Sentencing Advisory Council

Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts

State Government Victoria

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Abbreviations

6AAA	section 6AAA of the *Sentencing Act 1991* (Vic)
ANOVA	analysis of variance
CBO	community-based order
CCO	community correction order
ICO	intensive correction order
ns	not significant
TES	total effective sentence
YJCO	youth justice centre order

Glossary

6AAA statement

A statement by a sentencing court indicating the sentence and the non-parole period, if any, that it would have imposed but for the offender's plea of guilty (*Sentencing Act 1991* (Vic) s 6AAA).

Aggregate sentence

A sentence that occurs when a judge hands down one sentence for multiple charges within a case, as opposed to individual sentences for individual charges within a case.

ANOVA

A test used to assess if two or more groups differ to a statistically significant extent when their performance is measured using a continuous, numerical variable, for example, whether people indicating a guilty plea during the committal stage tend to receive a significantly higher sentence discount than people pleading guilty at the door of the court or during trial. If the data being measured are categorical, rather than continuous, alternatives such as a z-test should be considered (that is, if the data were simply measuring whether or not a discount was given for entering a plea at various stages of the court process, a z-test should be used; however, if the data were trying to measure the degree of discount that tended to be given at each stage, ANOVA should be considered).

A variant of the standard ANOVA, known as Welch's ANOVA, which performs much the same function, can be used if the data do not fulfil an assumption known as 'homogeneity of variance' (the assumption that the standard deviations and variance in performance scores between the different groups should be similar to each other for the standard ANOVA to work properly).

ANOVA *cont.*	Both the standard ANOVA and Welch's ANOVA are known as 'omnibus tests', which means that they can detect whether a significant difference exists somewhere between the groups being measured but not which pairs of groups are significantly different from each other. This is not a problem if only two groups are being studied. However, if the data involve three or more groups, ANOVA usually needs to be followed by post-hoc testing to identify which groups are different from each other. See also 'p-value', 'post-hoc test', 'statistical significance', and 'z-test'.
Average (mean)	See 'mean'.
Baseline median	A median calculated according to the counting rules under the *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) and further assumptions detailed in the Council's *Calculating the Baseline Offence Median: Report*.
Baseline offence	An offence for which a baseline sentence has been prescribed under the *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic). The current baseline offences are murder; culpable driving causing death; trafficking in a large commercial quantity of a drug or drugs of dependence; incest with a child/step-child/lineal descendant aged under 18; incest with the child/step-child/lineal descendant, aged under 18, of a de facto spouse; sexual penetration with a child under 12; and persistent sexual abuse of a child under 16.
Baseline sentence	The sentence that parliament intends as the median sentence for sentences imposed for the relevant baseline offence. The median sentence is the midpoint or middle sentence when all sentences imposed for an offence over a given period are ranked from lowest to highest – so that half of all sentences imposed are lower than the median and half are higher. See 'baseline median' and 'median'.
Carriage service	'A service for carrying communications by means of guided and/or unguided electromagnetic energy' (*Telecommunications Act 1997* (Cth) s 7). 'Carriage service' in the *Criminal Code Act 1995* (Cth) has the same meaning as in the *Telecommunications Act 1997* (Cth). An example of an offence committed using a carriage service is the offence of using a carriage service to transmit child pornography, for example, sending child pornography material over the internet.
Case	A collection of one or more charges against a person sentenced at the one hearing.
Charge	A single allegation of an offence. See also 'proven charge'.
Community correction order (CCO)	A sentencing order available since 16 January 2012 that may require the offender to comply with a range of conditions including undertaking unpaid community work, undergoing treatment, and being supervised by a community corrections officer. A community correction order may also include curfews and restrictions on the offender's movements and whom the offender may associate with (*Sentencing Act 1991* (Vic) pt 3A).
Defendant	A person who is charged with a criminal offence.
Eligible fine	A fine exceeding 10 penalty units or an aggregate fine exceeding 20 penalty units, triggering section 6AAA of the *Sentencing Act 1991* (Vic). See also 'fine'.

Fine A monetary penalty imposed by a court as a sentence. See also 'eligible fine'.

Higher courts For the purposes of this report, the County Court and the Supreme Court of Victoria.

Mean A way to estimate the middle value in a set or a distribution of values (also known as an 'average'). The mean is calculated by adding all the values in the set, then dividing the total by the number of values used. For example, 2.8 is the mean value in the following set of numbers:

1, 2, 2, 3, 4, 5

The mean is the sum of the values in the set (in this case 17) divided by the number of values used to reach that total (in this case 6). The mean is particularly sensitive to the influence of outliers (values that are very small or very large relative to the majority of values in a set). An alternative way to measure the middle value in a set of numbers is to calculate a median, which is resistant to the influence of outliers.

Median The middle value in a set or a distribution of values. For example, 4 is the median value in the following set of numbers:

1, 2, 2, 3, 3, 4, 5, 5, 6, 6, 7

The median represents a statistical midpoint, where half of the values (1, 2, 2, 3, 3) are below the median, and half of the values (5, 5, 6, 6, 7) are above the median. If a set has an even number of values, the two middle values (sometimes defined as the lower median and the upper median) are averaged to find the median.

Offender A person who has been found guilty of an offence.

P-value A score produced when performing a statistical test such as ANOVA, Welch's ANOVA, a z-test, or any of the varieties of post-hoc test. The p-value is the score that determines if the groups being studied in the relevant statistical tests are different enough to be considered 'statistically significant'.

In this report, p-values are displayed in the following ways: $p < 0.001$ indicates that the differences between groups are 'highly significant', $p < 0.01$ indicates that the differences are 'moderately significant', and $p < 0.05$ indicates that the differences are still significant but to a lesser degree compared with the other thresholds. P-values greater than 0.05 indicate that no evidence of statistically significant differences has been found between the groups in this report and are abbreviated as 'ns'. One thing to note about non-significant p-values is that there is always a possibility that future studies using different research designs or data samples may find a difference where this study did not.

Another limitation of the p-value is that it can only determine if a statistically significant difference exists between the groups examined in the data (that is, whether the results occurred by chance), but it does not provide any insight into the magnitude of the difference. Other aspects of the data, such as the mean (average), median, or percentage distributions, should be examined in conjunction with the p-value to determine whether the differences found are small or large. See also: 'ANOVA', 'post-hoc test', 'statistical significance', and 'z-test'.

Post-hoc test

A test used to do a follow-up from an 'omnibus' test such as ANOVA or Welch's ANOVA if three or more groups are being examined. Whereas the omnibus test can identify if an overall significant difference exists somewhere in the groups being studied, post-hoc testing is required to determine which individual groups are significantly different relative to each other.

A wide variety of post-hoc tests exists, each of which are differently suitable based on the characteristics of the data. This report uses two post-hoc tests in particular: a Games-Howell test and Hochberg's GT 2 test. The Games-Howell test is appropriate for use if the data violate the 'homogeneity of variance' assumption of ANOVA (a Games-Howell test would be used in situations where Welch's ANOVA was required), while Hochberg's GT 2 test is used if this assumption is fulfilled, but the sample sizes in the groups are very different. See also 'ANOVA', 'p-value', and 'statistical significance'.

Principal proven offence (PPO)

If a person is sentenced for a case with a single charge, the principal proven offence is the offence for that charge. If a person is sentenced for more than one charge in a single case, the principal proven offence is the offence for the charge that attracted the most serious sentence according to the sentencing hierarchy.

Proven charge

A criminal charge that has been proven against an offender (that is, the offender has been found guilty).

Reference period

The five-year period over which sentences are examined in this report: 2009–10 to 2013–14.

Stated sentence discount scheme

The requirement, under section 6AAA of the *Sentencing Act 1991* (Vic) and section 362A of the *Children, Youth and Families Act 2005* (Vic), that in certain cases in which a sentencing court has imposed a less severe sentence because the offender has pleaded guilty, the court must state the sentence that it would have imposed if the offender had not pleaded guilty. Subtracting the actual sentence from this stated sentence reveals the 'discount' given for the guilty plea.

Statistical significance

A statistical measure of the likelihood that the difference between two or more numbers has not occurred by chance. The most widely used threshold of statistical significance, and the threshold used in this report, is 0.05, which means there is a 5% likelihood that the observed difference occurred by chance alone. Statistical significance is often expressed as a 'p-value'. A statistically significant result does not necessarily mean that the magnitude of difference between groups is large, as relatively small differences may be statistically significant. See also 'ANOVA', 'p-value', 'post-hoc test', and 'z-test'.

Suspended sentence

A term of imprisonment that is suspended (that is, not activated), wholly or in part, for a specified period (the 'operational period') subject to the condition to be of good behaviour (that is, not reoffend). A suspended sentence may be imposed for a maximum of two years in the Magistrates' Court or three years in the County and Supreme Courts. Now abolished in Victoria, suspended sentences cannot be imposed in the higher courts for any offence committed on or after 1 September 2013 and in the Magistrates' Court for any offence committed on or after 1 September 2014 (*Sentencing Act 1991* (Vic) ss 27–31 (repealed)).

Total effective sentence (TES)

In a case involving a single charge, the sentence imposed for that charge. In a case involving multiple charges, the total effective sentence is the total sentence resulting from all charges in the case, following orders for concurrency and/or cumulation.

Volatility of low numbers

An issue that occurs in a dataset with a low number of values, where each value disproportionately affects the outcome of descriptive statistics, compared with each value in a dataset with a high number of values. The outcome may not be truly representative of other numbers in that group.

Youth detention

In this report, youth justice centre orders and youth residential centre orders collectively.

Youth justice centre order

A sentence requiring an offender aged 15–20 years at the time of sentencing to be detained in a youth justice centre.

In the Children's Court, a youth justice centre order is the most severe sentence that may be imposed on an offender aged 15–20 years at the time of sentencing (under the *Children, Youth and Families Act 2005* (Vic)). The maximum length of detention is two years for a single offence or three years for more than one offence.

In an adult court, offenders aged 15–20 years at the time of sentencing may be sentenced to a youth justice centre order as an alternative to imprisonment (under the *Sentencing Act 1991* (Vic) ss 7(1)(d), 32–35). A youth justice centre order may be imposed for a maximum of two years in the Magistrates' Court or three years in the County and Supreme Courts.

Youth residential centre order

A sentence requiring a young offender (aged under 15 years at the time of sentencing) to be detained in a youth residential centre. A youth residential centre order may be imposed for a maximum of two years in the Magistrates' Court or three years in the County and Supreme Courts (*Sentencing Act 1991* (Vic) ss 7(1)(da), 32–35).

Z-test

A statistical test used to assess whether the frequency of an event occurring between two groups is different enough to be statistically significant, for example, the frequency of pleading guilty at the committal stage between males and females. The z-test is used to measure the frequency of categorical variables occurring (that is, the event being measured can fit into discrete mutually exclusive categories such as 'plead guilty at the committal stage' or 'did not plead guilty at the committal stage'). If the variable being measured is continuous rather than categorical (for example, the degree of imprisonment length reduction due to a guilty plea, rather than just whether a reduction was given or not), other statistical tests such as ANOVA should be considered instead. See also 'p-value', 'statistical significance', and 'ANOVA'.

Z-tests have been used in previous Council reports including *Community Correction Orders: Monitoring Report* (2014) and *Exploring the Relationship between Community-Based Order Conditions and Reoffending* (2014).

Executive summary

This report examines the rate and timing of guilty pleas, and their effect on sentence, in the Supreme Court of Victoria and the County Court of Victoria ('the higher courts') from July 2009 to June 2014.

The study includes a total of 9,618 cases and 35,902 charges sentenced in the higher courts during the reference period (2009–10 to 2013–14).

Since 2008, section 6AAA of the Victorian *Sentencing Act 1991* has required sentencing judges (in certain circumstances) to state the sentence that they would have imposed if the offender had not pleaded guilty. Subtracting the actual sentence from this notional undiscounted sentence reveals the stated reduction in sentence, or 'discount' for the guilty plea.

As well as making the discounts more transparent to the parties in the case, the very high compliance with section 6AAA in the higher courts has enabled extensive data collection on plea-based sentence discounts for the first time in Victoria. During the reference period (2009–10 to 2013–14), there were over 7,000 higher court cases with sufficient detail in the 6AAA statement to analyse the reductions awarded for guilty pleas. A unique feature of these data is that the information about the plea-based reduction is sourced directly from the sentencing judges.

What proportion of offenders plead guilty?

Most offenders sentenced in the Victorian higher courts plead guilty. From 2009–10 to 2013–14, 72.4% of proven charges in the Supreme Court and 84.6% of proven charges in the County Court were resolved by a guilty plea.

During the reference period, the lowest plea rate in both the County Court and the Supreme Court occurred in 2011–12, and the second lowest plea rate in both courts occurred in 2010–11. While the fluctuation was more pronounced in the Supreme Court (possibly due to the volatility of the lower number of sentenced cases heard each year), it is noted that the lowest plea rates in both courts occurred in the same year.

Looking at all cases in the County Court (not just those in which the charges were proven) during the reference period, the plea rate fluctuated between 71% and 74.3%.

Must courts have regard to a guilty plea?

A long established principle of sentencing law – in Victoria and elsewhere – is that offenders who plead guilty to an offence can generally expect to receive a lower sentence than they would have received had they not pleaded guilty to the charge. Section 5(2)(e) of the Victorian *Sentencing Act 1991* requires a sentencing court to have regard to whether the offender pleaded guilty to the offence and, if so, the stage in proceedings at which the offender pleaded guilty or indicated an intention to do so.

Following advice from the Sentencing Advisory Council, in 2008 the Victorian Government introduced section 6AAA of the *Sentencing Act 1991* (Vic), which requires a sentencing judge (in certain circumstances) to state the sentence that he or she would have imposed on an offender but for the guilty plea.

Requiring sentencing judges to articulate the effect of the guilty plea on the sentence was intended to increase transparency, both in individual cases (by making it clear to all parties the difference that the guilty plea made to the sentence) and more generally, by requiring these discounts to be recorded.

Have plea rates or timing changed?

The introduction of section 6AAA was one part of a concerted effort by the government, the courts, the Office of Public Prosecutions (OPP), Victoria Legal Aid, and legal practitioners to reform criminal procedure to ensure that defendants who intended to plead guilty were in a position to do so at the earliest possible opportunity. Changes included reforms to pre-trial processes, earlier provision of evidence to the defence, a change in OPP policy intended to facilitate early discussion between the parties, and greater case management by the courts.

By increasing transparency around the sentence discounts for pleading guilty, section 6AAA was intended to encourage defendants who intended to plead guilty to do so as early as possible without inducing or coercing defendants to change their plea. Ideally there would be no increase in the proportion of cases resolved by a guilty plea, 'but an increase in the proportion of guilty pleas entered at an early stage of the proceedings'.[1]

A comparison of plea rates and timing from 2004–05 to 2013–14 in the County Court revealed that there has been no increase in the proportion of cases resolved by a guilty plea (on the contrary, plea rates have remained relatively stable while slightly, but statistically significantly, decreasing). Over the same period there was a statistically significant increase in the proportion of guilty pleas entered at an early stage in the proceedings, with the biggest jump occurring between section 6AAA's first and second year of operation.

It is difficult to isolate the specific effect, if any, that section 6AAA may have had on changes to plea timing, given the many procedural reforms that have been unfolding over the past decade. However, the findings are consistent with the intended outcome of section 6AAA and other reforms.

Factors associated with guilty pleas

Offence type

Examining the offences with the highest overall *number* of guilty and not guilty pleas is useful in considering the workload of the courts, prosecution, defence, and police. Looking at the offences with a high *proportion* of guilty and not guilty pleas (even if a relatively low number of charges are dealt with each year) sheds some light on the dynamics of prosecuting these offences.

The data revealed very different plea rates for different offences. For example, the offence of murder had the lowest proportion of guilty pleas (48.0% of proven murder charges), while attempted armed robbery had one of the highest plea rates (96.8% of proven charges).

The offences with the highest proportion of guilty pleas tended to be those that, by their nature, may involve a strong evidence trail. For example, attempted burglary and attempted armed robbery, which both had high rates of guilty pleas, may involve some form of intervention that prevents the completion of the offence, such as the offender being 'caught in the act'. Similarly, some offenders charged with cultivating narcotic plants may have a house-sitter role (for example, living on-site and taking care of the plants), which makes these offenders liable to be caught in the act of committing the offence. Other offences with high plea rates involved a paper/computer trail, such as sexual offences using a carriage service (for example, using the internet to access child pornography, grooming children under 16, or transmitting indecent communications to children).

1. Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts: Final Report* (2007) 134.

Murder was the offence with the lowest proportion of guilty pleas. A number of sexual offences – such as committing an indecent act with a child under 16, indecent assault, rape, incest, and sexual penetration with a child under 16 – were among the offences with both the highest *number* and the highest *proportion* of proven charges with a not guilty plea.

High-volume property offences such as theft, obtaining property by deception, and burglary were represented in the group with the highest number of charges resolved by guilty plea and the group with the highest number of charges with a not guilty plea, reflecting the large volume of these charges coming before the courts.

Baseline offences

The report also examines a number of offences in more detail, including all the offences included in the recently introduced baseline sentencing scheme. One of the implications of the baseline sentencing scheme is that it may affect plea rates (and possibly plea timing) for the seven prescribed baseline offences. The data presented in this report show that plea rates for some of these offences (such as murder and some sexual offences) are already relatively low, compared with other offences. Any reductions in plea rates for these offences could have implications for the workload of the courts and for victims and witnesses who may be required to give evidence in circumstances where, but for the baseline sentencing scheme, the defendant may have been inclined to plead guilty.

Some baseline offences (such as murder, trafficking in a large commercial quantity of a drug of dependence, and culpable driving causing death) have lesser, related charges available to be prosecuted (such as manslaughter, trafficking in a commercial quantity of a drug of dependence, and dangerous driving causing death). There is a possibility that the baseline sentencing scheme may also result in changes to the offence mix before the courts as a consequence of changed plea negotiation practices.

A further possible implication of the baseline sentencing scheme is that increased complexity of plea negotiations for baseline (and related) offences may delay guilty pleas and undo some of the progress in earlier plea timing found in this report.

Sentence type

The proportion of proven charges resolved by a guilty plea differed across sentence types, with sentences of imprisonment having the lowest guilty plea rates (80.9%), whereas almost all proven charges sentenced to a youth justice centre order (97.9%) or a community correction order (95.8%) were resolved by a guilty plea.

With the sole exception of fines, the most common plea timing stage for each of the seven most common sentence types in the County Court was a guilty plea during the committal stage. The most striking finding was the high proportion of youth justice centre order cases (87.3%) in which the offender indicated a guilty plea during the committal stage. This was:

- significantly higher than the proportion of cases for all other sentence types with a plea at this stage; and
- significantly higher than the proportion of youth justice centre order cases at any other plea timing stage.

Because youth justice centre orders may only be imposed if the offender is aged under 21 at the time of sentencing, part of the explanation for the high proportion of early guilty pleas may be offenders trying to expedite matters to ensure that their case is sentenced before they turn 21. Another possible explanation for their high plea rate may be the mitigating effect of pleading guilty (including as evidence of the offender's remorse and good prospects of rehabilitation in some cases), which may support a submission that the offender be sentenced to a youth justice centre order rather than imprisonment. The data on sentence discounts offer some support for this hypothesis, as in 53.4% of the 262 youth justice centre order cases with a 6AAA statement, the sentencing judge expressly stated that a different sentence type (almost always imprisonment) would have been imposed had the offender not pleaded guilty.

As the majority of all offences in the Supreme Court were sentenced to imprisonment (83.4%), plea timing for different sentence types could not meaningfully be compared.

Gender

The data presented in this report also revealed that there appears to be no significant difference in plea timing between males and females, aside from a statistically significant gender difference in the proportion of proven cases with a not guilty plea in the County Court (with males significantly more likely than females to plead not guilty).

Corporate status

There were no significant differences in plea timing between corporations and people. However, when the comparison was limited to fined cases (as 39 out of the 40 corporations received a fine as their most serious sentence), corporations were statistically significantly more likely to indicate a guilty plea at the committal stage (47.4% compared to 23.3% of natural persons), while natural persons were more likely to plead guilty at the door of the court (31.2% compared to 13.2% of corporations).

Offender's age

With increasing offender age, the rate of guilty pleas significantly and progressively decreased, and those offenders pleading guilty did so later.

In the County Court, adult offenders were most likely to indicate a guilty plea during the committal stage, regardless of age. Young adult offenders (aged 18–21) had the highest proportion of guilty pleas at the committal stage. As offender age increased, the proportion of guilty pleas indicated during the committal stage progressively (and statistically significantly) decreased, and the rate of not guilty pleas progressively and significantly increased.

In the Supreme Court, 18–21 year old offenders were most likely to indicate a guilty plea during the committal stage (37.5%), and they were more likely than offenders in all other age groups to plead guilty at this stage. The proportion of proven cases with a not guilty plea steadily increased as offender age increased. While care should be taken in interpreting these data due to the relatively small number of cases in the Supreme Court, the findings are consistent with the trend in the County Court.

Compliance with section 6AAA

This report found very high rates of compliance with section 6AAA of the *Sentencing Act 1991* (Vic) in the higher courts during the reference period for the sentence types analysed. In 99.6% of imprisonment cases, 98.9% of youth justice centre order cases, and 93.9% of eligible fines, the court made a 6AAA statement or provided a reason as to why compliance was unnecessary or problematic. These reasons are explored in Chapter 4 of this report.

The stated discount for a guilty plea

During the reference period, 7,073 cases had 6AAA statements with sufficient information to analyse the effect of the guilty plea on the offenders' sentences. The actual sentences imposed were compared with the notional sentences in the 6AAA statement to ascertain whether the guilty plea changed the sentence type or length.

In one-third of cases with a complete 6AAA statement, the sentence type changed as a result of the offender's guilty plea (for example, an offender sentenced to a community correction order would have received a sentence of imprisonment had he or she not pleaded guilty).

In almost all of the remaining two-thirds of cases, the offender received a shorter sentence because of his or her guilty plea.

Youth justice centre orders and eligible fines

For youth justice centre orders, the most common discount in sentence length for a guilty plea was 30% to less than 40% (36.1% of cases); however, the total number of cases was small (122 cases) compared with the 4,249 imprisonment cases that received a plea-based discount in sentence length. For eligible fines with a 6AAA statement (67 cases), the most common guilty plea discount was 20% to less than 30% of the fine that would otherwise have been imposed (40.3% of cases).

Imprisonment

The most common guilty plea discount for imprisonment sentences was 20% to less than 30% of the sentence that would otherwise have been imposed (44.9% of cases). The next most common discount was 30% to less than 40% (26.8% of cases).

As well as being required to take into account a guilty plea in sentencing, judges are required to take into account the stage at which the offender indicated or entered the plea. For imprisonment cases, sentence discounts for the guilty plea were compared at four key plea timing stages, two of which can be considered 'early' pleas and two of which can be considered 'late pleas':

- **Early pleas** – (1) guilty pleas entered during the committal stage (in the Magistrates' Court) and (2) guilty pleas entered during the pre-trial hearing stage; and
- **Late pleas** – (3) guilty pleas entered at the door of the court and (4) guilty pleas entered during trial.

Cases with 'early' guilty pleas (during the committal stage or pre-trial hearing stage) received slightly (but statistically significant) larger sentence discounts (as a group) than cases with 'late' guilty pleas (at the door of the court or during trial).

However, while the difference in plea-based discounts for early and late guilty pleas was statistically significant, it was smaller than might be expected, given that the stage at which a plea is entered is a relevant sentencing consideration. One possible explanation is that the distinction between early and late guilty pleas is 'muddied' by cases in which a case recorded as a 'late' plea warrants similar treatment to an 'early' plea because the offender pleaded guilty at the first practicable opportunity. If it were possible to identify such cases and combine them with 'early' plea cases and to compare the combined group with the remaining 'late' plea cases, the differences between the two groups may be more pronounced.

Sentence discounts for pleading guilty were also associated with sentence length. Offenders who received shorter sentences of imprisonment received a larger discount (as a proportion of their sentence) than offenders who received a longer sentence.

When sentence length was held constant (by examining plea timing and sentence discounts at two fixed imprisonment lengths), the relationship between plea timing and the sentence discount was still present (although statistically weaker). This suggests that plea timing and sentence length are both associated with the degree of discount.

1. Section 6AAA of the *Sentencing Act 1991* (Vic) and the focus of this report

Purpose

1.1 This report examines the rate and timing of guilty pleas and their effect on sentences in the Supreme Court of Victoria and the County Court of Victoria ('the higher courts') from 1 July 2009 to 30 June 2014.

1.2 Since 2008, section 6AAA of the Victorian *Sentencing Act 1991* has required sentencing judges (in certain circumstances) to state the sentence that they would have imposed if the offender had not pleaded guilty.[2] Subtracting the actual sentence from this notional undiscounted sentence reveals the stated reduction in sentence, or 'discount' that was given for the guilty plea.

1.3 As well as making the discounts more transparent to the parties in the case, the very high compliance with section 6AAA in the higher courts has enabled extensive data collection on plea-based discounts for the first time in Victoria.

1.4 Section 6AAA has a counterpart that applies to the Victorian Children's Court: section 362A of the *Children, Youth and Families Act 2005* (Vic). In this report, the scheme created by these two provisions is referred to as the 'stated sentence discount scheme'. However, the focus of this report is on the operation of section 6AAA in the higher courts.

1.5 The stated sentence discount scheme was introduced in 2008 following recommendations of the Sentencing Advisory Council in response to a reference in 2005 from the then Attorney-General.[3]

Aims

1.6 This report uses cases sentenced at first instance in the higher courts over a five-year reference period (1 July 2009 to 30 June 2014) to analyse:

- the rate and timing of guilty pleas, both generally and for particular offences, including offences in the recently introduced baseline sentencing scheme;[4]
- whether there has been a change to the rate and timing of guilty pleas in the County Court over the last 10 years;
- whether courts are applying section 6AAA in relevant cases by stating the sentence and the non-parole period, if any, that would have been imposed if the offender had not pleaded guilty; and
- the amount of the sentencing 'discount' for a guilty plea.

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2. *Sentencing Act 1991* (Vic) s 6AAA. See further: [1.12]–[1.20].
3. Sentencing Advisory Council (2007), above n 1.
4. *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic). See further: [3.17].

1.7 This report builds on the Council's previous work on guilty pleas, sentence indication, and specified sentence discounts.[5] However, the focus of this report is on the operation of section 6AAA alone, and not on the sentence indication scheme.

Exclusions

1.8 This report does not examine:

- the application of section 6AAA to custodial orders to which it originally applied but have since been abolished, such as suspended sentences;
- the application of section 6AAA in the Magistrates' Court or section 362A of the *Children, Youth and Families Act 2005* (Vic) in the Children's Court;
- the Victorian sentence indication scheme;[6]
- the plea discussion (or negotiation) process and associated issues and risks;[7]
- differences between the Council's original recommendations and the legislation that was subsequently enacted;[8] and
- cases in which the defendant was found to be unfit to stand trial and/or not guilty because of mental impairment and received a custodial or non-custodial supervision order or an order for unconditional release.[9]

Relevance of a guilty plea to sentence

1.9 The relevance of a guilty plea is expressly recognised in the Victorian *Sentencing Act 1991*, which provides that, in sentencing an offender, a court must have regard to 'whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so'.[10] Courts usually treat a plea of guilty as a mitigating factor in sentencing offenders. It can provide a powerful indication of remorse (and by extension cast light on the offender's prospects of rehabilitation). Even in the absence of evidence of remorse, a plea of guilty has a substantial utilitarian benefit.[11] The community is spared the time and expense of a trial. Justice can be delivered promptly, and victims and witnesses are spared the trauma of testifying in a trial.

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5. See further: Sentencing Advisory Council (2007), above n 1; Sentencing Advisory Council, *Sentence Indication: A Report on the Pilot Scheme* (2010).
6. For more information about this scheme, see Sentencing Advisory Council (2010), above n 5.
7. Much has been written on the plea negotiation process in Australia and elsewhere, which is not the subject of this report. See, for example: Sentencing Advisory Council (2007), above n 1, 67–72; Elizabeth Wren and Lorana Bartels, '"Guilty, Your Honour": Recent Legislative Developments on the Guilty Plea Discount and an Australian Capital Territory Case Study on its Operation' (2014) 35 *Adelaide Law Review* 361, 362–363; Asher Flynn, 'Bargaining With Justice: Victims, Plea Bargaining and the *Victims' Charter Act 2006* (Vic)' (2011) 37(3) *Monash University Law Review* 73; Asher Flynn, '"Fortunately We in Victoria Are Not in That UK Situation": Australian and United Kingdom Legal Perspectives on Plea Bargaining Reform' (2011) 16 *Deakin Law Review* 361; Robert D. Seifman and Arie Freiberg, 'Plea-Bargaining in Victoria: The Role of Counsel' (2001) 25 *Criminal Law Journal* 64; John Champion, 'Plea Offers and Discontinuances: DPP Speech' (Paper presented at the Law Institute of Victoria Annual Criminal Law Conference, Melbourne, 27 July 2012) <http://www.opp.vic.gov.au/Resources/Publications> at 17 April 2015; Juliet Horne, *Plea Bargains, Guilty Pleas and the Consequences for Appeal in England and Wales*, Warwick School of Law Research Paper no. 2013/10 (2013); Geraldine Mackenzie, 'The Guilty Plea Discount: Does Pragmatism Win Over Proportionality and Principle?' (2007) 11 *Southern Cross University Law Review* 205; Geraldine Mackenzie, 'Consistency in Sentencing and Discounts for Guilty Pleas' (Paper presented at the 20th Conference of the International Society for Reform of the Criminal Law, Brisbane, 2–6 July 2006).
8. For example, the Council did not recommend that the scheme be limited to particular sentence options and specifically recommended against introducing the scheme in the Children's Court jurisdiction.
9. Custodial and non-custodial supervision orders and orders for unconditional release are made under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) in situations where the defendant is found to be unfit to stand trial and/or not guilty because of mental impairment. See further: Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Report* (2014) 309, 341–342.
10. *Sentencing Act 1991* (Vic) s 5(2)(e).
11. Sentencing Advisory Council (2007), above n 1, 15; *Cameron v The Queen* (2002) 209 CLR 339, 360–361 [66]–[68], cited with approval in *Phillips v The Queen* (2012) 37 VR 594, 608 [47] (Redlich JA, Curtain AJA, with Maxwell P agreeing).

