

SENTENCING PRINCIPLES IN THE HIGH COURT AND THE PSA

ERIC COLVIN*

Two recent decisions of the High Court of Australia addressed important matters of general principle respecting sentencing: *Wong v The Queen; Leung v The Queen* (hereafter ‘*Wong and Leung*’)¹ on the role of guidelines in sentencing methodology; *Cameron v The Queen*² on discounts for pleading guilty. My purpose is to explore the significance of these decisions for sentencing in Queensland under the *Penalties and Sentences Act 1992* (Qld) (hereafter the ‘PSA’). The PSA contains its own scheme of sentencing principles. Neither of the cases under examination involved the PSA. *Wong and Leung* was an appeal from a sentence imposed in New South Wales for a Commonwealth offence; *Cameron* was an appeal from a sentence for a Western Australia offence. Nevertheless, the principles articulated by the High Court are of potentially wider relevance. How do these general principles fit with the principles expressed in the PSA and with sentencing practice in Queensland?

I SENTENCING GUIDELINES AND SENTENCING METHODOLOGY

Sentencing guidelines seek to strike a balance between discretionary considerations in the sentencing process and the need for reasonable consistency in the administration of criminal justice. The aim is to increase consistency, by providing some structure for the process, while retaining discretion over the final result in the individual case. Guidelines can take several different forms, constraining sentencing discretion to greater or lesser degrees.

The loosest guidelines simply specify a range of sentencing purposes and/or a range of specific factors to be taken into account. This is the kind of guideline contained in s 9 of the PSA for State offences and in s 16A of the *Crimes Act 1914* (Cth) for Commonwealth offences. It might be questioned whether such minimal direction for the sentencing process merits the term ‘guideline’. Nevertheless, the title ‘Sentencing guidelines’ is attached to s 9 of the PSA and to similar provisions in some other jurisdictions.³

Greater structure can be provided by guidelines which rank or otherwise assign weights to the various purposes and factors. For example, the Swedish Penal Code makes the ‘penal value’ of an offence (effectively its seriousness) the primary determinant of a sentence; it then prescribes the factors enhancing and diminishing penal value together

* Professor of Law, Bond University

¹ [2001] HCA 64.

² [2002] HCA 6.

³ See *Sentencing Act 1991* (Vic) s 5; *Sentencing Act* (NT) s 5.

with other factors to be taken into account.⁴ A judicial guideline of this kind was established when the High Court asserted the priority of the proportionality principle in *Veen v The Queen [No 1]*⁵ and *Veen v The Queen [No 2]*.⁶

Even tighter structure can be imposed by numerical guidelines which signify expectations about actual sentences for cases with certain features, usually objective features of the offence. The English courts have adopted ranges of sentences for various offences.⁷ Sentences outside the ranges need justification if they are to survive. The Canadian courts have preferred numerical 'starting points', with individual sentences then being determined by reference to aggravating and mitigating circumstances.⁸

In Queensland, little has been done to supplement the terms of the PSA through the development of judicial guidelines. The continuing authority of the *Veen* cases on the priority of the proportionality principle appears to have been accepted.⁹ Otherwise, the chief mechanism for maximising consistency is reference to sentences in previous cases with comparable features.

The scope for the Queensland Court of Appeal to develop sentencing guidelines must now be assessed in light of the decision of the High Court in *Wong v The Queen; Leung v The Queen* ('*Wong and Leung*').¹⁰ In *Wong and Leung*, the High Court was faced with a set of numerical guidelines, promulgated by the New South Wales Court of Criminal Appeal, for sentencing couriers and other low-level participants in schemes for importing narcotics. The guidelines were relatively crude in the sense that they simply attached ranges of sentences to ranges of quantities for particular drugs: for example, 7 to 10 years imprisonment for importing 1-1.5 kilos of heroin; 8 to 12 years imprisonment for importing 1.5-3.5 kilos of heroin. The accompanying judgment from the Court of Criminal Appeal acknowledged that factors other than quantity and type would need to be taken into account, usually in determining the precise sentence within the specified range, but did not indicate how this fine-tuning was to be approached. Although the Court of Criminal Appeal disclaimed any prescriptive effect for the guidelines, the High Court took the view that such effect was inevitable.

All members of the High Court concluded that the guidelines amounted to an illegitimate constraint on the exercise of the sentencing discretion conferred by s 16A of

⁴ See Andrew Von Hirsch 'The Swedish Sentencing Law' in Andrew Von Hirsch and Andrew Ashworth, *Principled Sentencing: Readings on Theory and Policy* (2nd ed, 1998).

⁵ (1979) 143 CLR 458, 498.

⁶ (1988) 164 CLR 465. The principle was stated in this way by Mason CJ, Brennan, Dawson and Toohey JJ at 472: 'a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender'.

⁷ See, eg, *Aranguren* (1994) 99 Cr App R 347.

⁸ See the description of this approach by McLachlin J in *R v McDonnell* [1997] 1 SCR 948, [58]-[61]. McLachlin J was dissenting in that particular case, but her description of the approach was not contradicted by the majority.

⁹ See, eg, *Eather* (1994) 71 A Crim R 305, 313 (Qld CA).

¹⁰ [2001] HCA 64.

the *Crimes Act 1914* (Cth).¹¹ The appellants had not actually been sentenced in accordance with the guidelines. They were major participants in an importation scheme. Their role had been at a level for which the Court of Criminal Appeal had taken the view that a guideline could not be promulgated because there was insufficient information on existing patterns of sentencing. Nevertheless, the prosecution's appeal against the sentence at trial had been the occasion for the guidelines to be promulgated. The Court of Criminal Appeal had also increased the sentences imposed by the trial judge, presumably taking account of the guidelines for lesser participants. The increase was then appealed to the High Court. Although the guidelines were unanimously repudiated by the High Court, appeals against the increased sentences were only allowed by a 4-2 majority.¹² The dissenters held that no error had been demonstrated in the increased sentences whereas the majority held that they were tainted by the guidelines. The matters were remitted to the Court of Criminal Appeal for further consideration.

In promulgating the guidelines, the New South Wales Court of Criminal Appeal was acting in the exercise of federal jurisdiction, dealing with sentences for offences under the *Customs Act 1901* (Cth). Sentencing for such offences is governed by s 16A of the *Crimes Act 1914* (Cth), which prescribes matters to be considered when a sentence is passed. Section 16A(1) enshrines the overriding principle that the sentence must be 'of a severity appropriate in all the circumstance of the offence'. Section 16A(2) then specifies a variety of particular matters which must be taken into account when they are relevant and known to the court. The list encompasses factors relating to the specific offence, such as its nature, circumstances and effects, and factors relating to the offender, such as the background and character of the person, any degree of contrition and the prospect of rehabilitation. The list also refers to certain systemic considerations such as the making of a guilty plea and the degree of any cooperation in the investigation of the offence or other offences. No particular weights are attached to different factors.

