounts for past and future assistance should be retained, as should the current requirements for disclosure of the penalty that would otherwise have been imposed and of the amount by which it has been reduced'.

discount being accorded for cooperation.<sup>87</sup> Further, to the extent that a discount relates to both future and past cooperation, there is no agreed methodology for dealing with the discounts. Therefore, a single total discount can be accorded, or a discrete discount can be given for each type of cooperation, or a quantified discount can be given only for promised cooperation.<sup>88</sup>

More often than not, however, courts do stipulate the quantum of the informer discount. This occurs in some jurisdictions as a matter of practice and in others pursuant to legislation.<sup>89</sup> The discount that is accorded for cooperating with authorities is large by any measure. It is generally between 20 per cent to 50 per cent, and in rare instances can be more. The reasoning informing the calculation of the discount has been described by the Western Australian Court of Appeal, which stated in *R v Baldock*:

Counsel for the prosecutor made submissions to the sentencing judge about what discount should be allowed for the undertaking pursuant to s 21E of the *Crimes Act*. Reference was made to *R v Sukkar* (2006) 172 A Crim R 151, where the New South Wales Court of Criminal Appeal considered cases in New South Wales where discounts had been granted for pleas of guilty and assistance. The court there concluded that while there is no fixed tariff, discounts customarily range between 20% and 50% and that, generally speaking, a discount of 50% is regarded as appropriate to assistance of a very high order. In this State, this court has said that there is no tariff for such a discount but that it may be ‘as much as 50% or even more.’<sup>90</sup>

In *R v Holland* a 45 per cent discount for cooperation with authorities and pleading guilty was upheld by the New South Wales Court of Criminal Appeal following a prosecution appeal.<sup>91</sup> Howie J in *SZ v The Queen* stated that the cooperation discount combined with a guilty plea ‘should normally not exceed 50 per cent’ and emphasised that a relevant consideration in determining the size of the discount is the usefulness of the information provided by the offender.<sup>92</sup> Yet in some rare cases, including *Z v The Queen*, an offender who gave evidence against

87 *Nannup v Western Australia* [2011] WASCA 257 (29 November 2011) [56]–[65]; *Chivers v Western Australia* [2005] WASCA 97 (1 June 2005) [66]. Courts in Western Australia at times do provide a quantified discount for assisting authorities. For a recent example, see *MSO v Western Australia* [2015] WASCA 78 (14 April 2015) [69]–[70].

88 For an example of where a combined discount is given for both forms of cooperation, see *R v FAF* (2014) 247 A Crim R 572.

89 See, eg, s 23(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which requires the court to specify the discount for both past and future assistance and where both are applicable to separate them out. As with the guilty plea discount, the quantification of the informer discount can occur in two ways — either in percentage terms or by stipulating the penalty that would have been imposed without the cooperation.

90 (2010) 243 FLR 120, 125–6 [6], citing *Western Australia v Tran* [2008] WASCA 183 (2 September 2008) [75]–[77]; *Western Australia v Wynne* (2008) 188 A Crim R 502.

91 (2011) 205 A Crim R 429.

92 (2007) 168 A Crim R 249, 251 [3]. In *R v Jones* (2010) 76 ATR 249, 256–7 [19]–[23], the Court attempted to further demarcate the boundaries of the discount by reaffirming that, normally, 50 per cent sets the upper limit but that this should be reduced to 40 per cent where the offender will not serve at least a substantial part of his or her sentence in more onerous prison conditions due to the provision of the information. This approach, however, has not been followed in other cases. *MSO v Western Australia* [2015] WASCA 78 (14 April 2015) is a case where a 50 per cent discount was given on account of past and future cooperation.



other offenders and pleaded not guilty to most of the offences still received a 50 per cent discount for cooperating with authorities.<sup>93</sup>

There are no rigid criteria that courts are required to observe to determine the quantum of a specific sentence reduction. There is, for example, no set 'tariff' for the discount.<sup>94</sup> And even the upper end of this range is not fixed, with courts noting that the discount can be as great as 60 per cent.<sup>95</sup> The open-ended nature of the discount and width of the range was considered in *R v Johnston*, where the Victorian Court of Appeal, in providing a 50 per cent discount, noted:

Effectively, the only safeguard [to the size of the informer discount] is the relatively rough and ready measure of manifest excessiveness or inadequacy as a ground of appeal. ... Although, recognising that the quantification of informer discount involves a degree of arbitrariness which adherents to the shibboleth of intuitive synthesis may prefer to avoid, in the circumstances of this case I would set the discount at 50%. So to say is not to suggest that the level of discount could not be less or more in another case involving drug-related offences. Each case is unique. Nor is it to say that it is necessarily the only figure to which one could properly come in the circumstances of this case. It goes without saying that, within a given range of acceptability, views may reasonably differ.<sup>96</sup>

The potential size of the discount is therefore only limited by the need to ensure that the final sentence is not manifestly inadequate and 'does not result in a sentence which is, in all the circumstances of the offending and the offender, obviously inadequate or an affront to community standards'.<sup>97</sup>

The second indication of the importance of the informer discount is the preparedness of the courts to quantify the exact size of the discount. In relation to promised future undertakings, it is understandable that the courts would indicate the exact discount.<sup>98</sup> This is necessary to ensure that an offender who does not comply with the undertaking can be resentenced on the basis of the reduction being retracted.<sup>99</sup> This is partly why legislation in several jurisdictions requires sentencing judges to stipulate the penalty reduction attributable to an undertaking to cooperate with authorities.<sup>100</sup>

However, as noted above, quantitative discounts for cooperation extend beyond promised cooperation to past assistance. This is notable because it is a rare deviation from the instinctive synthesis, which has been so staunchly endorsed

93 [2014] NSWCCA 323 (18 December 2014).

94 See, eg, *Bazzi v Western Australia* [2007] WASCA 195 (28 September 2007). See also *Hill v Western Australia* [2014] WASCA 150 (19 August 2014).

95 See *R v OPA* [2004] NSWCCA 464 (17 December 2004); *R v AMT* [2005] NSWCCA 151 (14 April 2005) [22].

96 (2008) 186 A Crim R 345, 350–1 [19]–[21] (citations omitted).

97 *MXP v Western Australia* (2010) 41 WAR 149, 162 [52], citing *R v Gallagher* (1991) 23 NSWLR 220, 232, 234.

98 *R v Golding* (1980) 24 SASR 161.

99 *R v Ngata* [2015] ACTSC 356 (3 November 2015) [59]. Although, as we have seen, the additional penalty does not always correlate with the original reduction.

100 As noted above, s 13A of the *Penalties and Sentences Act 1992* (Qld) states that a reduction for cooperating with authorities is appropriate and adds further that the court must specify the penalty that would have been imposed without the reduction. See also *Sentencing Act 1995* (WA) s 8(5); *Crimes Act 1914* (Cth) s 16AC (formerly s 21E).

by the courts.<sup>101</sup> Despite there being several hundred aggravating and mitigating considerations, the informer discount is one of only two factors that often results in a quantifiable discount. Departure from a supposedly important methodology can presumably only occur for compelling reasons.

