Aboriginal Legal Service of Western Australia Limited

Submission to the Statutory Review of Section 9AA of the *Sentencing Act 1995*

14 August 2017

ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA

ALSWA is a community-based organisation, which was established in 1973. ALSWA aims to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal peoples throughout Western Australia;
- Provide leadership which contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- Ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- Create a positive and culturally matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, child protection and human rights law. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

BACKGROUND

Section 9AA of the *Sentencing Act 1995* (WA) commenced operation on 20 December 2012. It provides that:

> (1) In this section —
>
> **fixed term** has the meaning given in section 85(1);
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> **head sentence**, for an offence, means the sentence that a court would have imposed for the offence if —
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> (a) the offender had been found guilty after a plea of not guilty; and
> (b) there were no mitigating factors;
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> **victim** has the meaning given in section 13.
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> (2) If a person pleads guilty to a charge for an offence, the court may reduce the head sentence for the offence in order to recognise the benefits to the State, and to any victim of or witness to the offence, resulting from the plea.
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> (3) The earlier in the proceedings the plea is made, the greater the reduction in the sentence may be.

(4) If the head sentence for an offence is or includes a fixed term, the court must not reduce the fixed term under subsection (2) —
(a) by more than 25%; or
(b) by 25%, unless the offender pleaded guilty, or indicated that he or she would plead guilty, at the first reasonable opportunity

(5) If a court reduces the head sentence for an offence under subsection (2), the court must state that fact and the extent of the reduction in open court.

(6) This section does not prevent the court from reducing the head sentence for an offence because of any mitigating factor other than a plea of guilty.

Prior to the inclusion of s 9AA, s 8(2) of the *Sentencing Act* provided that a 'plea of guilty by an offender is a mitigating factor and the earlier in proceedings that it is made, or indication is given that it will be made, the greater the mitigation'.

There are two primary justifications for providing a sentencing reduction for a guilty plea:

1. A plea of guilty may indicate remorse, acceptance of responsibility and/or a willingness to facilitate the course of justice (*subjective factors*).

2. A plea of guilty represents a saving (in terms of time and cost) to the administration of justice and saves witnesses the inconvenience, distress and trauma associated with giving evidence at a trial and associated with the delay in having the matter finalised (*objective factors*).

Prior the amendments in 2012, sentencing courts would provide reductions in sentences for guilty pleas because of both the subjective and objective factors described above. The precise discount would depend on the individual circumstances of the case; usually an offender would receive a discount of between 20% and 35%.

Underpinning the 2012 legislative reform was the view that a plea of guilty should not attract a sentencing discount on the basis that it is evidence of remorse. During the second reading speech the former Attorney General, Michael Mischin, observed that:

> [A]lthough genuine remorse may be a factor justifying a mitigation of the punishment to be imposed on an offender, on the basis that it displays an offender's receptiveness to rehabilitation, it is an uncertain and subjective yardstick by which to calculate the extent of any discount that should be granted for a plea of guilty.[1]

Instead, the former Attorney General contended that a sentencing reduction should attach to a guilty plea for utilitarian reasons because

> [a] plea of guilty saves the state the cost, the expenditure of resources, and the uncertainty of a trial, possibly a lengthy one. It saves witnesses the inconvenience and expense of having to put aside their daily routines and attend court, and often the stress of giving evidence. In the case of witnesses to traumatic events, or witnesses who are also victims of crime, it also relieves them of the trauma of remembering and recounting their experience.[2]

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1 Western Australia, Parliamentary Debates, Legislative Council, 16 August 2012, 5102 (Hon Michael Mischin, Attorney General).

2 Western Australia, Parliamentary Debates, Legislative Council, 16 August 2012, 5102 (Hon Michael Mischin, Attorney General).