There was some speculation within the High Court in *Wong and Leung* about the constitutional status of the sentencing guidelines promulgated by the New South Wales Court of Criminal Appeal. Some judges canvassed a suggestion that limitations on federal judicial power might create a constitutional barrier to a court promulgating numerical guidelines like those in issue.¹³ The concern was that such guidelines would be legislative in character and that this would inconsistent with federal judicial power. In the result, however, the principal objection to the numerical guidelines was simply that they were inconsistent with legislative directions in the form of those in the *Crimes Act 1914* (Cth).¹⁴ Presumably the same conclusion would have been reached if the directions had been in State rather than Commonwealth legislation.¹⁵

¹¹ Although the guidelines were repudiated by the High Court, they were not formally held invalid. This was because they had not been part of any order or declaration made by the New South Wales Court of Criminal Appeal, so that there was nothing for the High Court to strike down. *Ibid* [28], [39].

¹² *Ibid*. The majority were Gaudron, Gummow, Hayne and Kirby JJ. Gleeson CJ and Callinan J dissented. McHugh J did not take part in the judgment.

¹³ *Ibid* [81-86], [141-144], [165-167].

¹⁴ *Ibid*. The constitutional objection remained the main concern of Callinan J: see [165]-[167].

¹⁵ In the subsequent case of *R v Whyte* [2002] NSWCCA 343, [117]-[140], there was some discussion of how limitations on federal judicial power might impact on a court holding federal judicial power

The statutory scheme for sentencing persons for State offences in Queensland is similar to that for Commonwealth offences. Section 9 of the PSA, titled ‘Sentencing guidelines’, specifies the purposes for which a sentence may be imposed and prescribes factors to which a court must have regard in sentencing an offender. Section 9(1) states the permissible purposes: just punishment; rehabilitation; deterrence; denunciation; protection of the community. Two lists of prescribed factors are then provided: in s 9(2), there is a standard list for offences not involving violence or physical harm to another person; in s 9(4), there is a special list for offences which do involve violence or physical harm. The two lists cover much of the same ground, although s 9(2) contains limiting principles on the use of imprisonment which are absent in s 9(4). Reference in both lists is made to factors relating to the offence itself, to the background and character of the offender, and to the wider interests of the criminal justice system. The prospect for the offender’s rehabilitation is not mentioned specifically but rehabilitation is one of the purposes for which s 9(1) permits a sentence to be imposed. Guilty pleas and cooperation with law enforcement agencies are separately covered in ss 13-13A of the PSA. The Queensland scheme, like the Commonwealth scheme, is silent on the weight to be ascribed to any of the listed factors. Moreover, there is no order of priorities indicated in the list of permissible purposes of sentences.

Under the type of guideline at issue in *Wong and Leung*, the objective characteristics of the offence become the primary consideration in sentencing. This approach to sentencing, coupled with numerical indicators of appropriate sentences, is well established in England.¹⁶ The objections raised by members of the High Court focused on the absence in the guidelines of any indication of how factors other than the objective characteristics of the offence should be taken into account and on the risk that, because other factors were not mentioned, they might be ignored in sentencing practice.¹⁷ The guidelines were deficient in their treatment of factors relating to the offence itself and gave no direction at all for factors relating to the offender. Even with respect to the objective characteristics of the offence, the guidelines were criticised by some of the judges because they did not explicitly differentiate between levels of participation in schemes for importing drugs.¹⁸ A more fundamental objection to how ‘offence’ factors were handled was that the guidelines failed to address the subjective dimensions of offences: in particular, for narcotics offences, offenders’ beliefs about what was being imported and in what quantity.¹⁹ In addition, the guidelines were silent on how ‘offender’ factors should be taken into account.²⁰ The view of the New South Wales Court of Criminal Appeal had been that all these factors could be accommodated within the numerical ranges specified in the guidelines. The High Court, however, thought that it was inconsistent with s 16A of the *Crimes Act 1914* (Cth) to assign so

even when that court is sentencing under State jurisdiction. It was, however, noted that a test of ‘incompatibility or repugnancy’ with the federal judicial role, rather than inconsistency, would apply in a State context. It was said at [133]: ‘State legislation must have a quite exceptional character to contravene the constitutional protection of the judicial process.’ It was therefore concluded that any concerns about guidelines having a legislative character would not have the same force as they would in a federal context. The constitutional issues will not be discussed further in this paper.

¹⁶ See above, n 7 and accompanying text.

¹⁷ *Wong v The Queen; Leung v The Queen* [2001] HCA 64 [31], [56]-[78], [132]-[139], [167].

¹⁸ *Ibid* [64].

¹⁹ *Ibid* [31], [64], [68]-[69].

²⁰ *Ibid* [71], [78].

much weight in sentencing to the quantity of the narcotic and was also concerned about the risks of the guidelines not addressing the whole range of factors specified in s 16A. Presumably, the High Court would reach the same conclusion if a similar set of guidelines were judicially promulgated for State offences in Queensland. There would be inconsistency with the PSA just as there was with the *Crimes Act 1914* (Cth).

Wong and Leung would have relatively limited significance for general sentencing methodology if it had just involved the finding of inconsistency between the Commonwealth legislation and the particular guidelines promulgated by the New South Wales Court of Criminal Appeal. An advocate of greater consistency in sentencing might complain that guidelines of similar type have worked well in England. Nevertheless, a simple finding that guidelines like those in *Wong and Leung* are inconsistent with discretionary sentencing would still leave opportunities for drafting other, more sophisticated, guidelines. Such guidelines might, for example, rank the purposes of sentences or otherwise present criteria for weighing the various factors to be taken into account. A step in this direction was taken when the High Court asserted the priority of the proportionality principle in the *Veen* cases.²¹ There was no indication in *Wong and Leung* that the High Court intended to question the priority of that principle for sentencing under the *Crimes Act 1914* (Cth). In addition, numerical ranges might be acceptable if their prescriptive force were downplayed and if criteria were identified for selecting a point within the range or moving outside it. The New South Wales Court of Criminal Appeal has already taken a step in this direction.²² Similarly, if numerical ‘starting points’ were used instead of ranges, specific aggravating and mitigating factors could be specified for determining the final sentence. Such devices could bring greater consistency to sentences without limiting sentencing discretion to the extent of the guidelines condemned in *Wong and Leung*.