The informer discount is also explicitly quantified in order to ensure that offenders are aware of it and hence more likely to cooperate with authorities,<sup>102</sup> as the Full Court of the Supreme Court of South Australia explained in *R v T*.<sup>103</sup> Further, the Queensland Court of Appeal noted in *R v FAF* that '[e]ncouraging persons to provide cooperation of both kinds has been described as a matter of "high public policy", justifying substantial inducement by way of a reduction of sentence'.<sup>104</sup>

Thus, while a number of rationales have been advanced to justify the informer discount, the most common reason given for quantifying the discount is not to reward offenders for past deeds (in the form of giving evidence against co-offenders) but to influence the behaviour of other offenders. The practice of spelling out the size of the discount is largely directed to offenders who are in a position to provide evidence against other people. The implications underpinning this reasoning are that (i) a quantified discount is more likely to influence behaviour than a discount that is described in approximate language (such as 'substantial' or 'significant') and (ii) the prospect of a sentencing reduction can in fact meaningfully influence the actions of offenders after they have been apprehended. The persuasiveness of these assumptions is discussed further in Part V of this article, but for now it is sufficient to have made them clear.

## **D No Clear Methodology for Dealing with the Informer and Guilty Plea Discounts**

An especially complex issue in sentencing law is determining how the informer discount should be dealt with in association with the guilty plea discount. Sometimes, only the guilty plea discount is quantified. In other instances, the discounts are quantified and accorded separately. For example, in *R v Ngata* the offender was given a 40 per cent discount for a promise to give assistance against two co-offenders for an aggravated robbery, which was caught on closed-circuit television.<sup>105</sup> An additional seven months from a three years and seven-month term was deducted for pleading guilty. Thus in total his sentence was reduced by 36 months. The final sentence was 30 months and hence an overall reduction of 60 per cent was given.<sup>106</sup>

101 In *R v Sahari* (2007) 17 VR 269, 273–7 [16]–[20], it was suggested that a quantified discount is not a departure from instinctive synthesis, but is instead an example of sequential reasoning, but this distinction is without basis. A quantified discount is clearly a two-step approach: see, eg, *R v Johnston* (2008) 186 A Crim R 345, 350–1 [18]–[21].

102 *R v Johnston* (2008) 186 A Crim R 345, 348–9.

103 (2013) 242 A Crim R 476, 481 [23]. See also *R v Harris* (1992) 59 SASR 300, 302–3.

104 (2014) 247 A Crim R 572, 574 [10].

105 [2015] ACTSC 356 (3 November 2015).

106 *Ibid.* See also *R v Baldock* (2010) 243 FLR 120, where a 40 per cent reduction was given for an undertaking to assist authorities and a further 25 per cent for pleading guilty. Both discounts were from the initial sentence, as opposed to the contracted sentence.

In *Director of Public Prosecutions (Cth) v Couper*, the Victorian Court of Appeal expressed unequivocal support for identifying each discount:

A sentencing judge should not only specify what sentence would have been imposed but for the undertaking to co-operate and the plea of guilty, but also identify what specific reduction has been given with respect to each of those matters (for example, in *Bui*, the indication would have been, from the head sentence '12 months for the undertaking to co-operate' and 'two years for the plea of guilty'). Clearly, what is significant to an offender and provides guidance for future cases is the actual reduction from which the offender has benefited as a result of having given an undertaking to co-operate, and, separately, the actual reduction from which the offender has benefited as a result of having given a plea of guilty.

For this purpose, a sentencing judge should identify the number of months (or days, weeks, or years) from which an offender has benefited both by co-operating and by pleading guilty.<sup>107</sup>

In *R v Lenanit*, Adams J adopted the same approach and in the process emphasised the importance of clearly stating the 'reward' for pleading guilty and cooperating with authorities, in order to motivate offenders to cooperate and receive the discounts.<sup>108</sup> Adams J stated:

In my opinion, the better approach is not to roll up the various discounts into a single undifferentiated number, but to specify each discount and apply each to the sentence in succession. ... In this way a more predictable reward for the various kinds of public benefit will develop and different cases can rationally be compared. The other method, which either does not assess the discount applicable to each mode of assistance but simply specifies a total or conceals the calculation, merely mystifies what public policy — quite apart from other principles of criminal justice — requires to be clear.<sup>109</sup>

However, the approach of separately quantifying each discount is not universally applied. In *Saner v The Queen*, the Victorian Court of Appeal argued against setting out discounts separately, on account of the complexities underlying the process:

It must often be the case that an offender's conduct in pleading guilty, his expressions of contrition, his willingness to cooperate with the authorities, and the personal risks to which he thereby exposes himself, will form a complex of

107 (2013) 41 VR 128, 155 [141]. The Court added at 155–6 [144]: 'In my opinion, it would be wrong to consider that there is only one methodology (or one sequence) that is faithful to the requirements of the two sections. In some circumstances, as in *Bui*, the reduction in the sentence given for the undertaking to co-operate may be specified first before the reduction for the plea of guilty; in other circumstances, as in *Chan*, it may be more appropriate to indicate the reduction given by reason of the plea of guilty before indicating the reduction to reflect the undertaking to co-operate. Whichever sequence is adopted, it is important that the actual sentence imposed reflects the fact that the offender has had the benefit of *both* forms of reduction. A way of ensuring this has occurred is to indicate plainly, as T Forrest J has done, what discount is referable to the undertaking to co-operate and what discount is referable to the guilty plea.'

108 [2008] NSWCCA 67 (27 March 2008).

109 *Ibid* [50].

inter-related considerations, and an attempt to separate out one or more of those considerations will not only be artificial and contrived, but will also be illogical.<sup>110</sup>

It is not surprising then that courts often simply specify the one discount where the offender pleads guilty, has provided past assistance and undertakes to provide future assistance.<sup>111</sup>

A further unresolved aspect of the interaction between a guilty plea and an informer discount is how they should mathematically operate, irrespective of whether they are set out individually or a global discount is accorded. As we have seen, the courts seem to compound the discounts.<sup>112</sup> This is problematic, given that a process of consistently adding mitigating factors could potentially result in a sentence reduction that exceeds the original sentence. Hence, in some cases we see a moderated approach to according multiple discounts. In *SZ v The Queen*, for example, the Court stated that where a guilty plea discount is accorded, there is less scope to apply a large reduction for assisting authorities and preferred a model where subsequent discounts were added to the contracted sentence.<sup>113</sup>

Thus we see that there is considerable uncertainty regarding the manner in which the informer discount should be operationalised. Nevertheless, the rationale for the discount is jurisprudentially sound and has been unreservedly embraced by the courts, to such an extent where it can result in a sentencing methodology that departs from the instinctive synthesis, and in some cases an approximate halving of the penalty that would have been otherwise imposed. The preferable manner for dealing with multiple discounts is discussed further in Part V of this article. In Part IV, I first discuss the approach taken by the courts to the disclosure discount.