1.10 Determining the extent to which sentencing law should encourage and reward guilty pleas 'involves determining the point at which the encouragement (which is permissible) becomes an improper inducement or coercion (which would undermine the operation of the presumption of innocence)'.[12] The presumption of innocence is a cornerstone of the criminal justice system, under which:

> the defendant enjoys the presumption of innocence and the right to put the prosecution case to the test. In every criminal case, regardless of how overwhelming the prosecution case is, the court must recognise 'the rule that the accused is entitled to plead not guilty, put the prosecution to the proof and cannot be punished more severely for having exercised these rights.[13]

1.11 The Council was conscious of this tension in formulating its original recommendations (in its 2005–2007 review),[14] seeking to ensure that the combination of the stated sentence discount scheme and the sentence indication scheme should facilitate, rather than coerce, a defendant's plea decision and should not involve placing 'expediency before principle' in the administration of justice.[15]

The Victorian stated sentence discount scheme

Section 6AAA of the Victorian *Sentencing Act 1991*

1.12 The Council's 2007 recommendation for a stated sentence discount scheme[16] was adopted in March 2008 with the introduction of section 6AAA of the *Sentencing Act 1991* (Vic) and section 362A of the *Children, Youth and Families Act 2005* (Vic). The stated sentence discount scheme commenced on 1 July 2008 and applies if the plea hearing commenced on or after that date.[17] Rather than applying to all sentencing orders, both provisions specify particular sentencing orders to which they apply.

1.13 A separate sentence indication scheme was introduced at the same time.[18] Both schemes were 'designed to put defendants who may ultimately plead guilty in a better position to make this decision early in the proceedings'.[19]

1.14 Section 6AAA(1) of the *Sentencing Act 1991* (Vic) provides that if:

> (a) in sentencing an offender, a court imposes a less severe sentence than it would otherwise have imposed because the offender pleaded guilty to the offence; and
>
> (b) the sentence imposed on the offender is or includes –
>
> (i) an order under Division 2 of Part 3 [custodial orders]; or
>
> (ii) a fine exceeding 10 penalty units; or
>
> (iii) an aggregate fine exceeding 20 penalty units –
>
> the court must state the sentence and the non-parole period, if any, that it would have imposed but for the plea of guilty.

12. Sentencing Advisory Council (2007), above n 1, 40 (citing *Cameron v The Queen* (2002) 209 CLR 339, 352–353, 361).
13. *Cameron v The Queen* (2002) 209 CLR 339, 361 [68].
14. See further: Sentencing Advisory Council (2007), above n 1.
15. Sentencing Advisory Council (2010), above n 5, 6, quoting Paul Byrne, 'Sentence Indication Hearings in New South Wales' (1995) 19 *Criminal Law Journal* 209, 213.
16. Sentencing Advisory Council (2007), above n 1. This was the final report in response to a reference in 2005 from the then Attorney-General.
17. *Criminal Procedure Legislation Amendment Act 2008* (Vic) s 2(5).
18. *Criminal Procedure Legislation Amendment Act 2008* (Vic) pt 2.
19. Sentencing Advisory Council (2007), above n 1, 3.

Custodial orders

1.15 Section 6AAA applies to an 'order under Division 2 of Part 3' of the *Sentencing Act 1991*, which provides for 'custodial orders'. At first glance, a section 6AAA statement appears to be required for all 'custodial orders', as these are the subject of Division 2 of Part 3 of the *Sentencing Act 1991* (Vic). However, the actual power to impose some custodial orders (such as a sentence of imprisonment) arguably sits in section 7(1) of the *Sentencing Act 1991* (Vic), which falls under Division 1 of Part 3 (to which section 6AAA does not apply).[20] While the reference in section 6AAA to its application to 'an order under Division 2 of Part 3' may need to be revisited and clarified in future, for the purposes of this report, it is assumed that a 6AAA statement is required for all custodial orders.

1.16 The past few years have seen a great deal of change to sentencing in Victoria, including the abolition of a number of custodial orders to which section 6AAA originally applied, suspended sentences among them. The custodial orders to which section 6AAA now applies[21] are:

- imprisonment;[22]
- drug treatment orders;[23] and
- youth justice centre or youth residential centre orders.[24]

1.17 While, in theory, section 6AAA also applies to indefinite sentences,[25] courts very rarely impose these sentences. In practice, the application of the scheme in such a case is unlikely to arise.[26]

Eligible fines

1.18 Section 6AAA also applies to cases in which the sentence imposed is or includes a fine exceeding 10 penalty units or an aggregate fine exceeding 20 penalty units. The threshold fines for the scheme increase each year due to the increase in the value of penalty units. These are set out in Table 1.

Table 1: Fine amounts that triggered 6AAA during the reference period, 2009–10 to 2013–14[27]

Year	Penalty unit	Fine	Aggregate fine
July 2009 to June 2010	$116.82	$1,168.20	$2,336.40
July 2010 to June 2011	$119.45	$1,194.50	$2,389.00
July 2011 to June 2012	$122.14	$1,221.40	$2,442.80
July 2012 to June 2013	$140.84	$1,408.40	$2,816.80
July 2013 to June 2014	$144.36	$1,443.60	$2,887.20

20. In contrast, a youth justice centre order is specifically defined as being 'an order falling within Subdivision (4) of Division 2 of Part 3' of the *Sentencing Act 1991* (Vic). See further: [4.42].
21. However, the issues raised at [1.15] should be borne in mind.
22. *Sentencing Act 1991* (Vic) s 7(1)(a) and sub-div (1) div 2 pt 3.
23. *Sentencing Act 1991* (Vic) s 7(1)(ac) and sub-div (1C) div 2 pt 3. These orders are only available at the Drug Court: *Sentencing Act 1991* (Vic) s 18Y.
24. *Sentencing Act 1991* (Vic) s 7(1)(d), (da) and sub-div (4) div 2 pt 3. See further: [4.38]–[4.42].
25. Indefinite sentences are custodial orders under the *Sentencing Act 1991* (Vic) sub-div (1A) div 2 pt 3.
26. As at April 2015, indefinite sentences had only been imposed in five cases in Victoria. In one of these cases, the indefinite sentence was substituted with a fixed imprisonment sentence following a successful appeal: *R v Davies* (2005) 11 VR 314. In another case, the indefinite sentence has since been discharged: *Carr v The Queen* [2010] VSCA 2010 (2 August 2010). If a court imposes an indefinite sentence upon a person who pleads guilty, it is unlikely that a different sentence would have been imposed had they not pleaded guilty, and therefore it is unlikely that a 6AAA statement would ever be required in such a case. See generally: Sentencing Advisory Council, *High-Risk Offenders: Post-Sentence Supervision and Detention: Discussion and Options Paper* (2006) 37–39.
27. The value of a penalty unit for each financial year can be found in the 'Legislative Information' section of the Victorian Legislation and Parliamentary Documents website: Office of the Chief Parliamentary Counsel, *Penalty and Fee Units* (Victorian Legislation and Parliamentary Documents) <http://www.legislation.vic.gov.au/>.

Discretionary 6AAA statements for other sentence types

1.19 For other sentence types for which a 6AAA statement is not required (such as a community correction order), the court has the discretion to make a 6AAA statement.[28] That is, the court may, but is not required to, state the sentence that it would have imposed but for the guilty plea.

Other provisions

1.20 Sections 6AAA(2)–(5) provide further details about the scheme, including:

- where a case involves multiple charges, the court need only make a 6AAA statement for the case; it is not necessary to make one for each charge;
- the 6AAA statement must be recorded; and
- for the purposes of 6AAA, an aggregate sentence imposed for two or more offences is to be treated as a sentence imposed for one offence.

Purposes of the scheme

1.21 The stated sentence discount scheme was intended to achieve a number of purposes, including increasing transparency, consistency, and accountability in sentencing and encouraging defendants who may ultimately plead guilty to do so earlier in the proceedings.

Transparency

1.22 In its 2007 report recommending the introduction of the stated sentence scheme, the Council concluded that the weight given to guilty pleas in sentencing should be made more transparent, without limiting judicial discretion.[29] Instead of a 'specified [prescribed] sentence discount' for all guilty pleas, the Council recommended retaining judicial discretion over the discount amount, but legislating to require Victorian courts to state, when passing sentence, what weight, if any, they had given to the guilty plea in sentencing the offender. This was intended to 'promote clear, transparent and accountable sentencing'.[30]

1.23 There is an individual and a general component to the objective of increasing transparency. The scheme is intended to increase the transparency of the weight given to the guilty plea in an individual case, for the victim, the defendant, and the community. Increasing transparency also has a broader element: by making the discount given across all cases transparent, other defendants who may be considering pleading guilty (or their representatives) can see the general effect of guilty pleas on sentences. While a 6AAA statement provides transparency to the parties in an individual case, one barrier to broader transparency is the lack of published data on the discounts given across the courts.

Consistency

1.24 A related purpose of the scheme was to increase consistency, thereby strengthening confidence in the value of pleading guilty.[31]

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28. *Sentencing Act 1991* (Vic) s 6AAA(3).
29. Sentencing Advisory Council (2007), above n 1, viii, 47–55.
30. Ibid 54.
31. Ibid 36–37.

Encouraging earlier guilty pleas

1.25 To the extent that rewarding a guilty plea has a utilitarian benefit, an additional aim of the scheme was to ensure that this benefit was maximised by encouraging defendants who intend to plead guilty to do so at the earliest possible stage in the proceedings, without improperly inducing a guilty plea:

> Specifying the reduction in sentence available or given for a guilty plea is intended to encourage defendants who are intending to plead guilty to do so as early as possible without inducing or coercing defendants to change their plea decision on that account. The optimum result would be no change in the proportion of cases resolved by a guilty plea, but an increase in the proportion of guilty pleas entered at an early stage of the proceedings.[32]

Accountability and appellate review

1.26 Another purpose of the stated sentence discount scheme was to increase accountability in the decision about the weight of the guilty plea.[33] The Council anticipated that:

> If courts were to articulate the weight given to the guilty plea, appeal courts would have a clearer indication of the basis for imposing the sentence and therefore they would be better equipped to determine whether the sentencer had fallen into error.[34]

1.27 Since the scheme's introduction, the Court of Appeal has made it clear that the:

> 'notional' sentence announced in accordance with s 6AAA is not part of the sentence imposed. No appeal lies in respect of the notional sentence.[35]

1.28 There were some early conflicting judicial statements as to the use that might be made of a 6AAA statement on appeal.[36] It now seems settled that a 6AAA statement is generally not to be taken to exhibit error[37] (that is, only in very narrow circumstances will a 6AAA statement be taken to exhibit error). For example, the Court of Appeal has left open the possibility that a 6AAA statement might indicate specific error if the statement reveals that the plea of guilty was effectively ignored altogether.[38] Such a case will be rare.[39]

1.29 A 6AAA statement cannot be relied upon to establish that *insufficient weight* was given to the guilty plea. As with any argument about weight, the question for the appeal court is whether, taking into account all the relevant sentencing considerations (including the guilty plea), the sentence imposed was within range.[40] Such an assessment may be informed by, but will not be dependent on, the 6AAA statement.

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32. Sentencing Advisory Council (2007), above n 1, 134. See further: [2.2]–[2.10].
33. Ibid 54.
34. Ibid 50.
35. *R v Burke* (2009) 21 VR 471, 477 [30].
36. See for example: *R v Burke* (2009) 21 VR 471, 477 [30]–[31]; *Ciantar v The Queen; Rose v The Queen* [2010] VSCA 313 (29 November 2010) [28]–[36]; *R v Howard* [2009] VSCA 281 (30 November 2009) [16]; *R v Gill* [2010] VSCA 67 (31 March 2010) [61]; *Andrick v The Queen* [2010] VSCA 238 (14 September 2010) [14], [31]–[34]; *Key v The Queen* [2010] VSCA 242 (16 September 2010) [24]; *Scerri v The Queen* (2010) 206 A Crim R 1; *LJ v The Queen* [2011] VSCA 3 (14 January 2011) [21], [30]; *Davy v The Queen* (2011) 207 A Crim R 266; *Cedic v The Queen* [2011] VSCA 258 (31 August 2011) [37]–[40]; *Saab v The Queen* [2012] VSCA 165 (16 August 2012) [29]–[63]; *Gosland and McDonald v The Queen* [2013] VSCA 269 (24 September 2013) [9]–[10]; *Cummins (A Pseudonym) v The Queen* (2013) 40 VR 319, 326–327 [41]–[50]; *Saner v The Queen; Kamal v The Queen* [2014] VSCA 134 (27 June 2014) [97]–[101]. See also: Judicial College of Victoria, 'No Appeal Against s6AAA Notional Sentence', *Victorian Sentencing Manual* (Judicial College of Victoria, 2006–) <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#16053.htm> at 10 June 2015, [11.2.6.13].
37. *Scerri v The Queen* (2010) 206 A Crim R 1, 6 [24]; *Saab v The Queen* [2012] VSCA 165 (16 August 2012) [58]–[62].
38. *Scerri v The Queen* (2010) 206 A Crim R 1, 6 [24]; *Saab v The Queen* [2012] VSCA 165 (16 August 2012) [61]; *R v Howard* [2009] VSCA 281 (30 November 2009) [15].
39. *Saner v The Queen; Kamal v The Queen* [2014] VSCA 134 (27 June 2014) [100], citing *Saab v The Queen* [2012] VSCA 165 (16 August 2012) [61].
40. *R v Burke* (2009) 21 VR 471, 477 [31]. See also: *Scerri v The Queen* (2010) 206 A Crim R 1; *Saab v The Queen* [2012] VSCA 165 (16 August 2012) [58]–[62]; *Gosland and McDonald v The Queen* [2013] VSCA 269 (24 September 2013) [10].

The importance of data in achieving the purposes of the scheme

1.30 A prerequisite to realising the purposes of the stated sentence discount scheme is the publication of information about the discounts given in the courts. This will allow victims of crime, defendants, practitioners, the judiciary, and members of the community to see the discounts given for guilty pleas. Without publicly available information on the scheme, it is difficult for its purposes (such as increasing transparency and consistency) to be fully realised or assessed.

Data methodology

Reference period

1.31 Unless another time period is specified, the data in this report relate to cases and charges dealt with in the higher courts (the Supreme Court of Victoria and the County Court of Victoria) from 2009–10 to 2013–14 ('the reference period').

1.32 Some sections of Chapter 2 examine the longer period of 2004–05 to 2013–14 in the County Court due to data being readily available from the Council's *Sentence Indication and Specified Sentence Discounts: Final Report* (2007). Equivalent data for this extended period were not available for the Supreme Court.

Data sources and sample size

1.33 The majority of the data in this report was sourced from Court Services Victoria, including:

- the Higher Courts Conviction Returns database for sentence outcome and 6AAA data;
- a separate database for data on pleas (for individual charges); and
- another database for data on plea timing (at the case level).

1.34 The Higher Courts Conviction Returns database provides data on cases and charges sentenced in the higher courts of Victoria. It contains key variables such as age, gender, the name of the offences being sentenced, the type of sentence received for individual charges, the total effective sentence received for the overall case, and the 6AAA statement (if one was made) indicating the sentence that the court would have imposed but for the offender's guilty plea. There were a total of 9,618 cases and 35,902 charges from the Higher Courts Conviction Returns database during the reference period, which made up the pool of data for this report.

1.35 Data on pleas for individual charges and the plea timing stage for cases were each located in separate databases and matched with the sentencing data in the Higher Courts Conviction Returns database. The matching was done based on key variables such as County/Supreme Court case numbers, offender name, sentence date, and date of birth. A small, random sample of the data from the Higher Courts Conviction Returns database was then examined by reading the relevant sentencing remarks to confirm that the data-matching processes were accurate. The majority of Higher Courts Conviction Returns data for the 2009–10 to 2013–14 reference period was successfully matched using this process, with only 3.4% of charges unable to be matched for type of plea and 3.5% of cases unable to be matched for plea timing.

1.36 Additional data on plea timing for the 2004–05 to 2013–14 period were provided by the County Court. These data were used to provide a longitudinal view of plea rates over time in the County Court. As these data were available to the Council in aggregated form (that is, formatted to display only the totals in each category rather than individual records of cases and charges), it was only possible to show the total number of County Court cases by their plea timing stage for each financial year. Aggregate data on plea timing were not available from the Supreme Court for the equivalent 2004–05 to 2013–14 period.

Limitations

1.37 The data source for this project is limited to *sentenced* charges (that is, charges that have been proven against an offender and for which he or she has received a sentence). Therefore, the 'pool' of data examined in this report does not include withdrawn charges or charges that were unproven (for example, if the defendant pleaded not guilty and was acquitted). As a result, the guilty plea rates reported here are higher than they would be if both unproven and proven charges were analysed and the denominator was larger as a result. For example, discussion of the proportion of not guilty pleas does not include cases in which the defendant pleaded not guilty and was acquitted. An exception to this is the discussion at [2.22]–[2.27], which looks at plea rates across *all* cases in the County Court (including cases in which the defendant pleaded not guilty and was acquitted).

1.38 The Higher Courts Conviction Returns database only records data on sentences at first instance and does not provide information on changes to sentencing as a result of breach proceedings or resentencing in the Court of Appeal. Therefore, the sentencing patterns discussed in this report are limited to those imposed at first instance.

1.39 In a small percentage of cases, no successful match was found between the data in the Higher Courts Conviction Returns database and the other sources of data examined in this report (plea data for individual charges and plea timing stage at the case level). Given the small percentage of records that were affected by this problem, this is unlikely to distort the main findings of this report.

1.40 Ninety-three cases in which the defendant was found to be unfit to stand trial and/or not guilty because of mental impairment and was given a custodial or non-custodial supervision order or an unconditional release were excluded from the dataset.[41] Although custodial or non-custodial supervision orders are an important form of disposition of criminal charges, they are not sentencing orders and are therefore outside the scope of this report.

1.41 All sources of data used for this project underwent several quality control processes. Where unusual results occurred, the findings were verified by examining the relevant sentencing remarks and updating the data if necessary. As a result, there may be minor changes to the original data provided to the Council for the project. However, the vast quantity of data used in this project meant that it was not possible to cross-check every record against the corresponding sentencing remarks. The majority of data had to be accepted 'as is' and was assumed to be correct at the time of publication.

41. Custodial and non-custodial supervision orders are made under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). See further: above n 9.

1.42 The Council's quality control process could be seen in regard to the offences of sexual penetration with a child under 16, drug trafficking/cultivation, and incest. The raw data provided to the Council do not accurately distinguish individual offences within the broader offence categories. For example, data for the broad offence of sexual penetration with a child under 16 are not separated into the individual offences of sexual penetration with a child under 10 (or 12),[42] sexual penetration with a child aged 10/12–16, and sexual penetration with a child aged 10/12–16 under the defendant's care, supervision, or authority. Therefore, the Council analysed sentencing remarks to separate the individual offences. However, at the time of the analysis, sentencing remarks for some cases were unavailable. Cases that could not be verified through sentencing remarks were excluded from the sections that discuss those specific offences (for example, in Chapter 3). However, they were still included as part of the total data in other parts of the report where the offence type was not relevant.

Significance testing

1.43 This report used various significance tests to determine if key findings in data analysis were reliable or occurred due to chance. Two of the main significance tests used were the z-test and the one-way analysis of variance ('ANOVA') test.

Z-test

1.44 The z-test is a statistical test used to assess whether the frequency of an event occurring between two groups is different enough to be statistically significant (in other words, not merely different due to random variation). For example, one use of the z-test could be to assess whether the frequency of pleading guilty at the committal stage is significantly different between males and females.

1.45 One limitation of the z-test is that it can only be used to measure the frequency of categorical variables occurring (that is, the event being measured must fit into discrete mutually exclusive categories such as 'plead guilty at the committal stage' or 'did not plead guilty at the committal stage'). If the variable being measured is continuous rather than categorical (for example, the *degree* of imprisonment length reduction due to a guilty plea, rather than just whether a reduction was given or not), other statistical tests such as ANOVA should be considered instead.

1.46 Z-tests have been used in previous Council reports including *Community Correction Orders: Monitoring Report* (2014) and *Exploring the Relationship between Community-Based Order Conditions and Reoffending* (2014).

ANOVA test

1.47 ANOVA is a test that can be used to measure whether two or more groups of data significantly differ on a continuous measure. For example, it can measure whether the quantity of sentence discount is different for cases with a plea at the committal stage compared with cases with a plea at the door of the court. The findings of ANOVA are discussed in the context of the average (mean) score that each group has for the variable being investigated (for example, the average discount in sentence length for each stage of pleading guilty).

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42. On 17 March 2010, section 45(2) of the *Crimes Act 1958* (Vic) was amended to increase the minimum age of victims of this offence from 10 to 12 years. The new age limit applies to offences committed on or after 17 March 2010. The data in this report include the version of the offence committed both before and after 17 March 2010.

1.48 The standard ANOVA has several limitations and assumptions that the data must fulfil before it can properly measure significance. Most of these limitations are not relevant to the data studied in this report. In one instance, however, a variant of the standard ANOVA, known as Welch's ANOVA, was used, because the data were unable to fulfil the criterion of 'homogeneity of variance' in the groups being studied.[43] Welch's ANOVA corrects for these problems in the data and otherwise performs much the same function as the standard ANOVA.

1.49 Both the standard ANOVA and Welch's ANOVA are known as 'omnibus tests'. That is, where three or more groups of data are being simultaneously studied, they can detect whether a significant difference occurs *somewhere* between the groups, but omnibus tests cannot locate which pairs of groups are different in relation to each other. To fix this, a variety of 'post-hoc' tests are available to pinpoint which pairs are significantly different from each other.

Post-hoc tests

1.50 Several post-hoc tests are available for use, each of which are appropriate in different circumstances depending on the data being studied. This report accompanies ANOVA testing with either a Games-Howell test or a Hochberg's GT2 test. The Games-Howell post-hoc test is appropriate for use if the data do not fulfil the 'homogeneity of variance' criterion, while Hochberg's GT2 test is appropriate for use if the studied groups each have a very different sample size (for example, if the group 'indicating a guilty plea during the committal stage' is vastly larger than the group 'pleading guilty at the door of the court').

1.51 Post-hoc testing is not required if only two groups of data were examined in the initial ANOVA or Welch's ANOVA.

Reporting the results of significance testing

1.52 When the result of a z-test is stated in this report, it will be displayed in the following manner: (z = test score, p-value). When the result of ANOVA is stated, it will be displayed in the following manner: (*F*(degrees of freedom between groups, degrees of freedom within groups) = test score, p-value). The explanation for the test scores and degrees of freedom for these tests are technical and not central to understanding the results of the data analysis for this report. The p-value, however, is the most important output from these tests as it determines whether a result is significant or not.

1.53 P-values that are below 0.05 indicate that a significant result has been found, while anything above this threshold indicates that the result is not significant. When p-values are mentioned in this report, they are displayed as $p < 0.001$ for very significant results, $p < 0.01$ for moderately significant results, and $p < 0.05$ for results that remain significant but to a lesser degree compared with the other categories. P-values that are not significant are listed in this report with an 'ns' abbreviation. One limitation of the p-value is that it can only determine whether or not there is enough evidence to conclude that a result is significant (that is, the result did not occur by chance). P-values cannot comment on the *magnitude* of the difference found between groups. Where a statistically significant result occurs, other aspects of the data, such as the mean (average), median, or percentage distribution, should be used in conjunction with the p-value to decide on the magnitude of any differences found.

43. This requirement indicates that the variance (the square of the standard deviations) in each group should be relatively similar for a standard ANOVA to perform a proper analysis of the data.

2. The rate and timing of guilty pleas

Key findings

In the higher courts during the reference period (2009–10 to 2013–14):

- **Proven charges** were most commonly resolved by a guilty plea (72.4% of proven charges in the Supreme Court and 84.6% of proven charges in the County Court).
- The **plea rate** in the County Court did not vary considerably during the reference period; in the Supreme Court there was more fluctuation, which is likely to have been influenced by the lower number of sentenced cases heard in that jurisdiction, rather than by a change in plea practices.
- The overall plea rate in **all cases** (proven and unproven cases) finalised in the County Court from 2004–05 to 2013–14 was 74.4%. There was a slight decrease in the plea rate over that period (with fluctuations) and a slight increase in the rate of cases resolved with no finding of guilt (for example, due to the defendant being acquitted or having the charges withdrawn after pleading not guilty).
- In the County Court in the ten-year period from 2004–05 to 2013–14, there was a statistically significant increase in the **proportion of early guilty pleas** (indicated during the committal stage).

2.1 This chapter presents data on plea rates and timing for proven charges[44] sentenced in the higher courts and examines changes to plea timing in the County Court.

2.2 One of the reasons for the Council's 2007 recommendation that sentencing courts be required to articulate the effect of a guilty plea on a sentence was that it would be 'a first step' to understanding how courts apply the requirement to consider guilty pleas.[45]

2.3 The Council's 2007 report concluded that:

> Specifying the reduction in sentence available or given for a guilty plea is intended to encourage defendants who are intending to plead guilty to do so as early as possible without inducing or coercing defendants to change their plea decision on that account. *The optimum result would be no change in the proportion of cases resolved by a guilty plea, but an increase in the proportion of guilty pleas entered at an early stage of the proceedings.*[46]

2.4 One of the aims of the current study was to examine whether or not the proportion of guilty pleas has remained stable and whether or not there have been any changes to plea timing since the introduction of the stated sentence discount scheme.

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44. As the data source is limited to *sentenced* charges (that is, the offender has been found guilty of the charge and has received a sentence), the data presented in this chapter do not include withdrawn or unproven charges. As a result, the plea rates reported in this chapter are higher than they would be if both unproven and proven charges were analysed and the denominator (pool of cases) was larger as a result. An exception to this is the discussion at [2.22]–[2.27], which looks at plea rates across all cases (proven and unproven) in the County Court (including cases in which the defendant pleaded not guilty and was acquitted).

45. Sentencing Advisory Council (2007), above n 1, 63.

46. Ibid 134 (emphasis added).

2.5 The Council expected that:

> in Victoria there should be an appreciable change in the stage at which defendants facing indictable charges indicate a willingness to plead guilty once the effect on the sentence is made clear. We note, however, that the impact of this change will depend partly on the extent to which the parties are able to prepare the cases early enough to place the defendant in a position to benefit from an early guilty plea.[47]

2.6 In its *2005–06 Annual Report*, the County Court identified a number of issues contributing to delays and low plea rates:

> The delays experienced in hearing cases in the criminal jurisdiction, combined with the significant increase in the number of cases initiated, had contributed to the reduced clearance rate. During 2005–06, this Court received considerably more cases proceeding to trial due to fewer pleas of guilty in the Magistrates' Court. In many cases, defendants committed to this Court failed to receive a trial date for 12 months or more. Fuelling the influx of trials was the lack of incentive in the committal stream for considering sentencing options in exchange for pleas of guilty, driving defendants to take their chances at trial, where the possibility exists for acquittal[.][48]

2.7 Another issue identified by the County Court was the 10 to 12 week delay between a committal and the initial directions hearing in the County Court, which represented 'an unnecessary disconnect in the progress of a criminal matter between jurisdictions'.[49]

2.8 Other barriers to early guilty pleas include the late service of the prosecution brief; no or late legal representation of the defendant or changes in legal representation; a perception by the defence that closer to the trial charges may be reduced or further evidence disclosed; late acceptance by the prosecution of a plea to a lesser, related charge; and scepticism as to whether the guilty plea will result in a sentence discount and whether the timing of the plea will make a difference to the sentence discount amount.[50]

2.9 There have been a number of reforms since the Council's original reference in 2005, including a concerted effort by the courts, prosecution, and defence to ensure that cases that are likely to be resolved by a guilty plea can be identified at an earlier stage in proceedings. These reforms include:

- The introduction of section 6AAA of the *Sentencing Act 1991* (Vic), which was intended to make the sentence discounts for guilty pleas more transparent and consistent, thereby encouraging defendants who intended to plead guilty to do so as early as possible.[51]
- The commencement of the *Criminal Procedure Act 2009* (Vic), which was intended to 'clarify, simplify and consolidate the laws relating to criminal procedure' in the Magistrates' Court, County Court, and Supreme Court.[52]
- A change in policy at the Office of Public Prosecutions that opened the way to more meaningful discussion between parties, including requiring the solicitor with conduct of the prosecution to 'consider whether the prosecution may be resolved by a plea of guilty to appropriate charges' at every stage of the prosecution.[53]

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47. Sentencing Advisory Council (2007), above n 1, 63.
48. County Court of Victoria, *2005–06 Annual Report* (2006) 5.
49. See further: County Court of Victoria, *Notice to Practitioners: Expansion of 24 Hour Initial Directions Hearing Pilot to Include Straight Hand-Up Brief Matters with a Plea of Not Guilty* (2013) <https://www.countycourt.vic.gov.au> at 24 April 2015.
50. New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas: Models for Discussion,* Consultation paper 15 (2013) 5.
51. See further: [1.21]–[1.30].
52. *Criminal Procedure Act 2009* (Vic) s 1(a).
53. Director of Public Prosecutions Victoria, *Director's Policy on Resolution* (DPP Prosecution Policies, 2015) <http://www.opp.vic.gov.au/Resources/DPP-s-policies> at 10 June 2015, 2–3 [5]–[6]; Champion (2012), above n 7, 4.