There was, however, another and more troubling line of reasoning in *Wong and Leung*. An additional objection to the guidelines promulgated by the New South Wales Court of Criminal Appeal was raised in a joint judgment from Gaudron, Gummow and Hayne JJ. Their argument was that numerical guidelines are wrong in principle and should not be judicially promulgated in any form.²³ Sentencing guidelines can apparently specify, and perhaps rank, the purposes of sentences and/or the factors to be taken into account. It may also be legitimate to indicate what type of punishment would ordinarily be appropriate for a certain kind of offence, as long as precise figures are avoided and guidance is given on the reasons why a particular type of punishment would ordinarily be appropriate and what criteria should be applied in an individual case.²⁴ Numerical guidelines, however, were opposed because they do not permit due regard to be paid to the many considerations bearing on an individual case. They are incompatible with the measure of discretion required for the sentencing task to be performed properly. The joint judgment expressed particular opposition to ‘two-stage’ sentencing, in which reference is first made to a notional sentence determined by reference to a guideline and

²¹ Above, n 5-6.

²² See *R v Whyte* [2002] NSWCCA 343 [194]-234]. See also the analysis of the significance of *Wong and Leung* for South Australia in *R v Place* [2002] SASC 101, [21]-[33], especially the remarks about ‘identifying a range of penalties for an ordinary case’ at [26].

²³ *Wong v The Queen; Leung v The Queen* [2001] HCA 64 [60]-[66], [70]-[78].

²⁴ *Ibid* [61]-[63].

then an adjustment is made to accommodate features of the specific case.²⁵ The disapproval extended even to quantified discounts for guilty pleas.²⁶ What should occur in sentencing, according to the joint judgment, is ‘instinctive synthesis’. This was explained as a methodology whereby ‘the sentencer is called on to reach a single sentence which ... balances many different and conflicting features’.²⁷

The joint judgment was not a majority judgment. Kirby J expressed some general sympathy for ‘two-stage’ sentencing.²⁸ Gleeson CJ expressed some general sympathy for numerical guidelines, whether expressed in terms of ranges or in terms of ‘starting-points’.²⁹ Callinan J did not express an opinion on these issues. The joint judgment therefore represented the opinions of only half the members of the High Court who heard the case. Despite this, it is likely that the themes of the joint judgment would gain a majority if the issues arose again before the current membership of the High Court. The absentee judge from the decision in *Wong and Leung* was McHugh J. Prior to and subsequent to *Wong and Leung*, McHugh J has expressed opposition to ‘two-stage’ sentencing and support for the ‘instinctive synthesis’ approach.³⁰

What does the opposition to numerical guidelines and ‘two-stage’ sentencing mean for State offences in Queensland? Answering this question requires some attention to the terms of the PSA and to the comparative methodology used for sentencing in Queensland.

Even if ‘two-stage’ sentencing were to be rejected as a general methodology, quantification of certain particular discounts might be justifiable and, indeed, required for sentencing under the terms of the PSA. First, s 13A of the PSA expressly mandates quantification where a discount is given for cooperating with law enforcement agencies ‘in a proceeding about an offence’, usually by giving evidence against another accused person. Section 13A(7) provides that, having imposed a sentence in open court, the sentencer must state in closed court the sentence that would otherwise have been imposed. Some members of the High Court may not like this procedure but it is statutorily mandated in the PSA. Curiously, a similar provision in s 21E(1) of the *Crimes Act 1914* (Cth) received no comment in *Wong and Leung*.³¹ Secondly, it may be that the PSA requires, by necessary implication, some kind of ‘two-stage’ approach for discounts for guilty pleas. Section 13(1) of the PSA provides that a court must take a guilty plea into account and ‘may reduce the sentence that it would have imposed had the offender not pleaded guilty’. Section 13(4) further provides that, if a court does not make a reduction, it must state that fact in open court and give its reasons. Nothing in s 13 requires a court to formulate precisely the sentence that it would have imposed without the guilty plea, let alone requires such a sentence to be stated. Nevertheless, the section does refer to ‘reducing’ the sentence rather than, as does the Commonwealth

²⁵ Ibid [74]-[76].

²⁶ Ibid [76].

²⁷ Ibid [75].

²⁸ Ibid [102].

²⁹ Ibid [9]-[12].

³⁰ See *AB v The Queen* (1999) 198 CLR 111, 120-122; *Cameron v The Queen* [2002] HCA 6, [41].

³¹ A difference between the Queensland and Commonwealth provisions is that s 21E(1) of the *Crimes Act 1914* (Cth) does not require a closed proceeding for the specification of the sentence that would otherwise have been imposed.

legislation, to taking account of the plea in determining what is appropriate.³² It is difficult to see how a court could know whether or not it was making a reduction without at least a rough idea of the sentence that would otherwise have been imposed.³³ Moreover, the Queensland Court of Appeal has indicated that it would need the nature of a reduction to be specified in order to determine an appeal respecting its sufficiency.³⁴ In another case, however, the Court of Appeal has indicated that specification of the extent of a reduction is permitted but not required and is a matter for the sentencing judge.³⁵ The observations in these two cases might be reconciled if there were taken to be an obligation on a sentencing judge to give at least a rough indication of the extent of a reduction.

The way recognition is now given for pleading guilty in Queensland may obscure the presence of many quantified reductions. Guilty pleas are commonly recognised through recommendations for early parole rather than through leniency in head sentences.³⁶ Nevertheless, the severity of sentences cannot realistically be assessed without reference to parole eligibility.³⁷ A reduction in a non-parole period is just as much a discount on a sentence as is a reduction in a head sentence. Under the *Corrective Services Act 2000* (Qld), eligibility for parole (now technically called ‘post-prison community based release’) ordinarily occurs after half of a head sentence has been served.³⁸ When earlier eligibility is recommended because of a guilty plea, the measure of the discount is the difference between the statutory date of eligibility and the recommended date. Courts often do not announce the measure of a discount. Nevertheless, it can readily be calculated.

