Government of Western Australia
Department of Justice

Review of Section 9AA of the Sentencing Act 1995

REVIEW REPORT

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Strategic Reform
Department of Justice

EXECUTIVE SUMMARY

A statutory review (the Review) of section 9AA of the *Sentencing Act 1995 (WA)* (the Act) has far greater implications regarding the justice system than what at first might be anticipated. It goes to the heart of what is fair and just in the administration of the criminal justice system and to the extent to which judicial officers retain discretion in sentencing.

The aims of the Review were to measure the operation and effectiveness of section 9AA and assess whether it had: increased transparency in sentencing, increased utilitarian benefits to the State and led to efficiencies in the justice system. The review has found that largely these objectives have not been achieved.

The introduction of section 9AA was intended to increase the clarity of sentencing and transparency of the sentencing process, to encourage earlier guilty pleas, increase savings to the State and reduce the trauma to victims and witnesses.

There is no strong evidence that section 9AA has increased the number of early guilty pleas and there is little evidence that it has increased the transparency of the sentencing process, as in most cases the head sentence from which the reduction applies is not known. Section 9AA has raised more legal questions as to how a discount for an early plea should be applied including: what constitutes an early plea of guilty; should the head sentence be stated in order in increase the transparency of the reduction due to section 9AA, and to what extent should the strength of the prosecution's case be taken into account. In addition, there is the unanswered question of whether section 9AA can operate in relation to mandatory sentences.

Rather than increasing benefits to the State in terms of savings from early guilty pleas, there is some evidence that section 9AA may have increased costs to the State by increasing the grounds for appeal due to implied or express error in the sentencing process.

Sentencing depends very much on the nuances of each case. As the former Chief Justice the Hon. Wayne Martin AC stated in a speech on the art of sentencing:

> *"Although the High Court has acknowledged that there may be some cases in which transparency and accessible reasoning may justify 'some indulgence in an arithmetical process'*[1] *generally speaking, the number and complexity of the competing considerations which must be weighed by a trial judge will militate against mathematical calculation and instead will favour the enunciation of all factors properly taken into account and the proper conclusion to be drawn from the weighing and balancing of those factors."*[2]

1 *Markarian v R* [2005] HCA 25; 228 CLR 357, 39.

2 The Hon Wayne Martin AC, Chief Justice of Western Australia, "The Art of Sentencing – an appellate court perspective", *Singapore Academy of Law and State Courts of Singapore, Sentencing Conference 2014*, Singapore, 9 October 2014.

The above findings of the statutory review have identified two options for reform:

1. Repeal section 9AA of the Act and reinstate section 8(2) of the Act which would provide for a discount for a guilty plea on the basis that the earlier the plea was made, the larger the discount; or
2. Further amend section 9AA of the Act to clarify its application.

In addition, the implications of sentence discounting on mandatory sentencing could give rise to further reform.

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a) **Improvement in technology in evidence collection resulting in stronger initial prosecution cases;**
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INTRODUCTION

PURPOSE OF THIS REPORT

The Attorney General was required to carry out a statutory review (the Review) of the operation and effectiveness of section 9AA of the Sentencing Act 1995 (WA) (the Act) as soon as practicable after the expiration of 3 years from the commencement of the Act. The Act commenced on 20 December 2012, and as such the Review was due to commence after 20 December 2015.

The Department has prepared this Final Report for the Attorney General based on the Review. The Attorney General is required to cause the Final Report to be laid before each House of Parliament as soon as practicable after the report is completed.

As required, the Review examines the operation and effectiveness of section 9AA of the Act. The Review focuses on the following areas, reflecting the government's intentions at the time that the legislation was enacted:

1. Whether the courts recognise the fact and extent of a plea of guilty in sentencing remarks;
2. Whether the courts are limiting the use of mitigation in relation to section 9AA to a maximum of 25 per cent of the sentence;
3. Stakeholders' response to the effectiveness of section 9AA, including whether stakeholders have noticed a greater degree of clarity in judges' sentencing remarks; and
4. Recommendations regarding whether any further legislative or operational changes are required to fully implement the intent of the legislation.

GOVERNANCE

The Review was overseen by the Department's Evaluation and Review Steering Committee (ERSC), as outlined in the Strategic Framework for Evaluations, Reviews and Research 2017-2018. The role of the ERSC was to endorse the Review Plan and the Final Report, to monitor progress at key milestones, and to submit the Review Plan and Final Report to the Director General for the approval of the Attorney General.