## IV VOLUNTARY DISCLOSURE OF ONE'S CRIME (THE DISCLOSURE DISCOUNT)

### A *Rationale for the Disclosure Discount*

The voluntary<sup>114</sup> disclosure of one's own criminal conduct to authorities is another established mitigating factor in sentencing law.<sup>115</sup> A number of rationales have been advanced for discounting sentences for offenders who voluntarily disclose

110 [2014] VSCA 134 (27 June 2014) [81], quoting *R v Gallagher* (1991) 23 NSWLR 220, 228.

111 *Hamzy v The Queen* [2014] NSWCCA 223 (17 October 2014) [71]. In *R v Ehrlich* (2012) 219 A Crim R 415, 420 [12]–[13], the Court approved both approaches.

112 *R v Ehrlich* (2012) 219 A Crim R 415, 420 [15]. See also *R v NP* [2003] NSWCCA 195 (17 July 2003) [30]. Most recently, see *Panetta v The Queen* [2016] NSWCCA 85 (13 May 2016), although the NSW Court of Criminal Appeal ultimately reduced the size of the compounded discount because it would have resulted in a sentence which was too lenient.

113 (2007) 168 A Crim R 249, 252 [9]–[12], 261–2 [53].

114 If the disclosure is inadvertent (as opposed to voluntary) in that the offender mistakenly assumed the police were already aware of his or her involvement in an offence, a discount may be applicable, but it would seem that it is very small: *Hill v Western Australia* [2014] WASCA 150 (19 August 2014) [38].

115 For an overview of the operation of the discount, see Freiberg, above n 9, 385–7; Odgers, *Sentence*, above n 9, 337–59.

their offending. The most important of these, in common with the cooperation discount, is considered to be the assistance offenders render to police to apprehend and prosecute criminal offenders, thereby enhancing community safety and ameliorating victims' concerns.<sup>116</sup>

The desirability of providing a discount to encourage people to report their own crimes was emphasised by Buchanan JA, with whom Eames and Nettle JJA agreed, in *R v Doran*.<sup>117</sup> The Justices also noted other reasons for conferring the disclosure discount, stating that 'the consequences of the appellant's admissions are that they reduce the need for a sentence to personally deter the appellant, they increase the prospects of his successful rehabilitation and they demonstrate genuine remorse for his actions'.<sup>118</sup>

For these reasons, they endorsed the policy of giving a self-reporting offender 'a demonstrable discount in his sentence in order to encourage others to make like admissions'.<sup>119</sup> The benefits that criminal self-disclosure offers victims of crime have also been noted by Kirby J, who stated in *Ryan v The Queen*:

A confession by an offender allows a victim a public vindication. In the particular matter of serial criminal offences against children and young persons, a confession by the offender may also facilitate the provision, where appropriate, of community assistance to the victim or the payment of compensation and an extension of greater family understanding and support. Medical reports tendered in the appellant's sentencing proceedings indicated that some of the persons abused by him as boys were considered, years later, still to be in need of psychiatric treatment.<sup>120</sup>

Criminal self-disclosure may also indicate remorse and constitute a good indicator of rehabilitation,<sup>121</sup> and a lesser need for specific deterrence.<sup>122</sup> However, I argue that these considerations should be ignored when determining the application of the disclosure discount, given that they are stand-alone sentencing factors.<sup>123</sup>

The utilitarian benefits associated with the disclosure discount have entrenched its use as a mitigating factor. As with the informer discount, it has a common law foundation and in some jurisdictions, it also has a statutory basis. For example, s 22A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) states:

116 Ibid.

117 [2005] VSCA 271 (21 November 2005) [15], quoting *Ryan v R* (2001) 206 CLR 267, 295 [94].

118 Ibid [14].

119 Ibid. In Victoria, this case is so seminal that the disclosure discount is sometimes referred to as the 'Doran discount' principle: see *Latina v The Queen* [2015] VSCA 102 (15 May 2015) [12].

120 (2001) 206 CLR 267, 295 [93] (citations omitted). See also *DPP (Vic) v CPD* (2009) 22 VR 533, 545 [48].

121 *R v Doran* [2005] VSCA 271 (21 November 2005).

122 *JBM v The Queen* [2013] VSCA 69 (28 March 2013) [23], [47].

123 See above Part II regarding similar observations in the context of the informer discount and the following sections regarding the relevance of specific deterrence: *Crimes Act 1914* (Cth) s 16A(2)(j); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(b); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b); *Sentencing Act 1995* (NT) s 5(1)(c); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(i); *Sentencing Act 1997* (Tas) s 3(c)(i); *Sentencing Act 1991* (Vic) s 5(1)(b).

(1) A court may impose a lesser penalty than it would otherwise impose on an offender who was tried on indictment having regard to the degree to which the administration of justice has been facilitated by the defence (whether by disclosures made pre-trial or during the trial or otherwise).

(2) A lesser penalty that is imposed under this section in relation to an offence must not be unreasonably disproportionate to the nature and circumstances of the offence.

The discount is often referred to as the *Ellis* principle, reflecting the decision in which it was most clearly articulated. In *R v Ellis*, Street CJ stated that the disclosure discount should be in addition to that provided for pleading guilty and that such compounding is justified by the desire to encourage the guilty to report their offences and confess their guilt.<sup>124</sup> In particular, Street CJ stated:

When the conviction follows upon a plea of guilty, that itself is the result of a voluntary disclosure of guilt by the person concerned, a further element of leniency enters into the sentencing decision. Where it was unlikely that guilt would be discovered and established were it not for the disclosure by the person coming forward for sentence, then a considerable element of leniency should properly be extended by the sentencing judge. It is part of the policy of the criminal law to encourage a guilty person to come forward and disclose both the fact of an offence having been committed and confession of guilt of that offence.<sup>125</sup>

## **B Size of Disclosure Discount Not Stipulated**

The disclosure discount has been endorsed by the High Court in several cases. *Ryan v The Queen*<sup>126</sup> involved a sentencing appeal by an offender who voluntarily disclosed a large number of sexual offences against children. A key issue before the Court was whether this entitled the offender to a significant discount and whether in determining the size of the discount the court should inquire into the likelihood of the disclosed offences being discovered by other means. The sentencing judge provided a discount for voluntary disclosure but did not expressly state that it was considerable or substantial. The High Court (Kirby J dissenting on this point) rejected the appeal. In the process of considering the submission, several members of the Court made comments regarding the scope and application of the disclosure discount. McHugh J stated that the two main factors that impact on the size of the discount in relation to offences that were previously unknown to the authorities are '(1) the likelihood that the offences would have been discovered by the authorities; and (2) the likelihood that the offences could have been proven beyond reasonable doubt in a court without the disclosure'.<sup>127</sup> He dismissed the submission that the sentencing judge did not provide a large enough discount

124 (1986) 6 NSWLR 603, 604.

125 *Ibid.*

126 (2001) 206 CLR 267.