It might be argued that quantifying discounts for pleading guilty and for cooperating with law enforcement agencies would be justifiable exceptions to any general principle that sentencing is to be performed by ‘instinctive synthesis’. The practice of quantifying these particular discounts is well established in a number of jurisdictions, which gives some basis for treating them as special cases. The New South Wales Court of Criminal Appeal once suggested that, while ‘instinctive synthesis’ may be appropriate for handling the circumstances of the offence and the offender, quantifiable reductions may be the best way of encouraging offenders to assist the administration of justice.³⁹ Yet, the New South Wales Court of Criminal Appeal has now asserted that a

³² See *Crimes Act 1914* (Cth) s 16A(2)(g). Provisions merely requiring a guilty plea to be taken into account are found in the sentencing legislation of several States and Territories: see *Criminal Law (Sentencing) Act 1988* (SA) s 10(g); *Sentencing Act 1991* (Vic) s 5(2)(e); *Crimes Act 1900* (ACT) s 429A(1)(u); *Sentencing Act* (NT) s 5(2)(j). New South Wales adopts an approach closer to that of Queensland, referring to a ‘lesser’ sentence than would otherwise have been imposed: see *Crimes (Sentencing Procedure) Act 1999* s 22(1)(a). Section 8(4) of the *Sentencing Act (1995)* (WA) uses the expression ‘reduces the sentence’ with respect to various mitigating factors, including guilty pleas.

³³ See the interpretation by the Victoria Court of Criminal Appeal of a reference to reducing a sentence in the now-repealed *Penalties and Sentences Act 1985* (Vic): *O’Brien* (1991) 55 A Crim R 410, 414.

³⁴ See *Corrigan* (1993) 70 A Crim R 53, 54.

³⁵ See *R v Mulholland* [2001] QCA 480.

³⁶ See *Corrigan* (1993) 70 A Crim R 53.

³⁷ See *R v Bojovic* [1999] QCA 206, [31], [34].

³⁸ *Corrective Services Act 2000* (Qld) s 135(2)(e).

³⁹ *R v Thomson*; *R v Houlton* [2000] NSWCCA 309, [114]-[123]. The argument was expressed in terms of the utilitarian value of rewarding guilty pleas and cooperation with the authorities.

general right to promulgate numerical guidelines is conferred by features of the NSW sentencing legislation, so that *Wong and Leung* is a significant authority in NSW only for the particular form of numerical guidelines.⁴⁰ Similarly, the presence of specific provisions on sentence reductions in the text of the PSA may also afford some ground for questioning the general relevance of ‘instinctive synthesis’ to sentencing in Queensland. It can at least be asserted that the PSA is not as hostile to the ‘two-stage’ approach as are the advocates of ‘instinctive synthesis’ in the High Court. If the Queensland Court of Appeal wishes to resist the movement to ‘instinctive synthesis’, it could base a plausible argument on features of the text of the PSA.

Indeed, it does appear that there is considerable attraction among the Queensland judiciary for the ‘two-stage’ approach as a general methodology in sentencing. References to sentences previously imposed for comparable offences constitute a characteristic feature of sentencing methodology in Queensland. References are made to similar features supporting similar sentences and to differentiating features justifying higher or lower sentences. Two stages are not an essential part of the comparative methodology but their incorporation is common. Courts using this methodology often speak of sentence ranges or starting points for the offence, established by the review of comparable cases, and of discounts for mitigating factors in the immediate case, including matters other than guilty pleas and cooperation in law enforcement.⁴¹ Moreover, evidence of Queensland judges supporting ‘instinctive synthesis’ is sparse.⁴²

The regular use of sentencing comparisons, often coupled with ‘two stages’, may constitute a distinctive feature of sentencing in Queensland. There is certainly a marked difference between the approaches to sentencing in Queensland and in Victoria, the state in which ‘instinctive synthesis’ originated.⁴³ The difference can be illustrated through two cases decided within a few days of each other in March 2002. In *R v Easton*,⁴⁴ the Queensland Court of Appeal dismissed an appeal against a sentence of three years imprisonment for various offences, including breaking and entering. The trial judge had taken a sentence of four years as a ‘starting point’ and had then reduced that by one year to reflect a plea of guilty and a variety of other mitigating factors including work history and the effect of drugs. The Court of Appeal referred to the sentences in four other cases in deciding that the ‘starting point’ of four years was appropriate and further concluded that the reduction by one year took account of all relevant mitigating factors. In *R v McCluskey*,⁴⁵ the Victoria Court of Appeal dismissed an appeal against an effective total sentence of three years and three months for various offences, including aggravated burglary. It was held that the sentence reflected the

Reference to utilitarian considerations must now be qualified in light of the decision of the High Court of Australia in *Cameron v The Queen* [2002] HCA 6, discussed below.

⁴⁰ See *R v Whyte* [2002] NSWCCA 343, [38]-[67], especially [63]-[64].

⁴¹ See, eg, a series of cases decided by the Queensland Court of Appeal early in 2002: *R v Haluzan* [2002] QCA 94; *R v Easton* [2002] QCA 110; *R v Hall* [2002] QCA 125. See also *R v Houghton* [2002] 159, [30], where Fryberg J referred to the study of comparable cases as providing ‘the norm’, or perhaps, in accordance with Queensland practice, the range within which the norm falls’.

⁴² See, however, *R v Harman* [1989] 1 Qd R 414, 421, De Jersey J: ‘I consider ... that the concept of identifiable discounts is wholly inappropriate.’

⁴³ See especially *R v Williscroft, Weston, Woodley and Robinson* [1975] VR 292 (Full Ct); *Young, Dickenson and West* (1990) 45 A Crim R 147 (Vic CCA).

⁴⁴ [2002] QCA 110.

⁴⁵ [2002] VSCA 45.

gravity of the offences and took account of all relevant mitigating factors. In reaching these conclusions, the Court reviewed the circumstances of the offence and the background of the offender. No reference was made, however, to sentences in any other cases and there was no suggestion of two stages being used to determine that the sentence was appropriate.

Easton and *McCluskey* appear to be reasonably typical of the different approaches to sentencing currently used in Queensland and Victoria. In another recent case, the Victoria Court of Appeal observed: ‘It is often said that the question whether a sentence is manifestly excessive does not admit of much discussion. It is either perceived to be so or it is not’.⁴⁶ That observation may be consistent with a methodology of ‘instinctive synthesis’ in which reference to comparable cases plays no part. There is, however, ample room for discussion in Queensland over the selection of a set of comparable cases. There may be some element of ‘instinctive synthesis’ when particular cases are initially identified as similar to the immediate one. Nevertheless, the extent of the similarities can be analysed and poor comparisons can be rejected.

The Queensland Court of Appeal has not elaborated the relationship between its comparative methodology and other approaches to sentencing. With respect to the relationship to ‘instinctive synthesis’, it might be said that, whereas ‘instinctive synthesis’ in its pure form treats each sentence as a unique phenomenon, sentencing comparisons treat each sentence as a precedent for future cases. The methodology of sentencing comparisons might be viewed as a form of traditional ‘common law’ reasoning from case to case. The search for similarities provides consistency between cases; the search for marginal differences from the precedents allows for incremental development of the law. In contrast, the promulgation of sentencing guidelines could be viewed as a policy-oriented quasi-legislative act, or at least as a form of ‘common law’ reasoning which focuses on the broader principles underlying the precedents rather than the particular decisions they express.