The stated rationale for the legislative reform in 2012 was to:

- Clarify that the primary purpose of discounts for pleas of guilty is to recognise the utilitarian benefits to the State and to victims of, or witnesses to, the offence.
- Restrict the maximum discount available for a plea of guilty to no more than 25% of the head sentence.
- Clarify that the maximum discount is only available where an offender pleads guilty, or indicates that he or she would plead guilty, at the first reasonable opportunity.
- Enhance transparency in the sentencing process by requiring the court to state the fact and extent of discount for a plea of guilty in open court.[3]

INTERPRETATION OF SECTION 9AA

The background to and the provisions of s 9AA make it clear that the basis for providing a discount for a plea of guilty is now the objective utilitarian benefits to the State and to victims and witnesses. The section recognises that the utilitarian benefits are obviously greater the earlier an accused enters a plea of guilty (eg, greater cost savings to the State, reduced stress/worry for victims and witnesses). However, pursuant to s 9AA(6) a court may reduce the head sentence for an offence because of any mitigating factor other than a plea of guilty. Other mitigating factors include genuine remorse and cooperation with authorities.

First reasonable opportunity

Section 9AA(3) provides that the earlier in the proceedings a plea is made, the greater the reduction in sentence. Further, under s 9AA(4)(b), in order to obtain the maximum discount allowed under the legislation (ie, 25%), the offender must have pleaded guilty (or indicated that he or she would plead guilty) at the *first reasonable opportunity*.

Numerous factors influence or affect the timing of a plea of guilty. Such factors include (but are not limited to):

- **Access to legal advice:** Legal Aid, ALSWA and community-legal centres are overworked and under resourced. The provision of timely and appropriate legal advice to accused persons is fundamental to ensuring justice. However, due to resourcing constraints this may not always be available at the first or earliest opportunity in the court proceedings.

- **Access to interpreters:** There is no statewide Aboriginal languages interpreter service and timely access to interpreters is problematic across the state. It is impossible to ensure adequate legal advice in the absence of an interpreter for Aboriginal people who do not speak English as their first language.

- **Police and prosecution disclosure practices:** Depending on the circumstances of the case, it is unreasonable to expect an accused person to enter a plea of guilty prior to receiving disclosure of specific aspects of the prosecution evidence.

- **Decision-making authority within the DPP:** The administrative processes associated with file allocation within the DPP hampers the ability to

3 Sentencing Amendment Bill 2012 (WA) Explanatory Memorandum.

negotiate in relation to alternative charges or amended material facts. This may affect the timing of a plea.

- **Mental illness, cognitive impairment or intellectual disability:** There is a large proportion of Aboriginal accused persons suffering from mental illness, cognitive impairment or intellectual disability. These compound difficulties in understanding the legal processes including legal advice about whether an accused is guilty of the offence or offences charged. For example, ALSWA represented one accused who found it extremely difficult to understand his guilt as a party to an offence of burglary because he was outside the premises when the burglary occurred and he took no direct role in the commission of the offence.

In *Rossi v The State of Western Australia*[4] McClure P stated that the 'first opportunity for an accused to plead guilty to a charge for an indictable offence is after initial disclosure has been made under s 35 of the *Criminal Procedure Act 2004* (WA) (ie, copy of statement of material facts and a copy of the charges (fast-track plea))'.[5] McLure P further stated:

> However, the first opportunity is not necessarily the first reasonable opportunity to enter a plea of guilty. Whether or not it is requires an objective assessment, having regard to all relevant circumstances in the particular case, as to whether it would have been reasonable for the accused to have pleaded guilty on an earlier occasion.[6]

This is consistent with the views expressed during the Parliamentary Debates for the legislation. The former Attorney General stated the phrase 'at the first reasonable opportunity' is 'flexible' and observed that:

> The first reasonable opportunity can be based on failure by the prosecution to disclose the strength of its case at the earliest opportunity. It can take into account the inability to get legal advice. It can take into account the fact that an offender may not have an interpreter. Those are all factors that go towards whether a plea of guilty is timed at the earliest reasonable opportunity. [7]

Likewise, the current Attorney General, John Quigley stated that:

> A person cannot make an informed decision to plead guilty to many charges until after they have had the opportunity to discuss that with a legal practitioner, not to see whether there is a technicality under which they can get off, but to see whether that is the appropriate charge for the complained conduct or whether it should be another charge that he or she pleads guilty to.[8]

