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VALS' submission to the Sentencing Advisory Council in Response to the Sentence Indication and Specified Sentence Discounts Discussion Paper (January 2007) – sent 3 April 2007

Should a sentence discount/indication scheme be adopted in Victoria?

VALS prefers the current informal system of sentence discount and sentence indication over formalising the sentence indication/discount process. However, if a formal sentence indication scheme is adopted VALS prefers a model that maintains judicial discretion and contain safeguards.

In this submission VALS asks the following questions:

- “What are the causes of the late guilty pleas and more not guilty pleas?”
- “What is the likelihood of a formal sentence indication/discount scheme dealing with the problem?”
- “Where does fairness come into it?”

VALS argues that:

- The Discussion Paper does not adequately look into the causes of late guilty pleas and more not guilty pleas. VALS argues that a contributing factor to late guilty pleas and more not guilty pleas may be lack of access to legal representation. There is little examination of this issue or the issue of police and/or prosecution practice as factors influencing the changes.
- VALS argues that there are problems in the evidence presented in the Discussion Paper as to the likelihood of a formal sentence indication/discount scheme dealing with the problem of late guilty pleas and more not-guilty pleas. VALS argues that formalising the sentence discount/indication scheme is unlikely to deal with the problem of late guilty pleas and more not-guilty pleas and will actually create new problems in relation to fairness (see below).
- VALS argues that the Discussion Paper never satisfactorily tackles the issue of how sentence indication and specified discounts can be pursued without placing additional pressure on people to plead guilty. VALS argues that currently the informal sentence indication/discount process is susceptible to unfair outcomes, particularly in relation to placing specific pressure on Indigenous Australians to plead guilty. VALS is concerned that formalising such a sentence indication/discount process (ie: making pressure to plead guilty more explicit) will make the system more prone to unfair outcomes.

If a formal sentence indication/discount scheme is adopted it is essential that formal

safeguards are also in place to address the issue of unfairness.

VALS suggests safeguards, such as:

- Retention of discretion so that the particular circumstances of the case can be considered. There should be full judicial discretion rather than a proscriptive approach, is appropriate and discretion should remain unfettered.
- The Magistrate ensures that the Defendant is aware of the option of a sentence discount/indication. This involves asking the Defendant questions to extrapolate such information.
- If the Defendant is not aware of sentence indication/discount, perhaps because they are unrepresented, the matter should be adjourned so that they can make an informed choice how to plead with the assistance of a lawyer.

VALS also makes the following arguments specifically about Indigenous Australians:

- The Western Legal System could learn valuable lessons from Koori approaches to justice, such as the Koori Court which is efficient because it reduces recidivism and demand on the Courts.
- The climate of cultural warfare that results in the discounting of arguments for consideration of cultural background in the sentencing process is inappropriate and should be reversed.

Should a sentence discount/indication scheme be adopted in Victoria?

VALS prefers the current informal system of sentence discount and sentence indication over formalising the sentence indication/discount process. However, if a formal sentence indication scheme is adopted VALS prefers a model that maintains judicial discretion and contain safeguards.

VALS' reading of the Discussion Paper is that the problem of late guilty pleas and more not-guilty pleas is tenuously linked to the 'solution' of sentence indication and sentence discount. Much of the Discussion Paper is focused on what form of sentence discount and sentence indication system would be best.

In contrast, VALS believes that the more fundamental question is:

- "What are the causes of the late guilty pleas and more not-guilty pleas?"
- "What is the likelihood of a formal sentence indication/discount scheme dealing with the problem?"
- "Where does fairness come into it?"

VALS is not surprised by these differences given that the Discussion Paper locates the rationale for this review in the context of an increasing the proportion of not-guilty pleas being entered in indictable proceedings and an increasing proportion of late guilty pleas. Also, this pattern of an increased proportion of not-guilty pleas is linked by the Discussion Paper to anecdotal evidence in respect of the lack of clarity about what effect a guilty plea will have in relation to reduction of sentence. In contrast VALS is focussed more on the impact possible changes will have on

Indigenous Australians, who are disadvantaged.