Wong and Leung was concerned with the role of sentencing guidelines rather than that of sentencing comparisons. There is no reason why the High Court’s condemnation of the crude numerical guidelines at issue in that case should imply condemnation of the role of sentencing comparisons in Queensland. The comparative methodology can allow for the full range of sentencing factors to be taken into account. On the other hand, the disapproval of all numerical guidelines in the joint judgment could be taken to imply disapproval of using a comparative methodology to establish numerical ranges or starting points for cases with certain features. Admittedly, a review of comparable cases might make reference to more factors than would be expected in general guidelines. The joint judgment, however, expressed disapproval of all numerical guidelines, not just guidelines incorporating a limited range of factors. Moreover, the disapproval of ‘two-stage’ sentencing in the joint judgment was unqualified. If ‘instinctive synthesis’ comes to be endorsed by a majority of the High Court, as appears likely, there will be a clear conflict of sentencing methodologies between the High Court and the Queensland Court of Appeal. For Commonwealth offences, the Queensland Court of Appeal will have to follow the general direction of the High Court. For State offences, on the other hand, it could be argued that the text of the PSA makes the ‘two-stage’ methodology acceptable.

⁴⁶ *R v Siggins* [2002] VSCA 97 [34].

What approach should the Queensland Court of Appeal take towards sentencing methodology for State offences? It is difficult to see any advantage to 'instinctive synthesis', at least in the pure form practised in Victoria. Such an approach could detract severely from the sentencing consistency which has been achieved through the comparative methodology currently used in Queensland.⁴⁷ Advocates of instinctive synthesis praise its responsiveness to the particular circumstances of each offence and offender. Similar responsiveness, however, is also an integral part of the methodology of sentencing comparisons. The precedents do not dictate the outcome for a particular case. Instead, they merely provide an initial step in the sentencing process. The sentence eventually imposed takes account of any features of the particular case which distinguish it from the precedents.

What should be the role of sentencing guidelines in Queensland? It seems clear that the sparse guidelines in the PSA itself are inadequate to guide the sentencing process and to ensure sufficient consistency of outcomes. Indeed, courts generally do not refer to those guidelines in determining and justifying sentences. Instead, they rely on sentencing comparisons. The scheme of the PSA could perhaps be made more useful if it were to be supplemented by more guidelines from the Court of Appeal along the lines of those in the *Veen* cases, indicating the weights to be attached to the various purposes and factors identified in the PSA. It is, however, doubtful that guidelines of this type would generate the degree of sentencing consistency attainable through the examination of outcomes in comparable cases. The question which then arises is whether numerical guidelines would offer any advantages over the study of sentencing comparatives. On the one hand, it seems unlikely that consistency would increase. Sentencing comparisons already appear to work reasonably well in that respect. It would be difficult for numerical guidelines to offer greater consistency without becoming overly rigid and eliminating discretion in how to respond to the particular features of individual cases. Yet, while sentencing comparisons may enhance consistency, that is all they achieve. They do not lay sentencing patterns open for public scrutiny. They therefore do not facilitate the informed debate which is needed if levels of sentences are to be appropriate and if the community is to have confidence that they are appropriate. In contrast, numerical guidelines can make sentencing patterns publicly available and facilitate critical discussion about them. Among the virtues of explicit guidelines is their amenability to scrutiny, debate and improvement.⁴⁸

Adopting numerical guidelines does not necessitate abandoning sentencing comparisons. The two methodologies are not mutually exclusive. Indeed, they could easily perform complementary roles. Numerical guidelines could establish an overall structure for sentencing different offences, with sentencing comparisons assisting in the fine-tuning of a particular sentence for an individual case. If Queensland were to move in the direction of incorporating numerical guidelines, it would not be alone. While 'instinctive synthesis' may be emerging as the dominant approach in Australia,⁴⁹ numerical guidelines have found much favour elsewhere.⁵⁰ There is nothing in either

⁴⁷ For criticisms of 'instinctive synthesis', see Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999) 195-202; Ian Leader-Elliot, 'Instinctive Synthesisers in the High Court' (2002) 26 Crim LJ 5, 8.

⁴⁸ On the arguments for and against sentencing guidelines, see Arie Freiberg, *Pathways to Justice: Sentencing Review 2002*, 208-209.

⁴⁹ *Wong v The Queen; Leung v The Queen* [2001] HCA 64 [76] (Gaudron, Gummow and Hayne JJ).

⁵⁰ *Ibid* [9] (Gleeson CJ). See also Freiberg, above n 48, 199-203.

the PSA or the authority of *Wong and Leung* to foreclose their development for State offences in Queensland.

II DISCOUNTS FOR PLEADING GUILTY

Section 13(1) of the PSA provides that a court must take account of a guilty plea in imposing a sentence and may reduce the sentence that it would otherwise have imposed. Section 13(2) provides that, in making a reduction, a court may have regard to the time at which the offender pleaded guilty or informed the relevant law enforcement agency that a guilty plea would be made. It is common in Queensland for the extent of the reduction to be quantified.⁵¹ However, as was noted above,⁵² this is not mandatory.

The PSA does not state how reductions are to be made. As was noted above,⁵³ discounts are now often awarded through recommendations for early consideration for parole (now technically called ‘post-prison community based release’) rather than through reductions in head sentences. Section 135(2)(e) of the *Corrective Services Act 2000* (Qld) makes a prisoner ordinarily eligible for parole after serving half of a sentence of imprisonment.⁵⁴ Nevertheless, when a court imposes a sentence, it can recommend earlier parole eligibility.⁵⁵ When a guilty plea has been made, it is common for a court to recommend consideration for parole after a period of about one-third of the sentence. Reductions in head sentences are also sometimes used to reward guilty pleas. In one recent case, it was suggested that reductions in the range to 10-30 per cent are normal.⁵⁶ Reducing the head sentence rather than the non-parole period is effectively the only option where there has been a conviction of an offence classified as a ‘serious violent offence’.⁵⁷ When that happens, the prisoner must serve the lesser of 80% of the head sentence and fifteen years.⁵⁸ Therefore, if a discount is to be given, it must be done by reducing the head sentence.

Discounting sentences for guilty pleas is common in many jurisdictions. In *Siganto v The Queen*,⁵⁹ the High Court of Australia acknowledged and endorsed the general practice. It was said:

[A] plea of guilty is ordinarily a matter to be taken into account in mitigation; first because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial.⁶⁰

⁵¹ See, eg, the cases cited in n 41.