- Initiatives introduced by Victoria Legal Aid, such as a post-committal negotiation fee for private practitioners and barristers 'aimed at encouraging early resolution and narrowing of disputed issues' and the creation of specialist criminal law teams in Victoria Legal Aid's in-house practice.[54]
- Increased case management by the courts and earlier resolution discussions to identify early guilty pleas.[55] For example, the County Court 'proactively manage[s] listing with a view to the early identification of pleas'.[56]
- The introduction of a '24 hour initial directions hearing' program in the County Court. This shortened the gap between a committal with a not guilty plea (in the Magistrates' Court) and the initial directions hearing in the County Court from 10 to 12 weeks to '24 hours' (the following sitting day).[57] At the initial directions hearing, the list judge 'after hearing from the parties [assesses] whether to fix a trial date or to adjourn the matter for a further [initial directions hearing] in order to explore the possibility of resolution'.[58]

2.10 These changes make it difficult to isolate the specific effect, if any, that section 6AAA may have had on any changes to plea timing that have occurred. Section 6AAA 'is part of the arsenal for encouraging early pleas, but not the only reason for their increase'.[59] It is evident from the data that, while plea rates have remained relatively stable in the County Court over the period of reform, more guilty pleas are being indicated early. While it is not possible to draw causal inferences between the suite of reforms and the changes to plea timing, the changes identified in the data are consistent with the intent of section 6AAA and other reforms.

Plea rate over time

2.11 This section looks at plea rates:

- as a percentage of *proven charges* in the Supreme Court during the reference period;
- as a percentage of *proven charges* in the County Court during the reference period; and
- as a percentage of *all cases* (including cases in which the charges were not proven) in the County Court over a ten-year period (2004–05 to 2013–14).

2.12 As the data source is limited to *sentenced* charges (that is, charges that have been proven against an offender and for which he or she has received a sentence), the data presented in this chapter do not include withdrawn or unproven charges. As a result, the plea rates reported here are higher than they would be if both unproven and proven charges were analysed and the denominator was larger as a result. An exception to this is the discussion at [2.22]–[2.27], which looks at plea rates across all cases in the County Court (including cases in which the defendant pleaded not guilty and was acquitted).

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54. Victoria Legal Aid, *Delivering High Quality Criminal Trials: Consultation and Options Paper* (2014) 16–17.
55. See, for example: County Court of Victoria, *2013–2014 Annual Report* (2014) 12; Magistrates' Court of Victoria, *Annual Report 2005–06* (2006) 22; Magistrates' Court of Victoria, *2009–10 Annual Report* (2010) 32; Director of Public Prosecutions Victoria (2015), above n 53, 2–3 [5]–[6]. See further: [2.28]–[2.32] for an explanation of indictable (more serious) offences and the key stages of indictable criminal proceedings.
56. County Court of Victoria (2014), above n 55, 12.
57. This commenced as a pilot on 21 January 2013 and has since been expanded. See further: County Court of Victoria, *Notice to Practitioners: 24 Hour Initial Directions Hearing Pilot Commencing 21 January 2013* <https://www.countycourt.vic.gov.au/practice-notes-criminal> at 9 June 2015; County Court of Victoria (2013), above n 49.
58. County Court of Victoria (2013), above n 57. See further: County Court of Victoria (2013), above n 49.
59. Meeting with Judge Hannan, County Court of Victoria (20 April 2015).

Supreme Court

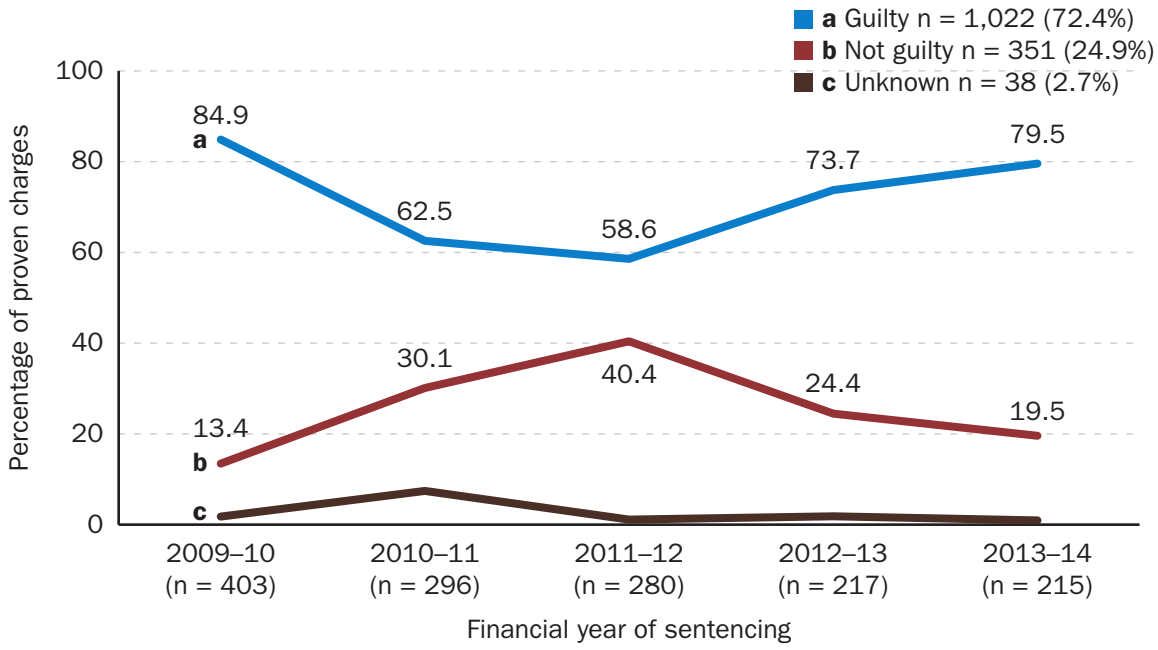
Proportion of proven charges that resolved as a guilty plea

2.13 The majority (72.4%) of proven charges in the Supreme Court during the reference period were proven after a guilty plea (1,022 out of 1,411 charges proven and sentenced in that period), although the proportion of guilty pleas each year fluctuated (Figure 1). The year 2009–10 had the highest proportion of guilty pleas (84.9% of proven offences), and the lowest was 58.6% in 2011–12. As the Supreme Court has jurisdiction over the most serious offences prosecuted in Victoria and the number of charges finalised each year is relatively small compared with the County Court (ranging from 215 charges in 2013–14 to 403 charges in 2009–10), a degree of fluctuation in plea rates is to be expected.

2.14 It is not clear what caused the relatively low guilty plea rate in 2011–12. One possible explanation is the composition of offences sentenced in that year. In 2011–12, murder was the principal proven offence in one-third (33.3%) of all cases sentenced in the Supreme Court. This was higher than the average across the other years during the reference period (25.3%). As the offence of murder tends to have a low guilty plea rate, this may have contributed to the overall low guilty plea rate. However, counter to this explanation is that the highest guilty plea rate for murder during the reference period occurred in 2011–12 (68.0%). Therefore, further investigation would need to be undertaken to fully explain the unusual plea pattern in 2011–12.

2.15 As plea rates followed a similar (although more stable) pattern in the County Court (Figure 2), it is possible that the lowest plea rate in 2011–12 reflects procedural or case management issues, for example, during the committal stage.

Figure 1: Percentage of proven charges sentenced in the Supreme Court, by type of plea entered (2009–10 to 2013–14)[60]



60. Court Services Victoria, unpublished data.

Number of proven charges that resolved as a guilty plea

2.16 Looking at the *number* (as opposed to the proportion) of charges that were proven after a guilty plea or a not guilty plea is useful in considering the workload of the courts, prosecution, defence, and police. However, there is more to assessing workload than looking at the raw number of charges heard:

> It is important to recognise that statistics, such as numbers of trials and persons dealt with, are not on their own sufficient to accurately understand the workload of the division. Sometimes a case commences as a trial but resolves in a plea after complex and detailed legal argument and ruling. Such a matter would for statistical purposes be recorded as a plea. Similarly the actual complexity of a trial cannot be reflected statistically.[61]

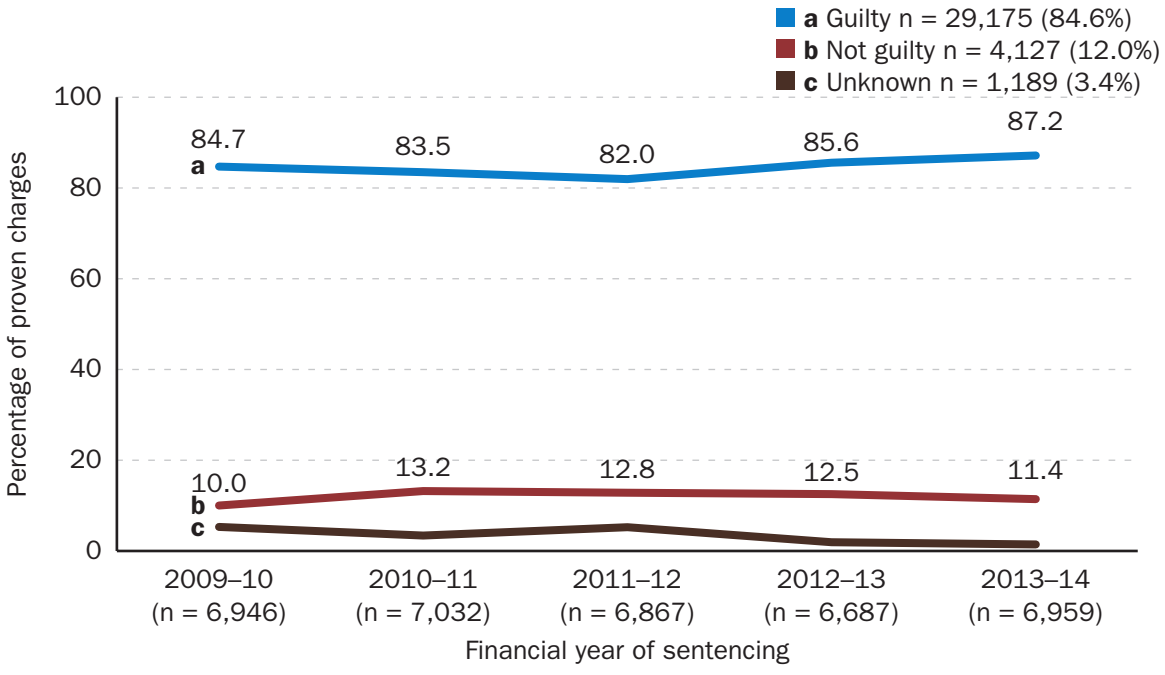
2.17 During the reference period, an average of 204 charges resolved as a guilty plea each year in the Supreme Court (ranging from 160 charges in 2012–13 (73.7%) to 342 charges in 2009–10 (84.9%)). The number of charges proven and sentenced after the defendant pleaded not guilty ranged from 42 charges in 2013–14 (19.5%) to 113 charges in 2011–12 (40.4%).

County Court

Proportion of proven charges that resolved as a guilty plea

2.18 Most proven charges (around 85%) in the County Court resolve by way of a guilty plea (29,175 charges out of 34,491 charges proven over the five-year reference period). The guilty plea rate was very stable over this period. The highest plea rate was 87.2% (6,066 charges with a guilty plea) in 2013–14. The lowest plea rate was 82.0% (5,630 charges with a guilty plea) in 2011–12 (Figure 2). While the fluctuation was more pronounced in the Supreme Court (possibly due to the volatility caused by the relatively low number of sentenced cases), the lowest plea rate for both courts was in 2011–12.

Figure 2: Percentage of proven charges sentenced in the County Court, by type of plea entered (2009–10 to 2013–14)[62]



61. Supreme Court of Victoria, *2011–12 Annual Report* (2012) 44.

62. Court Services Victoria, unpublished data.

2.19 Part of the explanation for the relatively low rate of guilty pleas in the County Court in 2011–12 may be that there was an increase in the proportion of cases with unknown plea status in that year. It is not known whether those cases would have followed approximately the same pattern as the cases with a known plea status, or whether a greater proportion of unknown cases would have a guilty plea (or not guilty plea), changing the overall pattern.

2.20 Given that both courts experienced their lowest plea rates in the same years, it is also possible that the lowest plea rate in 2011–12 reflects procedural or case management issues, for example, during the committal stage.

Number of proven charges that resolved as a guilty plea

2.21 During the reference period, an average of 5,835 charges resolved as a guilty plea each year in the County Court (ranging from 5,630 charges in 2011–12 to 6,066 charges in 2013–14). The number of charges proven and sentenced after the defendant pleaded not guilty ranged from 694 charges in 2009–10 (10.0% of proven charges in that year) to 925 charges in 2010–11 (13.2% of proven charges in that year).

Ten-year plea rate in the County Court

2.22 The data on plea rates for sentenced charges (presented in Figure 2) show that the plea rate for proven cases in the County Court has remained relatively stable in the last five years.

2.23 However, as this dataset was limited to the reference period, it did not enable an assessment of whether the plea rate had changed since the Council's original reference in 2005.[63] The dataset was also limited to the group of charges that are *proven* (through a guilty plea or a trial), and therefore charges that are unproven (for example, because they are withdrawn or the defendant is acquitted) were not included.

2.24 Additional data were available for the ten-year period from 2004–05 to 2013–14 on plea rates by *case*, rather than by *charge*,[64] for the whole pool of cases dealt with in the County Court (including cases that were finalised with no finding of guilt).[65] Across all cases finalised in the County Court in this ten-year period, the guilty plea rate was 74.4%, and between individual years it ranged from 71.0% to 80.3%, as shown in Figure 3.

2.25 An examination of whether plea rates for all County Court cases had changed since the Council's previous examination[66] reveals a very slight (but statistically significant)[67] decline since the earlier period: from 76.3% (in 2004–05 to 2008–09) to 72.7% (in 2009–10 to 2013–14). However, as Figure 3 shows, the plea rate has fluctuated over that time. For example, the plea rate occurring in 2008–09 (71.6%) was very close to that occurring in 2013–14 (71.3%).

2.26 A comparison of the two periods also reveals that, while the rate of people who have been found guilty at trial after pleading not guilty has remained relatively stable over the 10 years, there has been an increase in the rate of unproven cases.[68]

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63. The 2005 reference resulted in the Council's 2007 report: Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts: Final Report* (2007).

64. A 'charge' is a single proven allegation of an offence. A 'case' is a collection of one or more charges against a person sentenced at the one hearing.

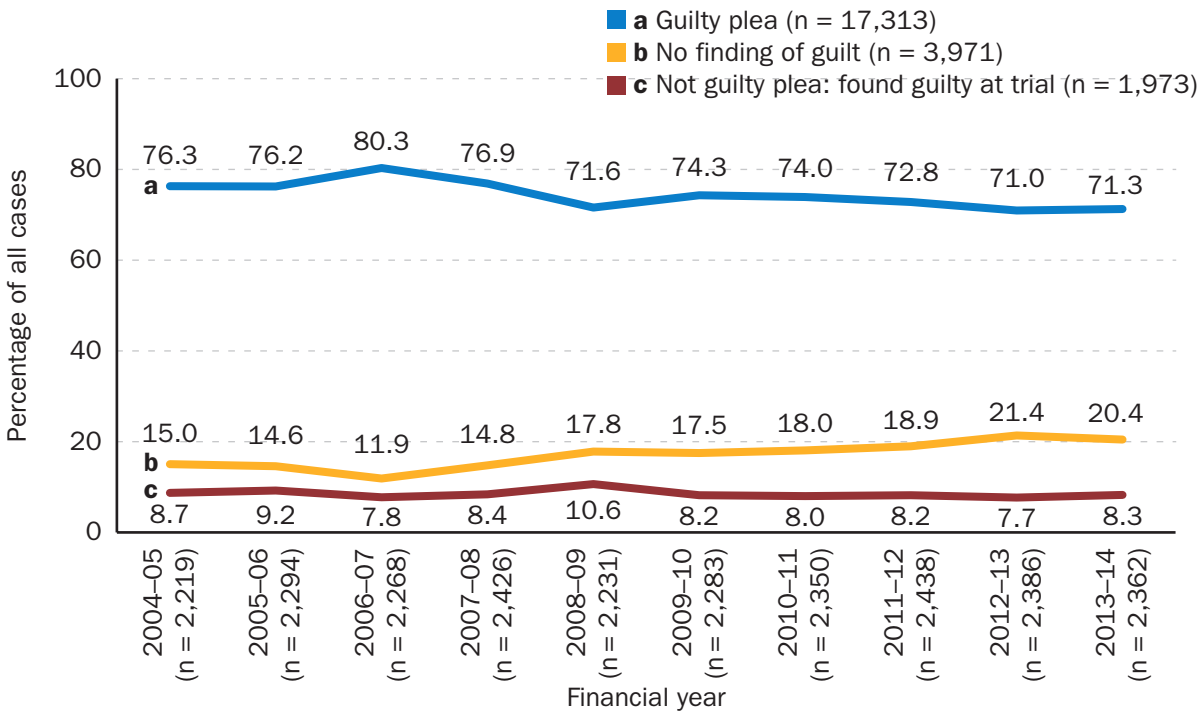
65. Data on cases dealt with during the longer 2004–05 to 2013–14 period (including cases resolved through no finding of guilt) were obtained directly from the County Court. The majority of the other data in the report was obtained from Court Services Victoria. Equivalent data for the Supreme Court were not available.

66. The Council's 2010 examination of plea rates covered the period from 2004–05 to 2008–09. See further: Sentencing Advisory Council (2010), above n 5.

67. Z-test = 6.35, $p < 0.001$.

68. This includes cases in which the defendant pleaded not guilty and was acquitted, cases in which the charge was withdrawn, and cases in which there has been a successful application for a nolle prosequi or other unspecified reasons where a case was resolved with no finding of guilt.

Figure 3: Outcomes of all County Court cases, 2004–05 to 2013–14[69]



2.27 The finding that plea rates have slightly decreased but have otherwise remained relatively stable suggests that recent reforms are not inducing defendants to plead guilty at a greater rate than they did previously. The next question is whether those defendants who are pleading guilty are doing so at an earlier stage of the proceedings.

The timing of guilty pleas

The key stages of indictable criminal proceedings

2.28 While some indictable (more serious) offences can be heard summarily in the Magistrates' Court,[70] most must be heard in the higher courts (that is, in the Supreme Court or the County Court).

2.29 Indictable offences that must be tried in the higher courts proceed through a number of key steps before their final resolution. After the police charge a person (the defendant) with an indictable offence, the charge is filed with a registrar in the Magistrates' Court. The registrar must then fix a date for a filing hearing, which represents the formal commencement of committal proceedings.

2.30 From this point, there are two key stages. (These are illustrated in Figure 4 in relation to the County Court.) The first stage is the committal stage, taking place in the Magistrates' Court, in which the defendant is committed for trial in the higher courts. The second stage occurs when the case proceeds to the County or Supreme Court, up to the point of trial and/or the plea hearing and sentence.

2.31 The defendant may indicate an intention to plead guilty at any stage in the Magistrates' Court and may enter a plea of guilty at any stage once the case is listed in the higher courts.

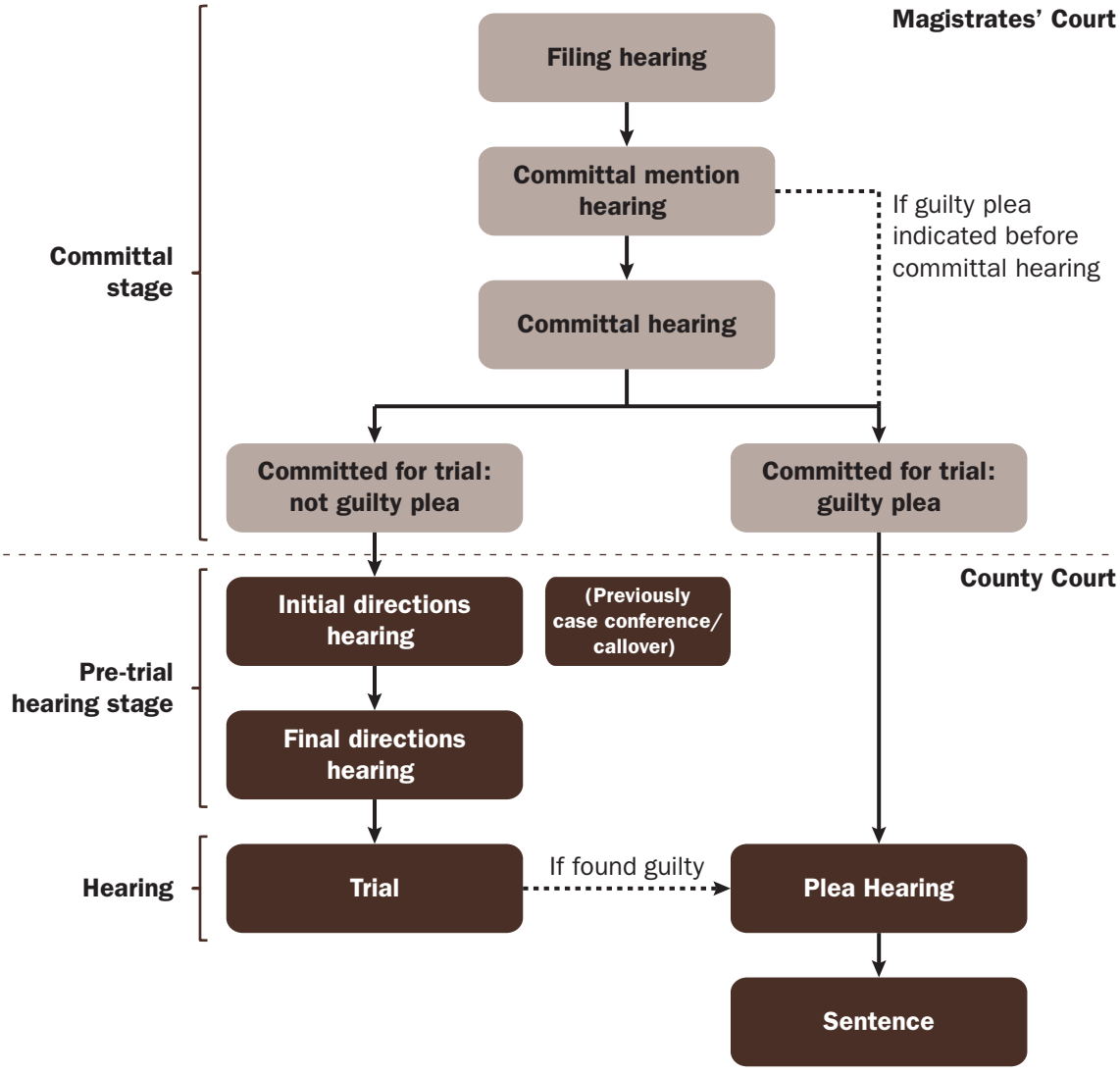
69. County Court of Victoria, unpublished data.

70. *Criminal Procedure Act 2009* (Vic) s 28(1).

The stage at which a guilty plea was made or indicated is one of the factors that a sentencing judge must consider in sentencing the defendant.[71]

2.32 If the defendant indicates a plea of guilty while the case is still at the committal stage, and the magistrate is satisfied that the evidence is of sufficient weight to support a conviction for the offence, the magistrate must make an order committing the defendant for trial in the County Court or the Supreme Court.[72] The order is sent to the County Court or the Supreme Court, and the matter is then listed for a plea hearing in that court. The paperwork sent from the Magistrates' Court to the higher courts has the plea field marked as 'guilty'.[73] Such cases are captured in the data presented in this chapter as 'guilty plea: committal stage (Magistrates' Court)'. This category does not distinguish cases in which the plea was indicated at the initial filing hearing from cases in which the plea was indicated after a full committal hearing. However, it captures all cases in which the indication was made before the case was listed in a higher court.

Figure 4: Key hearing stages for an indictable offence that proceeds to trial in the County Court[74]



71. *Sentencing Act 1991* (Vic) s 5(2)(e).
72. *Criminal Procedure Act* 2009 (Vic) s 142(1)(b).
73. Email from Court Services Victoria, 23 April 2015.
74. Sentencing Advisory Council (2010), above n 5, 3 (Figure 1).

The timing of guilty pleas in the County Court and the Supreme Court

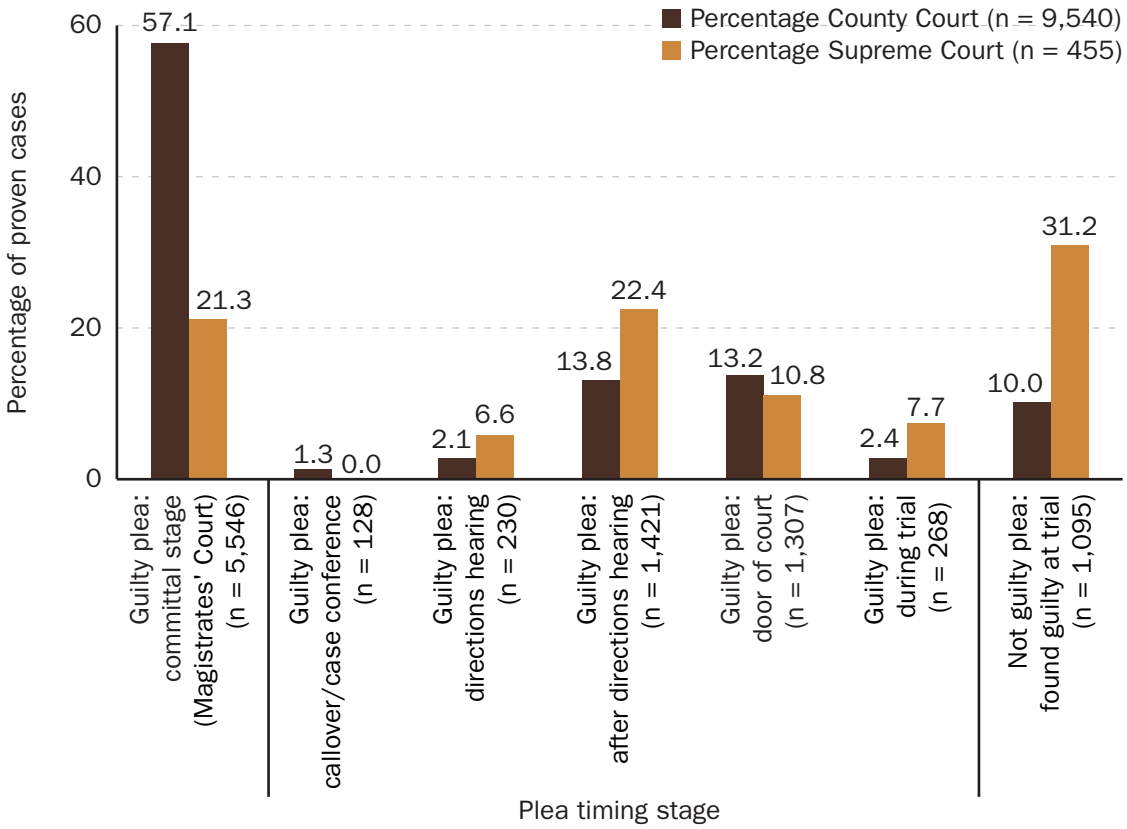
2.33 Figure 5 shows the proportion at each stage in the higher courts of proven cases in which offenders pleaded guilty. There are noticeable differences between the Supreme Court and the County Court.

2.34 Cases proven in the County Court are most commonly resolved after an early plea (during the committal stage, prior to the matter being committed to the higher courts). Cases with an early plea amounted to 57.1% of proven cases during the reference period.

2.35 In contrast, in the Supreme Court, the largest single proportion of proven cases were proven at trial after the offender pleaded not guilty (31.2%), and there was a more even spread of cases across a number of plea timing stages: the committal, 'after directions hearing', and 'not guilty plea' stages.

2.36 A likely explanation, or partial explanation, for this difference is that the Supreme Court has jurisdiction over the most serious offences, for which offenders usually face long prison sentences upon their conviction. In these circumstances, offenders may be more likely to contest charges or to plead guilty later. For example, the offence of murder (which may only be heard in the Supreme Court) had a lower guilty plea rate (48.0%) than any other offence during the reference period.[75]

Figure 5: Timing of guilty pleas for all proven cases in the County and Supreme Courts, 2009–10 to 2013–14[76]



75. See further: Table 4.

76. County Court of Victoria (County Court data) and Court Services Victoria (Supreme Court data). A small percentage of cases from the Supreme Court (4.2% of the original dataset) were excluded because they did not fit neatly into the categories displayed. This was either because the offender faced multiple charges and pleaded guilty to each charge at a different stage (these were identified from the sentencing remarks – 1.3%) or because the plea timing was unknown or unable to be determined from the data (2.9%).