Despite the apparent intent that the phrase 'first reasonable opportunity' would be interpreted flexibly and by reference to the specific circumstances of the case, ALSWA considers that, overall, the interpretation of s 9AA in practice does not consistently recognise the varying factors that might affect the timing of a plea of guilty. For example, in *The State of Western Australia v Abbott*[9] it was submitted the because the accused was being held in West Kimberley Regional Prison it was difficult for counsel to obtain instructions and that this should be taken into account in assessing the delay in presenting an offer to plead guilty to a lesser charge. However, Fiannaca J stated that:

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4 [2014] WASCA 189
5 Ibid [52].
6 Ibid [53].
7 Western Australia, Parliamentary Debates, Legislative Council, 26 September 2012, 5102 (Hon Michael Mischin, Attorney General).
8 Western Australia, Parliamentary Debates, Legislative Assembly, 8 November 2012, 8215 (Hon John Quigley).
9 [2017] WASCSR 69.

> While I acknowledge that your circumstances may have contributed to some delay, I have no information about what attempts were made to obtain instructions that would enable me to conclude that 5 January 2017 was the first reasonable opportunity to put an offer to the State. I am not satisfied that it was.[10]

In some cases, ALSWA lawyers are required to explain in detail the justification for each adjournment of proceedings for an indictable offence in the Magistrates Court. Even where accused persons plead guilty to an indictable offence before the committal mention date, they may not receive the maximum discount available because they not plead guilty on the first occasion after they had access to legal advice (even where that legal advice was provided by a busy duty lawyer).

ALSWA considers that s 9AA(4)(b) should be repealed. Section 9AA(3) which provides that 'the earlier in the proceedings the plea is made, the greater the reduction in the sentence may be', is sufficient to encourage early pleas of guilty. The phrase 'earlier in the proceedings' appropriately focuses the inquiry on the stage of proceedings rather that precise dates. For example, depending on the circumstances, there may be no justification for distinguishing between an accused person who enters a plea of guilty on the first court appearance after receiving a copy of the statement of material facts and any confessional evidence from another accused person who pleads guilty after three adjournments in the Magistrates Court.

Strength of prosecution case

The provisions of s 9AA are silent on the relevance of the strength of the prosecution case to any reduction given for a guilty plea based on the benefits that accrue to the State and to any victim of or witness to the offence. The Court of Appeal has held that the strength of the prosecution case is a relevant factor in determining the extent of any sentencing reduction.[11] This interpretation has, in ALSWA's view, undermined the intent of the provision and resulted in unfairness and a lack of transparency in the sentencing process.

In *Bein v The State of Western Australia* [No 2][12] McLure P (Mazza J concurring) stated that

> It is of benefit to the State to secure the conviction of people who offend against the criminal law. The strength of the State case is directly relevant to the prospect of securing a conviction. The stronger the case, the greater the prospect of securing a conviction absent a plea of guilty. The strength of the State case also has the potential to impact on the time and expense required by the State in the preparation and conduct of its case at trial. As a general rule, the stronger the State case the smaller the benefit to the State in the extent of the savings.
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> This conclusion does not alter the fact that the strength of the case is also relevant to subjective considerations including remorse and a willingness to facilitate the administration of justice. [13]

However, Pullin J disagreed and held that the strength of the prosecution case is not relevant to the determination of the discount to be given for the objective utilitarian benefits of a plea. He stated that there is "good reason for allowing a discount only for utilitarian reasons. If accused persons understand that a

10 Ibid [68].
11 See for example, *SCN v The State of Western Australia* [2017] WASCA 138 [91].
12 No 2] [2014] WASCA 54.
13 Ibid [58]-[59].

discount for a plea of guilty will not be reduced just because the sentencing judge thinks that the case against them was 'strong', then it will lead to a greater inducement to plead guilty and thereby product benefits to the State and benefits to the victim".[14] He further observed that this approach is consistent with the law in New South Wales and Victoria.