⁵² Text to n 35.

⁵³ Text to n 36-38.

⁵⁴ For sentences of imprisonment for life, eligibility ordinarily occurs after 15 years have been served but at least 20 years are required for prisoners with multiple murder convictions. See *Corrective Services Act 2000* (Qld) s 135(2)(a)-(b).

⁵⁵ *Corrective Services Act 2000* (Qld) s 135(3); PSA s 157(2).

⁵⁶ *R v Houghton* [2002] QCA 159, [31] (Fryberg J).

⁵⁷ This classification is automatic when the offence is listed in the Schedule to the PSA and a sentence of 10 or more years imprisonment is imposed. The classification is at the discretion of the sentencing court when the offence is listed in the Schedule and a sentence of five or more years, but less than 10, is imposed. See PSA ss 161A-161B.

⁵⁸ *Corrective Services Act 2000* (Qld) s 135(2)(c). Earlier release is not permitted: PSA s 161D.

⁵⁹ [1998] HCA 74.

⁶⁰ *Ibid* [22].

Siganto also affirmed the established position that pleading not guilty does not aggravate an offence. An accused should not be given additional punishment for having forced the prosecution to prove its case.⁶¹ This proposition might, of course, be questioned on semantic grounds. If the sentence imposed on an accused pleading not guilty is greater than it would have been if the plea had been guilty, then a disadvantage is suffered because of the plea of not guilty. It may not help to describe imposing this disadvantage as making the not guilty plea an aggravating factor. Describing it as an aggravating factor could suggest that there is some neutral point of comparison from which a sentence might be either reduced or increased depending on the plea. Whereas, the only comparison to be made is that between the two pleas. Yet, there is still a disadvantage requiring moral justification.

The moral basis for discounts for pleading guilty was the underlying issue in the decision of the High Court in *Cameron v The Queen*.⁶² An accused had pleaded guilty to a charge of possession of a prohibited drug with intent to sell or supply contrary to the *Misuse of Drugs Act 1981* (WA). The offence had actually occurred at Perth airport, a location within the constitutional jurisdiction of the Commonwealth. State law had, however, been made applicable by the *Commonwealth Places (Application of Laws) Act 1970* (Cth). In Western Australia, guilty pleas generally lead to head sentences being reduced by 'between 20-25 per cent up to 30-35 per cent depending upon the circumstances'.⁶³ In this instance, however, the sentence was reduced at trial by only 10%. The stated reason was that there was no indication that there would be a guilty plea until just before the preliminary hearing, which limited the saving of time and resources. The sentence was appealed on the ground that the guilty plea merited a reduction of at least 20-25 per cent. The appellant argued that this was merited because the delay in indicating there would be a guilty plea was due to an error in the charge. The wrong drug had been specified. The appeal was dismissed by the Western Australia Court of Criminal Appeal. The Court of Criminal Appeal held that there could have been an earlier guilty plea producing greater savings of costs. A further appeal succeeded, however, by a 4-1 majority in the High Court of Australia.⁶⁴ The conclusion of the High Court was that the accused was entitled to a discount of the standard order because he had pleaded guilty at the earliest reasonable opportunity, when the drug was correctly particularised, and that the magnitude of the savings of costs was immaterial.⁶⁵ The matter was remitted to the Court of Criminal Appeal.

In the course of deciding whether reducing the discount was justifiable, a joint judgment of Gaudron, Gummow and Callinan JJ examined the fundamental rationale for leniency in cases of guilty pleas. The concern expressed was that the comparative disadvantage suffered by a person who pleads not guilty, or by a person who (like Cameron) pleads guilty but does not receive the standard leniency, might amount to discrimination. The principle that those who plead guilty and those who plead not guilty stand equal before

⁶¹ Ibid [34].

⁶² [2002] HCA 6.

⁶³ Ibid [6], quoting *Mills v The Queen* (1997) 17 WAR 518, 521.

⁶⁴ Within the majority, a joint judgment was given by Gaudron, Gummow, and Callinan JJ. Kirby J gave a separate judgment. McHugh J dissented.

⁶⁵ Ibid [23]-[25], [76]-[80]. In dissent, McHugh J took the view that the accused could have pleaded guilty even if the drug was wrongly particularised: *ibid* [53].

the law was endorsed.⁶⁶ So too was the principle that a person should not be penalised for insisting on the right to trial.⁶⁷ There is also a provision in s 7(2)(a) of the Sentencing Act 1995 (WA) expressly excluding not guilty pleas from aggravating factors. The joint judgment referred to this provision but indicated that it merely gives effect to a common law requirement.⁶⁸

It was therefore concluded that, for leniency for an accused who pleads guilty to be non-discriminatory, it would have to be based upon some relevant and legitimate difference from cases where that leniency was not granted. Two candidates were considered: ‘objective’ differences in the costs of the proceedings to the community and ‘subjective’ differences between the states of mind of the persons being sentenced. The legitimacy of using ‘objective’ differences was readily dismissed,⁶⁹ presumably because the magnitude of the savings resulting from a guilty plea are substantially beyond the control of the accused. Instead the true rationale for leniency was said to lie in ‘subjective’ factors. In particular, the legitimacy of leniency was said to depend on the extent to which ‘the plea is indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice’.⁷⁰ From that standpoint, it was concluded, the justification for denying or limiting a discount would be failure to plead guilty at the first reasonable opportunity rather than failure to save costs for the community. In this context, the ‘first reasonable opportunity’ apparently means the first time when an indication of a guilty plea might reasonably have been expected.⁷¹ The Court of Criminal Appeal had been wrong in treating the magnitude of the savings as a material consideration. It had also been wrong in concluding that an earlier guilty plea could reasonably have been expected in *Cameron* itself.

McHugh J, in dissent, disagreed about the application of the ‘first reasonable opportunity’ principle to the facts of the case. He did express some sympathy for the concern about discrimination if discounts were not based on relevant subjective differences, although on a curious ground. Instead of voicing a general concern about discrimination in sentencing, he contended that such discrimination might be inconsistent with the exercise of federal judicial power.⁷² Although the offence was under the *Misuse of Drugs Act 1981* (WA), that was only because the *Commonwealth Places (Application of Laws) Act 1970* (Cth) had made State law applicable to its location. The sentencing court was still exercising the judicial power of the Commonwealth and was subject to any constitutional limitations in that respect. McHugh J suggested that a constitutional challenge to the denial of a discount in a case within federal jurisdiction might succeed.⁷³ However, since there had been no constitutional argument in *Cameron*, he left that issue for another day. In contrast, the conclusions of Gaudron, Gummow and Callinan JJ about discrimination were framed in terms of a general principle applicable to the exercise of State as well as Commonwealth jurisdiction.