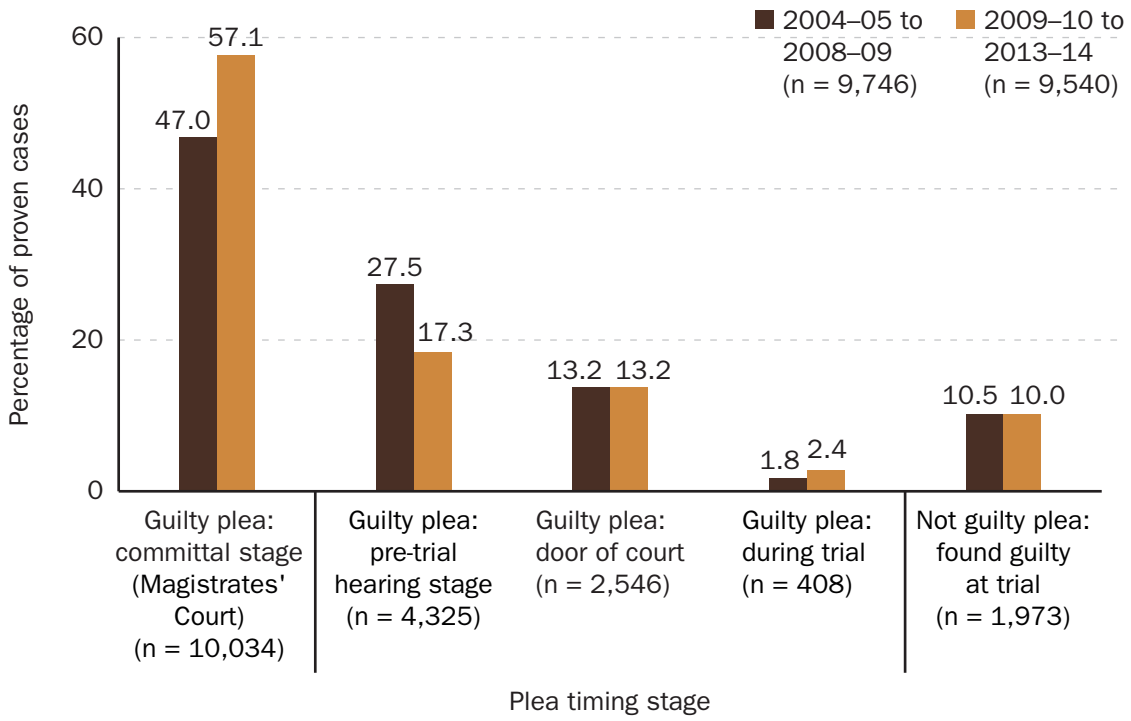
The changes to plea timing in the County Court over time

2.37 In its 2010 report, the Council examined plea timing in proven County Court cases for the five-year period from 2004–05 to 2008–09. One of the aims of the current report is to see whether there has been a change in the timing of guilty pleas in the County Court since then.

2.38 Figure 6 compares plea timing for proven cases between the earlier period (2004–05 to 2008–09) and the next five years (2009–10 to 2013–14) across five 'stages':

1. 'Committal stage (Magistrates' Court)': a plea was indicated by the offender at any stage prior to the case being committed to the County Court for trial.
2. 'Pre-trial hearing stage': the offender pleaded guilty at the callover/case conference, initial directions hearing, or in the period after the directions hearing.
3. 'Door of court': the offender pleaded guilty after a judge had been allocated to conduct the trial but before the jury had been empanelled.
4. 'During trial': the offender pleaded guilty after the jury was empanelled but before the jury returned with a guilty verdict.
5. 'Not guilty plea: found guilty at trial': the offender pleaded not guilty and was found guilty at trial.

Figure 6: Changes in timing of guilty pleas in proven County Court cases, between 2004–05 to 2008–09 and 2009–10 to 2013–14[77]



77. County Court of Victoria, unpublished data.

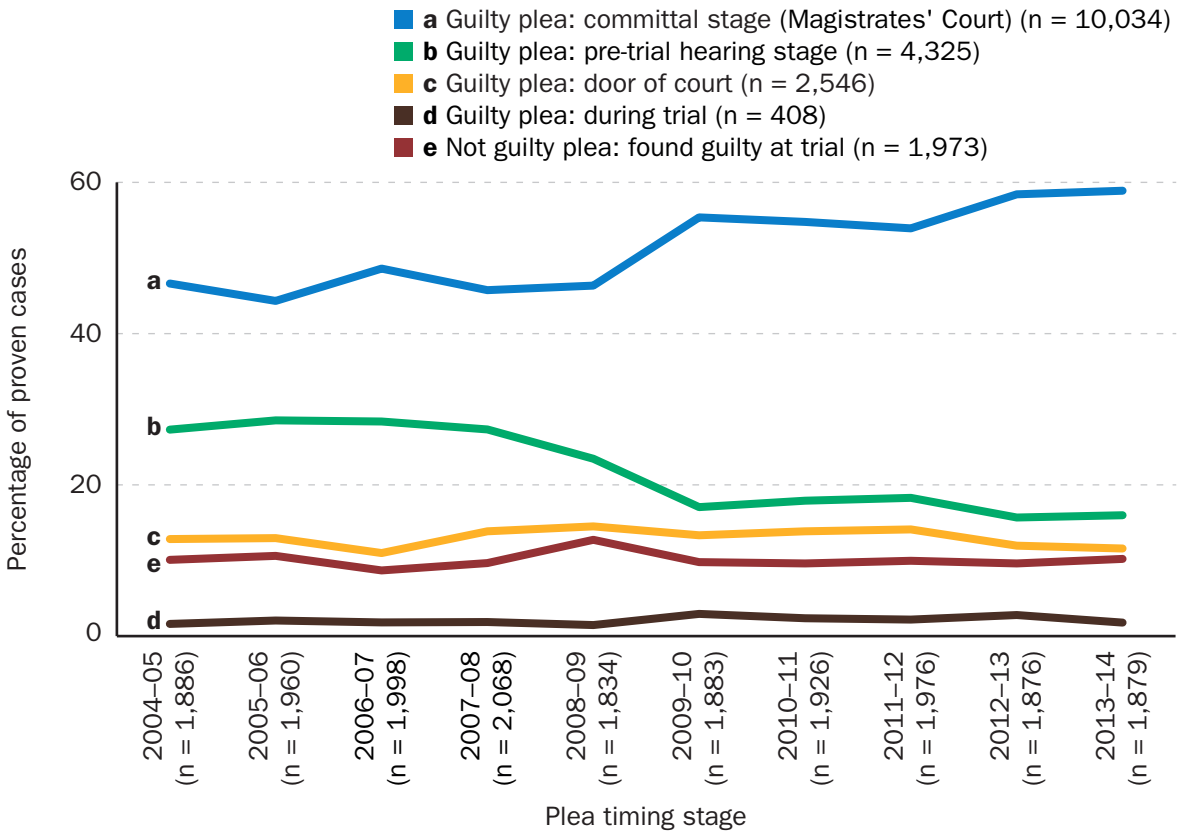
2.39 A comparison of the two periods reveals that the proportion of cases in which the offender indicated a guilty plea during the committal stage has increased by 10.1 percentage points, while the proportion of cases in which the offender pleaded guilty during the pre-trial hearing stage has decreased by 10.2 percentage points. Both of these changes were statistically significant.[78]

2.40 Another minor change between the two periods was an increase of 0.6 percentage points in the proportion of cases in which the offender pleaded guilty during trial. This increase was statistically significant ($z = 3.12$, $p < 0.01$) although the overall magnitude of the change was quite small.

2.41 A 0.5 percentage point decrease in the proportion of proven cases in which the offender pleaded not guilty was not statistically significant, and there was no change to the proportion of cases in which the offender pleaded guilty at the door of the court.

2.42 To understand better the shifting patterns in plea timing over the last 10 years, plea rates at each timing stage were compared on a yearly basis (Figure 7). This shows that the proportion of cases resolving as a guilty plea during the committal stage has been steadily increasing (with the biggest jump between 2008–09 and 2009–10), while the proportion of cases resolving as a guilty plea during the pre-trial hearing stage (once the case has been listed in the higher courts) has been steadily decreasing. The rate of pleading guilty at the 'door of the court' and 'during trial' has remained steady over the last 10 years, at around 13.2% and 2.1% respectively.

Figure 7: Changes in timing of guilty pleas for proven cases in the County Court, by individual years, 2004–05 to 2013–14[79]



78. A z-test was used to assess whether any changes in plea timing were statistically significant between the two periods (that is, comparing 2004–05 to 2008–09 with 2009–10 to 2013–14). This indicated that the increase in guilty pleas at the committal stage was significant ($z = 14.00$, $p < 0.001$), as was the decrease in guilty pleas during the pre-trial hearing stage ($z = 17.00$, $p < 0.001$). The z-test assesses the statistical significance of two column proportions in a table.

79. County Court of Victoria, unpublished data.

2.43 It is not possible to isolate the factors that have influenced the increase in early guilty pleas in the County Court, nor to determine the role of section 6AAA of the *Sentencing Act 1991* (Vic) in this shift. Section 6AAA was introduced during a period of substantial procedural reform in Victoria, as previously observed,[80] and is but one of numerous measures aimed at encouraging those intending to plead guilty to do so earlier. While it is possible that some, or all, of these measures contributed to the increase in earlier guilty pleas, this cannot be concluded from the data alone.

Conclusion

2.44 Most offenders sentenced in the Victorian higher courts plead guilty. From 2009–10 to 2013–14, 72.4% of proven charges in the Supreme Court and 84.6% of proven charges in the County Court were resolved by a guilty plea.

2.45 During the reference period (2009–10 to 2013–14), the lowest plea rate for both the County Court and the Supreme Court occurred in 2011–12, and the second lowest plea rate in both courts occurred in 2010–11. While the fluctuation was more pronounced in the Supreme Court (possibly due to the volatility of the lower number of sentenced cases heard each year), it is noted that the lowest plea rates in both courts occurred in the same year.

2.46 Looking at all cases in the County Court (not just those in which the charges were proven) over a longer (ten-year) period, the plea rate fluctuated between 71% and 80.3%. Although the rate of people who were found guilty at trial after pleading not guilty remained relatively stable over the 10 years, there was an increase in the rate of unproven cases.

2.47 Section 6AAA of the *Sentencing Act 1991* (Vic) was introduced at a time of multiple parallel reforms, including a concerted effort by courts and practitioners to identify and resolve early guilty pleas. One of the reasons for introducing section 6AAA was to encourage people who intended to plead guilty to do so as early as possible, without encouraging inappropriate guilty pleas. Therefore, the benchmark for effective plea reform suggested by the Council in its 2007 report was that, ideally, post-reform analysis would show that the plea rate had remained stable and had not increased, but that those who were pleading guilty were doing so earlier.

2.48 The data analysis revealed that the rate of guilty pleas has not increased. On the contrary, it has decreased slightly (but statistically significantly) over the last 10 years in the County Court. Over the same period, there has been a significant increase in the rate of early guilty pleas, with the biggest jump between section 6AAA's first and second year of operation. While it is not possible to identify which of the reforms, if any, have contributed to the significant shift in plea timing, the findings are consistent with the intended outcome of the section 6AAA and other reforms.

80. See further: [2.9].

3. Factors associated with guilty pleas

Key findings

In the higher courts during the reference period (2009–10 to 2013–14):

- Different **offences** had very different plea rates. For example, the offence of murder had the lowest proportion of guilty pleas (48.0% of proven murder charges). In comparison, attempted armed robbery had one of the highest plea rates (96.8% of proven charges).
- The proportion of proven charges resolved by a guilty plea differed across **sentence types**, with sentences of imprisonment having the lowest guilty plea rates (80.9%), whereas almost all proven charges sentenced to a youth justice centre order (97.9%) or a community correction order (95.8%) were resolved by guilty plea.
- There were no significant differences in plea timing between **corporations and people.** However, when the comparison was limited to fined cases (as 39 out of the 40 corporations received a fine as their most serious sentence), corporations were significantly more likely to indicate a guilty plea at the committal stage (47.4% compared to 23.3% of natural persons), while natural persons were more likely to enter a plea at the door of the court (31.2% compared to 13.2% of corporations).
- There was little difference in plea timing between **males and females**; the only statistically significant difference was in the County Court, where proven cases against males had a significantly higher proportion of not guilty pleas than proven cases against females.
- There were significant differences in plea rates and timing across different **offender age groups:**
  - In the County Court, adult offenders were most likely to indicate a guilty plea during the committal stage, regardless of age. However, young adult offenders (aged 18–21) had the highest proportion (78.3%) of guilty pleas indicated during the committal stage. As offender age increased, the proportion of guilty pleas at the committal stage progressively and significantly decreased, and the rate of not guilty pleas progressively and significantly increased.
  - In the Supreme Court, 18–21 year old offenders were most likely to indicate a guilty plea during the committal stage (37.5%), and they were more likely than offenders in all other age groups to plead gulty at this stage. The proportion of proven cases with a not guilty plea progressively increased as age increased, with a significantly smaller proportion of 18–21 year old offenders pleading not guilty.

3.1 The rate and timing of guilty pleas are likely to be the product of numerous factors, with some exerting more influence than others in different cases. Factors may be general (such as those relating to the procedure in a particular court). They may also be specific to the circumstances of the individual case (such as the nature and circumstances of the alleged offence, the strength of the prosecution case and of any potential defence to the charge, whether and when the defendant obtains legal representation, the defendant's prior criminal history and age, and the likely consequences – including sentence – that the defendant faces if found guilty). All these factors may influence whether, and when, a person pleads guilty.[81]

3.2 Another factor that obviously influences a person's decision about plea is his or her guilt or innocence in relation to the charge alleged. As the examination in this chapter is confined to *proven* charges, questions about guilt or innocence do not form part of the discussion of influencing factors.

3.3 Even when a person intends to plead guilty from the outset, there are many reasons why the person may not be in a position to indicate or enter a plea at the earliest stage in proceedings. For example, there may be genuine issues to resolve in relation to the charge that is most appropriate to the offence and in relation to the summary of the offence by the prosecution.

3.4 This chapter looks at differences in plea rate and timing across four specific factors: offence type, sentence type, gender, and age. Although these factors are examined separately, it is likely that they interact with each other – and with myriad other factors – to influence the decision to plead guilty. The examination in this chapter does not make causal connections between individual factors and plea rates nor attempt to isolate individual factors as being determinative of plea. Rather, it examines whether any statistically significant differences in terms of plea rates and timing emerge in relation to each factor, as an initial step to understanding the dynamics of guilty pleas in higher court cases.

Offence type

3.5 Central to the sentencing decision are the nature and gravity of the offence that has been committed, 'against which other factors that affect the sentence must then be considered'.[82] The nature of the offence charged (and the dynamics of its prosecution) also are likely to influence whether, and when, the defendant pleads guilty.

3.6 Examining offences with the highest *numbers* of guilty and not guilty pleas is useful in considering the workload of the courts, prosecution, defence, and police. Looking at the offences with the lowest and highest *proportion* of guilty pleas (even if a relatively low number of charges are dealt with each year) sheds some light on the dynamics of prosecuting those offences.

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81. For example, Ringland and Snowball's 2014 study found a range of factors influenced a defendant's plea, including age, offence type, the passage of time between the offence and the committal date, prior convictions, and the presence of multiple charges in the case: Clare Ringland and Lucy Snowball, *Predictors of Guilty Pleas in the NSW District Court*, Bureau Brief Issue Paper no. 96 (2014) 1.

82. Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed., 2014) [4.05], citing *R v Tuckey* (1991) 57 A Crim R 468, *R v Gordon* (1994) 71 A Crim R 459; *Sentencing Act 1991* (Vic) s 5(2)(c).

Offences with the highest rate and number of guilty pleas

3.7 Tables 3 and 4 display the 10 offences proven in the higher courts during the reference period which had:

- the highest *number* of charges that resolved with a *guilty* plea (Table 2); and
- the highest *proportion* of charges that resolved with a *guilty* plea (Table 3).[83]

High volume of guilty pleas

3.8 Table 3 shows that the proven offences with the largest volume of guilty pleas tended to be property and deception offences, including theft, obtaining property or financial advantage by deception, burglary or aggravated burglary,[84] and criminal damage. This is a reflection of the high volume of these offences overall, although they also had relatively high plea rates. For example, theft accounted for 10.2% of all charges proven in the higher courts during the reference period and also had a relatively high plea rate (86.1%); it was therefore not surprising that the offence of theft accounted for the highest number of guilty pleas. Due to their relatively high volume in the higher courts, some of these offences featured both in the group with the highest number of *guilty* pleas and in the group with the highest number of *not guilty* pleas (Tables 2 and 5).

3.9 Performing an indecent act with a child under 16 was the only sexual offence represented in the 10 offences with the highest *number* of guilty plea charges (Table 2), although the plea rate for this offence was considerably lower than that for the other offences in the table.

High proportion of guilty pleas

3.10 When the focus shifted to the *proportion* of proven charges with a guilty plea, several sexual offences involving a 'carriage service'[85] were represented, including using a carriage service to access child pornography and using a carriage service to groom a child under 16 (Table 3). A possible explanation for the high plea rate for carriage service sexual offences is that, by their nature, such offences are likely to have a strong evidence trail (for example, internet history and/or photographs on a computer) making them easier to prove.

3.11 A similar pattern emerged for other offences with high guilty plea rates; in that by their nature, these offences may be easier to prove. For example, an attempt offence (such as attempted burglary) is likely to involve some form of intervention that prevented the completion of the offence, which may include the offender being 'caught in the act' or evidence obtained through police surveillance.[86] Similarly, many offenders charged with the offence of cultivating narcotic plants are likely to have had a house-sitter role (for example, living on-site and taking care of the plants), which makes them liable to be caught in the act of committing the offence.[87]

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83. Offences were excluded from the analysis if fewer than 50 charges of the offence were sentenced during the reference period.
84. Although the offences of burglary and aggravated burglary can be classed as dishonesty offences, they can also be classed as being violently or sexually motivated, depending on the offender's intention. See further: Sentencing Advisory Council, *Aggravated Burglary: Current Sentencing Practices* (2011).
85. See Glossary for the definition of 'carriage service'.
86. Another contributing factor to the high plea rate for attempted burglary is that, because it is an offence that is able to be heard in the lower courts (*Criminal Procedure Act 2009* (Vic) sch 2), in some cases the charges heard in the Magistrates' Court may have been elevated to the higher courts to be heard alongside a more serious charge. If the defendant disputed the charge, he or she would be more likely to contest it in the lower courts than before a jury in the higher courts.
87. For example, in the period 2008–09 to 2012–13, 36% of offenders charged with the more serious offence of cultivating a commercial quantity of narcotic plants had a house-sitter role, which tends 'to entail assuming the blame for offending in order to protect principals/proprietors': Sentencing Advisory Council, *Major Drug Offences: Current Sentencing Practices* (2015) 19, 21.

Table 2: Offences with the highest number of proven charges with a guilty plea, higher courts, 2009–10 to 2013–14[88]

Rank	Offence type	Total number of charges	Number of charges with a guilty plea	Proportion of charges with a guilty plea
1	Theft	3,651	3,142	86.1
2	Armed robbery	2,016	1,904	94.4
3	Obtain property by deception	1,450	1,234	85.1
4	Indecent act with a child under 16	1,735	1,164	67.1
5	Obtain financial advantage by deception	1,395	1,136	81.4
6	Aggravated burglary	1,208	1,104	91.4
7	Possess drug of dependence	1,132	1,051	92.8
8	Traffick a drug of dependence in a non-commercial quantity*	923	868	94.0
9	Burglary	839	785	93.6
10	Criminal damage (Intentionally damage/destroy property)	828	765	92.4
Total charges proven in the higher courts		**35,902**	**30,197**	**84.1**

* Additional coding was required for the offence of trafficking a drug of dependence in a non-commercial quantity (see further: [1.42]).

Table 3: Offences with the highest proportion of proven charges with a guilty plea, higher courts, 2009–10 to 2013–14[89]

Rank	Offence type	Total number of charges	Number of charges with a guilty plea	Proportion of charges with a guilty plea
1	Attempted burglary	60	60	100.0
2	Obtain financial advantage by deception – against Cth entity (Cth)	79	78	98.7
3	Use carriage service to access child pornography (Cth)	137	135	98.5
4	Use carriage service to procure a child under 16 for sexual act (Cth)	188	185	98.4
5	Prohibited person possess/carry/ use firearm	106	104	98.1
6	Use carriage service to groom a child under 16 for sexual act (Cth)	105	103	98.1
7	Attempted armed robbery	442	428	96.8
8	Use carriage service to transmit indecent communications to a child under 16 (Cth)	53	51	96.2
9	Knowingly deal with proceeds of crime	66	63	95.5
10	Cultivate narcotic plants in a non-commercial quantity*	209	199	95.2
Total charges proven in the higher courts		**35,902**	**30,197**	**84.1**

* Additional coding was required for the offence of cultivating a narcotic plant(s) in a non-commercial quantity (see further: [1.42]).

88. Court Services Victoria, unpublished data (see Appendix for offence statutory references).

89. Court Services Victoria, unpublished data (see Appendix for offence statutory references). Offences with fewer than 50 charges sentenced during the reference period were excluded from the analysis.

Offences with the highest rate and number of not guilty pleas

3.12 The following two tables set out the offences in the higher courts with the highest:

- *proportion* of proven charges in which the defendant pleaded *not guilty* (Table 4);[90] and
- *number* of proven charges in which the defendant pleaded *not guilty* (Table 5).

Sexual offences

3.13 Sexual offences feature strongly in both tables: they account for five of the 10 offences with the highest *number* of proven charges with a not guilty plea, and eight of the 10 offences with the highest *proportion* of proven charges with a not guilty plea. This finding is consistent with previous studies on plea rates and attrition in sexual offence cases.[91]

3.14 In contrast to the sexual offences with high plea rates (see [3.10]), which were committed using a carriage service[92] (for example, to access child pornography), the offences with a high percentage of *not guilty* pleas were sexual offences involving direct physical contact between the offender and the victim that would be likely to occur in a private setting. The relatively low plea rate for these (proven) sexual offences is likely to reflect the dynamics of prosecuting such cases, for example, their complexity, the likelihood of delay before the offence is reported, the difficulty of proving guilt where a case comes down to one person's word against another (particularly in relation to those offences that occurred many years prior to proceedings commencing), a reluctance on the part of sexual offenders to acknowledge or admit what they have done, and the serious consequences of being found guilty (such as facing a sentence of immediate imprisonment and the possibility of being placed on the Sex Offenders Register).[93]

Dishonesty offences and non-sexual offences against the person

3.15 A number of dishonesty offences featured both in the group with the highest number of *guilty* pleas and in the group with the highest number of *not guilty* pleas, due to their sheer volume (see further: [3.8]). The dishonesty offence with the highest proportion of not guilty pleas during the reference period was the historic offence of defrauding the Commonwealth.[94]

3.16 Non-sexual offences against the person also had high numbers and high proportions of not guilty pleas. The offence of murder had the *highest proportion* of not guilty pleas (Table 4). The offences of intentionally cause serious injury and common law assault both had a relatively high number of not guilty pleas (although this reflects the volume of these offences, rather than their proportion of not guilty pleas (Table 5)).

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90. Offences were excluded from the analysis if fewer than 50 charges of the offence were sentenced during the reference period.

91. See, for example: Ringland and Snowball (2014), above n 81, 4; Jacqueline Fitzgerald, *The Attrition of Sexual Offences from the NSW Criminal Justice System,* Contemporary Issues in Crime and Justice no. 92 (2006) 7; Denise Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) 3; Julie Stubbs, 'Sexual Assault, Criminal Justice and Law and Order' (2003) 14 *Women Against Violence* 14, 19; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response: Final Report* (2010) [26.16]–[26.17]; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004) [1.6].

92. See Glossary for the definition of 'carriage service'.

93. *Sex Offenders Registration Act 2004* (Vic). The Victorian Register of Sex Offenders commenced operation on 1 October 2004.

94. *Crimes Act 1914* (Cth) s 29D (historic offence).

Table 4: Offences with the highest proportion of proven charges with a not guilty plea, higher courts, 2009–10 to 2013–14[95]

Rank	Offence type	Total number of charges	Number of charges with a not guilty plea	Proportion of charges with a not guilty plea
1	Murder	125	65	52.0
2	Incest with a child/step-child/lineal descendant aged under 18*	440	212	48.2
3	Rape	471	217	46.1
4	Defraud the Commonwealth (Cth) (historical offence)	93	42	45.2
5	Sexual penetration with a child aged under 10/12*	134	56	41.8
6	Gross indecency with a person under 16 (historical offence)	79	31	39.2
7	Incest (by de facto parent)*	127	45	35.4
8	Indecent assault	757	265	35.0
9	Indecent assault on a male person (historical offence)	110	38	34.5
10	Indecent act with a child under 16	1,735	535	30.8
Total charges proven in the higher courts		**35,902**	**4,478**	**12.5**

* Additional coding was required for incest and sexual penetration offences (see further: [1.42]).

Table 5: Offences with the highest number of proven charges with a not guilty plea, higher courts, 2009–10 to 2013–14[96]

Rank	Offence	Total number of charges	Number of charges with a not guilty plea	Proportion of charges with a not guilty plea
1	Indecent act with a child under 16	1,735	535	30.8
2	Theft	3,651	410	11.2
3	Indecent assault	757	265	35.0
4	Rape	471	217	46.1
5	Incest (by natural parent/lineal ancestor/step-parent) against child aged under 18*	440	212	48.2
6	Obtain financial advantage by deception	1,395	205	14.7
7	Obtain property by deception	1,450	143	9.9
8	Intentionally cause serious injury	599	99	16.5
9	Common law assault	787	98	12.5
10	Sexual penetration with a child aged 10/12 to under 16*	717	92	12.8
Total charges proven in the higher courts		**35,902**	**4,478**	**12.5**

* Additional coding was required for incest and sexual penetration offences (see further: [1.42]).

95. Court Services Victoria, unpublished data (see Appendix for offence statutory references). Offences with fewer than 50 charges sentenced during the reference period were excluded from the analysis.

96. Court Services Victoria, unpublished data (see Appendix for offence statutory references).

Baseline and high-volume offences

Baseline sentencing and plea rates

3.17 In 2014, the Victorian Parliament introduced a new 'baseline sentencing' scheme,[97] which specified seven serious offences as 'baseline offences' and prescribed 'baseline sentences' for those offences (along with a further baseline sentence for murder of an emergency worker while the worker is on duty). Baseline sentences are specified prison sentences that the Victorian Parliament intends as the median sentence for the relevant offence.[98] Victorian courts must sentence a charge of a baseline offence in accordance with that intention if the offence is committed on or after 2 November 2014.

3.18 One of the potential implications of the baseline sentencing scheme is that it may affect the rate and timing of guilty pleas for the seven serious offences prescribed as baseline offences. As Figure 8 shows, the existing plea rates are already relatively low for some of these offences, such as murder and the various sexual offences, compared with other offences. These offences are also ones for which the utility of a guilty plea is likely to be significant, particularly in terms of avoiding trauma to victims or witnesses.

3.19 For some baseline offences, such as murder and culpable driving causing death, for which there are alternative, lesser charges available to be prosecuted, the baseline sentencing scheme may also result in changes to the offence mix before the courts as a consequence of changed plea negotiation practices.

3.20 For example, a person charged with culpable driving causing death may be more likely to plead guilty to the lesser offence of dangerous driving causing death (in circumstances where that plea is acceptable to the Office of Public Prosecutions) in order to avoid the consequences of the baseline sentencing scheme. Were such a plea not to be accepted by the Office of Public Prosecutions, the person may be more inclined to plead not guilty to the charge of culpable driving causing death, in an attempt to delay or avoid the possibility of conviction and sentencing under the baseline scheme.

3.21 Thus a secondary effect of the scheme may be to change the plea rate and timing of lesser offences that are related to baseline offences. Associated with this is the risk that defendants with a valid defence to a baseline charge (such as murder) may feel under pressure to plead guilty to a lesser related non-baseline offence (such as manslaughter), rather than pleading not guilty and risking a conviction (and sentence) for the baseline offence if they are found guilty.

97. *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic). See Glossary for definitions of 'baseline offence', 'baseline sentence', and 'baseline median'. See further: Sentencing Advisory Council, *Calculating the Baseline Offence Median: Report* (2014).

98. *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) s 5.

3.22 A research paper published by the Parliament of Victoria in 2014 on the Sentencing Amendment (Baseline Sentences) Bill 2014 noted that:

> Some stakeholders have argued that the possibility of longer jail time under the baseline sentencing scheme could result in less guilty pleas, as there will be less incentive to plead guilty. Victoria Legal Aid stated in their submission to the SAC report that baseline sentencing could result in 'A reduction in the number of pleas of guilty, due to the high likelihood of a sentence of imprisonment even on a guilty plea, and a consequent increase in lengthier, more complex trials'.[99]

3.23 The research paper continued:

> [The then Premier], however, does not support the view that there would be fewer guilty pleas under baseline sentencing, stating that 'we believe that this will not have any impact on the length of trials or the propensity for people to plead guilty, because there are still benefits in pleading guilty for people'. The [then] Attorney-General stated that courts would still be able to give reductions based on guilty pleas. He also argued that the possibility of fewer guilty pleas should not be a factor in determining whether sentences should be increased: 'If the argument is that sentences should never be increased because any increase in sentences will deter people from pleading guilty, then the Government doesn't accept that argument'.[100]

3.24 Concerns have also been expressed about the possible effect of baseline sentencing on court resources, which would be directly affected by any delays in the timing of guilty pleas or by any increase in the number of trials caused by decreasing plea rates. Chief Judge Michael Rozenes has commented:

> The impact of the introduction of the *Sentencing Amendment (Baseline Sentences) Act 2014* will potentially undo many of the performance improvements that we have worked so hard to achieve in recent years. The new sentencing regime will likely add substantial complexity to the sentencing process, increasing the length of matters and the incidence of appeals. It will also change the case mix, adding to delay.[101]

3.25 The most recent annual report of the Supreme Court also anticipated that the baseline sentencing scheme may 'increase the disincentive to plead' and that 'likely flow on effects include … less guilty pleas, and increased delays and greater complexities in both trial and sentencing phases'.[102]

3.26 Monitoring plea rates and timing for both baseline offences and other related non-baseline offences, such as manslaughter and dangerous driving causing death, will be an important component of the baseline monitoring sentencing project being undertaken by the Council.