BACKGROUND

Amendments to the Act were made by the *Sentencing Amendment Act 2012* (WA) ('the amending Act') in order to add greater transparency to the operation of a guilty plea as a mitigating factor in sentencing.

The amending Act inserted a new section 9AA that ensured sentencing remarks would reflect the fact and extent of these mitigated sentences. As stated in the second reading speech, the

Bill's intent was to provide clarity as to the operation of a discount for a guilty plea in the sentencing process, the new section was required for the purposes of recognising that:

> *"… some credit should be given for a plea of guilty for essentially utilitarian reasons, against a background of the presumption of innocence and the entitlement of an accused to have the prosecution prove its case against him or her beyond reasonable doubt. 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, often a considerable time after the event."*[3]

The previous section 8 of the Act similarly recognised a guilty plea as a mitigating factor in sentencing and that the earlier a guilty plea was made, the greater the mitigation would be.

The amending Act further provided that the maximum discount to the mitigation must be limited to 25 per cent and ensured the full discount could only be applied if the plea was made at the earliest opportunity. The second reading speech stated that the figure of 25 per cent was drawn from the trend in sentencing towards a standard 25 per cent discount for mitigation in relation to a guilty plea. The legislative amendment enshrined this practice into legislation. In short, the amending Act did not seek to change the nature of the sentence so much as the transparency of the sentence.

The focus of this Review is on the transparency of court outcomes in relation to section 9AA. The Review seeks to ascertain whether the judiciary are recognising the fact and extent of a guilty plea in their sentencing remarks and not exceeding the 25 per cent limit on the use of a guilty plea as a mitigating factor in relation to the offender's sentence. It also seeks to ascertain whether section 9AA has led to an increase in early guilty pleas leading to utilitarian benefits for the State and better outcomes for victims and witnesses who are then saved from the trauma of going through trials.

METHODOLOGY

Data and information relating to the use of section 9AA of the Act was collated and analysed using a range of methods.

Method	Details
Overview and jurisdictional comparison	A targeted re-consideration of the aims of section 9AA. An examination of similar legislation in other relevant jurisdictions.

[3] Western Australia, *Parliamentary Debates*, Legislative Council, 16 August 2012, p.5102b-5103a

Qualitative analysis of transcripts	Qualitative analysis of transcripts to determine the compliance with section 9AA of the Act. Specifically, the sample aimed to include: - 200 cases with an imprisonment outcome in each of the Supreme, District and Magistrates Courts, with a total of 600 cases. Transcripts will be extracted individually and analysis will be undertaken using Microsoft Excel. Section 9AA is not used frequently in the Children's Court because most children are sentenced under the provisions of the *Young Offenders Act 1994*. The Act only applies to offenders aged over 18 years at the time of sentence, or to a limited extent, to offenders aged between 17 and 18 at the time of sentence pursuant to section 50A and 50B of the *Youth Offenders Act 1994*. As such, the Children's Court were included in the stakeholder response to the Review but excluded from the collection of data as there would not have been many cases that referred to section 9AA. - Cases from the Court of Appeal, including cases on hand.
Quantitative data analysis	Using Departmental and inter-agency data (if required), undertake quantitative data analysis relating to the Act. The total population of court finalisations up to three years prior to, and all years since the implementation of the legislation will be utilised for quantitative analysis. Case analysis will include the following: - Proportion of cases with a guilty plea; - Proportion of cases with a guilty plea that included a trial; and - Proportion of trials that did not proceed to trial following a guilty plea, with consideration to the amount of time between the plea and the trial date.

Targeted Stakeholder consultation Stage 1	Stakeholders included: - Legal Aid Commission - Office of the Department of Public Prosecutions - Community Legal Services - Aboriginal Legal Service of Western Australia (ALSWA) - Commissioner for Victims of Crime - Law Society of Western Australia - Western Australian Bar Association
Stage 2	- Chief Justice of the Supreme Court - Chief Judge of the District Court - Chief Magistrate of the Magistrates Court - The President of the Children's Court A summary of key issues was taken to all stakeholders prior to stage 2 of the consultation.

LEGAL ADVICE

Legal advice was sought from State Solicitor's Office following early findings that courts, and some judicial officers, had differing interpretations regarding the application of section 9AA, particularly as to whether section 9AA applied to all sentences or only those where the sentencing outcome was likely imprisonment.

State Counsel advised that the application of section 9AA applied to all offences for which a fixed term applies, and the limits applied only to fixed term sentences.