What are the causes of the late guilty pleas and more not-guilty pleas?

VALS wishes to highlight that the Discussion Paper does not adequately look into the causes of late guilty pleas and more not-guilty pleas. It would make sense to do this in order to develop solutions to reduce the rate of late guilty pleas and more not-guilty pleas. However, the Discussion Paper often implies that a formal sentence discount/indication process will fix the problem of late guilty pleas and more not-guilty pleas.

VALS argues that evidence provided from other jurisdictions suggests that part of the problem of late guilty pleas may be linked to the availability of legal aid and has been linked to the structure of payments for legal aid work. This information suggests that legal aid availability may be a significant contributor to later guilty pleas. There is no explanation as to what may have caused this problem to arise in the last few years as legal aid funding has been very limited for most of the last decade.

The Discussion Paper contains no analysis as to how the lack of legal aid availability will affect the fairness of any new system premised more explicitly on bigger discounts for early pleas (ie: front end pleas). Presumably, any new system would place even greater importance on Defendants being properly informed about their options at an early stage in proceedings.

The Discussion Paper contains no exploration of whether the prosecution or police practices have contributed to this pattern. There is no consideration as to whether media calls for more punitiveness, and more punitive sentencing statistics generally, have contributed to this situation.

What is the likelihood of a formal sentence indication/discount scheme dealing with the problem of late guilty pleas and more not-guilty pleas?

Problems of Evidence

VALS argues that there are problems in the evidence presented in the Discussion Paper as to the likelihood of a formal sentence indication/discount scheme dealing with the problem of late guilty pleas and more not-guilty pleas. VALS argues that formalising the sentence discount/indication scheme is unlikely to deal with the problem of late guilty pleas and more not-guilty pleas and will actually create new problems in relation to fairness (see below).

VALS argues that when the Discussion Paper moves beyond trying to anticipate how sentence indication regimes may influence Defendants decision making and on to practical examples we discover there is relatively little evidence connecting sentence indication schemes to earlier pleas of guilty.

The discussion of the Victorian informal sentence indication scheme which occurs in the context of the mention system implies that the sentence indication aspect of that system is a key contributor to the reduced proportion of not-guilty pleas. This overlooks for example the possibility that the contest mention stage is a trigger for the defence and prosecution to review their strategy and options and in some cases, finalise plea bargaining.

There is evidence put forward in the Discussion Paper about New Zealand and the higher levels of guilty pleas following sentence indications there (Pg 65). However, there is no evidence put forward to indicate that the Defendants opting for sentence indication, who represent only a

small percentage of the total in this evaluation, are representative of the broader population of Defendants. Towards the end of the Discussion Paper, the evaluation of the NSW pilot scheme casts considerable doubt on the effectiveness of the sentence indication scheme in changing the proportion of Defendants proceeding. It also highlights different patterns of pleading guilty in relation to different offence types (Pg 75-76).

The Victorian County Court statistics in relation to pleas entered at commencement and finalization of proceedings (Pg 82) again highlight different patterns of pleading guilty in relation to different offence types. This may suggest that it is over-simplistic to assume the importance of sentence indication schemes. It also may have relevance to other aspects of the Terms of Reference, particularly sexual assault cases.

There is mention made in the Terms of Reference for this review to special sexual assault lists in both Magistrates and County Court and their primary focus on early and active case management. The County Court statistics indicate that sexual assault cases have a very low rate of guilty pleas, both at the commencement and finalisation of proceedings. Perhaps in relation to these offences one possible improvement would be to place less reliance on sentence indication and more on bringing the matter to Court whether it is guilty or a not guilty plea.

The evidence advanced for believing that sentence indication and sentence discount will substantially improve the speed and stage at which cases are resolved is patchy or non-existent. The NSW Court pilot experience at introducing this measure was discontinued after a relatively short period of time.