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99. Parliament of Victoria, *Sentencing Amendment (Baseline Sentences) Bill 2014: Research Paper* (2014) <http://www.parliament.vic.gov.au/publications/research-papers/9028-sentencing-amendment-baseline-sentences-bill-2014> at 9 June 2015, pt 4 n 101, referring to Victoria Legal Aid, 'Submission to the Sentencing Advisory Council on Baseline Sentencing' (2011) <http://www.sentencingcouncil.vic.gov.au/projects/completed-projects/baseline-sentences/public-submissions> at 28 July 2015, 6.

100. Parliament of Victoria (2014), above n 99, pt 4 n 102–104.

101. County Court of Victoria (2014), above n 55, 2.

102. Supreme Court of Victoria, *2013–14 Annual Report* (2014) 46.

Offences included in the analysis

3.27 This section presents plea rates for a number of key offences:

Baseline offences[103]

- Murder – 125 charges during the reference period;
- Culpable driving causing death – 74 charges;
- Trafficking in a large commercial quantity of a drug or drugs of dependence – 75 (confirmed) charges;
- Incest with a child/step-child/lineal descendant aged under 18 – 440 (confirmed) charges;
- Incest with the child/step-child/lineal descendant, aged under 18, of a de facto spouse – 127 (confirmed) charges;
- Persistent sexual abuse of a child under 16 – 50 charges (this includes cases sentenced under a previous version of the offence, 'maintain a sexual relationship with a child under 16');
- Sexual penetration with a child under 12 – 134 (confirmed) charges (this includes cases sentenced under the previous version of this offence, 'sexual penetration with a child under 10');

Lesser, related offences that correspond to two baseline offences

- Manslaughter (lesser, related offence that corresponds to the offence of murder) – 88 charges;
- Dangerous driving causing death (lesser, related offence that corresponds to the offence of culpable driving causing death) – 116 charges;

High-volume imprisonment offences – offences that commonly receive imprisonment and/or represent a high number of imprisonment sentences

- Armed robbery – 2,016 charges;
- Aggravated burglary – 1,208 charges;
- Rape – 471 charges;
- Indecent assault – 757 charges;
- Theft – 3,651 charges;

Offence that received the highest number of fines above 10 penalty units or aggregate fines above 20 penalty units during the reference period (requiring a section 6AAA statement)[104]

- Fail to provide safe working environment (52 charges).[105]

103. See Glossary for the definition of 'baseline offence'. Additional coding was required for the offences of trafficking in a large commercial quantity of a drug or drugs of dependence, incest, and sexual penetration offences (see further: [1.42]). Only offences that could be identified and confirmed from the available sentencing remarks were included in this analysis, and in Figures 8 and 9.

104. See further: [1.14], [1.18].

105. *Occupational Health and Safety Act 1985* (Vic) s 21(1) and the *Occupational Health and Safety Act 2004* (Vic) s 21(1).

Plea rates by offence

3.28 Figure 8 illustrates that for all the studied offences apart from murder, the majority of proven charges were proven after a guilty plea, rather than at trial. The rate of guilty pleas for the studied offences ranged from 48.0% (murder) to 94.4% (armed robbery). After murder, five sexual offences (three of which are baseline offences) had the next lowest plea rates.

Plea timing by offence

3.29 Figure 9 displays the timing of guilty pleas for each reference offence (that is, the stage in proceedings at which the guilty plea was indicated or entered). Overall, 8,904 charges of the offences displayed had sufficient data for inclusion in the graph.[106] Offences are displayed in order from the highest to the lowest proportion of guilty pleas at the committal stage.

3.30 Guilty pleas indicated during the committal stage accounted for the largest proportion of proven charges for eight of the offences. The offence of armed robbery had the highest proportion of guilty pleas indicated during the committal stage (82.8% of proven armed robbery charges).

3.31 A finding of guilt at trial after a not guilty plea accounted for the largest proportion of proven charges of murder (52.4%), incest by a de facto parent (37.2%), rape (47.3%), indecent assault (36.5%), incest by a parent/step-parent/lineal ancestor (49.9%), and sexual penetration with a child under the age of 10 (or 12)[107] (42.4%).

3.32 For most of the offences examined, the most common plea timing stage was either a plea indicated during the committal stage or a not guilty plea (with the charge proven later at trial). These offences generally had relatively low plea rates during the 'middle' stages, such as during the pre-trial hearing stage.

3.33 In contrast, the most common plea timing stage for manslaughter was during the pre-trial hearing stage (36.5%). For dangerous driving causing death, this was the second most common stage (29.2%) after the committal stage (which accounted for 31.0%). As these two offences are each lesser, related charges for more serious offences (murder and culpable driving causing death), the higher 'mid-stage' plea rates may be explained, at least in part, by negotiation between the parties. For example, some of the offenders who pleaded guilty to manslaughter during the pre-trial stage may initially have been charged with murder. A similar trend emerged for the offence of trafficking in a large commercial quantity of a drug of dependence, where a quarter (25.4%) of pleas were entered at the pre-trial stage, which may also suggest that it is an offence that may be subject to negotiations between the parties before resolution.

3.34 The offences discussed at [3.33] either are baseline offences or are related lesser offences (such as manslaughter) to baseline offences (such as murder). For offences such as these (that may frequently be the subject of negotiations between prosecution and defence), the baseline sentencing scheme will be a further consideration in this negotiation process. As previously mentioned, any monitoring of the baseline sentencing scheme could usefully include the monitoring of plea rates and timing for both the baseline offences and their lesser, related counterparts.

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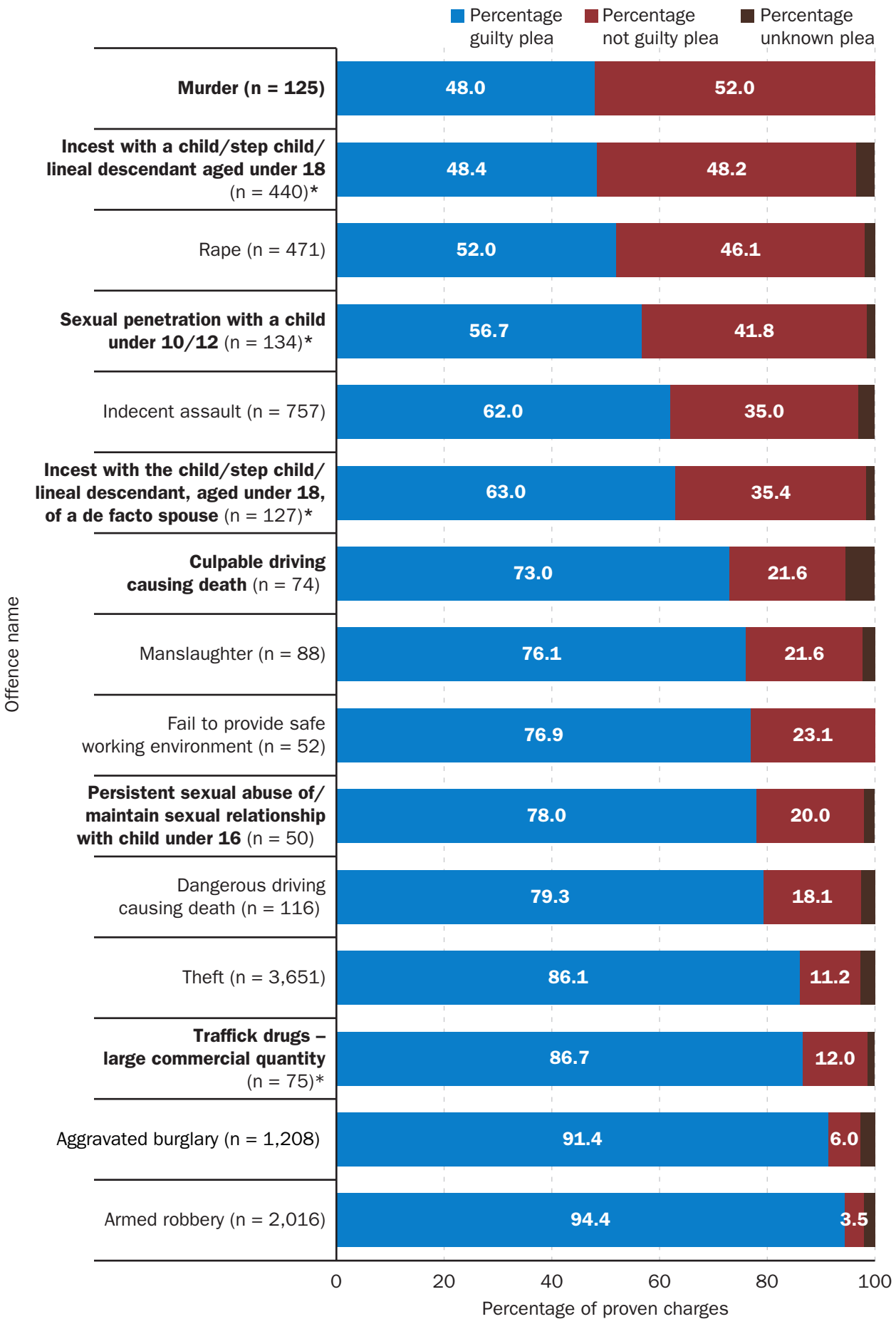
106. The graph excludes 480 charges (which comprised 5.1% of the original sample with these data included) where the timing of entering a guilty plea was unknown.

107. On 17 March 2010, section 45(2) of the *Crimes Act 1958* (Vic) was amended to increase the minimum age of victims of this offence from 10 to 12 years. The new age limit applies to offences committed on or after 17 March 2010. The charges in this report include the version of the offence committed both before and after 17 March 2010.

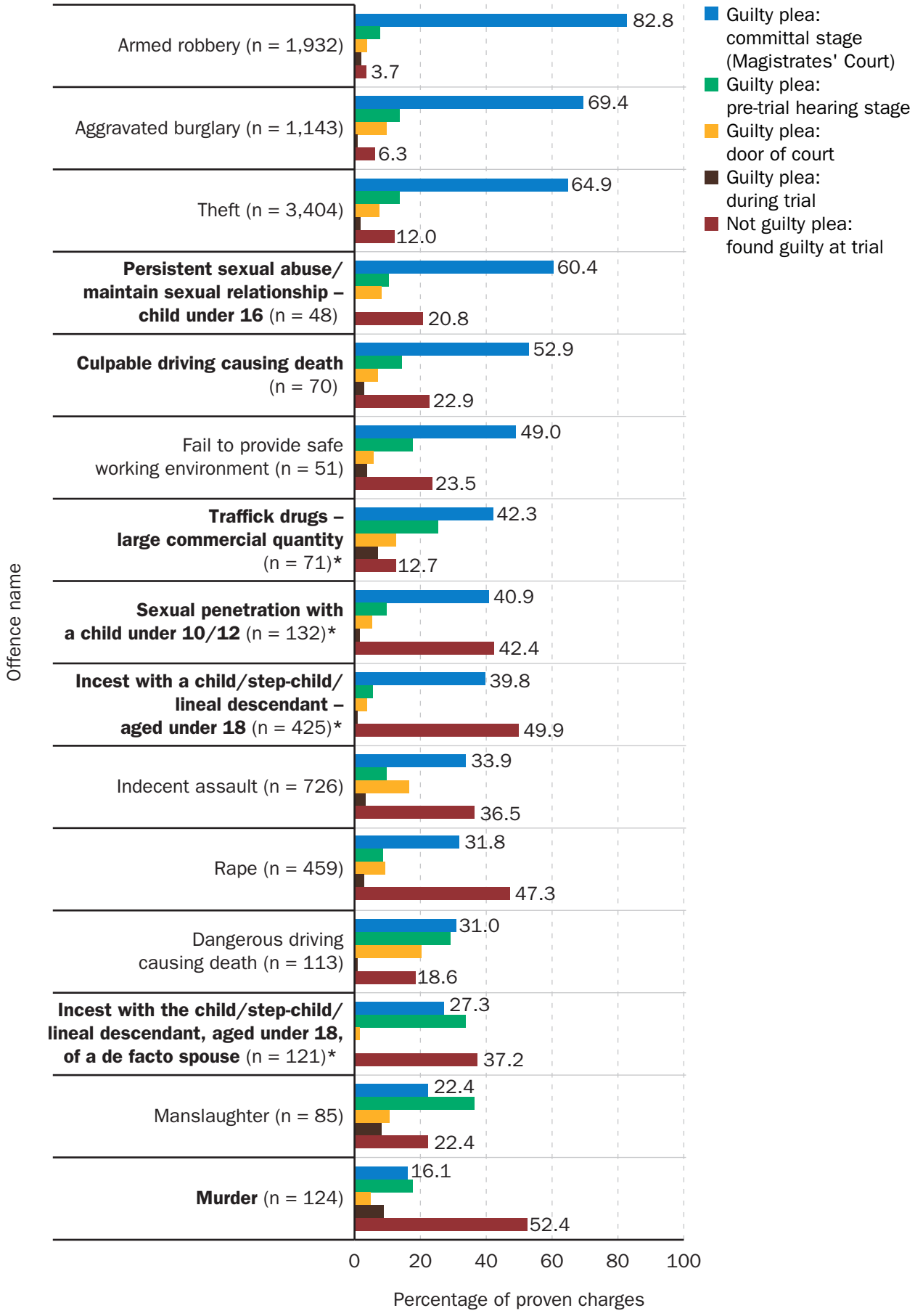
Figure 8: Proportion of proven charges with guilty pleas and not guilty pleas, higher courts, 2009–10 to 2013–14[108]



* Additional coding was required for the offences of trafficking in a large commercial quantity of a drug or drugs of dependence, incest, and sexual penetration offences (see further: [1.42]). Only offences that could be properly identified from available sentencing remarks were included in this graph.

108. Baseline offences are marked in bold (see Glossary for a definition of 'baseline offence').

Figure 9: Plea timing distribution (as a percentage of proven charges for each offence), 2009–10 to 2013–14[109]



* Additional coding was required for the offences of trafficking in a large commercial quantity of a drug or drugs of dependence, incest, and sexual penetration offences (see further: [1.42]). Only offences that could be properly identified from available sentencing remarks were included in this graph.

109. Baseline offences are marked in bold (see Glossary for a definition of 'baseline offence'). The graph excludes 480 charges (which comprised 5.1% of the original sample with these data included) where the timing of entering a guilty plea was unknown.

Sentence type

3.35 The sentence type and length in a case are determined by reference to the gravity and harm of the offence committed and the range of aggravating and mitigating factors in the case, including the guilty plea and the stage at which it is entered.

3.36 The previous section revealed that plea rates and timing vary (statistically) significantly between different offences. As offence seriousness is a key consideration in sentencing, it was expected that plea rates and timing would also differ across sentence types and lengths. However, no clear linear pattern was expected, or found, between plea timing and sentence type: for example, an early plea to murder will receive a far more severe sentence than a late plea to theft. Further, in an individual case, the expected sentence may influence whether and when the defendant pleads guilty and, in turn, the timing of the plea may influence the sentence ultimately imposed.

3.37 Offence type and the likely sentence are not the only factors that may influence plea rates. The decision whether and when to plead guilty is likely to incorporate a range of measurable and immeasurable factors that work in different combinations in different cases.[110]

Plea rates by sentence type

3.38 The proportion of proven charges resolved by a guilty plea (statistically) significantly differed across all the sentence types displayed in Figure 10. The only exception to this rule was that while the guilty plea rates for community-based orders (91.9%), fines (90.8%), and Commonwealth sentences (91.6%) were significantly different from other sentence types, they did not significantly differ from each other.[111]

3.39 Sentences of immediate imprisonment (including aggregate imprisonment) had the lowest proportion of guilty pleas (80.9% of all imprisonment charges). This is unsurprising given that offences severe enough to warrant imprisonment (such as murder) may typically have lower plea rates due to their nature and the dynamics of their prosecution. Offenders facing the prospect of immediate imprisonment also may be more likely to contest charges in the hope of avoiding or delaying their incarceration. Guilty pleas also appear to be determinative in the decision to sentence an offender who would otherwise have received a lesser sentence to imprisonment, such as a youth justice centre order or a suspended sentence, which is likely to affect the plea rates for these sentence types as well as for imprisonment.[112]

3.40 Partially suspended sentences had the second lowest proportion of guilty pleas (84.8%) followed by wholly suspended sentences (88.3%). This may reflect the fact that suspended sentences (prior to their abolition) were used to sentence cases in which the circumstances were serious enough to warrant imprisonment, and therefore defendants may have been more likely to contest the charges to try to avoid facing a possible imprisonment sentence upon conviction.

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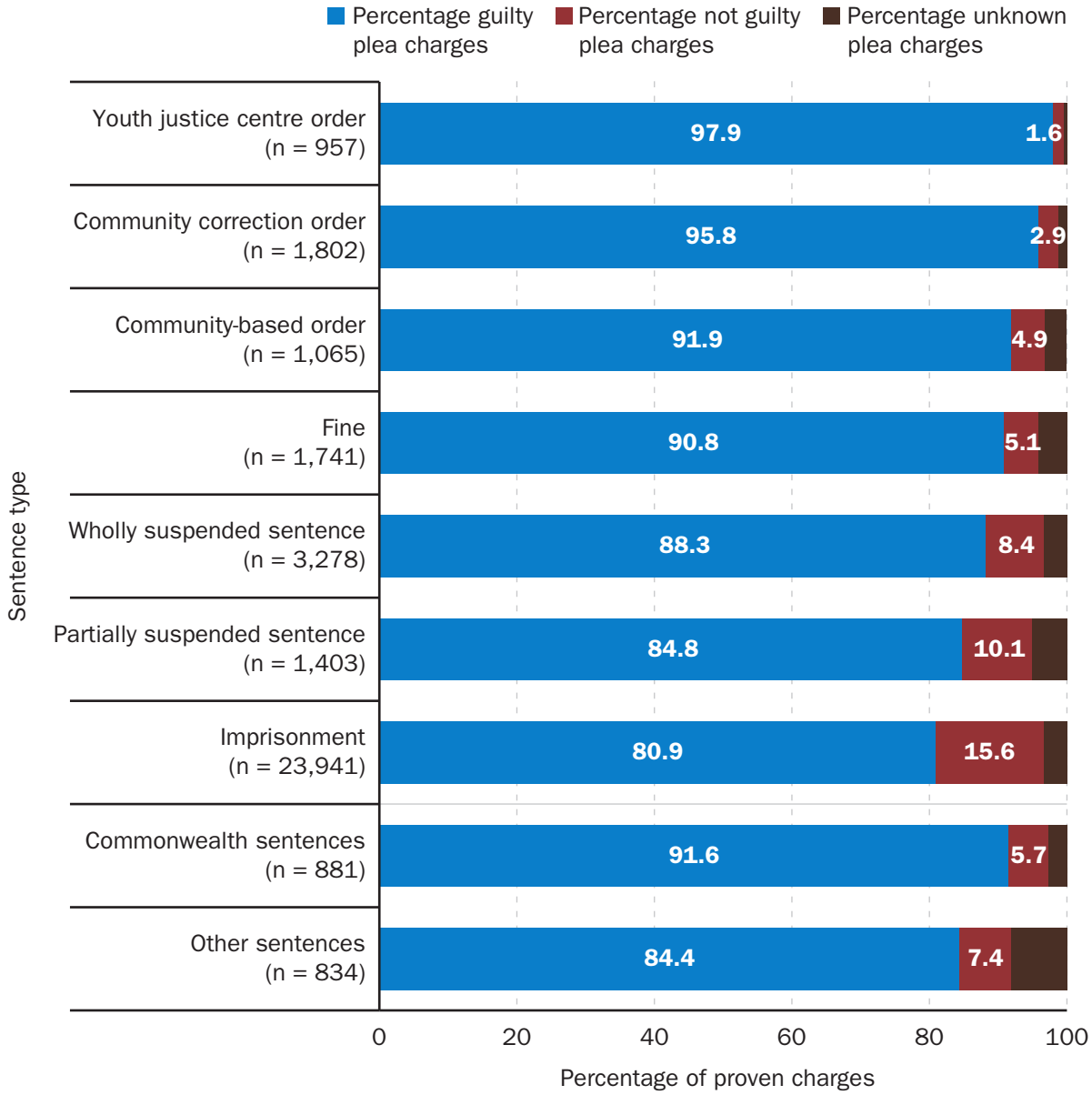
110. See further: [3.1]–[3.4].

111. Z-tests were used to compare each sentence type to the adjacent sentences that had similar percentages of guilty pleas to see if the differences in plea rates were statistically significant: youth justice centre order to community correction order ($z = 2.84$, $p < 0.01$), community correction order to community-based order ($z = 4.40$, $p < 0.001$), community-based order to Commonwealth sentence ($z = 0.26$, ns), Commonwealth sentence to fine ($z = 0.67$, ns), fine to wholly suspended sentence ($z = 2.77$, $p < 0.01$), wholly suspended sentence to partially suspended sentence ($z = 3.23$, $p < 0.01$), partially suspended sentence to imprisonment ($z = 3.61$, $p < 0.001$). Although community-based orders, Commonwealth sentences, and fines were not significantly different from each other, they were found to be significantly different when compared with the rest of the sentences displayed in Figure 10. 'Other sentences' were not examined through the z-test because they comprise a wide mix of sentence types, and it would be difficult to make a meaningful interpretation of their plea rates.

112. See further: [5.12]–[5.16].

3.41 In comparison, there was a very high plea rate for charges sentenced to a youth justice centre order[113] (97.9%) and to a community correction order (95.8%). One possible explanation may be the mitigating effect of pleading guilty (including as evidence of the offender's remorse and good prospects of rehabilitation in some cases). This may have supported a submission that these orders be imposed rather than a sentence of imprisonment. The data discussed at [5.12] support this hypothesis, as in 53.4% of the 262 youth justice centre order cases with a 6AAA statement, the sentencing judge expressly stated that a different sentence type (usually imprisonment) would have been imposed had the offender not pleaded guilty.

Figure 10: Percentage of guilty pleas and not guilty pleas for each sentence type (by individual proven charges) in the higher courts, 2009–10 to 2013–14[114]



113. A youth justice centre order is made under *Sentencing Act 1991* (Vic) sub-div (4) div 2 pt 3. See further: Glossary and [4.38]–[4.40]. This order was formerly known as a youth training centre order.

114. Court Services Victoria, unpublished data. The first seven sentence types in this graph account for 95.2% of sentenced charges during the reference period. Commonwealth sentences accounted for an additional 2.5%. The remaining 2.3% of proven charges received 'other' Victorian sentences. Each sentence type includes the 'aggregate' versions of those sentences. For example, the percentage of people for 'imprisonment' includes people receiving a sentence of 'aggregate imprisonment'.

3.42 The very high plea rate for youth justice centre orders also may be explained, at least in part, by their limited availability to offenders aged 15–20 years at the time of sentencing.[115] Offenders who are at risk of imprisonment and are approaching the cut-off age may be more likely to indicate a guilty plea as early as possible to expedite the sentencing hearing and ensure that a youth justice centre order is still available at the time of sentencing.[116] In such cases, the passage of time caused by pleading not guilty or by pleading guilty late may remove a youth justice centre order as a sentencing option. As approximately one-quarter of 18–21 year old offenders who indicated a guilty plea at the committal stage were sentenced to a youth justice centre order,[117] and these cases comprised 87.3% of all youth justice centre order cases in the County Court,[118] the data offer some support for this hypothesis.

Plea timing by sentence type

3.43 During the reference period, the majority of cases sentenced in the County Court (54.9%) and the Supreme Court (83.4%) received a sentence of imprisonment, regardless of the stage at which the offender pleaded guilty. The proportion of imprisonment cases in the Supreme Court was unsurprising, given its jurisdiction.

3.44 Due to the high proportion of imprisonment cases in the Supreme Court, the remaining sentence types had insufficient cases to compare meaningfully plea timing across sentence types. Therefore, the comparison of plea timing by different sentence types is limited to the County Court.

County Court

3.45 This section focuses on cases (rather than the sentence imposed for each individual charge in the case). Where multiple sentences were imposed in a case (for example, imprisonment with a community correction order), the most serious sentence imposed in the case was the sentence used. Therefore, the discussion of plea timing for community correction order cases does not include cases in which a community correction order was accompanied by imprisonment (such cases would be discussed as imprisonment cases). For imprisonment cases, the total effective sentence of imprisonment for the case is used.

3.46 Figure 11 shows the proportion of cases at each plea timing stage for the seven most frequently imposed sentence types in the County Court.[119] For example, in 27.3% of cases sentenced to a fine, the offender indicated a guilty plea during the committal stage. With the sole exception of fines, the most common plea timing category for each sentence type displayed in Figure 11 was a guilty plea during the committal stage.

115. *Sentencing Act 1991* (Vic) ss 32, 7(1)(d).

116. Meeting with Judge Hannan, County Court of Victoria (20 April 2015).

117. A youth justice centre order was imposed in 248 out of the 945 County Court cases involving an 18–21 year old offender who indicated a guilty plea during the committal stage.

118. In 248 out of 284 youth justice centre order cases in the County Court, the offender had indicated a guilty plea during the committal stage (see Figure 11).

119. These seven most serious sentence types accounted for 93.5% of sentenced cases during the reference period.

3.47 The most striking finding was the high proportion of youth justice centre order cases (87.3%) in which the offender indicated a guilty plea at the committal stage. This was significantly higher than the proportion of cases with a plea at the committal stage for all the other sentence types and was also significantly higher than the proportion of cases sentenced to a youth justice centre order at any other plea timing stage.[120] As previously discussed, part of the explanation may be offenders trying to expedite matters to ensure that their case is sentenced before they turn 21 and/or trying to maximise the prospect of receiving a youth justice centre order instead of imprisonment by indicating a guilty plea as early as possible.[121]

3.48 Cases in which a community-based order or a community correction order was the most serious sentence imposed did not significantly differ from each other in relation to the proportion of guilty pleas at the committal stage, which was the most common plea timing stage for both orders. The proportion of community-based order and community correction order cases with a guilty plea indicated during the committal stage was:

- significantly higher than that for cases sentenced to a fine or a wholly or partially suspended sentence;
- significantly lower than that for youth justice centre order cases; and
- significantly higher than that for imprisonment cases (for community correction order cases only).[122]

3.49 Imprisonment cases were divided into two groups by their total effective sentence: (1) up to two years' imprisonment and (2) imprisonment over two years. The only significant difference between these groups was that a higher proportion of cases sentenced to more than two years' imprisonment had a not guilty plea (14.3% compared with 9.3% of cases with imprisonment of up to two years).[123]

3.50 It is not possible to draw definitive conclusions about the direction of the relationship between sentence type and plea timing. Many factors are likely to influence a person's decision whether, and when, to plead guilty, including the likely sentence that the person faces. In turn, myriad factors are relevant to sentencing, including whether, and at what stage, the offender pleaded guilty.

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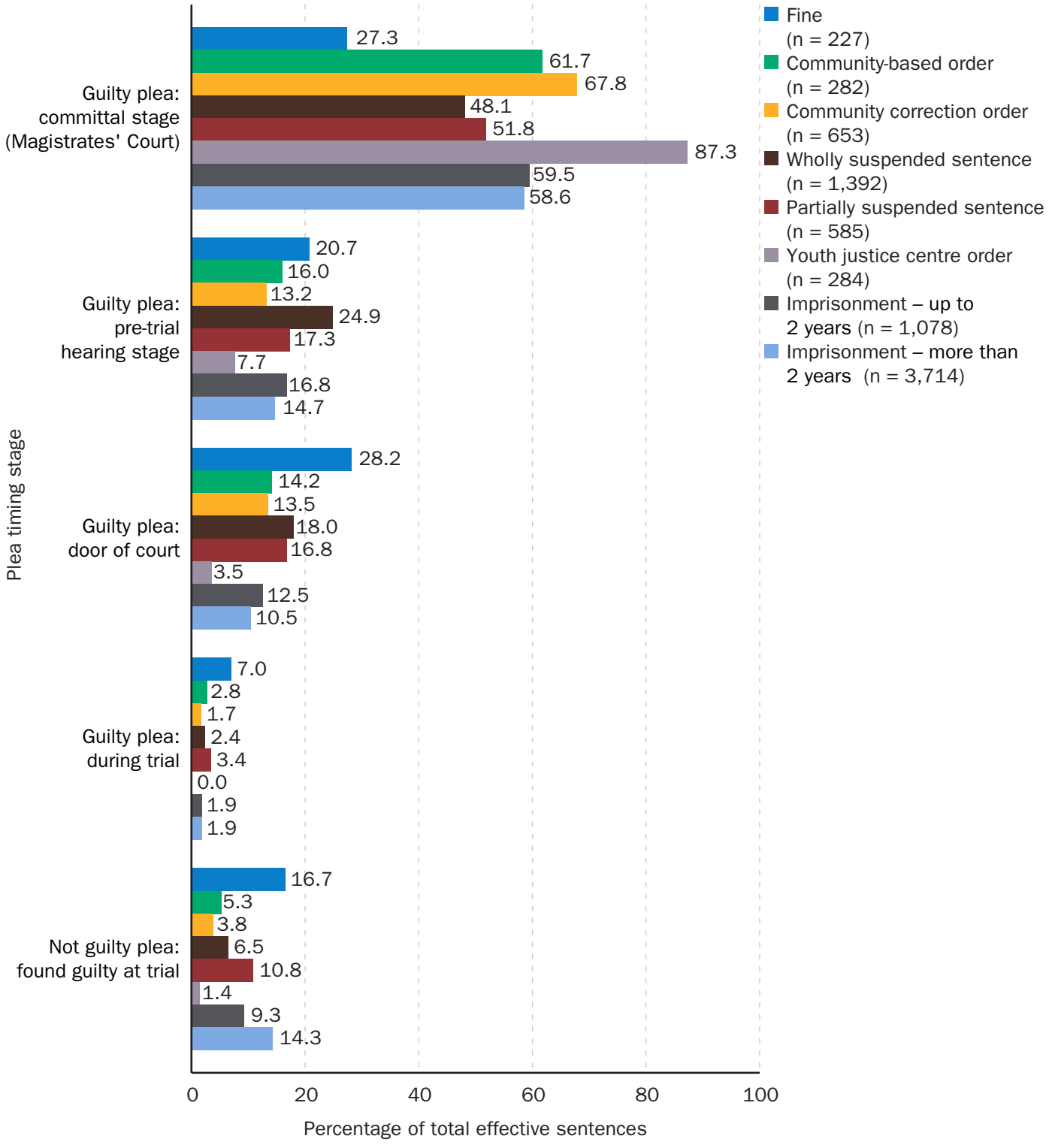
120. A series of z-tests was undertaken to see if youth justice centre orders were significantly more likely to occur at the committal stage compared with the other sentence types: youth justice centre order and fine ($z = 13.80$, $p < 0.001$), youth justice centre order and community-based order ($z = 7.00$, $p < 0.001$), youth justice centre order and community correction order ($z = 6.23$, $p < 0.001$), youth justice centre order and wholly suspended sentence ($z = 12.09$, $p < 0.001$), youth justice centre order and partially suspended sentence ($z = 10.20$, $p < 0.001$), youth justice centre order and imprisonment – up to two years ($z = 8.77$, $p < 0.001$), youth justice centre order and imprisonment – more than two years ($z = 9.55$, $p < 0.001$). Z-tests were also undertaken to see if youth justice centre orders were significantly more likely to occur at the committal stage compared with any later stage: committal and pre-trial ($z = 18.99$, $p < 0.001$), committal and door of court ($z = 20.06$, $p < 0.001$), committal and during trial ($z = 20.98$, $p < 0.001$), committal and found guilty at trial ($z = 20.61$, $p < 0.001$).