For example, in *Phillips v The Queen*[15] it was stated that:

> Even where the Crown case is strong and a guilty plea may be thought to be inevitable, it will, save in rare and quite exceptional cases, be appropriate to reduce the sentence to take account of the plea of guilty because the State has been saved the expense of a trial, witnesses have been spared the necessity of attending court and giving evidence, and resources have been released to other duties. The plea will always have facilitated the course of justice and have its utilitarian value, irrespective of the offender's reason for so pleading.[16]

It was also observed that the utilitarian benefits of a plea may be influenced by the *nature* of the prosecution's case but not by its strength. For example, the length or complexity of a possible trial may be relevant for assessing the utilitarian benefit and any reduction flowing to the accused.[17] Likewise, in *R v Thompson; R v Houlton*[18] it was stated that:

> The benefits to the criminal justice system as a whole, which flows from a plea of guilty, particularly an early plea of guilty, are not related to the circumstances of the offence or to the conduct of the offender...they are collateral benefits for the efficiency and effectiveness of the criminal justice system as a whole, which require acknowledgment of some character by way of an incentive, so that the benefits will in fact be derived by the system.[19]

ALSWA agrees with the approach of Pullin J and New South Wales and Victoria. The utilitarian benefits accrue irrespective of the reason an accused enters a plea of guilty. For example, an accused may plead guilty because he or she is genuinely remorseful and wishes to apologise to the victim and accept punishment. Another accused may plead guilty because the case against her is so overwhelming it would be futile and expensive to run a trial. Assuming these two accused entered a plea at exactly the same stage of the proceedings, the savings to the State and to victims/witnesses is identical despite the differing reasons for their decisions.

The current approach produces anomalies. For example, an accused who hands himself into police, makes a full confession, provides police with information that leads to the collection of strong forensic evidence against him, and then pleads guilty on the first appearance in court may receive less than the 25 percent discount because the prosecution case is very strong. Yet, the strength of the prosecution case is a direct result of the offender's cooperation, contrition and acceptance of responsibility. While these subjective factors can be taken into account under s 9AA(6), it is incongruous that such an accused would not receive the maximum discount allowed for the utilitarian benefits to the State. As stated in *R v Thompson; R v Houlton*[20] where 'the accused's own disclosure or confession is the basis of the strong Crown case, this should be taken into account with respect to the utilitarian benefit. Indeed, such conduct should be regarded as the earliest possible timing for a plea'.[21]

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14 Ibid [94].
15 [2012] VSCA 140.
16 Ibid [55] (Redlich KA, Curtain AJA & Maxwell P, Harper JA concurring)
17 Ibid [63]-[64].
18 [2000] NSWCCA 309.
19 Ibid [115] (Spigelman CJ, Wood CJ at CL, Foster AJA, Grove J and James J concurring).
20 [2000] NSWCCA 309.
21 Ibid [140] (Spigelman CJ).

The current interpretation in Western Australia leads to an absurd position – accused persons who are guilty and intend to plead guilty are discouraged from cooperating with investigating authorities in order to ensure that the case against them is as weak as possible so that they may maximise the sentencing reduction upon entering the guilty plea.

Another difficulty with the current approach is that the court must assess the strength of the prosecution case by reference to the written brief of evidence; this takes no account of the realities of criminal trials. Witnesses do not always attend court as required and those that do attend do not always give evidence in accordance with their original witness statement. To penalise accused persons who plead guilty when there is a seemingly strong prosecution case does not recognise that the true strength of the prosecution case is unknown until the trial takes place.

ALSWA recognises that the strength of the prosecution case is relevant to any mitigation that may arise due to remorse and willingness to facilitate the course of justice.

> A 'recognition of the inevitable' may qualify the extent of genuine contrition, if conditions exist which enable such a reasoning, but it does not qualify the utilitarian value of a plea.[22]

ALSWA recommends that reform of s 9AA of the *Sentencing Act 1995* should clarify that the *strength* of the prosecution case is not a relevant factor in assessing the sentencing reduction for the utilitarian benefits of a guilty plea. That is not to say that other factors associated with the prosecution case such as the likely complexity and length of a trial are not relevant factors.