On the other hand, the existence of an informal sentence indication scheme in the Magistrates Court in Victoria appears to have reduced the proportion of not-guilty pleas in spite of the lack of a requirement for Magistrates to specify at the time of sentence the exact contribution of the guilty plea to the sentence discount. As mentioned above there may be factors operating that are outside of sentence indication which contribute to guilty pleas.

Where does fairness come into it?

Problem of Fairness

VALS argues that the Discussion Paper never satisfactorily addresses the issue of how sentence indication and specified discounts can be pursued without placing additional pressure on people to plead guilty and surely this is exactly what such schemes are designed to do.

VALS argues that currently the informal sentence indication/discount process is susceptible to unfair outcomes, particularly in relation to placing specific pressure on Indigenous Australians to plead guilty which occurs because an unfair playing field exists.

VALS is concerned that formalising such a sentence indication/discount process (ie: making pressure to plead guilty more explicit) will make the system more prone to unfair outcomes. This is because it will increase pressure to plead guilty when considerable pressure to plead guilty already exists under the current system. If a formal sentence indication/discount scheme is adopted it is essential that formal safeguards are also in place to address the issue of unfairness.

Failure to consider fairness satisfactorily

VALS argues that the Terms of Reference mention the need to investigate the possibility that the

changes could provide significant and unjustified incentives to plead guilty. The Discussion Paper makes cursory references to the need to consider fairness. The Discussion Paper makes a statement about the need for Courts to deliver both fair and efficient outcomes (Pg 3).

On page 4 the topic is touched on again:

“Arguably, to focus on means to increase the speed and efficiency of criminal proceedings might detract from efforts to preserve their fairness. However, achieving justice in criminal proceedings is inextricably linked with achieving efficiency. Justice delayed in some circumstances may mean that justice is denied; the sheer duration of a criminal case may inflict an added burden on the participants. Delay affects not only the cost and efficiency of criminal proceedings, but also their fairness. When proceedings are not finalised within a reasonable time, their sheer length can impose a burden over and above the burden arising from the crime and/or the sentence”.

The discussion of fairness on page 4 quoted above, starts to discuss the potential conflict between speed and fairness but then quickly recognizes that speed may contribute to fairness and then in a triumph of re-badging implies that speediness is fairness.

Increasing the pressure to plead guilty

The fairness discussion does not progress far from the ‘fairness as speed’ idea. There is a further reference to fairness in a paragraph about pressure to plead guilty on page 32.

“However, one of the chief concerns with the provision of a clear discount for a guilty plea is that it could induce a Defendant to plead guilty and thereby undermine the voluntary nature of the decision and the fairness of the outcome..... Some commentators have suggested that the impact may be most significant on Defendants in ‘borderline ‘cases, where providing a discount may not merely advance, but induce the actual plea decision. In these cases, the practical benefits arguably would not justify the concessions that the provision of sentence discounts requires: the erosion of the presumption of innocence and the conventional role of the judge, and reduced parity in the sentences imposed on offenders found guilty after a trial and those who plead guilty.”

The brief coverage of the issue in the ensuing paragraphs recognizes the conflict between the idea of a discount for a guilty plea and the right to contest a matter. This ‘potential difficulty’ is not dealt with except to say there is considerable emphasis given to the ‘utilitarian’ value that early guilty pleas provide.

Considerable pressure to plead guilty already exists

There is no discussion of the extent to which the criminal justice system already places a range of pressures and inducements on Defendants to plead guilty. There is anecdotal evidence pointing to considerable pressure at the police interview stage to agree to statements in order to get out of the police station, or for some other reason unrelated to the issue of guilt or innocence.

Lack of legal assistance at the police station, difficulties in accessing legal aid, lack of confidence in dealing with the criminal justice system, the mention system (‘plead guilty and get it over with today’) system in the Magistrates’ Court and the delays in accessing police briefs and police loading up charges all contribute to pressure to plead guilty.