127 *Ibid* 272 [12].

on the basis that the disclosure discount is a general principle, not a 'rule to be quantitatively, rigidly or mechanically applied'.<sup>128</sup> Rather, McHugh J stated:

It is an indication that, in determining the appropriate sentence, the disclosure of what was an unknown offence is a significant and not an insubstantial matter to be considered on the credit side of the sentencing process. How significant depends on the facts and circumstances of the case.<sup>129</sup>

Callinan J, with whom Gummow J agreed on this point,<sup>130</sup> noted that the sentencing judge stated that he provided a 'discount in punishment' to the appellant because of the disclosure and that a decision not to state the quantum of the discount will not generally constitute a sentencing error.<sup>131</sup> Hayne J dismissed the appeal for similar reasons, noting that:

The fact that the sentencing judge made no express reference to *R v Ellis* (to which he was referred in the course of the plea) and did not use an epithet like 'considerable' or 'significant' when referring to the credit he gave on this account does not demonstrate error. Error could be discerned only if it could be seen that the sentence imposed was excessive.<sup>132</sup>

Thus each of the Justices made clear that courts are not required to specify the size of the disclosure discount. The only member of the Court that believed that a considerable or significant discount was merited, and that this should be quantified, was Kirby J.<sup>133</sup> Despite this, Kirby J did not indicate even approximately the size of the discount that is appropriate.<sup>134</sup>

The High Court most recently considered the disclosure discount in *CMB v Attorney-General (NSW)*.<sup>135</sup> The main issue in the case was the circumstances in which a Crown appeal pursuant to s 5D(1) of the *Criminal Appeal Act 1912* (NSW) can succeed.<sup>136</sup> This was in the context of an accused who was sentenced for sexual offences, many of which he voluntarily disclosed to police. Several members of the High Court made a number of observations regarding the disclosure discount.<sup>137</sup> French CJ and Gageler J noted that the disclosure discount entitles an offender to a significant degree of leniency.<sup>138</sup> Their Honours, however, provided no guidance regarding the size of the discount and instead endorsed the comments of McHugh J in *Ryan v The Queen* that 'in determining the appropriate sentence, the disclosure of what was an unknown offence is a significant and

128 Ibid 273 [15].

129 Ibid.

130 Ibid 287 [63].

131 Ibid 321–2 [185].

132 Ibid 312 [153] (citations omitted).

133 Ibid 296–7 [97]–[98]. See also *Hill v Western Australia* [2014] WASCA 150 (19 August 2014) [82]–[91].

134 Callinan J (with whom Gummow J agreed) also stated that in some circumstances it might be appropriate to quantify the informer discount: *Ryan v The Queen* (2001) 206 CLR 267, 322 [185].

135 (2015) 256 CLR 346.

136 The Court held that in order for a prosecution appeal to succeed the Crown needs to establish that there is (i) an error and (ii) the discretion to allow the appeal should be exercised: *ibid* 349.

137 This was in the context of s 23 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

138 *CMB v A-G (NSW)* (2015) 256 CLR 346, 361–2 [42]. See also 371 [72] (Kiefel, Bell and Keane JJ).

not an insubstantial matter to be considered on the credit side of the sentencing process. How significant depends on the facts and circumstances of the case'.<sup>139</sup>

French CJ and Gageler J underlined the imprecision of the discount by noting that its exact size is a matter 'on which reasonable minds might differ'.<sup>140</sup> Kiefel, Bell and Keane JJ also used the same phrase in noting that whether a discount is so substantial that it is disproportionate to the seriousness of the offence 'is a judgment about which reasonable minds may differ'.<sup>141</sup>

In summary, while the disclosure discount is an established mitigating factor in sentencing law, the High Court has provided no guidance about even the approximate size of the discount.<sup>142</sup> To the contrary, it has consistently emphasised that this is a matter about which disagreement is not only reasonable but perhaps even necessary.

### **C The Scope of Operation of Disclosure Discount and Approximating the Size of the Discount**

Before I examine more closely the size of the sentencing discount that can be potentially conferred for disclosing one's own crime, I describe the circumstances in which the disclosure discount is applied. The High Court decisions cited above concern situations where an offender disclosed offences to authorities that were not previously known to them. However, these are not the only circumstances in which the discount has been applied. The discount also applies in relation to offences that have been reported but where the identity of the offender has not yet been established. A recent example of this is the decision of the New South Wales Court of Criminal Appeal in *Herbert v The Queen*.<sup>143</sup> The case involved a sentencing appeal by an offender who was sentenced to a total term of imprisonment for 10 years with a non-parole component of seven years for three offences of sexual intercourse without consent in circumstances of aggravation. The main ground of appeal was that the sentencing judge did not provide an appropriate discount for the applicant's disclosure of offending. The Court of Criminal Appeal upheld the appeal, holding that the sentencing judge did not give an appropriate discount for the applicant's voluntary disclosure. The Court of Criminal Appeal resented the applicant to an aggregate sentence of nine years' imprisonment with a non-parole period of six years and three months. In doing so, it made a number of observations and comments regarding the rationale for the discount and the scope of its operation.

139 *CMB v A-G (NSW)* (2015) 256 CLR 346, 362 [43], quoting *Ryan v The Queen* (2001) 206 CLR 267, 272–3 [15].

140 *Ibid* 362 [44].

141 *Ibid* 373 [78]. For a recent instance in which a discount for pleading guilty and voluntary disclosure was reduced on this basis, see *Panetta v The Queen* [2016] NSWCCA 85 (13 May 2016).

142 In *Lewins v The Queen* (2007) 175 A Crim R 40, it was stated that a mathematical discount should not be accorded for disclosure.

143 [2015] NSWCCA 172 (29 June 2015).



The offences to which the applicant confessed related to a sexual assault he committed upon a 55-year-old woman he grabbed while she was walking along a beach in Jervis Bay. The applicant, aged 30, punched the victim and dragged her into bushes where he proceeded to have sexual intercourse with her. The victim became unconscious during the attack. On awaking the applicant was nearby and he apologised to her but warned her to not report the attack. The victim promptly reported the attack and the incident was widely reported in conventional and social media. Two days after the incident, the applicant voluntarily attended a police station and stated that he had a history of blackouts after using alcohol and prescription drugs and that this would often cause him to become violent. He told police that he believed he had committed the offences because he had visions of grabbing a woman. Upon searching the applicant's home, police found letters he had written to his girlfriend and the son of a friend in which he apologised for what he had done and stated that he would be 'going away for a while'.<sup>144</sup> At the time the applicant went to the police station, he was not a suspect. The Court of Criminal Appeal accepted that any suggestion that the applicant would have been detected by police for the offence involved a degree of speculation. Thus, while the offences were already reported to police, a discount for admitting guilt was accorded. In this respect, the case affirmed Basten JA's observations in *R v Windle* that voluntary disclosure can arise in three main situations: '(a) revelation of an offence unknown to the authorities; (b) revelation of the offender's identity; or (c) revelation of an aspect of the offending unknown to the authorities'.<sup>145</sup>