121. See further: [3.41]–[3.42].

122. A series of z-tests was undertaken to see if community-based orders and community correction orders were significantly different in their frequency of occurrence at the committal stage compared with other sentence types: community-based order to community correction order ($z = 1.82$, ns), community-based order to fine ($z = 7.73$, $p < 0.001$), community-based order to wholly suspended sentence ($z = 4.16$, $p < 0.001$), community-based order to partially suspended sentence ($z = 2.75$, $p < 0.01$), community-based order to youth justice centre order ($z = 7.00$, $p < 0.001$), community-based order to imprisonment – up to two years ($z = 0.68$, ns), community-based order to imprisonment – more than two years ($z = 1.02$, ns), community correction order to fine ($z = 10.64$, $p < 0.001$), community correction order to wholly suspended sentence ($z = 8.34$, $p < 0.001$), community correction order to partially suspended sentence ($z = 5.76$, $p < 0.001$), community correction order to youth justice centre order ($z = 6.23$, $p < 0.001$), community correction order to imprisonment – up to two years ($z = 3.49$, $p < 0.01$), community correction order to imprisonment – more than two years ($z = 4.44$, $p < 0.001$).

123. ($z = 4.31$, $p < 0.001$).

Figure 11: The proportion of each sentence type (categorised by the most serious sentence in the case) at each plea timing stage, County Court, 2009–10 to 2013–14[124]



124. Cases were classified by their most serious sentence type (see [3.45]). Plea timing was 'unknown' or ambiguous in 3.9% of cases in the original dataset. These cases were excluded from the graph. Imprisonment cases were separated into two groups according to the total effective sentence (see further: [3.49]). If combined, the proportion of imprisonment cases at each plea timing stage was 58.8% (committal stage), 15.2% (pre-trial hearing stage), 11.0% (door of the court), 1.9% (during trial), 13.2% (not guilty plea) (numbers slightly exceed 100% due to rounding).

Gender

County Court

3.51 During the reference period, 8,237 sentenced cases in the County Court involved male offenders, and 866 sentenced cases involved female offenders. In the majority of these cases, the offender indicated a guilty plea during the committal stage, regardless of gender (57.6% of males and 60.0% of females).[125] The only statistically significant gender difference was that males were significantly more likely than females to plead not guilty (in 10.7% of cases proven against males compared with 5.3% of cases proven against females).[126] Males and females did not otherwise significantly differ in terms of plea timing.[127]

3.52 Understanding that plea rates differ across offence types, gender differences in plea timing patterns were tested in relation to the five principal proven offences with the highest number of women sentenced in the County Court (to ensure an adequate number of female offenders): armed robbery, obtaining financial advantage by deception, theft, trafficking drugs in a non-commercial quantity, and aggravated burglary.[128] For all but two of these, gender differences in plea timing were slight and insignificant. The only statistically significant differences across these offences were:

- a significantly higher proportion of females (38.6%) than males (22.9%) sentenced for obtaining a financial advantage by deception pleaded guilty during the pre-trial hearing stage;[129] and
- a significantly higher proportion of females (76.8%) than males (55.9%) sentenced for theft indicated a guilty plea during the committal stage.[130]

Supreme Court

3.53 During the reference period, there were 421 sentenced cases against males and 54 sentenced cases against females in the Supreme Court. Looking only at cases in which the offender pleaded guilty, a larger proportion of females than males pleaded guilty 'early'.[131] However, while there were minor gender differences in plea timing in the Supreme Court, none of these were statistically significant,[132] even when the sample was restricted to only those males and females sentenced to imprisonment.[133] These findings may indicate that differences in plea rates and timing in the Supreme Court are more likely to be a function of offence type, sentence type, and other factors than gender per se.

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125. A total of 345 cases (3.8% of the original dataset) were excluded because the plea timing stage was unknown.
126. ($z = 4.96$, $p < 0.001$).
127. A z-test was used to assess whether differences in plea timing were statistically significant between males and females. Looking at proven cases, females were slightly (but not significantly) more likely than males to plead guilty at the committal stage (60.0% of females versus 57.6% of males), during the pre-trial hearing stage (19.0% of females versus 16.4% of males), and at the door of the court (14.1% of females versus 13.0% of males). Males were slightly (but not significantly) more likely to plead guilty during trial (2.3% of males versus 1.6% of females).
128. The reference to offences in this paragraph is to the principal proven offence in a case. Only cases with known plea timing were included in the analysis. Additional coding was required for the offence of trafficking a drug(s) of dependence (see further: [1.42]).
129. ($z = 2.25$, $p < 0.05$).
130. ($z = 2.71$, $p < 0.01$).
131. For this analysis, 'early' is defined as meaning during the committal stage (24.1% of proven cases with female offenders, compared with 20.9% of proven cases with male offenders), or the pre-trial hearing stage (33.3% of proven cases with female offenders compared with 28.4% of proven cases with male offenders).
132. A z-test was used to assess whether differences in plea timing were statistically significant between males and females. No significant differences were identified.
133. Both males and females sentenced to imprisonment were most likely to be found guilty at trial (35.5% of cases against men and 35.0% of cases against women). Those who pleaded guilty were most likely to do so at the pre-trial hearing stage (27.6% of men, 27.5% of women). Males and females pleaded guilty in similar proportions at every other plea timing stage. There were no significant gender differences between imprisoned offenders.

Corporations and natural persons

3.54 During the reference period, there were 40 sentenced cases involving corporate offenders in the County Court and no such cases in the Supreme Court. There were no statistically significant differences in plea timing between these corporate offenders and natural persons overall.

3.55 In 39 of these 40 cases, the most serious sentence imposed was a fine,[134] therefore plea timing was also compared between fined corporations and the 189 natural persons who received a fine as their most serious sentence (to attempt to minimise the influences of other sentence types on the results for natural persons).[135] The only statistically significant differences were:

- a significantly larger proportion of fined corporations (47.4%) than natural persons (23.3%) indicated a guilty plea at the committal stage ($z = 3.04$, $p < 0.01$); and
- a significantly larger proportion of fined natural persons (31.2%) than fined corporations (13.2%) pleaded guilty at the door of the court ($z = 2.26$, $p < 0.05$).

3.56 However, caution should be used in interpreting these data. The relatively low number of cases involving corporate offenders makes the data on plea timing subject to more variability than that for natural persons. Further, the significant differences in plea timing between corporate and non-corporate defendants may not necessarily be attributable to the corporate status itself, but may instead be explained by differences in the offence profiles of the two groups and other factors.

Age of the offender

3.57 Offenders were divided into five age groups:

- 18–21 years old;
- 22–24 years old;
- 25–34 years old;
- 35–44 years old; and
- 45 and older.

3.58 A number of significant differences in plea timing across age groups emerged. While age itself may explain some of these differences, it is likely that other factors contribute to the age differences in plea timing, or operate alongside it. Such factors include offence type, the likely sentence, the number and severity of prior criminal convictions, and the availability of legal representation.[136]

County Court

Significant differences in plea timing

3.59 Cases proven in the County Court were most commonly resolved after an early indication of a guilty plea by the offender (at the committal stage).[137] This was true for all adult offenders with cases proven in the County Court: each age group was more likely to indicate a guilty plea at the committal stage than to plead guilty at a later stage or to plead not guilty (Figure 12).

134. In the remaining case, the defendant body corporate was sentenced to an adjourned undertaking without conviction.

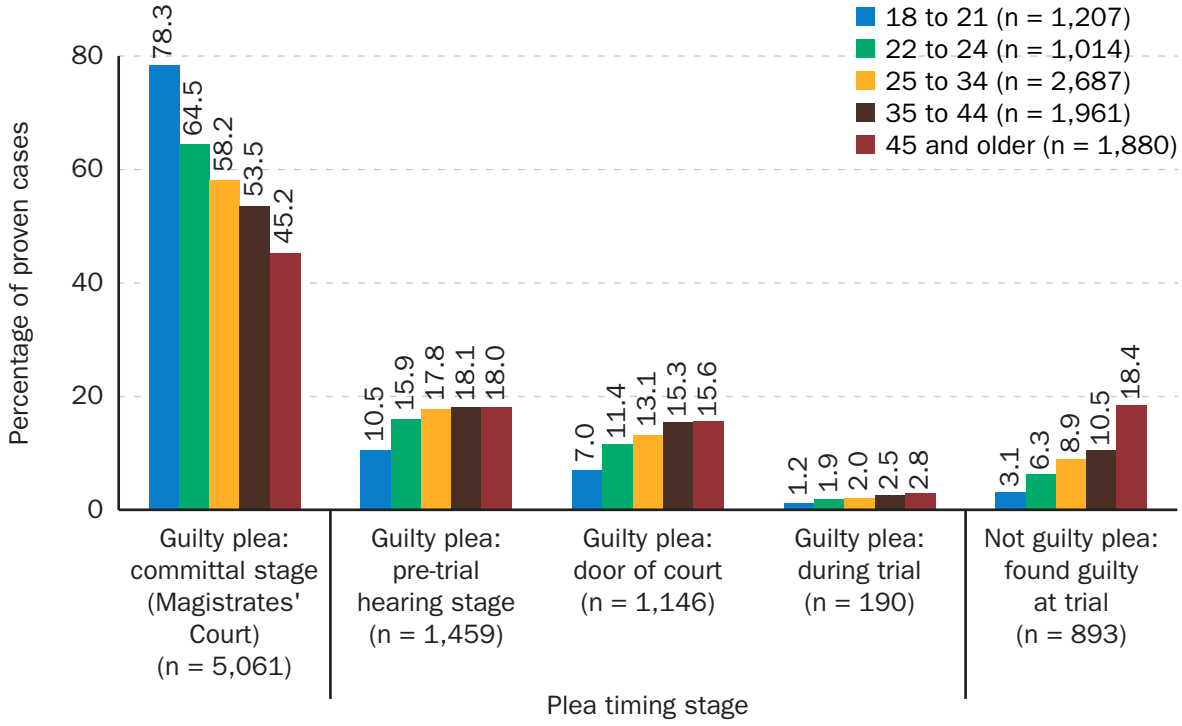
135. There was sufficient plea timing data to include 38 defendant body corporates and 189 natural persons in the z-test. A small percentage of cases in the original dataset were excluded due to unknown or unclear plea data or multiple plea timing stages within the case (3.8% of cases involving natural persons and 2.5% of cases involving corporations).

136. As the focus of this report is on proven charges, innocence is not discussed as a factor that influences whether, and when, an offender pleads guilty.

137. See further: Figure 5.

3.60 However, young adult offenders (aged 18–21) had the highest proportion (78.3%) of guilty pleas indicated during the committal stage,[138] and the plea rate at this stage progressively and significantly decreased with increasing age (to 45.2% for the 45 and older age group).[139] There was a corresponding significant increase in the rate of not guilty pleas with increasing age.[140] This finding is consistent with the findings of Ringland and Snowball in their 2014 study *Predictors of Guilty Pleas in the NSW District Court*, that: 'with increasing age, defendants were more likely to plead not guilty, and those who did plead guilty were more likely to plead guilty late than early'.[141]

Figure 12: The proportion of proven cases in each (adult) age group at each plea timing stage, County Court, 2009–10 to 2013–14[142]



138. This finding may be partially explained by the 20 year old age limit for youth justice centre orders, which may encourage offenders who are under 21 to indicate a guilty plea as early as possible, to expedite the sentencing hearing and ensure the availability of a youth justice centre order (see further: [3.41]–[3.42], [3.47]). The data offer some support for this hypothesis. Approximately one-quarter of 18–21 year old offenders who indicated a guilty plea at the committal stage were sentenced to a youth justice centre order (248 out of 945 cases). These 248 cases comprised 87.3% of all cases sentenced to a youth justice centre order in the County Court (248 out of 284 cases).

139. The age categories displayed in Figure 12 were examined using a series of z-tests to see if they significantly differed from each other. The z-test revealed that the differences in percentage for all age groups indicating a guilty plea at the committal stage were all significantly different from one another: 18–21 and 22–24 ($z = 7.21$, $p < 0.001$), 22–24 and 25–34 ($z = 3.50$, $p < 0.001$), 25–34 and 35–44 ($z = 3.14$, $p < 0.01$), 35–44 and 45 and older ($z = 5.20$, $p < 0.001$).

140. The proportion of offenders who pleaded not guilty fell into four significantly different groups, with the proportion progressively (and significantly) increasing with increasing age: 18–21 and 22–24 ($z = 3.66$, $p < 0.001$), 22–24 and 25–34 ($z = 2.59$, $p < 0.01$), 25–34 and 35–44 ($z = 1.80$, ns), 35–44 and 45 and older ($z = 6.98$, $p < 0.001$).

141. Ringland and Snowball (2014), above n 81, 1.

142. A total of 3.8% of cases with a known age group were excluded from the graph: 0.8% of cases in which there were multiple charges with pleas entered at multiple stages of court proceedings, and 3.0% of cases with unknown or unclear plea timing data. Corporate offenders (40 cases), people aged under 18 (seven cases), and people of unknown age (six cases) were also excluded. In addition to the adult offenders shown in the graph, there were seven proven cases in the County Court in which the defendant was a child (aged 15–17) in the five-year reference period. In two of these cases, a guilty plea was indicated during the committal stage. In the other three cases, the offender pleaded guilty during trial. The remaining two cases did not have information on plea timing.

3.61 Another statistically significant finding was that the proportion of 18–21 year old offenders who pleaded guilty at the door of the court was significantly lower than the proportion of 22–34 year old offenders, which was significantly lower than the proportion of those aged 35 and older.[143]

Sentence type and age differences

3.62 To test the influence of sentence type on the above findings, sentence type was held constant by examining offender age and plea timing within the most common sentence types imposed.[144] The overall pattern (the proportion of guilty pleas at the committal stage progressively decreasing with increasing age) remained in cases in which the most serious sentence imposed was imprisonment, a wholly suspended sentence, or a community-based order, although the degree of difference diminished:

- For community-based orders, while the proportion of guilty pleas at the committal stage progressively decreased with increasing age, the difference between adjoining age groups was no longer statistically significant (in contrast to the finding for cases overall). However, the differences became significant when comparing an age group with the age group two levels above. For example, the proportion of 18–21 year old offenders who indicated a guilty plea during the committal stage (74.5%) was not significantly higher than that for the 22–24 age group, but was significantly higher than that for all age groups 25 years and older (ranging from 58.8% of 25–34 year old offenders to 33.3% of people aged 45 and older).
- Wholly suspended sentence cases fell into three significantly different age groups in relation to the likelihood of indicating a guilty plea during the committal stage. Offenders aged 18–21 were most likely to plead guilty at this stage, followed by 22–24 year old offenders who were moderately likely, followed by all age groups of 25 years and older who were least likely).
- For cases sentenced to imprisonment of up to two years, 18–24 year old offenders were (statistically) significantly more likely than offenders in older age groups to indicate a plea during the committal stage.
- For imprisonment lengths of more than two years, the proportion of guilty pleas at the committal stage was significantly higher for 18–21 year old offenders than older offenders. The proportion of cases with a guilty plea at this stage significantly decreased as age increased in groups as follows: 22–34, 35–44, and 45 and older.[145]

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143. A series of z-tests was performed between the age categories listed: 18–21 and 22–24 ($z = 3.67$, $p < 0.001$), 22–24 and 25–34 ($z = 1.36$, ns), 25–34 and 35–44 ($z = 2.13$, $p < 0.05$), 35–44 and 45 and older ($z = 0.29$, ns).

144. Plea timing across these adult age groups was examined for individual sentence types that were frequently used in the County Court. These included imprisonment – up to two years, imprisonment – more than two years, youth justice centre orders, partially suspended sentences, wholly suspended sentences, community correction orders, community-based orders, and fines. Cases were classified according to the most serious sentence imposed in the case. Children aged 15–17, corporations, people of unknown age, and cases with unknown plea timing data were excluded from this section.

145. A series of z-tests was undertaken for individual sentence types to see if age groups at the committal stage were significantly different from each other. Community-based orders: 18–21 and 22–24 ($z = 0.97$, ns), 22–24 and 25–34 ($z = 0.82$, ns), 25–34 and 35–44 ($z = 1.41$, ns), 35–44 and 45 and older ($z = 0.84$, ns). Although adjoining age groups receiving community-based orders were not significantly different, they were significant if comparing age groups at least two levels away from them. For example, 18–21 year old offenders were not significantly different from 22–24 year old offenders, but were significantly different from people aged 25–34 ($z = 2.19$, $p < 0.05$) and from all the older age groups. Wholly suspended sentences: 18–21 and 22–24 ($z = 2.43$, $p < 0.05$), 22–24 and 25–34 ($z = 2.95$, $p < 0.01$), 25–34 and 35–44 ($z = 0.60$, ns), 35–44 and 45 and older ($z = 1.58$, ns). Imprisonment – up to two years: 18–21 and 22–24 ($z = 0.92$, ns), 22–24 and 25–34 ($z = 2.68$, $p < 0.01$), 25–34 and 35–44 ($z = 1.54$, ns), 35–44 and 45 and older ($z = 1.68$, ns). Imprisonment – more than two years: 18–21 and 22–24 ($z = 2.76$, $p < 0.01$), 22–24 and 25–34 ($z = 1.33$, ns), 25–34 and 35–44 ($z = 3.14$, $p < 0.01$), 35–44 and 45 and older ($z = 4.13$, $p < 0.001$).

3.63 Consistent with the general pattern, in cases sentenced to a partially suspended sentence (585 cases) or a community correction order (653 cases), offenders aged 18–21 had a significantly higher proportion of guilty pleas indicated during the committal stage than offenders aged 22 and older. However:

- in partially suspended sentence cases, age groups above 21 years old did not significantly differ from each other in relation to plea timing (for example, the proportion of people aged 25–34 indicating a guilty plea during the committal stage was the same as that for those aged 45 and older: (51.1%)).
- in community correction order cases, a high proportion of people aged 35–44 (71.3%) indicated a guilty plea during the committal stage, which was not significantly different from the proportion of those aged 18–21 (80.0%). However, a significantly lower proportion (50.6%) of people aged 45 and older pleaded guilty at the committal stage than people in all other age groups except those aged 25–34 (63.1%).[146]

3.64 While the findings suggest that the offender's age may be associated with whether and when he or she pleads guilty, the differences in age/timing patterns across individual sentence types indicate that other factors may also influence plea timing. Further research could examine the unique influence of age on plea rates and timing, after isolating the influence of sentence type and other factors.

Supreme Court

3.65 The influence of age on plea rates and timing was even more pronounced in the Supreme Court. In the County Court, although the proportion of guilty pleas indicated at the committal stage gradually decreased as age increased, the majority of offenders in each age group pleaded guilty during the committal stage. In contrast, in the Supreme Court there was a noticeable difference in plea timing between offenders aged 18–21 and those aged over 21 years, although some caution should be taken due to the comparatively low number of cases sentenced in the Supreme Court (Figure 13).

3.66 The majority of 18–21 year old offenders in the Supreme Court indicated a guilty plea during the committal stage (18 out of 48 proven cases = 37.5%), and they were significantly more likely to do so than all other age groups, apart from offenders aged 35–44 (where the proportion was still lower than the 18–21 year old group, but the difference just missed the threshold of significance).[147]

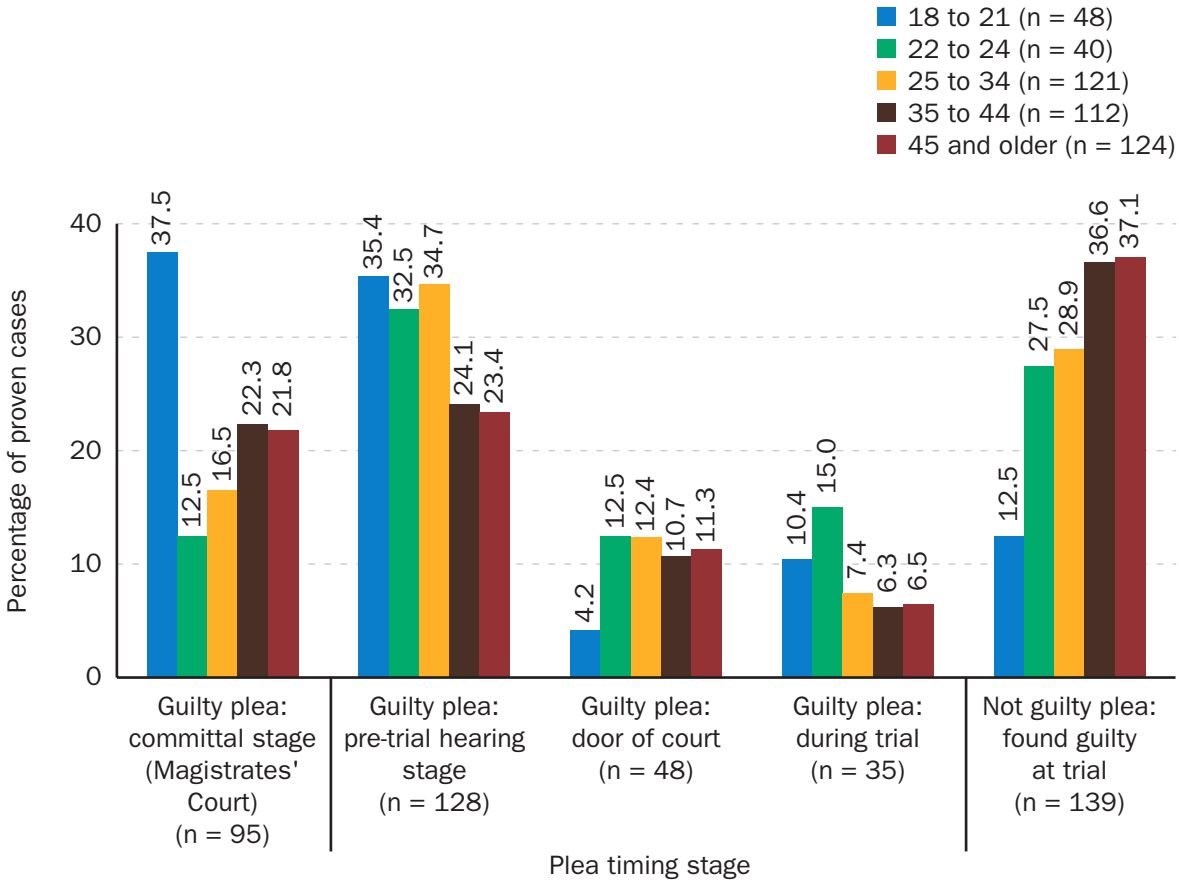
146. A series of z-tests was undertaken for individual sentence types to see if age groups at the committal stage were significantly different from each other. Partially suspended sentence: 18–21 and 22–24 ($z = 2.72$, $p < 0.05$), 22–24 and 25–34 ($z = 0.25$, ns), 25–34 and 35–44 ($z = 0.75$, ns), 35–44 and 45 and older ($z = 0.70$, ns). Community correction order: 18–21 and 22–24 ($z = 2.91$, $p < 0.01$), 22–24 and 25–34 ($z = 0.33$, ns), 25–34 and 35–44 ($z = 1.32$, ns), 35–44 and 45 and older ($z = 2.71$, $p < 0.01$). Another interesting finding from the z-test for community correction orders was that 18–21 year old offenders pleading guilty at the committal stage were not significantly different from those aged 35–44 ($z = 1.60$, ns), and 25–34 year old offenders pleading guilty at the committal stage were not significantly different from those aged 45 and older ($z = 1.87$, ns).

147. Z-test results for people indicating a plea during the committal stage: 18–21 and 22–24 ($z = 2.66$, $p < 0.05$), 18–21 and 25–34 ($z = 2.94$, $p < 0.01$), 18–21 and 35–44 ($z = 1.98$, ns – the p-value for this test was 0.053, which indicates that the differences were very close to being significant but just missed the threshold of 0.05), 18–21 and 45 and older ($z = 2.10$, $p < 0.05$). While it is possible that some 18–21 year old offenders were trying to finalise their case quickly to be eligible for a youth justice centre order, none ultimately was sentenced to such an order. Of the 18–21 year old offenders who indicated a plea during the committal stage and did not receive imprisonment, one person received a wholly suspended sentence, four people received a community-based order, and three people received a community correction order.

3.67 Likewise, the proportion of proven cases in which the offender had pleaded not guilty progressively increased as age increased (Figure 13), with a significantly smaller proportion of 18–21 year old offenders pleading not guilty (12.5%) than the proportion of people in all age groups of 25 years and older.[148] None of the other age groups significantly differed from each other, although it is noticeable that a lower proportion of people aged 22–34 pleaded not guilty than people aged 35 and older.

3.68 While care should be taken in interpreting these data due to the relatively small number of cases sentenced in the Supreme Court, the findings are consistent with the trend in the County Court.

Figure 13: The proportion of proven cases in each (adult) age group at each plea timing stage, Supreme Court, 2009–10 to 2013–14[149]



148. Z-test results for people who were found guilty at trial: 18–21 and 22–24 ($z = 1.77$, ns), 18–21 and 25–34 ($z = 2.25$, $p < 0.05$), 18–21 and 35–44 ($z = 3.07$, $p < 0.01$), 18–21 and 45 and older ($z = 3.15$, $p < 0.01$).

149. A small percentage of cases (4.2% of the original dataset) were excluded from the graph due to unknown or unclear plea timing data. A further 10 proven cases were excluded because the offender was a child. In two of these cases, the guilty plea was indicated during the committal stage, in four cases during the pre-trial hearing stage, in one case at the door of the court, and in three cases the offender pleaded not guilty.

Conclusion

3.69 There were striking, and statistically significant differences in plea rates and timing across a number of key factors, including age, offence type, and sentence type (although it does not necessarily follow that there are causal links between a particular factor and plea rates and/or timing). It is likely that these and other factors work in different combinations to influence whether, and when, a person pleads guilty in an individual case. Additional factors that could be measured in future research include the number and type of prior convictions and whether other offences were sentenced along with the principal proven offence. Further research could also explore how measurable factors work in combination.

3.70 Equally important factors that may be more difficult to measure include the strength of the prosecution case and whether, and when, an offender had access to legal representation.

3.71 This chapter has not discussed innocence or guilt as factors influencing plea because the analysis is confined to *proven* charges (that is, charges for which the offender has been found guilty).

4. Compliance with section 6AAA

Key findings

In the higher courts during the reference period (2009–10 to 2013–14):

- There was a very **high rate of compliance** with section 6AAA for the sentence types analysed.
- The court **made a 6AAA statement** in 98.7% of eligible imprisonment cases, 93.1% of eligible youth justice centre order cases, and 85.5% of eligible fine cases.
- In most of the cases without a 6AAA statement, the court **provided a reason** as to why a 6AAA statement was unnecessary or problematic.

4.1 If an offender pleads guilty, section 6AAA of the *Sentencing Act 1991* (Vic) requires the court to state the sentence and the non-parole period, if any, that it would have imposed but for the guilty plea, if:

- the court reduced the sentence that it otherwise would have imposed as a result of the guilty plea;[150] and
- the court is imposing an 'eligible' sentence;[151] and
- the plea hearing occurred on or after 1 July 2008.[152]

4.2 Cases that appeared to meet these criteria ('eligible cases') were analysed to assess the degree to which the courts complied with the requirement to make a 6AAA statement. Between July 2009 and June 2014 in the higher courts, there were:

- 4,450 eligible imprisonment cases;
- 276 eligible youth justice centre order cases; and
- 165 cases with eligible fines (based on the fine imposed for an individual charge).

4.3 The analysis in this section is limited to these three current sentencing options.

Did courts apply section 6AAA in relevant cases?

4.4 There was a very high compliance rate across all three sentencing options, particularly imprisonment:

- imprisonment (98.7%);
- youth justice centre orders (93.1%); and
- eligible fines (85.5%).

150. A 6AAA statement is not required if the court does not reduce the sentence: it 'is only required *if* the court decides to impose a less severe sentence than it would otherwise have done because the offender has pleaded guilty'. *DPP v Hunter* [2013] VSC 440 (21 August 2013) [94].