Even academic lawyer Mirko Bargaravic, a commentator notable for his antipathy to rights based approaches, acknowledges that the present system already induces a significant proportion of innocent people to plead guilty. Bargaravic's solution to this problem is to increase the pressure to plead guilty further by introducing the "I only pleaded guilty for the discount but really I am innocent and want to provide evidence in that regard in order to qualify for a further discount" option (Bargaravic and Brebner 2002).

The Discussion Paper notes the issue of fairness and voluntariness but does not consider the paradox that beside the supposed utilitarian value of the early guilty plea and the cost saving there is the already considerable pressure to plead guilty which would be increased further by a more formal sentence indication system arguably reducing the fairness of the system. In addition to this there is the charge made about the NSW pilot that under the scheme sentences were too lenient, again increasing the critique of the justice system.

The unfairness of rewarding 'pleading guilty at the earliest stage'

The Discussion Paper highlights the fact that most specified discount schemes link bigger discounts to earlier pleas of guilty. Apart from the clear pressure that a more explicit system of reward for early pleading would contribute to pleading guilty there is a considerable problem in practice. The earliest stage at which a Defendant can make an *informed* plea will depend on prosecution, police and legal advice being provided to the Defendant. Sentence discount schemes can state that they take this into account, but how well can they do this? A system premised on providing the biggest discount for pleading at the earliest stage will be most accessible to rich and/or well advised Defendants. It will create a situation where Defendants and/or their lawyers will have to justify why a plea did not happen at the earliest opportunity. It sets up a reverse onus situation which is economically rational in terms of Court throughput objectives, but is likely to create additional systemic disadvantage for disadvantaged people who were considering pleading guilty. It is similar to the Commonwealth Government policy of giving rich people a discount on their university fees if they pay up front. The Defendants who are least likely to receive paper work, (due to lack of secure accommodation), seek legal advice immediately or plead at the earliest opportunity will be disadvantaged.

Specific vulnerability of Indigenous Australians

VALS argues that Indigenous Australians fit into the category of people who will be disadvantaged by a formal scheme. Indigenous Australians have a specific vulnerability of being disadvantaged because of their status as Indigenous Australians.

VALS agrees with the Sentencing Advisory Council that "[T]here is a fine line between ensuring that criminal law and procedure 'facilitate' a defendant's plea decision, and creating a process that encourages, induces or coerces a Defendant to waive the legal right to the put the prosecution case to the test".¹ VALS is pleased to see that the Sentencing Advisory Council has not discounted the need for safeguards by asking question 6.

VALS urges the Sentencing Advisory Council to not discount suggestions relating to safeguards in the submissions it receives in light of the fact that the Discussion Paper contains limited information on safeguard options.

¹ Sentencing Advisory Council, 'Sentence Indication and Specified Sentence Discounts Discussion Paper', January 2007, p11

VALS welcomes the acknowledgement of the Sentencing Advisory Council that “[i]f a defendant is vulnerable, the provision of a sentence indication with a specific sentence discount could lead the defendant to admit a matter that should be contested. Care is therefore needed to ensure that the sentence indication process does not, and is not seen to, deprive any accused of the right to have the matter determined according to its merits”.²

VALS argues that Indigenous Australians fit within the category of vulnerable because of a trend amongst the Indigenous Australian community which VALS has identified: pleading guilty in order to have the matter dealt with quickly so they can get out of Court. It is VALS’ solicitors’ experience that they have to convince clients to fight the charges against them. Indigenous Australians have a specific vulnerability to this trend due to their following negative perceptions, and misunderstandings of, the Western Legal System:

- Not trustworthy in light of the fact that it failed to protect Indigenous Australians in the past (ie: stolen generation).
- Unlikely to achieve justice even if a person is innocent, so it is not worth challenging the charges (ie: systemic issue).
- Powerful and this is overwhelming so it is not possible to win, so there is no point pleading not guilty.
- Criminalises Indigenous Australians which contributes to the over-representation of Indigenous Australians in the criminal justice system.
- Confusing and equated with pleading guilty.
- Has an alienating effect and is not meaningful and the result of this according to anecdotal evidence is that innocent people plead guilty in order to access the Koori Court.