In some other cases the scope and importance of the discount has been deliberately reduced because the courts have decided that there was a real likelihood that that the offender would have been detected and convicted without his or her admissions.<sup>146</sup>

One case demonstrating this is *JBM v The Queen*,<sup>147</sup> where an offender admitted to child sex offences for which he was interviewed. The offender pleaded guilty to two sexual offences against his niece, who at the time was aged three. Initially he was sentenced to seven years' imprisonment with a non-parole period of four years and six months. This was reduced to five years and six months' imprisonment with a non-parole period of three years and six months<sup>148</sup>. Thus, the offender was given a discount on his sentence of approximately 20 per cent. This was on account of the fact that he cooperated with authorities and admitted the offences. This reduction was conferred despite the fact that the offences to which the offender admitted were known and the offender was a suspect for the offences. In providing a disclosure discount to this offender the Court noted that the distinction that may be made in sentencing for known and unknown offences is sometimes marginal. In *JBM v The Queen* the Court stated:

144 Ibid [11].

145 *Herbert v The Queen* [2015] NSWCCA 172 (29 June 2015) [34], quoting *R v Windle* [2012] NSWCCA 222 (16 October 2012) [36].

146 *Zhang v The Queen* [2011] NSWCCA 233 (26 October 2011) [29].

147 [2013] VSCA 69 (28 March 2013).

148 Ibid [51].

It is true, in one sense, that the appellant's offences were already 'known to police'. As a matter of reality, however, they were 'known' only from a theoretical perspective. What the police had been told could not possibly have formed the basis of any prosecution. It was likely that the appellant would have appreciated that fact.

It may be correct that the appellant did not, in this case, tell the police anything that they did not already suspect. However, it is one thing to have been told by a child of three about something that may have happened. It is altogether another to be able to make any forensic use of such information. The appellant completed the picture. Indeed, he drew it. He did so voluntarily, and without any prevarication on his part. That, of itself, entitled him to a significant discount, greater than that which would normally be accorded to a plea of guilty.<sup>149</sup>

In *Director of Public Prosecutions (Vic) v CPD*, the Victorian Court of Appeal observed that there is a distinction between situations where an offender discloses unknown offences and where he or she makes admissions relating to offences for which he or she is being interviewed.<sup>150</sup> Despite making this distinction, it held that even where the admission is in relation to known offences, the offender is entitled to a 'significant sentencing discount' but not "really big discounts" ... of at least 50%.<sup>151</sup>

To recap then: case law emphatically suggests that the disclosure discount should and will be applied to offences that have been reported to police, even in cases where the confessing offender is already a suspect in relation to the offences. This remains the case also in instances when an offender makes admissions relating to an offence for which there is a large amount of inculpatory evidence.<sup>152</sup>

There are effectively four different scenarios (rather than three, as suggested in *Herbert v The Queen*<sup>153</sup>) in which the disclosure discount can be applied. The first is where authorities are unaware of the crime and it is unlikely to be reported, and the offender admits to committing the offence. The second is where the offence is known to police but there is no suspect. The third is where the offence has been reported and evidence is available which in time could lead police to the offender. The fourth is where the offender is a suspect and there is significant evidence against him or her. However, in practice the discount is only rarely conferred in the fourth scenario.<sup>154</sup>

In common with other forms of sentence reduction, the means by which the size of the disclosure discount is determined are obscure. As noted in *JBM v The Queen*,<sup>155</sup> a number of different terms have been used to describe the reduction that is appropriate for offenders who voluntarily disclose their offending. The

149 Ibid [42]–[43].

150 (2009) 22 VR 533, 541 [31].

151 Ibid 542 [35]. See also *R v Doran* [2005] VSCA 271 (21 November 2005) [15], approved in *SJ v The Queen* [2012] VSCA 237 (28 September 2012) [64].

152 *R v Barlow* (2010) 78 NSWLR 629, 635 [48].

153 [2015] NSWCCA 172 (29 June 2015), [34].

154 *Zhang v The Queen* [2011] NSWCCA 233 (26 October 2011) [29].

155 [2013] VSCA 69 (28 March 2013).

main terms are “substantial”, “considerable”, “significant” or “demonstrable”.<sup>156</sup> Given that courts do not quantify the size of the disclosure discount, we cannot ascertain with any degree of certainty whether there is a typical tariff for the discount and what the size of such a tariff might be. However, we can get some insight into the size of the tariff by examining the results of appeal decisions where an appeal has been upheld for failure to appropriately recognise the disclosure discount.

In *DPC v The Queen*<sup>157</sup> an offender was interviewed for certain child sex offences and admitted to having committed both these and other similar offences. The court in this case noted that voluntary disclosure of offending is a strong mitigating factor in sentencing, and it reduced a penalty for 24 sexual offences to a total effective sentence of 12 years' imprisonment with a non-parole period of seven years' imprisonment, down from the original sentence of 13 years and six months' imprisonment with a non-parole period of nine years. Even though the total effective sentence was reduced by less than 10 per cent, the discounts for each of the offences that were disclosed by the accused seem to be higher. The accused made voluntary disclosures in relation to five offences and for each of these a penalty reduction of between 25 per cent and 40 per cent was provided. The disclosure related to offences that were previously not known to police. On face value, this is a considerable reduction. However, in resentencing the offender (who was 76 years old) the Court also considered fresh evidence it had received about his bad health. The greater burden of imprisonment that the accused would consequently experience was also a mitigating factor.<sup>158</sup>

In *Latina v The Queen*, the Victorian Court of Appeal allowed an appeal because the sentencing judge did not provide a sentencing discount where the accused admitted to trafficking a greater quantity of drugs that had been suspected.<sup>159</sup> The penalty for the relevant offence was reduced from four years and six months' imprisonment to three years' imprisonment, equating to a discount in the order of one-third. A discount of almost exactly the same size was provided in *Dawson v The Queen*<sup>160</sup> to an offender who admitted to participating in an armed robbery with a co-offender who had already been arrested.<sup>161</sup>

The sample size of the above cases is small. However, they provide some indication of the range of discounts that appeal courts have held to be appropriate for voluntary disclosure of one's offending. The one-third deduction for disclosing one's own crime is also consistent with the rare instances in which a court has

156 Ibid [33] (citations omitted).

157 [2011] VSCA 395 (29 November 2011).

158 Ibid [50]. There are numerous cases where, on appeal, a court has held that a sentence should be reduced because insufficient weight was accorded to disclosure, but often other mitigating factors also apply (such as youth or harsh prison conditions) and hence it is not tenable to ascertain the weight that has been accorded to self-disclosure: see, eg, *R v Kohl* (2012) 227 A Crim R 271; *Roberts v Western Australia* (2015) 249 A Crim R 154.

159 [2015] VSCA 102 (15 May 2015).

160 [2015] VSCA 166 (25 June 2015).