A **literal** reading of the text confined the application of section 9AA to fixed term sentences. However, as the societal benefits that result from pleas of guilty apply equally to non-imprisonment and imprisonment sentences, the advice considered that it would impede the purpose of the section if it were to only apply to imprisonment. Consequently, a **purposive** interpretation of the provision that resulted in section 9AA being applicable to all sentences unless they were a life sentence, mandatory sentence or an indefinite term of imprisonment, was considered the correct interpretation of the legislation.

For the purposes of the Review, the purposive interpretation of the legislation has been used because it is more congruent with the intention of the amending Act, which was that the discount should recognise the utilitarian benefits of an early plea of guilty including the savings to the State and the lesser impact and trauma on victims and witnesses.

APPROACHES TO SENTENCING

In Australia, two distinctive approaches to sentencing have developed in the Courts: instinctive synthesis, and two-tier sentencing. Although opinions have been divergent across jurisdictions, owing largely to statutory obligations and parliamentary attitudes, the High

Court has resoundingly endorsed the instinctive synthesis approach as expressed in *Markarian v The Queen* [2005] HCA 25. The view that instinctive synthesis was the preferred method for determining a suitable sentence was further affirmed by the High Court in *Barbaro v The Queen* [2014] HCA 2 (***Barbaro***).

INSTINCTIVE SYNTHESIS

Instinctive synthesis is:

> *"… the method of sentencing 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. Only at the end of the process does the judge determine the sentence."*[4]

The primary feature of instinctive synthesis is its antithesis of mathematical exercise. It was outlined in *Barbaro* at [34] that:

> *"Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features. The sentencing cannot, and should not be broke down into some set of component parts."*

In New South Wales, the Court of Appeal in *R v Thomson*[5] at [54] suggested that even though the instinctive synthesis approach is the correct general approach to sentencing, it was still possible that individual elements could be taken out and treated separately (albeit few in number and narrowly confined), without compromising the instinctive character of the sentencing process considered as a whole.

It was further stated that where statute requires the court to expressly indicate what sentence it would have imposed if certain events did not, or do not, occur, there is no reason in principle why this could not be achieved, whilst maintaining the general sentencing principles of instinctive synthesis.

TWO-TIER APPROACH

Two-tier or two-stage sentencing is a:

> *"… method of sentencing by which a judge first determines a sentence by reference to the "objective circumstances" of the case. This is the first tier of the process. The judge then increases or reduces this hypothetical sentence incrementally or decrementally*

[4] *Markarian v The Queen* [2005] HCA 25 per McHugh at [51].

[5] [2000] NSWCCA 309.

by reference to other factors, usually, but not always personal to the accused. This is the second tier."[6]

OPERATION

Finding One

Data indicates inconsistency in application of section 9AA across

a) **Jurisdictions; and**
b) **Sentences.**

The new section 9AA received Royal Assent on 22 November 2012 and came into operation 28 days after. However, evidence from data stakeholder analysis shows that section 9AA has not been applied consistently across all Western Australian jurisdictions.

Round 1 of the stakeholder consultation evinced some observations that the Magistrates Court was inconsistent in its recognition of section 9AA, perhaps due to the necessary expediency in their jurisdiction. It was also observed that the practice of referring to a percentage discount was less consistent in the Magistrates Court.

Overall, however, stakeholders agreed that the courts were consistently recognising the fact of a guilty plea in sentencing remarks. As regards the approach by the judiciary of recognising the extent of the application of section 9AA, stakeholders agreed the extent was nearly always recognised as a percentage, however, there was a variation in approach by the judiciary across jurisdictions in deciding upon that percentage.

Stakeholders observed the judiciary were limiting the use of mitigation to a maximum of 25 per cent of the head sentence, based on a plea of guilty in all courts and noted an increase of clarity in sentencing remarks, in respect of reference to discount afforded. Similarly, they noted an increase of clarity and transparency of the sentencing process for victims.

However, stakeholders also noted a lack of clarity due to the actual reduction in sentence being unascertainable, usually because there was no reference to the head sentence, and a lack of clarity due to variation in application of discount by judicial officers.

There was general consistency in the recognition of the extent of a guilty plea in sentencing remarks, expressed by means of percentage, in superior courts. But a mixed recognition of the extent of a guilty plea in sentencing remarks, expressed by means of a percentage, in Magistrates Court due to brevity and expediency requirements.

Stakeholders found a variation in approach to how the judiciary formulated the extent of a guilty plea in sentencing remarks, in superior courts.

The Department conducted a transcript analysis of sentencing remarks to ascertain the extent to which section 9AA was operational in the courts. A lack of available transcripts from the

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[6] *Markarian v The Queen* [2005] HCA 25 per McHugh at [51].