⁶⁶ Ibid [15].

⁶⁷ Ibid [12]. See also [41], McHugh J, and [65](3), Kirby J.

⁶⁸ Ibid [17]-[19].

⁶⁹ Ibid [13].

⁷⁰ Ibid [22].

⁷¹ Ibid [23]-[24].

⁷² Ibid [44]-[45].

⁷³ Ibid [47].

Of the judges who participated in *Cameron*, Kirby J alone appeared comfortable with awarding discounts on the pragmatic ground of encouraging savings to the community. He described discounting as a ‘purely utilitarian’ exercise.⁷⁴ Nevertheless, he agreed with Gaudron, Gummow and Callinan JJ that there should be a discount when a guilty plea was entered at the ‘first reasonable opportunity’⁷⁵ and that the appeal should be allowed because this requirement had been met on the facts of the case. Kirby J also took the opportunity to express his support for identifying the quantity of a discount, whereas McHugh J took the opportunity to underline his disapproval of this approach.⁷⁶ The propriety of ‘two-stage sentencing’ has been discussed in the earlier part of this paper.

In the result, the joint judgment of Gaudron, Gummow and Callinan JJ represented an overall majority of the members of the High Court who heard the case. Their distinction between subjective and objective grounds for awarding a discount is potentially relevant to the interpretation of the Queensland PSA. Section 13(2) of the PSA focuses on the time when a guilty plea is made or indicated. It states that a reduction of sentence ‘may be made having regard to the time at which the offender – (a) pleaded guilty; or (b) informed the relevant law enforcement agency of his or her intention to plead guilty’. The provision does not, however, state why the timing of the plea is relevant. Is timing relevant because it can signify something about the state of mind of the accused or because it can affect the savings to the community or because of both? The words of s 13(2) are compatible with any of these interpretations. The joint judgment in *Cameron*, however, holds as a matter of general principle that the state of mind of the accused is the only proper concern. Otherwise discounting sentences for guilty pleas would discriminate against persons who exercise their right to trial. In the absence of a contrary indication in the PSA, it would seem that this principle should be applied to the interpretation of s 13(2). Even though the PSA does not give express recognition to an offender’s right not to be penalised for insisting on a trial, this was endorsed as a common law right in both *Siganto* and *Cameron*.⁷⁷ Without an express statutory abrogation, the right should be accepted as an implied element of the sentencing scheme established by the PSA.

A different view of the application of *Cameron* has been taken by the courts in South Australia and New South Wales. In both states, the view has been expressed that features of the relevant State legislation entitle courts to calculate credit for guilty pleas on the basis of utilitarian considerations despite the disapproval of this approach in *Cameron*. In *R v Place*, there were dicta from the South Australia Court of Criminal Appeal to the effect that, when the State legislature provided that guilty pleas should be taken into account in sentencing, it must be assumed to have been aware of the existing practice of basing credit on utilitarian considerations.⁷⁸ In *R v Sharma*, the New South Wales Court of Criminal Appeal focused on two ways in the New South Wales legislation differed from the Western Australia legislation which had been in issue in

⁷⁴ Ibid [66].

⁷⁵ Ibid [74]-[75].

⁷⁶ Contrast McHugh J at [41] with Kirby J at [69]-[73].

⁷⁷ Above, n 61 and 67.

⁷⁸ [2002] SASC 101, [76]-[78]. It was also noted that the High Court in *Cameron* had itself raised the issue of discrimination and that it had not been the subject of submissions in argument.

Cameron.⁷⁹ First the New South Wales legislation, unlike the Western Australia legislation, provides that a guilty plea ‘must’ be taken into account. It was thought to be significant that this prescription is unqualified. It is not made dependent on any subjective factors. Secondly, the New South Wales legislation, unlike the Western Australia legislation, does not contain an express affirmation of the common law principle that a person should not be penalised for insisting on the right to trial. The Queensland PSA is similar in both respects to the New South Wales legislation. Nevertheless, the differences between the various state legislative schemes hardly seem sufficient to justify ignoring the issue of discrimination which was identified in *Cameron*. If legislation can sensibly be interpreted to avoid discriminatory effect, it should be.

Attempts to circumvent the authority of *Cameron* may stem from concerns about potentially adverse effects of focusing on subjective considerations. The joint judgment in *Cameron* did not analyse the character of the relevant subjective considerations with precision. In the crucial passage in the joint judgment, it was said that ‘the issue is to what extent the plea is indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice’.⁸⁰ This statement is susceptible to various interpretations. In particular, what does ‘willingness to assist the course of justice’ mean? Does it simply signify being willing to assist in the sense of not intending to resist the prosecution by pleading not guilty or hinder it by delaying a guilty plea? On this interpretation an accused is willing to assist the course of justice if there is willingness to save the prosecution time and expense, even though eventual conviction would be inevitable in any event.⁸¹ Or does ‘willingness to assist the course of justice’ signify a requirement for willingness to provide some more positive assistance to the prosecution? Examples of more positive assistance might be disclosing an unsuspected offence, or supplying the evidence to confirm a suspicion, or pleading guilty in a case where the evidence is insufficient for a conviction. The second, more restrictive, interpretation seemed to be adopted by Fryberg J, in *R v Houghton*.⁸² He observed that, although there had been a guilty plea, the prosecution case was strong, so that the accused ‘might well have regarded conviction as inevitable’, and that there had been no cooperation in the prosecution of accomplices. He then concluded: ‘These matters do not suggest a willingness to facilitate the course of justice.’ He would therefore have limited the credit for the guilty plea.⁸³ The attempts to distinguish *Cameron* by the South Australia and New South Wales courts may be perhaps explained by a similar interpretation of ‘willingness to assist the course of justice’ and by concerns about the practical effect of such an interpretation.

The interpretation of ‘willingness to assist the course of justice’ is important for the future of guilty pleas. It cannot be realistically contended that many guilty pleas are

⁷⁹ [2002] NSWCCA 142, [50]-[68].

⁸⁰ [2002] HCA 6, [22].

⁸¹ See *R v Shannon* (1979) 21 SASR 442, 452-3, where King CJ referred to: ‘... a willingness to cooperate in the administration of justice by saving the expense and inconvenience of a trial, or the necessity of witnesses giving evidence, or results from some other consideration which is in the public interest; notwithstanding that the motive, or one of the motives, for such cooperation may be a desire to earn leniency....’