THE STATUTORY REVIEW

Section 150 of the *Sentencing Act* requires a statutory review of s 9AA after three years of operation. The scope of the statutory review is as follows:

1. Whether the courts are recognising the fact and extent of a guilty plea in their sentencing remarks.

2. Whether the courts are limiting the use of mitigation to a maximum of 25% of the sentence.

3. Whether stakeholders have noticed a greater degree of clarity in sentencing remarks.

4. Whether there are further legislative or operational changes required to fully implement the intent of s 9AA.

The material provided to ALSWA in relation to the statutory review indicates that data analysis and consultation will inform the review process. ALSWA emphasises that it will be necessary to examine whether there has been an increase in the proportion of guilty pleas but more importantly, whether there has been any change to the timing of guilty pleas in all courts in order to assess if section 9AA has had any unintended consequences. For example, it was suggested during the

22 *Phillips v The Queen* [2012] VSCA 140, [61].

Parliamentary debate of the Bill that the changes would act as a disincentive to plead guilty.[23]

ALSWA RESPONSE

ALSWA provides its response to the specific questions posed by the review below. Following this discussion, ALSWA recommends appropriate reforms to s 9AA and other provisions of the *Sentencing Act 1995*.

Whether the courts are recognising the fact and extent of a guilty plea in their sentencing remarks

Overall, in ALSWA's experience, courts are recognising the fact and extent of a discount for a guilty plea. Most commonly, judges and magistrates state in their sentencing remarks that they have given a discount for the plea. This is especially the case for sentences of imprisonment. The courts invariably recognise the extent of the discount by referring to a percentage discount. This practice is arguably less consistent in the Magistrates Court; however, most magistrates do recognise the fact and extent of a sentencing reduction.

As a useful example of how courts formulate their sentencing remarks in this regard, Fiannaca J stated in *The State of Western Australia v Tugwell*[24] that:

> Having given consideration to all relevant factors, I have come to the conclusion that, after allowing for a 20% reduction for your plea of guilty under s 9AA and making further allowance for the other mitigating factors, the appropriate sentence in this case is one of 3 years' imprisonment.[25]

This is the most common way of dealing with s 9AA discount. Hence, in the above example, the precise length of the discount is not ascertainable. If the only discount related to the plea (ie, 20%), the head sentence would have been 3 years and 9 months' imprisonment and therefore the length of the discount would have been 9 months imprisonment. However, the court reduced the sentence for other mitigating factors so there is no way of ascertaining the head sentence and the actual reduction given for the plea. For example, the head sentence might have been 5 years' imprisonment reduced by 20% for a plea (discount of 12 months' imprisonment) and further reduced by 12 months' for other mitigating factors. The current approach begs the question, 20% of what?

ALSWA notes that there are some judges who will state the head sentence before pronouncing the discount for a plea and this means that the actual length of the discount (in addition to the percentage) is known. ALSWA discusses the benefits of this approach further below.

Whether the courts are limiting the use of mitigation to a maximum of 25% of the sentence

ALSWA is unsure of the purpose of this question. The law allows a maximum discount of 25% for the benefits that flow to the State or to any victim or witness from a plea of guilty. Judicial officers follow the law and ALSWA is not aware of any cases where a court has given a higher discount than 25% for this purpose.

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23 Western Australia, Parliamentary Debates, Legislative Council, 26 September 2012, 6527 (Hon Michael Mischin, Attorney General).

24 [2017] WASCSR 142.

25 Ibid [44]. The sentence of 3 years' imprisonment was conditionally suspended see [6-].

However, as permitted under s 9AA(6), the court may reduce the head sentence for an offence because of any other mitigating factor. This includes 'remorse and other subjective considerations which informed the weight to be given to a guilty plea prior to the commencement of s 9AA'. [26]

Whether stakeholders have noticed a greater degree of clarity in sentencing remarks

Overall, ALSWA does not consider that there is any greater clarity in sentencing remarks since the commencement of s 9AA of the *Sentencing Act*. Prior to the amendments, Superior Courts would routinely state that a discount had been given for a guilty plea and this reduction would usually be expressed in terms of a percentage. This is what occurs now under the new provision. As discussed further below, there is a lack of clarity in this approach because the actual reduction given is generally unascertainable.