Magistrates Courts precluded any conclusions as to the use and operation of section 9AA in the Magistrates Court.[7]

District Court

In the District Court, of the 200 transcripts provided, 195 were suitable for data analysis. Of the 195 sentencing remark transcripts analysed, 41% made explicit reference to section 9AA. 91 per cent referred generally to a reduction in sentence being warranted by virtue of a plea of guilty.

Of the total guilty pleas recorded:

- 61.5% were recorded before a trial date was listed;
- 14% were recorded after a trial date was listed;
- 10% were recorded at trial; and
- The remainder did not detail the exact timing of when the guilty plea was entered.

Eighty-five per cent of the transcripts analysed stated the extent of the guilty plea as a percentage. Of those, 65 per cent received the maximum discount of 25 per cent. This reflects the early guilty pleas recorded before a trial date was listed. The range of discounts given extended from 5 per cent to 25 per cent.

Supreme Court

In the Supreme Court, of the 200 transcripts provided, 183 were suitable for data analysis and 32 per cent made explicit reference to section 9AA. However, 96 per cent referred generally to a reduction in sentence being warranted by virtue of a plea of guilty.

Of the total guilty pleas recorded:

- 55 per cent were recorded before a trial date was listed;
- 14 per cent were recorded after a trial date was listed;
- 3 per cent were recorded at trial;
- The remainder did not detail the exact timing of when the guilty plea was entered.

Ninety-one percent of the transcripts analysed stated the extent of the guilty plea as a percentage. Of those, 65 per cent received the maximum discount of 25 per cent. This is largely reflective of the number of guilty pleas entered before a trial date was listed. The range of discounts given extended from 5 per cent to 25 per cent.

In conclusion, while section 9AA is operational in terms of its legislative requirement there is a great variance across jurisdictions and within each Court as to its application.

[7] Due to the Magistrates Courts' record-keeping there were only seven from the 200 randomly selected transcripts of sentencing remarks available. The Magistrates Court makes an automatic transcript where there is a prison sentence or a suspended sentence order. The rest are kept on audio. The audio transcripts are only held for two years on the server.

Finding Two

Data indicates no reductions in head sentence over the 25 per cent limit have been recorded for a plea of guilty.

Information gathered from stakeholder consultation and transcript analysis indicated that there were no instances of discounts greater than 25 per cent being given under section 9AA for a plea of guilty, in accordance with the statutory limit prescribed under section 9AA(4).

EFFECTIVENESS

To measure the effectiveness of section 9AA, the Review considered whether:

- The legislation had led to an increase in guilty pleas, or any increase could be attributed directly to section 9AA;
- The section had led to an increase in guilty pleas being made earlier, or any increase could be attributed directly to section 9AA; and
- There had been a greater degree of clarity in the sentencing remarks of judicial officers relating to the discount for a guilty plea in recognition of the utilitarian benefits to the state, victims and witnesses.

THE NUMBER OF GUILTY PLEAS

Finding Three

Data indicates no evidence that the number of guilty pleas have increased since the introduction of section 9AA.

The Department sourced data from the courts' case management system (ICMS) to analyse the number of guilty pleas before, at or after a trial was scheduled. The data was collected from the cases finalised during the four year period from 20 December 2012 (when section 9AA of the Act commenced) to 19 December 2016 and as a comparison, cases finalised during the five year period prior to the commencement of section 9AA (20 December 2008 to 19 December 2012). This analysis was to determine whether there was any clear benefit by the new section 9AA; whether it would lead to an increase in the number of early guilty pleas. This data was used to investigate the potential correlation in the effect of the legislation; clear cause and effect could not be established due to the many other factors that are involved in the type of plea and when it is entered.

The first comparison to be made relates to the proportion of convictions before and after 20 December 2012 which recorded a guilty plea. Table 1 shows that there has been a small increase in convictions following guilty pleas in the District Court and no change in the Supreme Court. The Magistrates Court appears to have had a decrease in the proportion of cases resulting in a guilty plea, but this is attributed to a corresponding increase in the proportion of no plea being entered; the proportion of not guilty pleas has remained constant.

The table shows no significant change in the number of cases with guilty pleas before and after the introduction of section 9AA. It must be noted that the proportion increase in guilty pleas in the District Court cannot be attributed solely to the commencement of section 9AA. Changes in police practice and procedure, the types of offences being committed and other new or amended legislation, amongst others, all may have contributed to the increase in guilty pleas.