The table³ below outlines cultural differences which lead to the alienating effect of the Western Legal System as there is a bias in favour of the left hand column:

	Western justice	Traditional Aboriginal justice
Justice system	-Adversarial	-Non-confrontational
Guilt	-European concept of guilty/not guilty	-No concept of guilty/not guilty
Pleading guilty	-The accused has the right against self-incrimination. Thus, it is not seen as dishonest to plead not guilty when one has actually committed the offence	-It is dishonest to plead not guilty if one has committed the crime

² Op cit p 53

³ Canadian Criminal Justice Association ‘Aboriginal People and the Criminal Justice System, Part IV: Aboriginal People and the Justice System’ as at <http://www.ccja-acjp.ca/en/abori4.html#xcii>

		(values of honesty and non-interference come into play here)
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VALS' observation of the trend that Indigenous Australians plead guilty in order to have the matter dealt with quickly so they can get out of Court is supported by case law and research:

- Australian Law Reform Commission: Prisoners are susceptible generally to pressure to induce them, even if innocent, to plead guilty and some categories, such as Aboriginal prisoners, are susceptible in particular.⁴
- R V Thomson; R V Houlton [2000] NSWCCA 309 (17 August 2000):“...Some parts of the community, like Aboriginal accused, may be particularly vulnerable to inappropriate pressures to plead guilty. A sizeable discount for a plea may increase such pressures.”⁵
- Bagaric and Brebner: Preliminary research indicates “ that the most likely to plead guilty are `aboriginal people; men; inarticulate defendants who would not stand up very well in court; and those who are at high risk of receiving a custodial sentence if they go to trial”.⁶
- “A sentence indication that is accompanied by a significant discount for an early guilty plea is inescapably coercive in nature partly because of the judge’s position of power and authority.”⁷
- Sentence discount discriminates where a group utilises it too much or too little.⁸

Safeguards

Need for safeguards

VALS argues that if the sentence discount/scheme is formalised, and the pressure to plead guilty made more explicit than it currently is, that safeguards should accompany the formalisation process at the very least.

VALS argues that safeguards are needed in light of the risks outlined above caused by the utilitarian value in a legal system being built around and reliant on guilty pleas (ie: it is for the greater good that incentives are provided for guilty pleas in order to ensure the smooth running

⁴ Cameron v The Queen [2002] HCA 6 (14 February 2002) as at http://www.austlii.edu.au/au/cases/cth/high_ct/2002/6.html#fn49

⁵ R v THOMSON; R v HOULTON [2000] NSWCCA 309 (17 August 2000) as at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/NWCCA/2000/309.html?query=Thomson%20and%20Houlton>

⁶ Bagaric Mirko, Brebner Julie, ‘The Solution to the Dilemma Presented by the Guilty Plea Discount: The Qualified Guilty Plea – ‘I’m pleading guilty only because of the discount ...’ (2002) 30(1) International Journal of the Sociology of Law 51-74 as at <http://www.julieclarke.info/publications/2002guiltyplea.htm>

⁷ Te-aka-matua-te-o-ture ‘ Preliminary Paper 55 - Reforming Criminal P Re – Trial Processes - A discussion paper’, para 235 as at http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_97_242_PP55.pdf

⁸ Bagaric Mirko, Brebner Julie, (2002) above n 6

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of the system, such as reduce backlog). Even the Koori Court privileges guilty pleas as a guilty plea is the entry point to the Koori Court, and VALS argues this should not be the case.