151. See further: [1.12]–[1.18].

152. *Criminal Procedure Legislation Amendment Act 2008* (Vic) s 2(5).

4.5 Judges overwhelmingly complied with 6AAA, notwithstanding concern from some (particularly when section 6AAA first commenced operation) about the difficulty of isolating the guilty plea from other factors in order to make a 6AAA statement.[153] For example, in *Youil v The Queen*,[154] Priest JA (with whom Buchanan and Neave JJA agreed) commented:

> Given that any sentence now passed must represent an instinctive synthesis of all relevant factors, and given that the court cannot look at mitigating features in isolation, s 6AAA requires the Court to indulge in a somewhat artificial (although legislatively mandated) exercise in order to apply it.

4.6 However, Neave JA added:

> although there may be some artificiality in the court stating the sentence it would have imposed if the appellant had not pleaded guilty, s 6AAA reflects the important policy aim of encouraging those who have committed the offences with which they are charged to plead guilty by indicating the discount given for that plea. By so doing, it may reduce expenditure on the strained resources of the criminal justice system and relieve victims of crime from the ordeal of giving evidence.[155]

4.7 Likewise, Judge Hannan, the Head of the Criminal Division in the County Court of Victoria, has commented that 'the fact that the judge announces the discount at the end of the sentence is significant' and is 'part of an arsenal' of measures that encourages those intending to plead guilty to do so early.[156]

4.8 To understand better some of the issues that courts may face in applying section 6AAA, the sentencing remarks for eligible cases without 6AAA statements were read to cross-check the data and to ascertain the reason that the court did not state the sentence that it would have imposed but for the offender's guilty plea.

Imprisonment

Compliance with 6AAA

4.9 The data revealed a very high compliance rate for imprisonment sentences. Out of 4,450 sentenced cases in which the offender pleaded guilty and received a term of imprisonment (eligible imprisonment cases):[157]

- The judge applied 6AAA in 4,391 cases (98.7%). This included 4,388 cases with a complete 6AAA statement and three cases without a 6AAA statement where a discount was not given for the guilty plea (and therefore a 6AAA statement was not required.
- Fifty-nine imprisonment cases (1.3%) did not have a complete 6AAA statement, despite the court reducing the offender's sentence because of the guilty plea. In some of these cases, it appears that section 6AAA may not require a statement as a matter of law. In others, the circumstances of the case made compliance problematic. The reasons that the court did not make a 6AAA statement in these cases are discussed below.

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153. See, for example: *R v Flaherty (No 2)* (2008) 19 VR 305; *DPP v Jones (A Pseudonym)* (2013) 40 VR 267; *Youil v The Queen* [2013] VSCA 228 (22 August 2013); *SD v The Queen* (2013) 39 VR 487.
154. *Youil v The Queen* [2013] VSCA 228 (22 August 2013) [36].
155. *Youil v The Queen* [2013] VSCA 228 (22 August 2013) [40].
156. Meeting with Judge Hannan, County Court of Victoria, 20 April 2015.
157. In addition to the 4,450 imprisonment cases that were eligible for a 6AAA statement, a further 54 cases were excluded because there were insufficient data to identify whether a 6AAA statement was required and/or made. These cases were not included in the total eligible cases or in any calculations.

Reasons why there was not a 6AAA statement

4.10 In 40 of the 59 eligible imprisonment cases without a 6AAA statement, the court provided a reason for not making a 6AAA statement. In the remaining 19 cases (0.4% of eligible imprisonment cases), the judge did not refer to 6AAA or make a 6AAA statement, despite acknowledging that the plea had been a mitigating factor in the case. The 40 cases with reasons provided fell into the following categories:[158]

- In eight cases, the judge commented that he or she was not making a 6AAA statement because the case contained a Commonwealth offence(s). Six of these cases involved Commonwealth offences only, while two involved a combination of state and Commonwealth offences.
- In eight cases, the judge decided not to make a 6AAA statement because it would be 'meaningless', 'misleading', or 'impossible' in the particular circumstances of the case or sentence.
- In six cases, the judge made a partial 6AAA statement – indicating that but for the guilty plea, a longer term of imprisonment would have been imposed – but not quantifying the amount of the 'discount'. In most of these cases, the judge commented that it was impossible, or would be misleading, to be more specific.
- In 12 cases, the judge did not make a 6AAA statement because the sentence was a combination of imprisonment and a community correction order (11 cases) or imprisonment and a community-based order (one case). In these cases, the imprisonment imposed was usually at or close to the time that the offender had already served.
- In two cases, the judge decided not to make a 6AAA statement because the sentence was for rolled-up counts.
- There was no 6AAA statement in four cases that involved a combination of charges to which the defendant had pleaded guilty and charges to which the defendant had pleaded not guilty (but that had subsequently been proven).

4.11 It is clear from the analysis of imprisonment cases that compliance with section 6AAA was very high. While 6AAA does not provide specific exceptions, where an apparently eligible imprisonment case did not have a 6AAA statement, it was usually either because in the circumstances of the case section 6AAA did not apply or an aspect of the case complicated the task of making the statement. Some of these circumstances are discussed in more detail below.

6AAA statements and federal offences

4.12 In formulating the original recommendations that lead to section 6AAA, the Council chose not to consider the use of the scheme for federal offences heard in Victorian courts. This decision was made on the basis that Commonwealth legislation governs sentencing for federal offences, and the Australian Law Reform Commission (ALRC) in its review of federal sentencing law had already examined the issue and recommended a federal scheme.[159]

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158. Each case was only counted once. Where cases could have fallen into a number of categories, the most appropriate category (based on the judge's reasoning) was selected. These categories are discussed in more detail at [4.12]–[4.37].

159. Sentencing Advisory Council (2007), above n 1, 5, referring to Australian Law Reform Commission, *Same Crime, Same Time: The Sentencing of Federal Offenders*, Report 103 (2006). The Australian Law Reform Commission recommended legislation to enable courts sentencing offenders under federal law to state whether an offender's sentence was reduced because of his or her guilty plea and to specify how the reduction had been applied.

4.13 The application of section 6AAA to federal sentencing was raised in *Scerri v The Queen,*[160] in which the Victorian Court of Appeal applied section 6AAA in resentencing the offender following a successful appeal against a sentence for a federal offence. The Court of Appeal accepted a submission by counsel for the Commonwealth Director of Public Prosecutions that the court 'should treat the requirement in s 6AAA of the *Sentencing Act* as applicable (by force of section 79 of the *Judiciary Act 1901* (Cth)) to Commonwealth offences' and made the 6AAA statement on that basis.

4.14 While this position was adopted in a number of subsequent cases,[161] the Court of Appeal returned to this point in *Cooper v the Queen*,[162] commenting that '[t]here is some doubt as to whether s 6AAA of the *Sentencing Act 1991* (Vic) applies to sentences for federal offences, as well as sentences for state offences'.[163] However, consistent with the approach in *Scerri*, the Court of Appeal in *Cooper* made a 6AAA statement 'on the assumption that it applies'.[164]

4.15 This uncertainty was evident in the eight cases involving federal offences sentenced during the reference period in which the judge declined to make a 6AAA statement. In one of these cases, 6AAA may not have applied in any event as the judge commented that the mandatory sentence attached to the federal offence exceeded the sentence that she would have otherwise imposed; therefore, it is likely that the guilty plea did not change the sentence. In addition to these eight cases, in another two cases in which 6AAA was not applied (for other reasons) or was not mentioned, the case included at least one federal offence.

4.16 According to the Commonwealth Director of Public Prosecutions (CDPP), Australia's federal prosecution service, there is no apparent impediment to making a 6AAA statement in sentencing federal offences:

> Sections 68 and 79 of the *Judiciary Act 1903* (Cth), in effect, provide that the procedure for sentencing federal offenders is to be the same as that for offenders sentenced in accordance with the procedures applicable in the state/territory in which the charges are brought … so far as the state procedural law is applicable [and] except as otherwise provided. …
>
> The requirement under Victorian law to quantify a specific sentencing discount for a plea of guilty … appears capable of being picked up and applied under s 68 and s 79 of the *Judiciary Act 1903* (Cth). The *Crimes Act 1914* (Cth) makes no provision for quantifying the discount for a plea. However it is arguable that the Commonwealth regime on that subject is not complete on its face and there appears to be no contrary intention expressed in Commonwealth legislation.[165]

4.17 Section 6AAA requires the sentencing court to make a 6AAA statement in relation to specific fines and/or an 'order under Division 2 of Part 3' of the *Sentencing Act 1991* (Vic). As an order to imprison an offender for a federal offence is an order under the Commonwealth *Crimes Act 1914*, it is unlikely that a 6AAA statement *is required*. However, there appears to be no impediment to a 6AAA statement being made and, in practice, it appears that courts usually make 6AAA statements in imposing imprisonment for federal offences.

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160. *Scerri v The Queen* (2010) 206 A Crim R 1.
161. See, for example: *R v Emini & Blumberg* [2011] VSC 336 (27 July 2011) n 10; *DPP (Cth) v Bui* (2011) 32 VR 149.
162. *Cooper v the Queen* [2012] VSCA 32 (2 March 2012).
163. *Cooper v the Queen* [2012] VSCA 32 (2 March 2012) [38].
164. *Cooper v the Queen* [2012] VSCA 32 (2 March 2012) [38].
165. Commonwealth Director of Public Prosecutions, *Federal Sentencing in Victoria (as at 1 May 2014)* (CDPP, 2014) <http://www.cdpp.gov.au/publications/federal-sentencing-in-victoria/> at 10 June 2015, 3, 5.

4.18 During the reference period, a 6AAA statement was made in 96.4% of cases that involved at least one federal offence and in which the offender had pleaded guilty, as follows:

- in 172 of 179 imprisonment cases involving only federal offence(s), the court made a 6AAA statement; and
- in 97 of 100 imprisonment cases involving a combination of state and federal offences, the court made a 6AAA statement.

4.19 Therefore, 10 out of 279 cases involving federal offences did not have a section 6AAA statement. In eight of these cases, the judge referred to the presence of the federal offence as the reason for not making a 6AAA statement. In the remaining two cases, the judge mentioned the guilty plea as a mitigating factor but did not provide a 6AAA statement.

4.20 The approach taken in the Court of Appeal and the view of the Commonwealth Director of Public Prosecutions, together with the high compliance rate in cases involving federal offences sentenced in Victoria, suggest that section 6AAA may be relevant to sentencing federal offences, at least in practice, if not in law. While courts may not be required to make a 6AAA statement in federal cases, there appears to be no impediment to courts doing so.

Meaningless, misleading, or impossible in the circumstances

4.21 In eight cases, the judge decided not to make a 6AAA statement, forming the view that to do so would be meaningless, misleading, or impossible due to the unique circumstances of the case. In a further six cases, the judge referred to 6AAA and said that but for the guilty plea he or she would have imposed a longer term of imprisonment; however, the judge did not, or felt unable to, quantify the amount of the longer term. For example, in one such case the offender had provided considerable assistance to the authorities as well as pleading guilty. The judge stated:

> Pursuant to s.6AAA of the *Sentencing Act 1991* I am obliged to state the sentence which would have been imposed but for your pleas of guilty. In my view any assessment of your guilty pleas is inextricably intertwined with your assistance to the authorities and it is not possible to specify an arithmetical outcome that isolates the guilty pleas alone. All that can be said is that in the absence of the entry of guilty pleas a significantly greater term of imprisonment would have been imposed on you.[166]

Guilty pleas and informer discounts

4.22 The case described at [4.21] above highlights one of the complicating features of section 6AAA: it operates alongside section 5(2AB) of the *Sentencing Act 1991* (Vic), which requires that:

> If, in sentencing an offender, a court imposes a less severe sentence than it would otherwise have imposed because of an undertaking given by the offender to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence, the court must announce that it is doing so and cause to be noted in the records of the court the fact that the undertaking was given and its details.

166. *DPP v Arslan* (Unreported, County Court of Victoria, 10 December 2010).

4.23 While section 5(2AB) requires the court to state that it has imposed a less severe sentence, the court is not required to specify the sentence that it would have imposed but for the undertaking to assist.[167] If the offender has already cooperated and/or provided assistance to the authorities at the time of sentencing, the sentencing judge must take that into account along with all other relevant sentencing factors, and it is likely to mitigate the sentence that would otherwise have been imposed.[168] Regardless of whether the assistance to authorities has been given or promised, courts have commented that it can be difficult to disentangle the weight given to this factor from the weight given to the guilty plea.[169]

4.24 Similarly, in federal prosecutions, the court is required to state the sentence that would have been imposed but for the offender's undertaking to cooperate after sentencing,[170] which may complicate the task of making a 6AAA statement. This complexity was observed in *R v Emini & Blumberg*,[171] in which the sentencing judge said:

> the difficulties … in applying s 6AAA are multiplied in a case like the present, where the Court is also required to state a but for sentence in respect of future cooperation pursuant to s 21E of the *Crimes Act*. One immediately is faced with the problem as to whether the but for sentence under s 6AAA should be stated on the basis that there will or will not be future cooperation (it would be higher in the absence of future cooperation, and lower if there is to be future cooperation).[172]

4.25 Referring to somewhat conflicting authorities on whether or not cooperation with law enforcement authorities should be included in the 6AAA statement,[173] the judge continued:

> In the circumstances of this case, it is not realistic to provide a but for sentence under s 6AAA that does not take into account the issue of cooperation. Cooperation was, in this case, inextricably linked, and necessarily involved, with the pleas of guilty. Specifically, it is artificial, and unrealistic, to analyse the sentences in this case on the hypothetical basis that there were no pleas of guilty, but that there would be ongoing future cooperation. If there were no pleas of guilty, one could not expect (in the circumstances of this case) cooperation, or at least cooperation of the kind referred to in s 21E.[174]

4.26 The sentencing judge in *Emini* referred to *R v Flaherty (No 2)*,[175] in which Kaye J held that it would be undesirable to consider the discount given for the guilty plea in isolation from other related factors, including remorse and providing assistance to the authorities:

> in determining, in effect, the amount by which the accused's sentence is to be reduced as a consequence of his plea of guilty in this case, I do take into account, not only the utilitarian effects of the plea, but also the fact that it was made out of an ongoing concern to cooperate with the authorities, and that it was accompanied by remorse.

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167. *Sentencing Act 1991* (Vic) s 5(2AC).
168. *R v Su & Ors* [1997] 1 VR 1; *R v Evans* (2000) 112 A Crim R 234; *R v El-Ahmad* [2004] VSCA 93 (26 May 2004). See further: Judicial College of Victoria, 'Assistance Given to Authorities', *Victorian Sentencing Manual* (Judicial College of Victoria, 2006–) <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#17902.htm> at 10 June 2015, [26.9.3].
169. See, for example: *DPP v Arslan* (Unreported, County Court of Victoria, 10 December 2010); *R v Maddox* [2009] VSC 447 (9 October 2009) [47].
170. This is pursuant to section 21E of the *Crimes Act 1914* (Cth).
171. *R v Emini & Blumberg* [2011] VSC 336 (27 July 2011).
172. *R v Emini & Blumberg* [2011] VSC 336 (27 July 2011) n 10.
173. *R v Flaherty (No 2)* (2008) 19 VR 305; *DPP (Cth) v Bui* (2011) 32 VR 149; *R v Rau* [2010] VSC 370 (19 August 2010) [34] (Forrest J); *Giordano v The Queen; Giordan v The Queen; Cosentino v The Queen* [2010] VSCA 101 (7 May 2010).
174. *R v Emini & Blumberg* [2011] VSC 336 (27 July 2011) n 10.
175. *R v Flaherty (No 2)* (2008) 19 VR 305, 310 [14].

4.27 However, in *DPP (Cth) v Couper*,[176] Tate JA (with whom Harper JA and Williams AJA agreed) said that where an offender is entitled to a sentencing discount that enlivens both section 21E of the *Crimes Act 1914* (Cth) and section 6AAA of the *Sentencing Act 1991* (Vic):

> it is necessary for the actual sentence imposed faithfully to reflect the benefit of both reductions rather than only the larger of the two. To sentence in accordance with the latter approach would be to fail to take account of an offender's entitlement to a reduction under the other provision. It would fail to recognise that the provisions relate to separate and distinct conduct by an offender that confers largely unconnected benefits upon law enforcement authorities and the community. …
>
> [I]t would be wrong to consider that there is only one methodology (or one sequence) that is faithful to the requirements [under s 21E and s 6AAA] … Whichever sequence is adopted, it is important that the actual sentence imposed reflects the fact that the offender has had the benefit of both forms of reduction. A way of ensuring this has occurred is to indicate plainly … what discount is referable to the undertaking to co-operate and what discount is referable to the guilty plea.[177]

4.28 Different approaches have emerged in relation to making a 6AAA statement in cases in which the offender has assisted the authorities or has undertaken to do so. In some cases, the court endeavoured to separate the two and to confine the 6AAA statement to the discount for the guilty plea, perhaps commenting that this exercise is difficult or artificial. In other cases, the court has combined the cooperation and guilty plea in the 6AAA statement,[178] or has declined to make a 6AAA statement on the basis that it is impossible to separate the guilty plea from other sentencing factors.[179]

4.29 The data for the 4,391 imprisonment cases with a 6AAA statement discussed in this report do not provide information about whether there was also a discount for assisting authorities, or agreeing to provide assistance after sentencing. Therefore, it is possible that some of the guilty plea discounts discussed in Chapter 5 encompass a discount for assisting authorities or for undertaking to do so.

Imprisonment combined with a community correction order

4.30 In 12 cases in which the sentence involved the combination of a term of imprisonment and a community correction order or a community-based order, the judge did not make a 6AAA statement. The term of imprisonment imposed in these cases was usually at or near the time that the offender had already served as pre-sentence detention, and the main focus of the sentence was on the length and conditions of the community correction order. For example, in one such case, the offender was sentenced to a term of imprisonment of 14 days (which was for time already served) and a four-year community correction order.

4.31 In some of these cases, it was suggested that to make a 6AAA statement in such circumstances would be impossible or meaningless.

176. *DPP (Cth) v Couper* (2013) 229 A Crim R 115.
177. *DPP (Cth) v Couper* (2013) 229 A Crim R 115, 141–142 [136], 144 [144] (Tate JA).
178. See, for example: *R v Emini & Blumberg* [2011] VSC 336 (27 July 2011) n 10.
179. See, for example: *DPP v Arslan* (Unreported, County Court of Victoria, 10 December 2010).

4.32 There also was a question raised as to whether a 6AAA statement was required in such cases, given that:

> the provision that allows the CCO and term of imprisonment [section 44 of the *Sentencing Act 1991* (Vic)] doesn't fall within the part that requires a *6AAA* [Division 2 of Part 3 of the *Sentencing Act 1991*].[180]

4.33 Section 7(1)(a) of the *Sentencing Act 1991* (Vic) empowers a court that has found a person guilty of an offence to order that the offender serve a term of imprisonment. Section 44 empowers a court to 'make a community correction order in addition to imposing a sentence of imprisonment', if the sum period of all the terms of imprisonment to be served is two years or less. Neither of these sections falls within Division 2 of Part 3 of the *Sentencing Act 1991* (Vic), which sets out the detailed powers relating to making custodial orders.

4.34 The first question raised by these cases is whether a sentence of imprisonment imposed with a community correction order pursuant to section 44 is an order made under section 44 and/or under section 7(1)(a) and (e) (in which case a 6AAA statement may not be required), or whether it is an order under Division 2 of Part 3 of the *Sentencing Act* 1991 (Vic) (in which case a 6AAA statement may be required). This in turn raises a broader second question – what is the authorising provision for a sentence of imprisonment? Is an order to imprison an offender an order under section 7 of the *Sentencing Act 1991* (Vic) (in which case it is unclear whether a section 6AAA statement would be mandatory for imprisonment cases) or a custodial order under Division 2 of Part 3?

4.35 In light of the issue raised by these cases, consideration may need to be given to amending section 6AAA to clarify the sentencing orders to which it applies. For example, linking section 6AAA to the relevant sub-sections of section 7 of the *Sentencing Act 1991* (Vic) may provide more clarity than linking it to Division 2 of Part 3.

4.36 In 2014, the power to combine a community correction order with imprisonment under section 44(1) was expanded, increasing the maximum sentence of imprisonment that may be combined with a community correction order from three months to two years (for some offences, the maximum term of imprisonment is not limited).[181] This will increase the pool of cases for which a combined community correction order/imprisonment sentence may be an appropriate disposition, which in turn may increase the number of these 'combined' sentences. This provides further reason to clarify whether a 6AAA statement is required in such cases.

4.37 Regardless of whether section 6AAA makes it *mandatory* for courts to make a 6AAA statement in cases involving imprisonment with a community correction order, courts have the power to do so under sub-section 6AAA(3). In a further 81 cases involving offenders sentenced to a community correction order (or community-based order) and imprisonment during the reference period, the court made a 6AAA statement. Similarly, in a recent Court of Appeal decision, the court made a 6AAA statement when resentencing an offender to imprisonment and a community correction order, following a successful appeal against sentence.[182]

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180. *DPP v Clarke* [2014] VCC 726 (15 May 2014).

181. *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 18(1).

182. *Mackay v The Queen* [2015] VSCA 125 (27 May 2015) [27] (Ashley JA).

Youth justice centre orders

4.38 A youth justice centre order is a sentence requiring an offender aged 15–20 years at the time of sentencing to be detained in a youth justice centre.[183]

4.39 In the Children's Court, it is the most severe sanction that may be imposed on an offender of this age, and the maximum length of detention is two years for a single offence or three years for more than one offence.[184]

4.40 In the adult jurisdiction, offenders aged 15–20 years at the time of sentencing may be sentenced to a youth justice centre order as an alternative to imprisonment.[185] The maximum duration of the order is two years if imposed in the Magistrates' Court or three years in the County and Supreme Courts.[186]

4.41 Offenders who are under 15 years of age at the time of sentencing may be sentenced in the higher courts to a youth residential centre order as an alternative to imprisonment, requiring their detention in a youth residential centre.[187] However, as no offenders were sentenced to these orders in the higher courts during the reference period, these orders are not discussed further in this report.

Compliance with 6AAA

4.42 As youth justice centre orders are defined as 'an order falling within Subdivision (4) of Division 2 of Part 3' of the *Sentencing Act 1991* (Vic), a section 6AAA statement is required if the sentence is reduced as a result of the offender's guilty plea.[188]

4.43 During the reference period, there were 294 cases in which the offender was sentenced to a youth justice centre order in the higher courts. Of these, 276 youth justice centre order cases were eligible for a 6AAA statement.[189]

4.44 Compliance with section 6AAA for these orders was very high (93.1%, n = 257), although not as high as for imprisonment. Nineteen cases (6.9%) did not have a complete 6AAA statement.

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183. Prior to 23 April 2007, youth justice centres were called 'youth training centres' and a youth justice centre order was called a 'youth training centre order'. Cases in the data that were sentenced to either a youth training centre order or a youth justice centre order were combined into one category for the purposes of this report.
184. *Children, Youth and Families Act 2005* (Vic).
185. *Sentencing Act 1991* (Vic) ss 7(1)(d), 32–35.
186. See further: *Sentencing Act 1991* (Vic) ss 7(1)(d), sub-div (4) div 2 pt 3; Sentencing Advisory Council, *A Quick Guide to Sentencing* (2015).
187. See further: *Sentencing Act 1991* (Vic) ss 7(1)(da), sub-div (4) div 2 pt 3; Sentencing Advisory Council (2015), above n 186.
188. *Sentencing Act 1991* (Vic) s 3. See further: [1.15]–[1.17] in relation to the construction of section 6AAA for custodial orders.
189. Thirteen cases were excluded because there were insufficient data to identify whether a 6AAA statement was required and/or made. Five cases were excluded because the offender had pleaded not guilty and therefore section 6AAA did not apply. These cases were not included in the total eligible youth justice centre order cases discussed in this section.

Reasons why there was not a 6AAA statement

4.45 The 19 cases without a complete 6AAA statement fell into the following categories:

- In one case, the judge decided not to make a 6AAA statement because it would be meaningless or misleading in the particular circumstances of the case.
- In six cases, the judge referred to section 6AAA but was uncertain whether it applied to a youth justice centre order and did not make a 6AAA statement.
- In nine cases, the judge made a 'partial' 6AAA statement, that is:
  - the judge stated that he or she would have imposed a longer sentence of youth detention but for the plea of guilty, but did not specify the actual length that would have been imposed (seven cases); or
  - the judge indicated the possible range that the defendant might have faced but for the guilty plea, but did not specify the actual length of the youth detention order that would have been imposed (one case); and
  - in one case, the judge indicated that but for the guilty plea, he would 'have seriously had to consider whether a Youth Justice Centre Order would have been appropriate' but that he could not take the 6AAA statement any further as 'it is just so unrelated to reality … when you are dealing with a young offender that it is almost impossible to comply with'.[190]
- In the remaining three cases (1.1% of eligible youth detention cases), the judge did not refer to 6AAA or make a 6AAA statement, despite acknowledging that the plea had been a mitigating factor in the case.

Eligible fines

4.46 A 6AAA statement is required in relation to:

- a fine exceeding 10 penalty units; and
- an aggregate fine exceeding 20 penalty units.[191]

Compliance with 6AAA

4.47 During the reference period, there were 207 cases in which at least one charge in the case had a fine at or above the threshold amount (10 penalty units) or above the aggregate fine amount (20 penalty units).[192] Twenty of these cases were not eligible for a 6AAA discount because the defendant did not plead guilty. Twenty-two cases had insufficient data to establish whether a 6AAA statement was required and/or made, leaving a total pool of 165 eligible cases to examine.[193]

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190. *DPP v PJR* [2013] VCC 700 (14 May 2013) [37].
191. *Sentencing Act 1991* (Vic) s 6AAA. See further: [1.18].
192. In addition to these 207 cases with individual fines above the threshold amount, there were a further 86 cases in which individual fines in the case were below the threshold amount, but the total amount of the fines imposed in the case was above the threshold amount. Such cases do not appear to trigger section 6AAA, on a reading of the section as a whole, and were therefore not included in the pool of cases examined.
193. These 165 eligible fine cases comprised 155 cases with at least one charge sentenced to a fine at or above the threshold amount (10 penalty units), eight cases with an aggregate fine at or above the threshold amount (20 penalty units), and two cases that had both individual and aggregate fines that exceeded the relevant thresholds. These 165 cases formed the 'pool' of cases for which 6AAA compliance was examined.

4.48 In 141 out of 165 cases (85.5%), the court made a 6AAA statement. However, in 58 of these cases, the fine was imposed alongside another sentencing disposition, and the 6AAA statement did not necessarily refer to the fine:

- In 13 cases, the eligible fine was accompanied by a term of immediate imprisonment, and the 6AAA statement was limited to an indication of the longer term of imprisonment that would have been imposed but for the guilty plea. It is unclear whether this means that the judge would not have imposed a fine had the offender not pleaded guilty, or whether the judge elected not to make a statement regarding the fine, or whether the judge thought that 6AAA did not apply or did not turn his or her mind to the fine component of the sentence.
- In 39 cases, the fine was accompanied by a partially suspended sentence (five cases) or a wholly suspended sentence (34 cases – including wholly suspended sentences under the Commonwealth regime). An examination of the sentencing remarks in a very small sample (five) of these cases revealed the same pattern as for immediate imprisonment cases, in that the 6AAA statement focused only on the custodial aspect of the sentence.
- The eligible fine was imposed together with a community-based order (in one case), a community correction order (in four cases), or an intensive correction order (in one case). The sentencing remarks revealed that in three of these six cases, the offender would have received a sentence of imprisonment but for the guilty plea (with no mention of a fine). In the remaining three cases, the court stated that a more severe fine would have been imposed but for the guilty plea.

4.49 In the remaining 83 cases with a 6AAA statement, the fine was the most severe sentence imposed in the case. Although sentencing remarks were not analysed for these cases, it is expected that the 6AAA statement in these cases would focus on how the fine would have changed but for the offender's guilty plea.

4.50 The 85.5% compliance rate for fines should be considered in this context.

Reasons why there was not a 6AAA statement

4.51 There were 24 eligible fine cases without a 6AAA statement (14.5%). These cases fell into the following categories:

- Nine cases had a partial 6AAA statement, the judge stating that the fine would have been greater but for the guilty plea, but not specifying an actual dollar amount.
- In two cases, the judge stated that making a 6AAA statement would be misleading or impossible due to the unique circumstances of the case.
- In three cases with eligible fines, the judge expressed uncertainty about whether a 6AAA statement was required for the fines imposed in the case and ultimately decided not to make a statement.
- In the remaining 10 cases (6.1% of eligible fine cases), the judge did not make a 6AAA statement or mention 6AAA, despite acknowledging the offender's guilty plea as a mitigating factor in sentencing.

Optional 6AAA statements: community correction orders

4.52 Even where courts are not required to make a 6AAA statement, they may do so by virtue of sub-section 6AAA(3) of the *Sentencing Act 1991* (Vic). During the reference period, the courts made 6AAA statements in a number of cases in which they were permitted, but not required, to do so.

4.53 For example, in at least 43.0% of cases in which the offender pleaded guilty and was sentenced to a community correction order (274 cases out of 637 in the period), the judge made an optional 6AAA statement. In these cases, the community correction order was not accompanied by any other sentence that would automatically trigger section 6AAA.

4.54 A 6AAA statement was made in an additional four cases in which a community correction order was the most severe sentence imposed in the case but was accompanied by an eligible fine. In three of these cases, the 6AAA statement incorporated the community correction order, but it is difficult to speculate on whether the judges in these cases would have made a 6AAA statement if the community correction order had not been accompanied by the eligible fine. In the remaining case, the judge specifically made a 6AAA statement only for the fine, and not for the community correction order.[194]

Conclusion

4.55 In certain circumstances, a sentencing court is required to state the sentence, and the non-parole period if any, that it would have imposed if the offender had not pleaded guilty to the offence. These statements are made under section 6AAA of the *Sentencing Act 1991* (Vic) and are referred to in this report as 6AAA statements. These statements are mandatory for some sentencing orders and discretionary for others.