Whether there are further legislative or operational changes required to fully implement the intent of s 9AA

The intent of s 9AA is to encourage pleas of guilty and at the same time ensure transparency and clarity in sentencing. It is also an objective of s 9AA to cap the sentencing reduction given to accused for the utilitarian benefits of a guilty plea to a maximum of 25 percent of the head sentence.

Hall J usefully highlighted the problems with the current practice in relation to s 9AA in *Seeto v The State of Western Australia*.[27]

> Sentencing judges are generally not required to state a notional starting point for sentence for an offence and then specify any reductions made. The High Court has said that the preferred approach is to take into account all relevant factors and then make a judgement as to the appropriate sentence... This is often referred to as the intuitive or instinctive synthesis approach. It is, however, subject to any statutory requirements...
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> The evident objects of s 9AA are to limit the maximum discount that can be given for a plea of guilty and to ensure that those who plead guilty (and others) know what discount they have received...If the percentage reduction cannot be translated into a period of time, it is difficult to see how it can be meaningful either to the offender or other persons who have been charged but not yet entered a plea...
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> The problem with the [current] procedure is that the head sentence is not stated so there is no figure to which the offender can apply the percentage to calculate the discount he or she received. Nor can the discount be calculated back from the final sentence imposed. This is because s 9AA requires any discount to be applied before taking into account other mitigating factors. Any reduction allowed for those other factor does not have to be stated. Accordingly, since it is not possible to know what reduction was allowed for those other factors it is usually impossible to reverse-engineer to the starting point and thereby calculate the discount. A law that seems intended to make the discount more certain and apparent does not achieve that objective if the Forkin procedure is followed...
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> There is another risk with the [current] procedure. It is that a sentencing judge will merely state a percentage discount without in fact going through the procedure required by s 9AA. A sentencing judge might wrongly think that an entirely instinctive synthesis approach with an aside regarding a percentage discount would meet their obligations. There is also the risk that having stated the percentage discount a sentencing judge who does go through the steps that

26 *Bein v The State of Western Australia* [No 2] [2014] WASCA 54, [54].
27 [2014] WASCA 221.

> s 9AA requires will forget to actually apply it, or will make an error in applying it. If those types of errors occur they will not be apparent. [28]

In *Kat v The State of Western Australia*[29] Buss P observed that s 9AA does not require the sentencing court to state the head sentence in open court; however, it was acknowledged that the judge must necessarily determine the head sentence before applying the discount.[30] Furthermore, Buss P stated that if as a matter of policy it is desirable for the sentencing court to state the head sentence in open court then this is a matter for Parliament.

ALSWA considers that there is a strong case for amending s 9AA of the *Sentencing Act* to require sentencing courts to state the head sentence in their sentencing remarks. This is the approach in Victoria. Section 5(2)(e) of the *Sentencing Act 1991* (Vic) provides that the sentencing court must have regard to 'whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so'. If a guilty plea is taken into account in mitigation s 6AAA requires sentencing courts to state the sentence that it would have imposed but for the plea of guilty. Where there are multiple offences the court is not required to state the sentence for each offence separately but rather for the total effective period of imprisonment that would have been imposed but for the plea of guilty.

The Victorian Sentencing Advisory Council has observed that s 6AAA was intended to increase transparency and thereby encourage accused who intended to plead guilty 'to do so as early as possible without inducing or coercing' accused to change their plea.[31] The aim was not to increase the number of guilty pleas but increase the proportion of guilty pleas entered at any early stage of proceedings. The Sentencing Advisory Council found that from 2004/05 to 2013/14 there was a 'statistically significant increase in the proportion of guilty pleas entered at an early stage of proceedings, with the biggest jump occurring between section 6AAA's first and second year of operation'.[32]

If transparency and clarity are key objectives, ALSWA considers that the Victorian approach is preferable. It is far easier for accused persons, victims, and members of the public to understand that a sentence has been reduced by a period of months or years than a percentage of an unknown and generally an unascertainable figure. In addition, such an approach is likely to encourage further and earlier pleas of guilty because the likely benefits to an accused are more easily understood and quantifiable.