The utilitarian justification for encouraging guilty pleas is a middle class value judgement assumes that everyone is equal, which is not the reality as differing levels of socio-economic status exist and some people are more vulnerable to coercion than others (ie: Indigenous Australians), hence safeguards that target such vulnerable people are essential to uphold the value of innocence until proven guilty.

VALS agrees with the Sentencing Advisory Council when it acknowledges that “efficiency is by no means the only yardstick used to measure the effectiveness of the criminal justice system The preferred outcome must be the just outcome.”⁹ VALS is concerned that the sentencing discount process is arguably a triumph of expediency over principle.¹⁰ In Koori eyes, the Koori Court achieves justice because it takes the time to decide an appropriate sentence, but in Western eyes it may be inefficient because it only sits fortnightly. VALS argues that in the long run the Koori Court is more efficient because it reduces recidivism, hence reducing the amount of traffic through the Court system. A lesson could be learned by the Western Legal system about the Koori Court.

Types of safeguards

Retain discretion

Given the conflict between offering sentence discounts for a guilty plea and the need to have a credible and fair justice system it is not clear that making more explicit and stronger incentives in this direction would be desirable, nor is there evidence that it would solve the identified problems. Given the considerable difficulties in defining what the earliest possible opportunity for a plea is, and the relative disadvantage such an indicator would present to more marginalized groups, it is not clear that this criteria should be given any higher emphasis than it does at present as a factor in determining sentence.

The value judgments involved in quantifying the importance of an early plea in the context of the relative importance of the other sentencing matters suggests judicial discretion should be preserved. VALS argues:

- The Court should have the discretion to decide whether or a not a guilty plea merits a reduction in sentence.
- The amount of any reduction in sentence should be determined by the Court exercising full discretion. This is consistent with the recommendation of the Australian Law Reform Commission in its report titled ‘Same Crime, Same Time: Sentencing of Federal Offenders’.¹¹

⁹ Sentencing Advisory Council, (January 2007) above n 1, p 3

¹⁰ Bagaric Mirko, Brebner Julie (2002) above n 6

¹¹ Australian Law Reform Commission ‘ Report 103 - Same Crime, Same Time: Sentencing of Federal Offenders’, April 2006, para 11.40, at

<http://www.austlii.edu.au/au/other/alrc/publications/reports/103/>

- There should not be a cap on the amount by which a sentence can be reduced for a guilty plea, nor should there be a sliding scale with the maximum reduction provided for a guilty plea entered at the first reasonable opportunity.
- How judicial discretion is exercised should be transparent (ie: state weight given for guilty plea not in a percentage formula but high, medium, low weighting).

The reasons against a proscriptive approach and the retaining of judicial discretion is that when discretion is retained the Court is better able to take into account the particular circumstances of the individual case which impacts the appropriateness of a sentence. VALS draws upon the words within the Standing Committee of Attorneys-General Working Group on criminal trial procedure Report September 1999 to support the retention of discretion: “Statutory prescription is incapable of meeting the infinite variety of circumstances in which consideration to the appropriate discount must be given”.¹²

Full judicial discretion means the Court can consider circumstance of presence of mental issues which may act as a barrier to making a plea at an early stage. VALS agrees with comment of a legal practitioner who responded to the Australian Law Reform Commission inquiry into Sentencing of Federal Offenders: “Legislative specification of a discount for a guilty plea could make the sentencing process inflexible and may not take into account the fact that an offender is sometimes not at fault when entering a late plea”.¹³

Also, the Court can consider the circumstance of inaccessibility of legal assistance which may act as a barrier during the plea stage. Arguments to this effect by Weatherburn and Baker (2000) are mentioned in the Discussion Paper: late preparation and late resolution of guilty pleas were “caused at least in part by difficulties in securing continuous legal assistance at an early stage of proceedings”.¹⁴

Informed choice

VALS argues that the following safeguards should be implemented to ensure Defendant’s make an informed choice and are not coerced into pleading guilty.