⁸² [2002] QCA 159, [32]. Fryberg J was dissenting on the matter of the overall sentence. He was the only judge who discussed the significance of the guilty plea.

⁸³ *Ibid* [33].

driven by remorse or acceptance of responsibility. As it was said in a recent Queensland case:

I would doubt whether at least in this State a guilty plea is usually evidence of remorse. More likely in most cases, it is evidence of an expectation on the part of an offender usually as a result of legal advice that a guilty plea will probably result in a reduced sentence.⁸⁴

It might also be supposed that few persons pleading guilty are willing to do more than avoid forcing the prosecution to trial when eventual conviction already appears inevitable. If more were to be required in order to be 'willing to assist the course of justice', the incidence of guilty pleas would probably diminish markedly. The search in *Cameron* for a moral justification for leniency in cases of guilty pleas would have the result of eliminating most of them.

It would be unfortunate if the High Court's broad endorsement of the use of discounts for pleading guilty were taken, because of loose language in the joint judgment, to restrict their availability. There was no indication in the joint judgment that a drastic change to the administration of criminal justice was intended or even contemplated.⁸⁵ If Gaudron, Gummow and Callinan JJ had meant to impose any significant restriction on discounts for guilty pleas, they would be expected to have offered a clear indication of and justification for such a major change in sentencing practice. They would also be expected to have examined the significance of the restriction for *Cameron* itself. If positive assistance to the prosecution were to be a condition for a discount, it would hardly have sufficed that the guilty plea in *Cameron* was made at the first reasonable opportunity. Evidence of greater cooperation from the accused would have been needed. That it was not required suggests that 'willingness to assist the course of justice' means no more than willingness to assist in the sense of not intending to resist or hinder the prosecution.

On the suggested interpretation of the joint judgment, its impact on sentencing practice should be minimal. It is particularly difficult to imagine that a discount justifiable on utilitarian grounds would ever be excluded on 'subjective' grounds. A person who voluntarily makes a guilty plea knows and accepts that a conviction will follow without trial. The plea therefore always manifests willingness to assist the course of justice, in the sense described, even though it may be accompanied by various competing emotions. Indeed, the plea manifests willingness to permit the utilitarian benefits of an uncontested trial to be attained. From a utilitarian standpoint, it may be debatable whether the benefits accruing from a guilty plea are worth discounting the sentence. Nevertheless, if the objective benefits are sufficient for this purpose, it will be justifiable to give the discount to an accused whose decision to plead guilty makes the benefits attainable. The need for a 'subjective' moral justification therefore presents no barrier to discounts being given for utilitarian reasons.

Cases in which objective and subjective considerations produce different sentencing outcomes are most likely to arise where an accused is willing to assist the course of

⁸⁴ *R v Jones* [2000] QCA 84 (Davies JA). See also *R v Thomson*; *R v Houlton* [2000] NSWCCA 309, [117].

⁸⁵ It is, however, conceded that McHugh J, at [47], questioned whether discounts for pleading guilty could ever be given in the exercise of federal jurisdiction.

justice but is unable to do so or at least unable to do so fully. In such cases, the 'subjective' approach can be more generous in awarding discounts. *Cameron* itself provides an example: the lower courts denied a full discount because of the low level of objective savings whereas the High Court granted it because a plea at the earliest reasonable opportunity expressed a willingness to provide full assistance to the course of justice. It was the responsibility of the prosecution, not the accused, that the full benefit from the earliest conceivable indication of a guilty plea was no longer attainable.

Of course, even if a utilitarian rationale for sentencing discounts were to be adopted, it might still be possible to conclude that the full discount should apply whenever a guilty plea is made at the earliest reasonable opportunity. Indeed, that was the conclusion of Kirby J in *Cameron*.⁸⁶ Thus, different views of the moral justification for discounting sentences because of guilty pleas do not necessarily lead to different conclusions about who is entitled to discounts. In *Cameron* itself, the High Court's adoption of the subjective approach brought success to the appeal against the sentence. That result only occurred, however, because of the restrictive view of the objective approach which had been adopted in the lower courts.

III CONCLUSIONS

There was a time when the High Court of Australia steered clear of sentencing matters. It was not until *Veen v The Queen [No 1]* was decided in 1979 that the High Court abandoned this tradition of 'hands-off sentencing'.⁸⁷ *Veen [No 1]* was the first case for which special leave to appeal against a sentence was granted. Subsequently, the High Court has made several contributions to the development of sentencing principles. With respect to Queensland offences, however, those principles must operate within the statutory framework set by the PSA.

The PSA expresses sentencing principles in loose terms which leave room for the principles of the High Court to play important complementary roles. Some of the principles articulated by the High Court can be used to put flesh on the bones of the PSA scheme. The *Veen* cases have been used in this way, giving priority to considerations of proportionality among the various factors required to be taken into account by the PSA. *Wong v The Queen; Leung v The Queen* provides another example. Effectively, it decides that statutory lists of various factors to be taken into account in sentencing, like the lists in s 9 of the PSA, need to be taken seriously and must not be by-passed by judicially-promulgated numerical guidelines as crude as those at issue in that case. *Cameron v The Queen* provides yet another example. Its prescriptions for discounting sentences for guilty pleas can be incorporated in the interpretation of s 13 of the PSA. When s 13(2) says that a court making a reduction of sentence may have regard to the time of the plea or its indication, the point of reference should be the time when an indication of a guilty plea might reasonably have been expected.

The principles of the High Court are, however, subject to the legislative supremacy of the PSA. It may be questioned whether some parts of the joint judgment in *Wong and Leung* are consistent with the scheme of the PSA. The joint judgment links a

⁸⁶ At [74]-[75].

⁸⁷ (1979) 143 CLR 458, 496 (Murphy J).

condemnation of all numerical guidelines with a rejection of ‘two-stage’ sentencing and an endorsement of ‘instinctive synthesis’ as the correct sentencing methodology. The rejection of ‘two-stage’ sentencing does not sit easily with the provisions of the PSA respecting discounts for pleading guilty and for cooperating with law enforcement agencies. Instinctive synthesis must be excluded in those contexts. The terms of the PSA present no barrier to using instinctive synthesis in other contexts. On the other hand, it might also be noted that the general hostility of the joint judgment to ‘two-stage’ sentencing is not reflected in the PSA. It might therefore be argued that the Queensland Court of Appeal is justified in making wider use of ‘two-stage’ sentencing for State offences, regardless of the views of the High Court about its appropriateness as a general methodology in sentencing.