Table 1: Proportion of cases resulting in a conviction following a guilty plea in the WA courts, by jurisdiction and reference period

	MC	DC	SC	Total
Cases with guilty pleas before 20 December 2012	72%	80%	83%	73%
Cases with guilty pleas after 20 December 2012	66%	84%	83%	66%

Finding Four

Data indicates there is some evidence of section 9AA resulting in earlier guilty pleas. However, this is more likely to have been caused by other external changes including:

- **a) Improvement in technology in evidence collection resulting in stronger initial prosecution cases;**
- **b) Changes in legislation outside of section 9AA;**
- **c) Changes in practice of the ODPP in plea negotiations and case management; and**
- **d) Other unidentified causes.**

As seen below in Table 2, there was no significant change of the number of cases where a guilty plea was entered and a trial scheduled.

Table 2: proportion of cases resulting in a conviction where a guilty plea was entered and a trial was also scheduled in the WA courts, by jurisdiction and reference period

	MC	DC	SC	Total
Cases with trials scheduled before 20 December 2012	5%	15%	13%	5%
Cases with trials scheduled after 20 December 2012	6%	16%	17%	6%

For cases where a trial had been scheduled before the case was eventually finalised following a guilty plea, the formal plea may have been recorded in the case management system before, on or after the scheduled trial date.

Table 3 below, shows that there was an increase in guilty pleas recorded before the trial start date as opposed to on or after the scheduled trial date. However, it is not possible to claim that the correlation in the proportion of guilty pleas entered before a trial versus guilty pleas entered at or after the trial is due to section 9AA alone, as there are likely a number of other factors involved that could not been investigated by this simple comparison. Other factors could include improvements in the collection of evidence, improvements in technology and the recording of evidence and the impact of other legislative changes, among others. The fact that the numbers of early guilty pleas doubled in the Magistrates Court where stakeholders reported that section 9AA was not used as frequently or consistently adds to the unlikelihood that the data is evidence of a direct causative effect between the introduction of section 9AA and early guilty pleas.

Table 3: Proportion of cases resulting in a conviction where a guilty plea was entered, a trial was scheduled, and the plea was recorded prior to the scheduled trial in the WA courts, by jurisdiction and reference period

	MC	DC	SC	Total
Five years before 20 December 2012	10%	25%	31%	11%
Five years after 20 December 2012	21%	37%	53%	22%

In conclusion, the data analysis indicated that there had not been an increase in guilty pleas. While there was some evidence of a correlated increase in earlier guilty pleas, there was no evidence of any direct causation between the introduction of section 9AA and the number of early guilty pleas (i.e. pleas recorded prior to a scheduled trial).

INCONSISTENCY IN THE APPLICATION OF SECTION 9AA

Finding Five

Data indicates inconsistency in interpretation of section 9AA between the literal and purposive approaches in relation to section 9AA's application to fixed term sentences.

Stakeholders noted some inconsistency in the application of section 9AA across jurisdictions, particularly in the Magistrates Court, and between judicial officers. Some of this inconsistency relates to the literal and purposive interpretations of the legislation (see legal advice). In addition, while the legal advice confirms that in WA section 9AA is not applicable to offences prescribed mandatory sentences, there is variance in other states and countries which could warrant further consideration.

Stakeholders noted that section 9AA was not referenced as frequently in the Magistrates Court as in other jurisdictions, which might be due to the need for brevity and expediency in sentencing in this court. The lack of data, in particular transcripts of sentencing remarks from the Magistrates Court, meant it was not possible to fully investigate the use of section 9AA in this jurisdiction. However, some case studies from the transcripts, and audio, of sentencing remarks demonstrate the variance of interpretation in the application of section 9AA between judicial officers and jurisdictions.

Case 1: No discount given under section 9AA. Dangerous Driving occasioning death. A discount of up to 25 per cent only applies to fixed term sentences. Section 9AA not applied to fines. District Court

The sentencing judge stated that he had taken into account an early plea of guilty, which indicated remorse, however, he did not refer to any discount given under section 9AA. The Judge deferred to submissions from the ODPP on the behalf of the State that section 9AA did not apply in the case because it only applied when a "fixed term" was given under subsection (4).

Case 2: No discount under section 9AA. Stealing a motor car. Section 9AA not applied to fine. Supreme Court

The sentencing judge made no reference to any discount for a guilty plea under section 9AA and fined the offender $400 for stealing a motor car.

Case 3: 25 per cent discount under section 9AA. Stealing. Section 9AA applied to a fine. Supreme Court.