- The Magistrate ensure that the Defendant is aware of the option of a sentence discount/indication. This involves asking the Defendant questions to extrapolate such information. If the Defendant is not aware of sentence indication/discount, perhaps because they are unrepresented, the matter should be adjourned so that they can make an informed choice how to plead with the assistance of a lawyer.
- As unrepresented Defendants tend to be disadvantaged in relation to pleas legal assistance should be guaranteed.¹⁵ 3% of unrepresented Defendants sought sentence

¹² Standing Committee of Attorneys-General Working Group on Criminal Trial Procedure Report September 1999, p 37, as at [http://www.ag.gov.au/www/agd/rwpattach.nsf/vap/\(cfd7369fcae9b8f32f341dbe097801ff\)~wwscag.pdf/\\$file/wwscag.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/vap/(cfd7369fcae9b8f32f341dbe097801ff)~wwscag.pdf/$file/wwscag.pdf).

¹³ Australian Law Reform Commission (April 2006) above n 11

¹⁴ Sentencing Advisory Council, (January 2007) above n 1, p 57

¹⁵ Te-aka-matua-te-o-ture, above n 7, para 254

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indication according to a New Zealand evaluation of sentence indication, which is a marked contrast to the rate at which sentence indications were generally sought (ie: 20%).¹⁶ Once such protection may be to increase resources for legal aid so less people are unrepresented. Such as increase is important in light of the fact highlighted in the Discussion Paper that sentence indication schemes mean greater preparation is required by lawyers earlier in the proceedings than if the scheme did not exist.¹⁷

- To ensure informed choice here should be a standard approach to the way in which a defendant is provided information in relation to sentence indication:
 - whether or not a sentence indication includes a discounted component
 - whether or not the sentence, in the event of a conviction following trial, may differ from that indicated.¹⁸
 - a sentence indication is not intended to undermine the defendant's right to require the prosecution to prove its case;
 - If the sentence indication includes the discount for the plea of guilty that the discount is appropriate in the circumstances of the case at that stage of the proceedings;
 - the sentence indication given at that point would not be applicable at a later stage of the proceedings.¹⁹

Other

Some other safeguards to prevent coerced guilty pleas are:

- Provide training to Judicial Officers about the impact that the sentence indication scheme may have on Indigenous Australians (see above). Also, provide cultural awareness training so that they do not use their discretion relating to sentence discount/indication in a prejudicial manner.
- Monitor the impact of the sentence indication scheme on vulnerable people and do a cost/benefit analysis.

VALS also argues that:

- To prevent people who choose plead non-guilty not being disadvantaged for making this choice the sentence indication scheme should be available to both people who plead guilty and not-guilty. Also, the judicial officer who provides the sentence discount/indication should be disqualified from hearing the case if it becomes a trial, except possibly with the consent of the parties.²⁰
- To ensure the Court adheres to a sentence indication the sentencing judge should, wherever possible, be the same judge who provides the sentence indication.²¹

¹⁶ Sentencing Advisory Council, (January 2007) above n 1, p 65

¹⁷ Op cit, p 56

¹⁸ Te-aka-matua-te-o-ture, above n7, para 236

¹⁹ Op cit, para 252

²⁰ Sentencing Advisory Council, (January 2007) above n 1, p 49

²¹ Te-aka-matua-te-o-ture, above n7, para 249

- To ensure there is a difference between a sentence indication and a sentence handed down upon a finding of guilt (ie: a *real* sentence discount or not illusory - R v Robertson [2005] VSCA 190 the judicial officer who provided the indication should preside over the plea hearing.²² VALS wishes to highlight that it is VALS' experience that not much weight is given to the guilty plea in the average case as opposed to extreme cases like the underworld gangland killings. In the latter case pleas of guilty are given a lot of weight because of the savings (ie: investigation, court time), that such a plea will result in. This observation is supported by the following research: "there is some evidence that the plea discount makes very little difference to the ultimate penalty, especially in the lower courts, with sentencers merely paying lip service to it as a mitigating consideration".²³