While ALSWA acknowledges that Western Australian courts tend to adopt the intuitive sentencing approach, the current provisions of s 9AA actually require the sentencing court to formulate a head sentence.[33] As Buss P stated in *Kat v The State of Western Australia*[34] there is

> no reason to suspect that, in the application of s 9AA, sentencing judges (or some of them) do not in fact comply with their obligation to determine the 'head sentence'. In other words, there is no basis for asserting that sentencing judges (or some of them) merely state that they have reduced the 'head sentence' they would have imposed by a specified percentage without

28 Ibid [60]–[70].
29 [2017] WASCA 11.
30 Ibid [32] & [35].
31 Victorian Sentencing Advisory Council, *Guilty Pleas in the Higher Courts: Rates, Timing and Discounts* (2015) xvi-xvii.
32 Ibid xvii.
33 See *Kat v The State of Western Australia* [2017] WASCA 11, [32] &[35].
34 [2017] WASCA 11.

> having determined the sentence they would have imposed for the offence if the offender had been found guilty after a plea of not guilty and there were no mitigating factors. [35]

It is not an overly onerous step to require courts to state this head sentence in open court.[36] If s 9AA of the *Sentencing Act 1995* (WA) is to remain in its current or in a revised form, ALSWA recommends that any reform includes a requirement for the sentencing court to state the head sentence in open court (and this legislative requirement be modelled on the Victorian provision).

However, overall, ALSWA is of the view that s 9AA should be repealed and full discretion reinstated because of the wide variety of factors that influence the mitigatory quality of a guilty plea in any particular case. Sentencing courts should be permitted to consider both the utilitarian benefits and subjective factors associated with a guilty plea and determine an appropriate discount taking into account all of the individual circumstances of the case. A general discretion to take into account a guilty plea in mitigation would avoid the difficulties associated with the current approach whereby courts consider the strength of the prosecution case in relation to the utilitarian benefits of a plea even though it is actually relevant to the subjective factors of remorse, contrition and willingness to facilitate the course of justice.

ALSWA recommends that s 9AA of the *Sentencing Act* should be repealed and replaced with the former s 8(2), which stated that:

> A plea of guilty by an offender is a mitigating factor and the earlier in proceedings that it is made, or indication is given that it will be made, the greater the mitigation.

This reform should be accompanied by a legislative requirement (as outlined above) that the sentencing court must state the sentence that it would have imposed but for the plea of guilty.

Other issues concerning s 9AA of the *Sentencing Act 1995* (WA)

For the sake of completeness, ALSWA draws attention to the difficulty in properly applying s 9AA in cases where mandatory penalties apply. In simple terms, if a court determines that the mandatory minimum term is the appropriate head sentence, no reduction is possible for a plea of guilty. Further, if it is highly likely that an accused will not receive any more than the minimum term, there is no incentive to enter a plea of guilty. This observation also applies to s 86 of the *Sentencing Act 1995*, which provides that the minimum term of imprisonment that can be imposed for single offence is 6 months' and 1 days' imprisonment.

While ALSWA is opposed to mandatory sentencing for a number of reasons, the primary objection rests with the removal of judicial discretion. Justice requires that courts can weigh up the individual circumstances of the offender and the offence to arrive at the appropriate sentence. Mandatory sentencing precludes this approach and specifically prevents an appropriate reduction for a guilty plea.

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35 Ibid [44].

36 ALSWA notes that for indictable matters, defence counsel are required under District Court Practice Direction Crim 2 of 2008 to sign a certificate that includes a question in regard to s 9AA of the *Sentencing Act*. Defence counsel must indicate whether the accused has been advised of: the discount that may be available under s 9AA of the *Sentencing Act 1995* (WA) if a plea of guilty is entered at the first reasonable opportunity; the legal practitioner's estimate of the reduction in the head sentence ***(expressed in years or months)*** that may be available if a plea of guilty is entered at the first reasonable opportunity; and that the extent of the discount available under s 9AA of the *Sentencing Act 1995* will generally be reduced the longer the delay in entering a plea of guilty.

ALSWA strongly recommends that the Western Australia Government repeal all mandatory sentencing provisions because they are the antithesis of justice and fairness. In the present context, mandatory penalties are inconsistent with the policy objective of encouraging guilty pleas to facilitate justice and save resources.

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