The sentencing judge applied the full 25 per cent discount given for an early plea of guilty, which once taken into consideration with other mitigating factors reduced the sentence to a $450 fine.

Case 4: 25 per cent discount under section 9AA for fines related to one count of stealing, one breach of bail and one count of trespass. Magistrates Court.

The sentencing judge reduced each fine by 25 per cent for the early guilty plea to all charges.

Case 5: District Court. Fraudulently diverting power from Western Power. Fine. District Court.

The sentencing judge noted that in relation to the count of the offence to which the defendant pleaded guilty, which was for fraudulently diverting power from Western Power, he had given the full 25 per cent discount resulting in a fine of $3000.

Case 6: No discount under section 9AA. A fine imposed. Two counts of Corruption. District Court

The sentencing judge indicated that had he imposed a term of imprisonment he would have given the full 25 per cent discount for an early plea of guilty. However, his decision was that the appropriate sentence was to impose a fine, therefore, there would be no discount given under section 9AA.

Finding Six

The introduction of section 9AA has led to increased grounds for appeal and thereby potential costs to the State.

The introduction of section 9AA presented two new grounds for appeal in relation to sentencing. By setting a limit of a 25 per cent discount of a sentence, the section created new grounds as to what extent the percentage discount in each particular case constituted the:

1) "earliest reasonable opportunity" to plead guilty; and
2) extent of benefits to the State, including the trauma saved to witnesses and victims of the crime.

While the data was not available from ICMS to conduct a comparison of the number of appeals under the former section 8(2) as compared to the number of appeals extending from section 9AA, it is evident that the prescriptive nature of section 9AA has created grounds of appeal that did not exist before.

Any further legislative change that added to the prescription of section 9AA would again increase the grounds for appeal. Given one of the purposes of the legislation is to benefit the State thereby saving costs, further defining the grounds for section 9AA would likely increase the grounds for appeal and could undermine the original intent of the legislation by leading to increased costs for the State.

As noted by the Chief Justice of Western Australia, the Hon Justice Peter Quinlan, any additional amendments to section 9AA to impose additional requirements would undoubtedly increase the number and complexity of sentencing appeals:

> *"Prior to the introduction of s 9AA, a sentencing judge only exercised a single discretion which focussed attention on the outcome (the ultimate sentence). The effect of section 9AA is that there is an additional discretion, being the discretion in fixing the percentage discount for a plea of guilty under s9AA (2). A sentencing judge must expressly identify the two exercises of discretion, and both are therefore susceptible to challenge on appeal."*

If, for example, section 9AA were amended to require the identification of the head sentence there would be four elements challengeable to appeal:

- The head sentence;
- The reduction for the guilty plea;
- The reduction for other mitigating factors; and
- The ultimate sentence.

In considering the requirements of section 9AA, questions have been raised as to how the section should be applied, particularly in relation to:

1) What constitutes first reasonable opportunity to plead guilty?
2) Should the strength of the prosecution's case be taken into account when assessing the percentage discount?
3) Is the 25 per cent limit too low for cases in which the evidentiary base is weak?
4) Should the head sentence be stated to make clear the discount?
5) What constitutes utilitarian benefits to the State?

First Reasonable Opportunity

The meaning of the phrase 'first reasonable opportunity' was considered in *Rossi v The State of Western Australia* [2014] WASCA 189. Per McLure P (with Mazza JA and Hall J agreeing), the first opportunity for an accused to plead guilty to a charge for an indictable offence is after initial disclosure has been made under section 35 of the *Criminal Procedure Act 2004* (WA), including a copy of the charges and the statement of material facts. A plea entered at this stage is known as a 'fast-track' plea.

McLure P at [53] however, did recognise that, *'the first opportunity is not necessarily the first reasonable opportunity to enter a plea of guilty'*, and that deciding whether or not a plea was made at the first reasonable opportunity requires an objective assessment, having regard to all relevant circumstances in the particular case.

A secondary consideration was canvassed by McLure P as to the role of section 9AA(4) and the directions it provides. At [65] it was stated that:

> *'Subsection (4) of s 9AA has more than one purpose. Its primary purpose is to fix the upper limit of the discretionary discount range (the maximum discount). However, the condition that enlivens the power to grant the maximum discount also informs the approach to the exercise of the discretion in subs (2) and the proper construction of subs (3).'*

Strength of State's Case

In *Beins v The State of Western Australia [No 2]* [2014] WASCA 54 (***Beins [No 2]***) per McLure P (Mazza JA agreeing) at [57] held that the strength of the State's case can be taken into account, *'under the rubric of "the benefit to the State" in s 9AA(2)'*.