161 The penalty for the armed robbery was reduced from 22 to 15 months, although the total effective sentence the offender received on account of other offences remained the same.

provided a quantitative discount for voluntary disclosure. Thus, we see that in *Moore v The Queen*<sup>162</sup> the sentencing judge gave the offender a 35 per cent discount for voluntary disclosure (in addition to a 25 per cent discount for pleading guilty) and this was not disapproved by the New South Wales Court of Criminal Appeal.

In summary, it seems that a discount for voluntary disclosure of offending in the order of one-third of the penalty defines what is regarded as an acceptable range, irrespective of whether the offences were previously known to authorities.

The disclosure discount itself is a strongly-entrenched sentencing consideration. The contours of the discount are not precise and neither is the weight that should be accorded to it. But the courts have not questioned the appropriateness of treating voluntary disclosure as an appropriate legitimate mitigating circumstance in sentencing.

Having established that both the informer and disclosure discounts have sound justifications and that the principal rationales for each are similar, I now explain why there should be greater alignment between the discounts and the manner in which the discounts should be conferred.

## **V ALIGNING THE INFORMER AND DISCLOSURE DISCOUNTS**

### **A Comparing the Utilitarian Benefits of the Respective Discounts**

In contrasting and evaluating the informer and disclosure discounts it is important to be clear about the respective rationales for each of them. As I argue above, it is also necessary when attempting this task to ignore rationales for these discounts that are discrete sentencing considerations in their own right. Removing considerations that are common to both the informer and disclosure discount, brings into sharper relief the distinctive features of each sentencing discount, which in turn makes easier any assessment of their relative merits.

Focused assessment of each discount is also enhanced by the fact that in typical scenarios where both the informer and disclosure discounts are applied, offenders normally plead guilty and hence this factor can also be largely dismissed.<sup>163</sup> This process of comparing the utilitarian advantages of the discounts is inevitably rudimentary, especially as both discounts are applied in a relatively large range of situations. However, some clarity can be injected into the comparison by focusing on circumstances that best highlight the rationales for the respective discounts. A paradigm situation attracting the informer discount is a drug dealer who reveals to police the identity of his supplier. A paradigm case attracting the disclosure discount involves an accused admitting to crimes that have not been reported.

162 [2005] NSWCCA 407 (2 December 2005).

163 See discussion further below at Part V(C).

We observe a considerable overlap in the rationales for the informer and disclosure discounts. The principal rationale in both instances is identical: the conduct attracting the discount is likely to result in higher rates of crime detection and more successful prosecutions of offenders.

This rationale is more relevant in cases involving the disclosure discount. This is because an admission is a powerful indicator of guilt (especially when there is no suggestion of coercion or inducement) and nearly always results in a successful prosecution.<sup>164</sup> Moreover, the disclosure discount often relates to crimes that may otherwise never have been reported or detected. By contrast, the informer discount is conferred merely for the provision of evidence by an offender against other alleged offenders. This evidence necessarily forms part of the prosecution case and will only secure a finding of guilt if the other offender pleads guilty or the informer's evidence in conjunction with other evidence establishes guilt beyond reasonable doubt. The key point is that the informer discount does not necessarily or perhaps even often lead to a productive outcome from the perspective of the criminal justice system. To sum up then: from the perspective of detecting and solving crime, the utility of the disclosure discount is more substantial than the informer discount.

As noted above, there are also often benefits to victims stemming from offenders coming forward to disclose crimes and providing evidence against other offenders. However, these benefits largely only occur when a finding of guilty is secured, in which case victims are spared the possible anxiety of giving evidence and also the time associated with this process. Again, these benefits most commonly arise in relation to the disclosure discount, given that the circumstances that attract it are more likely to result in a finding of guilt than with the informer discount. It follows that the utilitarian benefits associated with the disclosure discount are generally more significant than is the case with the informer discount.

However, as noted above there is an additional justification for the informer discount that does not apply in cases involving the disclosure discount. This is the erosion of trust among criminals. There is, however, no empirical evidence to support this justification for applying the informer discount in sentencing. There is no evidence demonstrating, for example, that the informer discount has given authorities any aid in tackling such high-profile organisations as outlaw motorcycle gangs.<sup>165</sup> Further, the availability of the informer discount may have the effect of encouraging organised criminals to be more discerning about the

164 Unless of course, the admission is excluded from evidence, for example because it was obtained by coercion or arose as a result of inducements. For a discussion of situations where admissions can be excluded, see, eg, Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 11<sup>th</sup> ed, 2014) 417–22, 434–5, 449–62.

165 This has resulted in a number of legislative schemes directed towards undermining the criminal activities of motorcycle organisations. Several of the legislative schemes have been subject to challenge in the High Court: see, eg, *Wainohu v New South Wales* (2011) 243 CLR 181; *South Australia v Totani* (2010) 242 CLR 1; *Kuczborski v Queensland* (2014) 254 CLR 51. See also Bianca Hall, 'Government Declares War on Bikies as Bullets Fly in Melbourne', *The Age* (online), 11 March 2016 <<http://www.theage.com.au/victoria/government-declares-war-on-bikies-as-bullets-fly-in-melbourne-20160311-gnghqj.html>>.

identity of their criminal associates. In any event, it is not clear that the net amount of criminal activity has been reduced by the discount.

To that end, it is noteworthy that the most harmful criminal acts in Australia's recent history, such as the Port Arthur<sup>166</sup> and Belanglo State Forest killings,<sup>167</sup> were committed by offenders acting on their own. While certain forms of crime, such as large-scale drug trafficking, are committed by criminal gangs,<sup>168</sup> it is not clear that the dissipation of these gangs would lessen the amount of illicit drugs that are being trafficked at any given time.

In summary: while some weight should arguably be accorded to the capacity of the informer discount to erode trust between criminals, on close reflection this does not appear to be a credible rationale for applying the discount.

Thus, on comparing the circumstances underpinning the discounts and benefits derived from them, in terms of demonstrated utility, the disclosure discount is functionally superior, principally because it is more likely to lead to a successful prosecution.

### **B Considerable Overlap between Benefits Associated with Disclosure and Guilty Plea Discounts**

Although the disclosure discount brings greater overall benefits to the justice system and the community at large, this does not mean that offenders who receive the disclosure discount should get a greater discount than those who receive the informer discount. As we have seen, the allocation of both of these forms of sentencing mitigation normally accompany or augment a discount for pleading guilty. The guilty plea discount will normally carry greater additional weight in association with the informer discount. This is because the utilitarian advantages stemming from a guilty plea often overlap with the advantages associated with disclosing one's own offending; in both situations the community is spared the time and cost of a trial. Of course, in situations where an offender discloses a crime that is unlikely to have been reported or solved, there is the additional benefit of solving a crime and hence a bigger net discount should be accorded in such cases. However, it is notable that the utilitarian benefits of providing information about the crimes of other people are separate to those that follow a guilty plea of one's own crime, and hence there will normally be greater scope for independent operation of the guilty plea discount in comparison with the informer discount.