Cultural Background as a factor in Sentencing

Positively the Koori Court acknowledges Indigenous Australian culture. VALS argues that changes to the Crimes Act 1914 (Cth) through the Crimes Amendment (Bail and Sentencing) Act 2006 to remove the requirement to consider 'cultural background' during the sentencing process is disappointing. VALS urges the Sentencing Advisory Council to highlight to the State Government the undesirability of introducing similar state legislation. VALS argued in a submission to the Commonwealth Government that the assumption that the consideration of cultural background by Courts is leading to lenient sentences is unwarranted. It is our experience, the inappropriate use of cultural background by Courts to justify more lenient sentences is extremely rare. VALS argues that consideration of cultural background is not a sign of sentence discount but judicial discretion to consider all the circumstances.

CONCLUSION

VALS argues that:

- Full judicial discretion rather than a proscriptive approach, is appropriate and discretion should remain unfettered. When discretion is retained the Court is better able to take into account the particular circumstances of the individual case which impacts the appropriateness of a sentence. VALS gives examples of the particular circumstances of mental illness and inaccessibility of a lawyer.
- The Court should be required to state how much weight has been given to the guilty plea and its effect, if any, on the sentence imposed, in the interests of transparency.
- It is only appropriate for a judicial officer to provide an indicative sentence before the defendant has entered a guilty plea or a contested hearing has been conducted, if safeguards are in place and complied with. VALS highlights a trend it has observed, which is supported by caselaw and research, whereby: Indigenous Australians are vulnerable to being coerced into pleading guilty, perhaps more than the general population. VALS expands upon this by arguing Indigenous Australians plead guilty in

²² Sentencing Advisory Council (January 2007) above n1, p 49

²³ See for example, R Douglas and K Laster, Victim Information and the Criminal Justice System (School of Law and Legal Studies, La Trobe University, June 1994); P Robertshaw and A Milne, 'The Guilty Plea Discount: Rule of Law or Role of Chance?' (1992) 31 Howard Journal of Criminal Justice 53.

As cited in Bagaric Mirko, Brebner Julie, (2002) above n 6

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order to have the matter dealt with quickly so they can get out of Court, which is motivated largely by the following negative perceptions and misunderstanding of Western Legal System: existence of systemic issues, questionable trustworthiness and ability of the system to administer justice, cultural alienation and fears which are influenced by history and power imbalance.

The safeguards VALS suggests in relation to coerced guilty pleas are:

- Retention of judicial discretion.
- Onus on the Magistrate to ensure that the Defendant is aware of their right to access the sentence discount/indication process.
- Increase resources for legal aid so less people are unrepresented.
- Provide training to Judicial Officers about the impact that the sentence indication scheme may have on Indigenous Australians.
- Monitor the impact of the sentence indication scheme on vulnerable people and do a cost/benefit analysis.
- Develop standard approach to providing information about sentence discount to Defendants so that they are in a position to make an informed choice.

VALS argues that the utilitarian argument that it is for the greater good of the Court system that guilty pleas result in sentence discounts contains a value judgement that assumes that everyone is equal, however this is not the reality. There is already considerable pressure on defendants to plead guilty within existing arrangements and this is especially likely to affect disadvantaged groups. VALS argues that the Western Legal System could learn valuable lessons from Koori approaches to justice, such as the Koori Court. By taking a slower more comprehensive approach greater efficiency is achieved because it reduces recidivism and subsequent demand on the Courts.

VALS takes the opportunity to discuss sentencing of Indigenous Australians generally in the context of cultural background, highlighting a climate of discounting the importance of cultural background and urging that this climate to be changed. VALS urges the Sentencing Advisory Council to highlight to the State Government the undesirability of introducing similar State legislation to the Crimes Amendment (Bail and Sentencing) Act 2006 which removes the requirement to consider 'cultural background' during the sentencing process.

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