McLure P relevantly provided at [55], [58]:

> *'As explained by the High Court in Cameron v The Queen (2002) 209 CLR 339, under the former sentencing regime a distinction had to be made between the objective and subjective considerations relating to a plea of guilty. In broad terms the objective considerations are the saving of time and expense of those involved in the administration of criminal justice including police, prosecuting authorities, witnesses, jurors and the courts. The objective considerations are often referred to as the utilitarian value or benefit of a plea of guilty. The subjective considerations go to personal issues of remorse, acceptance of responsibility and willingness to facilitate the course of justice. The utilitarian benefits of a plea of guilty were not directly relevant to the discount for a plea of guilty under Cameron. Section 9AA reversed that position.*
>
> *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.'*

Is the 25 per cent limit too low in cases where the evidentiary base is weak?

There was some appetite among stakeholders for the removal of the 25 per cent limit. The President of the Children's Court observed that there were cases where the prosecution lacked a strong case, the case came down to one person's word against another, and yet the defendant still pleaded guilty to the offence. As observed, these cases warranted a higher discount for the savings to the State, witnesses and victims. Some serious drug offences where there is an early plea and acknowledgement of offending might also be worthy of a discount of greater than 25 per cent.

Many stakeholders were in favour of removing, or increasing, the 25 per cent limit on the discount for a guilty plea. The ODPP suggested that there may be some merit to increasing the maximum discount for early pleas. The Chief Judge of the District Court noted that in South Australia the maximum discount that could be applied was up to 40 per cent and that the amount in Western Australia should be reviewed. The Chief Judge also suggested that Western Australia should consider applying the discount to the net sentence rather than the head sentence and that any stating of the head sentence should be avoided.

Similarly, in case study 7, a case of indecent assault against two minors, the District Court sentencing judge noted that the limit of 25 per cent discount available under section 9AA was not always sufficient, particularly in some sex related cases where the evidence was equivocal and the benefits to the victims, saved from the ordeal of being cross examined in a jury case, were significantly more substantial.

Stating of the head sentence

Stakeholders during consultation raised the issue of the potential clarity and transparency that section 9AA could afford, not being fully realised due to the head sentence not being stated. This, coupled with discounts afforded under section 9AA(6) which do not require explicit quantification, and the general model of instinctive synthesis, has led to a minimisation of the possible transparency and clarity in sentencing that section 9AA endeavours to achieve.

However, overwhelmingly, stakeholders expressed the view that it was either unnecessary or undesirable to amend section 9AA to create a statutory requirement to state the head sentence prior to applying the relevant discount for a plea of guilty. The arguments that underlined this view, accepted that greater transparency and clarity may be achieved by its function, but that converting that sentencing process into a mathematical equation or exercise, was incongruent with instinctive synthesis, and therefore, should be avoided.

In Western Australia, the Court of Appeal has taken the view that a judicial officer is not required under section 9AA to state the original head sentence prior to discount being applied.[8] However, it was also recognised by the same Court that in reducing the 'head sentence' under section 9AA, the judge must necessarily determine the head sentence he or she would have imposed: *'The determination of the 'head sentence' is necessary because section 9AA(4) prescribes limits, expressed as a percentage, on the extent to which a sentencing judge may reduce the "head sentence" to recognise the matters specified in section 9AA(2)"*[9]. This necessity to determine the head sentence operates as an internal sentencing process, and does not reflect a required external or explicit annunciation in sentencing remarks.

<u>*What constitutes the benefits to the State?*</u>

Pullin JA dissented, arguing at [87] that, *'the utilitarian value of a plea of guilty is now the relevant consideration. The two stated matters, namely the benefits to the State and the benefits to any victim or witness to the offence, "exhaustively state the matters which can be taken into account in determining whether a discount is to be given for a plea of guilty' and if so, 'the extent of the discount"'.*

Pullin JA further concluded at [94] that there was, '*good reason for allowing a discount only for utilitarian reasons'* and:

> *'If accused persons understand that a 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 produce benefits to the State and benefits to the victim. It also brings Western Australia into line with the New South Wales and Victorian approach.'*

The majority decision of McLure P and Mazza JA in *Beins [No 2]*, was affirmed in *Abraham v The State of Western Australia* [2014] WASCA 151 (***Abraham***).