166 Martin Bryant shot and killed 35 people in Port Arthur on 28 January 1996. For details, see, eg, Peta Carlyon, 'Port Arthur Massacre: 20<sup>th</sup> Anniversary Organisers in Tasmania Predict Mixed Reaction to Commemoration', *ABC* (online), 20 January 2016 <<http://www.abc.net.au/news/2016-01-20/20-year-commemoration-of-port-arthur-massacre/7100494>>.

167 Ivan Milat killed seven people in Belanglo State Forest between 1989 and 1992 and has been labelled 'Australia's most infamous serial killer': see Megan Palin, 'Inside the Life and Mind of Australia's Most Infamous Serial Killer: Letters from Ivan Milat', *news.com.au* (online), 12 March 2016 <<http://www.news.com.au/national/crime/inside-the-life-and-mind-of-australias-most-infamous-serial-killer-letters-from-ivan-milat/news-story/67a972cc48e03c2109c175b7805bb8fb>>.

168 This has resulted in the Federal Government making a concerted effort to disrupt the activities of 'outlaw motorcycle gangs' recently: see, eg, Agence France Presse, 'Australia Declares War on Biker Gangs, Tears Up Visas', *Yahoo! News* (online), 11 March 2016 <<https://www.yahoo.com/news/australia-declares-war-biker-gangs-tears-visas-025303659.html>>.

It follows that as a general rule the importance that sentencing law should ascribe to the disclosure discount should be greater, and certainly no less, than the informer discount. Despite this, sentencing orthodoxy accords greater emphasis to the informer discount. However, I argue that the considerable community benefits associated with the disclosure of one's own crime mean that the disclosure discount should be given at least equal if not greater weight than the informer discount.

### **C The Disclosure and Informer Discounts Should be Quantitative in Nature**

There are of course two ways in which the law relating to the disclosure and informer discounts could be harmonised. The first is to both calculate and state the disclosure discount in a similar fashion to the informer discount so that a considerable and transparent numerical sentence reduction is clearly quantified. Alternatively, the informer discount could be applied in the same manner as the disclosure discount, and no longer carry a specific reduction. This approach would have the benefit of making the methodology for applying the informer discount consistent with the manner in which all other mitigating and aggravating factors are integrated into the sentencing calculus, with the exception of the guilty plea discount.

Whether the informer and disclosure discounts should be aligned by prescribing a quantified discount for the disclosure discount or by no longer providing a quantified discount for the informer discount potentially raises complex and wide-ranging jurisprudential issues regarding the respective advantages and disadvantages of instinctive synthesis and the two-stage approach to sentencing. It is beyond the scope of this article to fully deal with these issues.<sup>169</sup> However, it is important to emphasise this wider tension particularly in the context of the mitigating factors discussed in this article.

As a matter of logic, it is not necessary to demonstrate that instinctive synthesis is flawed or that the two-step sentencing methodology is generally superior in order to make a persuasive argument for a mathematical discount. Rather, it can be argued that even within the overarching rubric of an instinctive synthesis methodology, an exceptional case should be made for the manner in which the disclosure discount is calibrated. This argument in part invokes some of the rationales underpinning the current quantitative approach to the guilty plea discount and (sometimes) the informer discount.

The reason that the guilty plea and informer discounts are often precisely quantified is because the behaviour that qualifies offenders for the discount is

169 Indeed, this has been the subject of relatively recent commentary and it is clear that this is a contestable matter. See Mirko Bagaric, 'Sentencing: From Vagueness to Arbitrariness: The Need to Abolish the Stain that is the Instinctive Synthesis' (2015) 38 *University of New South Wales Law Journal* 76. See also Arie Freiberg and Sarah Krasnostein, 'Statistics, Damn Statistics and Sentencing' (2011) 21 *Journal of Judicial Administration* 73.

regarded as having important tangible benefits for the criminal justice system. However, as we have seen, the conduct that attracts the disclosure discount is actually no less important. In addition, the principal rationale for quantifying guilty plea and informer discounts, and for substantial sentencing reductions, is to provide a positive incentive for offenders to engage in the relevant behaviour. This applies equally in the case of the disclosure discount.

Further, the disclosure discount, the informer discount and guilty plea reductions can be distinguished from nearly all other mitigating considerations. These three considerations all relate to the manner in which an offender responds after the commission of a crime. They are considerations that involve a decision that needs to be made by the accused. This is in contrast to the other three categories of mitigating factors that were identified in Part II of this paper. Considerations that relate to the circumstances of the offence, such as the degree of harm that is caused; factors that are personal to the offender, such as previous good character; and matters that impact on the severity of the sanction, such as the conditions in prison, are beyond the control of the offender and hence it is futile adjusting the size of a discount or the manner in which it will be promulgated with regard to encouraging the relevant form of behaviour. This is not the situation in relation to whether or not an offender pleads guilty, discloses his or her own offending or informs on the criminal activities of others.

Moreover, all of the three mitigating considerations analysed in this article confer demonstrable tangible benefits to the criminal justice system (unlike most other mitigating factors) and hence offenders should be encouraged to make choices that attract the sentencing discounts. The best manner in which to influence offenders' behaviour is to provide a transparent and clear benefit. The instinctive synthesis methodology cannot accommodate this inducement. Thus, a strong argument can be made for a quantitative discount applying in circumstances where an offender discloses his or her own offences. An incidental but logical consequence of this proposal is that the informer discount should more regularly attract a prescribed discount. As we have seen, it is common but not mandatory for courts to provide a quantitative discount when offenders provide information about the crimes of others.

#### **D *Setting the Mathematical Range of the Disclosure Discount***

There is no objectively correct level at which the disclosure discount should be set. As has been noted by the High Court, this is a matter upon which reasonable minds can disagree. However, there are some principles by which the parameters of the discount should be informed. The purpose of providing the discount is to provide an incentive for offenders to disclose their crimes and hence the size of the discount needs to reflect this objective. Self-interest is a strong behavioural motivator and hence people have a strong desire to not subject themselves to the likelihood of criminal sanctions. Accordingly, to overcome this it is likely that a considerable discount is necessary. However, at the same time the ceiling for the discount is set by the principle of proportionality. This principle is relatively



elastic given that the two limbs of the principle are not informed by firm criteria.<sup>170</sup> There is no clear methodology for ascertaining either the seriousness of a crime or the hardship of a sanction.<sup>171</sup> Despite this considerable grey area, the principle is sufficiently instructive to detect clearly inappropriate sanctions, for example a short jail term for murder or a fine for an armed robbery.<sup>172</sup> In determining an appropriate reference point, guidance can also be obtained from the level at which existing discounts are set.