In *Abraham* per Buss JA at [56], a non-exhaustive list of the, *'benefits to the State … resulting from the plea'* under section 9AA was provided that included the following:

a) Securing the conviction of a person who has committed a criminal offence;
b) The ODPP not having to use resources in the preparation and conduct of a criminal trial;
c) If the accused has been or would otherwise have been granted legal aid, the Legal Aid Commission not having to use resources in the preparation and conduct of a defence;
d) Avoiding the time and expense involved in summoning and empanelling jurors for a criminal trial; and
e) The more expeditious and efficient resolution and proceedings in the criminal justice system than would otherwise be the case.

Buss JA proposed that the strength of the prosecution case is a relevant factor in considering the extent of any discount to be given under section 9AA for a guilty plea. Buss JA referred to

8 *Kat v The State of Western Australia* [2017] WASCA 11.
9 Ibid per Buss P at [32].

a judgment by McLure P in *Beins [No 2]* which proposed that the strength of the State case is directly relevant to the prospect of securing a conviction [58].

Buss JA expressed at [58] that:

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

CROSS-JURISDICTIONAL ANALYSIS

The practice of discounting a sentence for an early plea of guilty in Australian states and territories varies widely, including in relation to its application to offences where a mandatory sentence is prescribed. The variation between jurisdictions reflects a choice between imposing a grid-like system of discounts that specify exactly how much of a discount should apply for when a plea was made, with providing for judicial discretion as to how much of a discount ought to be applied for when the plea was made.

New South Wales and South Australia have imposed a grid-like reference for how much of a discount must be given according to when the plea of guilty was made. The *Crimes (Sentencing Procedure) Act 1999* (NSW), which provides for a guilty plea to be taken into account when sentencing Part 1B, was modelled on the *South Australian Criminal Law (Sentencing) Act 1988* (SA). In addition, both jurisdictions prescribe mandatory sentences for some offences. In New South Wales, however, there is limited judicial discretion to discount sentences (including mandatory) whereas in South Australia, a formal approach to sentence discounting exists for all sentences except those attracting life imprisonment.

The *Sentencing Act 1997* (Tas) sets out Tasmania's sentencing law framework, and does not include any discount to be given for a plea of guilty.

Victoria offers a discount for a plea of guilty but does not place any limitations on how much of a discount may be applied, or at what stage of proceedings the discount may apply. Section 6AAA of the *Sentencing Act 1991* and section 362A of the *Children, Youth and Families Act 2005* provide a discount for an early plea of guilty in the Victorian courts. In Victoria, the courts must state the sentence that would have been imposed but for the plea of guilty. Mandatory sentences are also prescribed for some offences with limited judicial discretion to discount in very narrow circumstances.

Queensland provides for a discount to be made for an early plea of guilty and that the court must state that it took account of the guilty plea when it imposes the sentence. Where the court does not reduce the sentence, it must state its reasons for doing so. There are a number of mandatory sentences applicable in Queensland to which sentence discounting does not apply.

The Northern Territory also provides that the court must state if it has had regard to a plea of guilty and the stage in proceedings at which the offender made the plea of guilty (*Sentencing Act 1995 (NT)* section 108A). In addition, there are mandatory sentences applicable to some offences and exemptions are available in 'exceptional circumstances' which is a rarely met threshold.

In the Australian Capital Territory, section 35 of the *Crimes (Sentencing) Act 2005* (ACT) provides for a discount for an early plea of guilty for sentences where the court considers there is a real chance of imprisonment. There are no limits on how much the sentence should be discounted. The earlier the plea the greater the discount but a grid of times and discounts are not mandated. The court must not make a significant reduction if it considers the prosecution's case is overwhelmingly strong.

A report of the different jurisdictions, only including information about sentence discounting not mandatory sentencing, is attached at Appendix A.

SUMMARY OF FINDINGS AND OPTIONS FOR REFORM

Overall analysis of stakeholders' views indicates there is support for the repeal of section 9AA and a return to previous section 8(2), whereby no limits are placed on the discretion exercised by the court in deciding on the extent of mitigation for an early guilty plea. However, some key stakeholders argued for the retention of section 9AA on the grounds that limits to the discount served to encourage earlier plea resolutions.

As a result, two options for reform can be considered:

1. Repeal section 9AA and re-instate previous section 8(2); OR
2. Retain section 9AA with consideration to be given to:
    - A specific requirement that the head sentence be clearly stated
    - A specific requirement to ensure that the strength of the State's case should not be taken into account when considering the benefits of section 9AA and
    - A more specific provision specifying the extent of a discount for a pleas of guilty depending on the stage at which the guilty plea was entered similar to South Australia and New South Wales.
3. In either case consideration be given to the interplay between section 9AA and mandatory sentencing.