As I noted earlier, the benchmark for the informer discount is generally between 20 per cent and 50 per cent. The disclosure discount provides no fewer utilitarian benefits than the informer discount and it therefore should be set at a similar level. The highest discount should arguably be conferred in cases where the value of information is greatest (ie for the disclosure of crimes that were unlikely to be otherwise reported) and lowest in circumstances when proffered information is of least benefit (ie when an offender makes admissions to crimes in relation to which there is a considerable degree of inculpatory evidence). If the lower end of the disclosure discount was set at 20 per cent, this would be too large in cases where an offender makes admissions for a crime in which he or she is caught red-handed, given that in all likelihood the utilitarian benefits would be secured even without the admissions. Sentences could give less weight to the guilty plea discount in such cases. However, rather than impacting directly on the guilty plea discount, it is more straightforward to reduce the floor of the disclosure discount to, for instance, five per cent. Thus, the range of the discount should encompass five per cent to 50 per cent of an unmitigated sentence.

### **E Appropriate Method for Dealing with Multiple Quantitative Discounts — Focusing on the Contracted Sentence**

There are potential difficulties that would attend having another sentencing consideration that attracts a quantifiable discount. Most important, this will arguably complicate the sentencing process. As we have seen, there is no clear methodology for determining precise discounts when two forms of discount are granted and the addition of a third discount could further complicate sentencing. However, there is a ready solution to this problem. Logically, it is not tenable to cumulate discounts. This is because this could lead to the absurdity of a discount exceeding 100 per cent. Thus, for example, if a 40 per cent discount is accorded for both the informer and disclosure discounts and a further 30 per cent for pleading guilty, this would on the cumulative approach entail a 110 per cent reduction. Instead the discounts should be applied to the contracted sentence following application of the previous discount, which in the example being used would yield a reduction of 75 per cent (74.8 per cent to be precise).<sup>173</sup> This approach is both logically and mathematically sound and readily capable of implementation.

170 See Mirko Bagaric, 'Injecting Content into the Mirage that is Proportionality in Sentencing' (2013) 25 *New Zealand Universities Law Review* 411, 411–2.

171 *Ibid* 413.

172 *Ibid*.

173 It has been noted that a combination of the disclosure and informer discounts could lead to more than a 50 per cent discount: *SZ v The Queen* (2007) 168 A Crim R 249, 261 [52].

There is a caveat that applies to the recommendation to provide a large quantified discount for self-disclosure. As we have seen, the law assumes that offenders are influenced by incentives built into the criminal justice system. It is for this very reason that the guilty plea and informer discounts are quantified. Common sense suggests this assumption is sound. However, the effectiveness of these particular incentives has not been empirically validated. And there are plausible reasons to question the efficacy of incentives to influence offender behaviour. If we examine, for example, the widely-held view that harsh sanctions discourage crime, we see that while this view is intuitively appealing, it is not supported by relevant empirical studies. Indeed, these studies suggest that the greatest discouragement to crime is the perceived risk of being caught, not the magnitude of the ultimate penalty.<sup>174</sup>

The validity of these studies to the assessment of sentencing discounts is qualified by the fact that harsh sanctions are designed to deter crime through the threat of punishment, while sentencing discounts are designed to simplify and shorten judicial proceedings through inducements. In any case, the broader point remains that common sense assumptions about the motivators of human behaviour should be viewed with a degree of scepticism, unless and until they are empirically validated. To this end, the fact that many offenders do inform on other people provides some evidence that the inducement of a lower penalty does influence behaviour. However, cooperation with authorities can also be motivated by other considerations, such as remorse. It follows that the recommendations advanced in this article are necessarily qualified. Nevertheless, they are no less persuasive than the current arguments that are typically advanced to justify existing quantitative discounts.

## VI CONCLUSION

Voluntary disclosure of one's own offending is a well-established sentencing mitigating factor. From the doctrinal perspective, there are sound reasons for reducing the sentences of offenders who voluntarily disclose their own wrongdoing. In particular, these offenders save the criminal justice system the cost and time of running trials and contested hearings. Further, witnesses are spared the anxiety and time of giving evidence.

174 For an overview of the literature, see Nigel Walker, *Sentencing in a Rational Society* (Penguin Press, 1969) 60–1; John K Cochran, Mitchell B Chamlin and Mark Seth, 'Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment' (1994) 32 *Criminology* 107, 129; Dale O Cloninger and Roberto Marchesini, 'Execution and Deterrence: A Quasi-Controlled Group Experiment' (2001) 33 *Applied Economics* 569, 574–6; Dieter Dölling et al, 'Is Deterrence Effective? Results of Meta-Analysis of Punishment' (2009) 15 *European Journal on Criminal Policy and Research* 201; Anthony N Doob and Cheryl Marie Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' in Michael Tonry (ed), *Crime and Justice: A Review of Research* (University of Chicago Press, 2003) 143; Steven D Levitt, 'Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not' (2004) 18(1) *Journal of Economic Perspectives* 163, 177–8; Sentencing Advisory Council (Vic), *Does Imprisonment Deter? A Review of the Evidence* (18 April 2011) <<https://www.sentencingcouncil.vic.gov.au/publications/does-imprisonment-deter>>; Richard Berk, 'New Claims about Executions and General Deterrence: Dèjà Vu All Over Again?' (2005) 2 *Journal of Empirical Legal Studies* 303.

Similar rationales underpin the discount that is provided to offenders who provide information that assists in the arrest or prosecution of other offenders. The rationales underpinning the informer discount are, however, less compelling than those supporting the disclosure discount, as the disclosure of information against others does not invariably lead to a successful prosecution and even when it does it can often follow a trial, as opposed to a guilty plea. Yet the courts generally apply the informer discount more liberally and give it more weight than the disclosure reduction. This is unsound.

The law should be harmonised to provide greater consistency regarding the approach to the two discounts. In particular, the weight that is accorded to the disclosure discount should be similar to the informer discount and a mathematical discount should always be ascribed in relation to both discounts. This would make the law in this area more coherent and also provide a greater incentive for offenders to self-report crime.

More fully, there are several discrete sentencing reforms that should occur in order to make this area of law more coherent. First, courts should always confer a quantitative discount for assisting authorities. Secondly, this should also be the case in relation to disclosing one's own offences. Thirdly, the range for the disclosure discount should be between five and 50 per cent. To this end, four broad categories of the disclosure discount should be recognised with differing discounts for each category, with the highest discounts awarded for crimes that were not known to police (and were unlikely to be reported) and the lowest where an offender makes admissions in the face of compelling inculpatory evidence.

The fourth key reform that should occur is that when there is more than one quantitative mitigating factor that is applicable, the courts should set out the exact weight given to each consideration. These individual discounts then should be applied to the contracted portion of the remaining sentence.

It is acknowledged that the reforms proposed in this article are at odds with the instinctive synthesis approach to sentencing; however, there is a logical reason for distinguishing the guilty plea and the disclosure and informer discounts from other mitigating factors. The three mitigating factors considered in this article relate to post-offence conduct that involves a voluntary choice by an offender and behaviour that has demonstrable benefits to the community. The sentencing process should be structured to provide incentives to offenders to plead guilty, self-report crimes and inform on other offenders. The best manner for this to occur is to provide large quantitative discounts for these actions. While reasonable minds can disagree on the size of the discount it is no longer reasonable to continue with an opaque approach to the disclosure discount.