4.56 The higher courts had a very high rate of compliance with section 6AAA of the *Sentencing Act 1991* (Vic) during the reference period. The court made a 6AAA statement in almost all cases with sentencing orders that triggered section 6AAA. In 98.7% of imprisonment cases, 93.1% of youth justice centre order cases, and 85.5% of eligible fine cases, the court made a 6AAA statement.

4.57 In the relatively few cases without a 6AAA statement, the court usually provided a reason as to why a 6AAA statement was unnecessary or problematic in the circumstances of the case. These cases revealed genuine questions as to the application of section 6AAA in particular circumstances, such as cases involving a sentence of imprisonment with a community correction order.

4.58 In addition to a high compliance rate in cases in which a statement was required, there were many cases in which the court made a discretionary 6AAA statement, for example, in cases in which the offender was sentenced to a community correction order as the most serious sentence.

194. See also: [4.48] in relation to the application of section 6AAA in cases sentenced to a community correction order with an eligible fine.

5. The stated discount for a guilty plea

Key findings

During the reference period (2009–10 to 2013–14) in the higher courts:

- In one-third of cases with a 6AAA statement, **the sentence type changed** as a result of the guilty plea.
- In the remaining two-thirds of cases with a 6AAA statement, the guilty plea **reduced the sentence length**.
- In imprisonment cases:
  - the **most common discount** was 20–30% of the total effective sentence (in 44.9% of cases), and there was a 30–40% discount in a further 26.8% of cases;
  - cases with **longer imprisonment sentences** received significantly smaller sentence discounts (as a group) than those with shorter imprisonment sentences;
  - cases with **early guilty pleas** (during the committal stage or pre-trial hearing stage) received slightly (but statistically significant) larger sentence discounts (as a group) than cases with late guilty pleas (at the door of the court or during trial); and
  - when sentence length was held constant (by examining plea timing and sentence discounts at two fixed imprisonment lengths), the relationship between plea timing and the sentence discount was still present (though statistically weaker). This suggests that **plea timing** and **sentence length** are both associated with the level of discount.

5.1 As previously noted, in sentencing an offender, a sentencing judge must consider whether, and at what stage, the offender pleaded guilty or indicated a willingness to do so.[195] In practice, a guilty plea is almost always viewed as a mitigating factor, even if there is little evidence of remorse. This reflects its substantial utilitarian benefit.

5.2 While many jurisdictions, like Victoria, provide for reductions in sentence for a guilty plea, there have been calls for more research into the 'exact magnitude of the reductions awarded, and the factors determining the level of reduction'.[196] As Roberts and Bradford recently emphasised:

> A great deal rests on the magnitude of the reductions offered to defendants who plead guilty. As the magnitude of the discount increases, so, too, does the likelihood that innocent defendants will enter a guilty plea. Similarly, very large discounts will significantly undermine proportionality, as a factor unrelated to harm or culpability assumes greater importance in determining sentence outcomes.
>
> … in the absence of comprehensive sentencing statistics it is hard to estimate the size of plea-based reductions in any jurisdiction, or to make systematic comparisons between jurisdictions. Despite the importance of this factor at sentencing, few jurisdictions routinely collect sentencing data detailed enough to establish the exact magnitude of plea-based reductions.[197]

5.3 In Victoria, requiring (in certain circumstances) sentencing judges to articulate the sentence that they would have imposed but for the defendant's guilty plea provides insight into the level of reductions being awarded, which can be calculated by subtracting the actual sentence from the notional undiscounted sentence in the 6AAA statement.

5.4 This method of estimating the discounts given for guilty pleas is not without its limitations. While Chapter 4 revealed a very high compliance rate with 6AAA in the higher courts, a number of judges have commented on the difficulty and artificiality of making 6AAA statements, '[g]iven that any sentence now passed must represent an instinctive synthesis of all relevant factors, and given that the court cannot look at mitigating features in isolation'.[198]

5.5 Judges have also commented that the task of isolating the value of the guilty plea is further complicated by the distinct but overlapping purposes that it can serve:

> In a large number of cases … the plea of guilty does not operate as a mitigating circumstance in isolation. Of necessity it interrelates with, and, to some extent, has a symbiotic relationship with, other mitigating circumstances, and particularly matters such as cooperation, contrition and rehabilitation. Thus a guilty plea may, of itself, provide some evidence of remorse, and manifest an intention to advance the course of justice. Equally, the value of a plea of guilty may be enhanced where it is found that it is made in a spirit of cooperation, and that it is attended by contrition.
>
> The question, then, is what aspects of the accused's plea do I take into account in quantifying the "discount" to which the accused is entitled under s 6AAA[?] … Ordinarily, a plea of guilty may be relevant for a variety of purposes [including] … its utilitarian effect in saving the State

195. *Sentencing Act 1991* (Vic) s 5(2)(e). See further: [1.9]–[1.11].

196. Julian Roberts and Ben Bradford, 'Sentence Reductions for a Guilty Plea in England and Wales: Exploring New Empirical Trends' (2015) 12(2) *Journal of Empirical Legal Studies* 187, 187.

197. Ibid 188.

198. *Youil v The Queen* [2013] VSCA 228 (22 August 2013) [36] (Priest JA, Buchanan and Neave JJA agreed). See further: [4.5]–[4.7].

> resources and expense; its beneficial effect in sparing witnesses, and relatives of the victim, the trauma and stress of a criminal trial; its role in manifesting the accused's willingness to facilitate the course of justice; and the fact that it is in the public interest that accused persons, who are guilty, be encouraged to publicly acknowledge their guilt by a plea to that effect. Further, in appropriate cases a plea of guilty may be evidence of remorse. The question is which, if any, of the above factors are to be taken into account in determining the quantitative weight to be given to the plea of guilty, for the purposes of s 6AAA.[199]

5.6 However, although judges in a number of cases have commented on the difficulty of trying to isolate and ascribe a numerical value to the guilty plea, they have also acknowledged their responsibility to endeavour to comply with section 6AAA[200] and the importance of its policy aims, including increasing transparency and encouraging people intending to plead guilty to do so at the earliest opportunity:

> although there may be some artificiality in the court stating the sentence it would have imposed if the appellant had not pleaded guilty, s 6AAA reflects the important policy aim of encouraging those who have committed the offences with which they are charged to plead guilty by indicating the discount given for that plea. By so doing, it may reduce expenditure on the strained resources of the criminal justice system and relieve victims of crime from the ordeal of giving evidence.[201]

5.7 While recognising the concerns raised in these cases and the possible limitations of 6AAA statements in light of those concerns, the 6AAA statements still provide insight into the courts' treatment of, and the value placed on, guilty pleas. As sentencing judges endeavour to give their best indication of the sentence that would have been imposed but for the guilty plea, in this chapter the resulting 6AAA statements are taken at face value and the 'discount' for the guilty plea are calculated by subtracting the actual sentence from the 6AAA statement. However, the discussion of 'discounts' in this chapter should be read in this context.[202]

5.8 During the reference period, 7,073 cases had 6AAA statements with sufficient information to analyse the effect of the guilty plea on the offenders' sentences. The actual sentences imposed were compared with the notional sentences in the 6AAA statement to ascertain whether the offender would have faced a different sentencing order, or a longer sentence, had he or she not pleaded guilty.

5.9 A unique feature of these data is that the information about the plea-based reduction comes directly from the sentencing judges.

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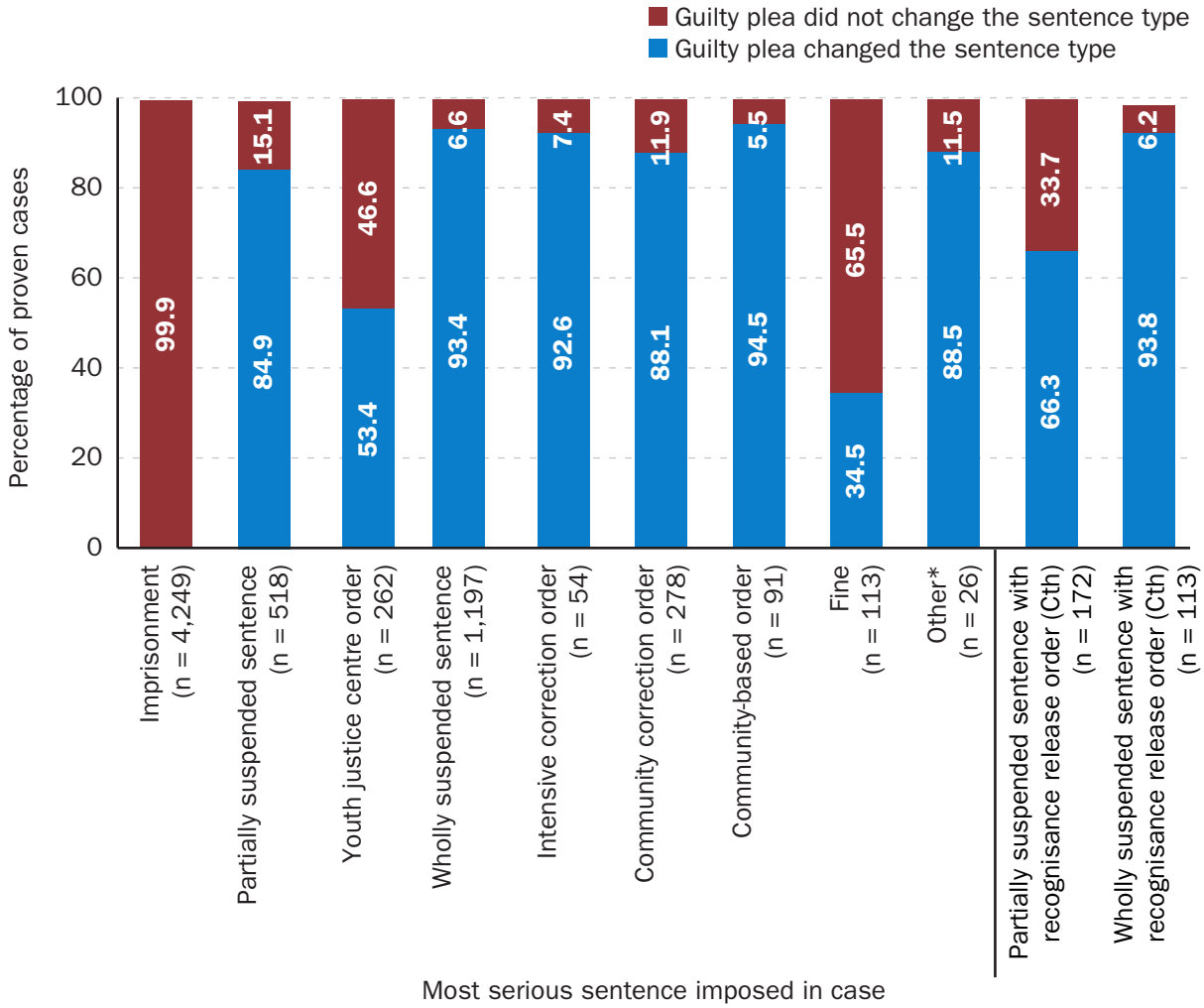
199. *R v Flaherty (No 2)* (2008) 19 VR 305, 308–309 (citations omitted).
200. See, for example: *R v Flaherty (No 2)* (2008) 19 VR 305, 309 [12], 310 [15] (citations omitted).
201. *Youil v The Queen* [2013] VSCA 228 (22 August 2013) [40] (Neave JA). See further: [4.6]–[4.7].
202. The 6AAA discount in some cases may also encompass a reduction in sentence for assisting authorities or for undertaking to do so. See further: [4.22]–[4.29].

Changes to sentence type due to the guilty plea

5.10 For each of the most common sentence types,[203] Figure 14 displays the proportion of cases in which the court would have imposed a different sentence type if the offender had not pleaded guilty. There were noticeable differences across sentence types (in relation to whether the offender would have received a different sentence type but for the guilty plea).

Figure 14: Proportion of proven higher court cases in which the guilty plea changed the sentence type that would otherwise have been imposed, 2009–10 to 2013–14[204]



* Sentence types with a very low number of cases with a 6AAA statement, such as adjourned undertakings, were combined into the 'other' category.

203. Cases were categorised by the most serious sentence imposed in the case. This analysis is limited to the 7,073 cases with a 6AAA statement.

204. Cases without a known 6AAA statement were not included in this graph. This particularly affected sentence types such as community correction orders, community-based orders, fines, and Commonwealth suspended sentences, as they had a relatively large percentage of cases without a 6AAA statement (as 6AAA statements are not required).

Imprisonment

5.11 In the majority (99.9%) of imprisonment cases with a known 6AAA statement, the judge stated that the offender would still have faced imprisonment had he or she not pleaded guilty, which is to be expected given that imprisonment is the most severe sentencing order in the sentencing hierarchy. There were three imprisonment cases (0.1%) in which the judge would have imposed a different sentencing order but for the guilty plea. These were unique cases in which the sentencing judge stated that he or she would have imposed a longer sentencing order but not used a sentence of immediate imprisonment. For example, in one case, the court sentenced the offender to three months' imprisonment with a two-year community correction order. But for the guilty plea, the offender would have received a two-year youth justice centre order.

Youth justice centre orders

5.12 In 53.4% of youth justice centre order[205] cases with a known 6AAA statement, the offender would have received a different sentence type, usually imprisonment,[206] had he or she not pleaded guilty.

Suspended sentences and intensive correction orders

5.13 For over 90% of intensive correction order cases and wholly suspended sentence cases (both Victorian and Commonwealth) and for 84.9% of Victorian partially suspended sentence cases, the offender would have been sentenced to a different sentence type but for his or her guilty plea. The sentence that would have been imposed instead was one of immediate imprisonment in:

- 99.5% of Victorian and 99.1% of Commonwealth partially suspended sentence cases in which the sentence type changed;
- 84.3% of (Victorian) wholly suspended sentence cases in which the sentence type changed (in a further 14.1% of cases, the sentence of imprisonment would have been partially, rather than wholly, suspended if the offender had not pleaded guilty); and
- 73.6% of (Commonwealth) wholly suspended sentence cases in which the sentence type changed (in a further 21.7% of cases, the offender would have been sentenced to a Commonwealth partially suspended sentence but for the guilty plea).

5.14 This finding suggests that the guilty plea was influential in the decision to suspend all or part of the sentence of imprisonment that the offender otherwise would have received (or to order that it be served by way of an intensive correction order).

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205. A youth justice centre order is made under *Sentencing Act 1991* (Vic) sub-div (4) div 2 pt 3. See further: [4.38]–[4.40]. This type of order was formerly known as a 'youth training centre order'.

206. In 137 out of 140 youth justice centre order cases in which the sentence type changed, the offender would have received a term of imprisonment but for the guilty plea. The remaining three cases would have received a partially suspended sentence.

Community correction orders and community-based orders

5.15 Community correction orders and community-based orders[207] also had a high proportion of cases in which the offender would have received a different sentence type but for the guilty plea (88.1% and 94.5% respectively). This result should be interpreted with caution as over half of all cases that received these sentences did not have a recorded 6AAA statement (which is not required for these orders). As a result, the cases with a 6AAA statement may not be truly representative of the type of cases that usually receive a community-based order or a community correction order.

5.16 Nearly three-quarters of community correction order cases (74.3%) and just over half of the community-based order cases (53.5%) in which the guilty plea changed the sentence type would have been sentenced to imprisonment but for the guilty plea. In a sizeable percentage of community-based order cases in which the guilty plea changed the sentence type, the judge indicated that the offender would have been sentenced to a partially (12.8%) or wholly (16.3%) suspended sentence or to youth detention (12.8%) but for the guilty plea.

Changes to sentence amount due to the guilty plea

5.17 The weight given to a guilty plea in an individual case will depend on the circumstances, although 'the presumption is that a discount should be given irrespective of the seriousness of the offence', and 'the effect of the guilty plea is not cancelled or outweighed by other aggravating factors'.[208]

5.18 This section presents the discounts given for guilty pleas in imprisonment, youth justice centre order, and eligible fine cases, in which there was a complete 6AAA statement[209] and the discount was recorded in the data. Across all sentencing types, in 66.5% of cases with a complete 6AAA statement, the sentence type remained the same but the length was reduced as a result of the guilty plea.

5.19 For imprisonment cases, these discounts are examined across four sentence length groups, to ascertain whether there are differences in the proportion of sentence reduction for short, medium, and long imprisonment sentences.

5.20 This section also studies the discounts for cases at different plea timing stages, as the stage at which a plea was made or indicated is a factor that Victorian courts must have regard to in sentencing,[210] and 'the earlier the guilty plea, the greater the utilitarian value and the greater the discount that will be given by the sentencing court'.[211]

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207. As community-based orders were abolished during the reference period, the data contain some cases sentenced to community-based orders (sentenced during the first half of the reference period).

208. Freiberg (2014), above n 82, 379.

209. In these cases, the sentencing judge stated the sentence type and length (and the non-parole period, if any) that would have been imposed but for the guilty plea.

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

211. New South Wales Law Reform Commission (2013), above n 50, [9.14], citing *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [154], [160].

5.21 One caveat in relation to the plea timing data is that some cases that appear in the dataset as a 'late' guilty plea may in effect have been treated as an 'early' plea by the sentencing judge because, practically speaking, the plea was entered at the first opportunity. Although the timing of a guilty plea is a significant factor in assessing its weight at sentencing:

> the timing is more complicated than simply considering a chronology of when the offender entered a guilty plea. The intricacies of the criminal justice system mean there are often lengthy periods of communication and procedural matters to be addressed before an offender can reasonably be expected to plead guilty. The High Court in *Cameron* acknowledged that the question of timeliness is not one that can be answered 'simply by looking at the charge sheet'. Rather, the question to be asked is when would it be reasonably practicable to expect the offender to have entered a plea.[212]

5.22 For example, if the defendant's unequivocal, early offer[213] to plead guilty to a lesser, related offence was not accepted by the prosecution until later in proceedings, the defendant may be entitled to receive the full benefit of the guilty plea from the time at which the offer was made:

> there is often a relationship between the timeliness of a plea and negotiations with the prosecution. In some situations a plea will be considered early if it follows late negotiations with the prosecution.[214]

5.23 However, such a case would appear in the dataset as a 'late' guilty plea to the lesser, related charge. The proportion of guilty pleas entered during the pre-trial hearing stage (rather than at an earlier stage) for offences such as manslaughter and dangerous driving causing death (Figure 9), may, at least partly, reflect this negotiation process.[215] The discounts shown in the data for each timing stage should be understood in this context, particularly when comparing the relative discounts for early and late guilty pleas.

Imprisonment

Percentage discount for guilty plea

5.24 For the immediate imprisonment cases in which there was a 6AAA statement, the discount for the guilty plea was calculated by subtracting the actual sentence that was imposed from the sentence that would have been imposed but for the guilty plea (indicated in the 6AAA statement). There were 4,249 imprisonment cases in which the 6AAA statement contained sufficient information to calculate the discount. Figure 15 shows the percentage discounts given for these imprisonment sentences. In some of these cases, the defendant also received a discount for being an informer (for example, giving evidence against a co-accused), and sometimes the section 6AAA statement merged the guilty plea and informer discount. However, data were not available on the number of cases in which this occurred.

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212. Wren and Bartels (2014), above n 7, 366, citing *Cameron v The Queen* (2002) CLR 339, 345 [20]. See also: Freiberg (2014), above n 82, 379–380.

213. 'An offer to plead guilty must be a real offer – not merely an invitation to treat – expressed in clear terms, and preferably be in writing and before the judge in order to ensure that there are no disputes about the offer and its terms': Freiberg (2014), above n 82, 379, citing *R v Franklin* [2012] SASFC 109 [45] (White J).

214. Wren and Bartels (2014), above n 7, 376, citing *R v Ayres* (Unreported, Supreme Court of the Australian Capital Territory, Penfold J, 13 December 2012); *R v Williams* (Unreported, Supreme Court of the Australian Capital Territory, Higgins CJ, 16 November 2011). See also: *R v Dib* [2003] NSWCCA 117 (27 May 2003) [3] (Hodgson JA).

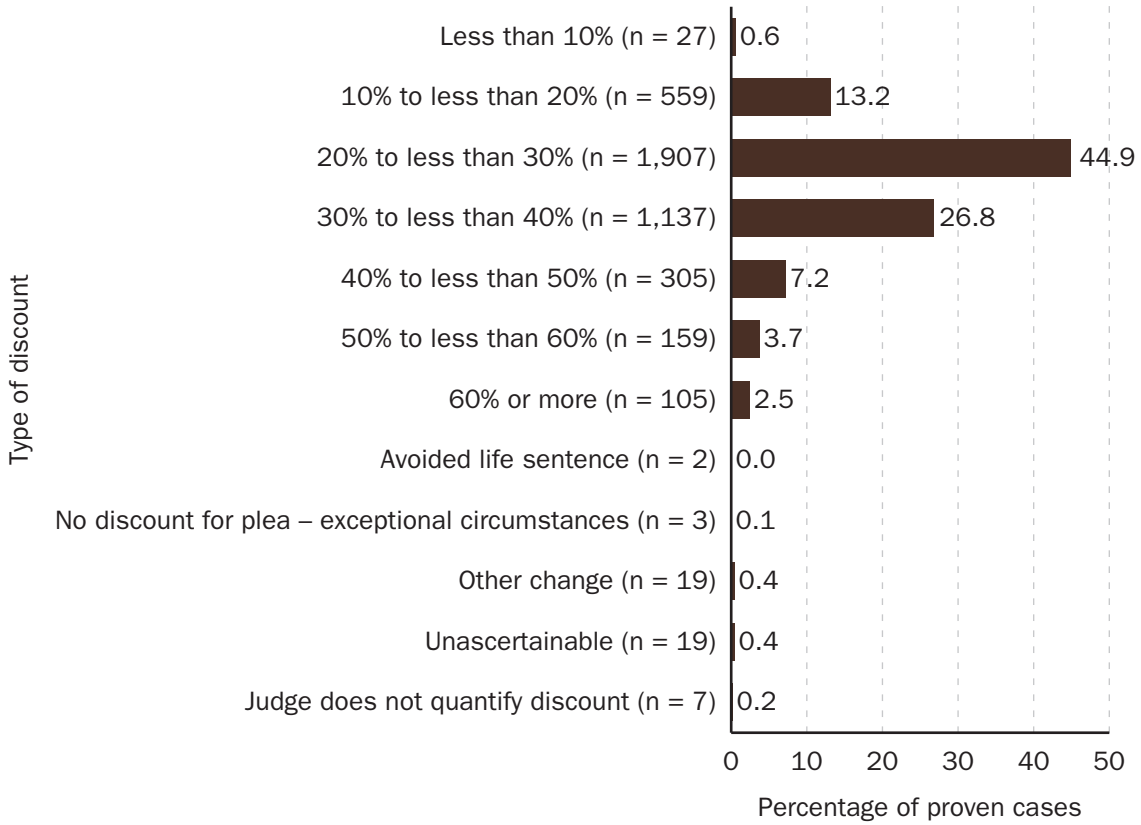
215. See further: [3.33].

5.25 Figure 15 shows that for just under half of the imprisonment sentences that received a discount, the discount was in the range of 20–30% (44.9% of cases) with the next largest group receiving a discount between 30% and 40% (26.8% of cases).

5.26 A very small percentage of cases (0.6% = 27 cases) received a sentence discount of less than 10%. In a further three cases, the guilty plea did not change the sentence length:

- In two murder cases, the court imposed a sentence of life imprisonment without parole despite the guilty plea.
- In the third case, the imprisonment ordered (321 days) was equivalent to time that the offender had already spent in pre-sentence detention. The offender, who suffered from mental illness, was also sentenced to a restricted involuntary treatment order for two years. The judge stated that in the exceptional circumstances of the case, the sentence would have been the same regardless of the guilty plea.

Figure 15: Guilty plea discount in imprisonment sentence length (higher courts imprisonment cases, 2009–10 to 2013–14)[216]



216. The total pool of cases shown in this graph does not include cases with a 6AAA statement in which the guilty plea changed the sentence *type* (this happened very rarely for imprisonment), cases in which a 6AAA statement was not made, and cases in which it was unknown or ambiguous if a 6AAA statement was made due to missing sentencing remarks.

5.27 In a small number of unusual cases (2.5% = 105 cases), the offender received a high discount of 60% or more for the guilty plea. Almost all these cases involved relatively short sentences of imprisonment (so that a 60% discount represented days or months rather than years)[217] and a sample of these cases revealed that the discount generally reflected unusual circumstances, such as:

- a short sentence of imprisonment combined with a community-based order or a community correction order. The court indicated that if the offender had not pleaded guilty, he or she would have instead received a longer sentence of imprisonment without a community order. The 'discount' calculated in such cases represents the short sentence of imprisonment subtracted from the longer sentence of imprisonment but does not account for the community-based disposition. This was the explanation in many of the sampled cases with a sentence discount of 60% or more.
- the guilty plea was inextricably linked to a high level of cooperation with authorities. For example, an offence that had not been reported was only discovered when the offender made a statement to police, and the guilty plea was viewed as a continuum of this expression of remorse and cooperation. Such cases have been described as warranting 'the biggest discount of all'.[218] Similarly, in some cases the 6AAA statement (from which the discount was calculated) combined the plea of guilty and the offender's decision to give evidence against a co-accused person.

5.28 A small group of cases changed in ways that were not easily quantifiable, including:

- two murder cases in which the court would have imposed a sentence of life imprisonment had the offender not pleaded guilty;
- twelve cases in which the court indicated that the total effective sentenced would have remained the same (or been lower) but for the guilty plea, but the non-parole period would have increased (that is, the person would have been required to spend a longer period in custody before being eligible for parole if he or she had not pleaded guilty);
- two cases in which the sentence of imprisonment would have remained the same but the accompanying community correction order would have been longer;
- seven cases in which the judge mentioned that the total effective sentence of imprisonment would have been longer but for the guilty plea, but the judge did not quantify by how much longer;
- nineteen cases in which the percentage discount was unascertainable because the person was already serving multiple sentences of imprisonment and the 6AAA statement proposed a total effective sentence to account for all these sentences, not just the case for which the person was being sentenced on the day;
- one case in which the 6AAA statement included two different sentencing options that the judge would have considered but for the guilty plea; and
- four cases in which the 6AAA statement was made in relation to individual charges, not to the total effective sentence in the case (in three of these cases the offender had entered a mixture of guilty and not guilty pleas).

217. In 103 out of 105 such cases, the total effective sentence of imprisonment in the case was two years' imprisonment or less.

218. Kathy Mack and Sharyn Anleu, 'Sentence Discount for a Guilty Plea: Time for a New Look' (1997) 1 *Flinders Journal of Law Reform* 123, 128.

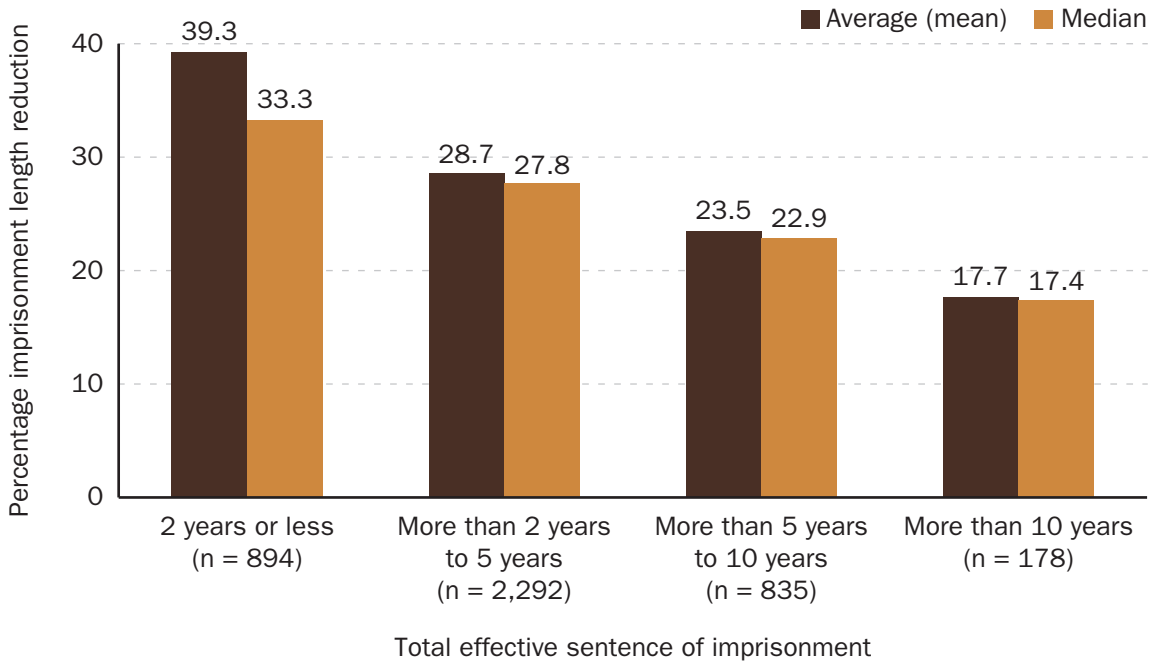
5.29 The weight given to the guilty plea is likely to be influenced by a range of factors, such as the plea timing and the extent to which its value is more than utilitarian, for example, reflecting the offender's genuine remorse.[219] Although 'the effect of the guilty plea is not cancelled or outweighed by other aggravating factors',[220] in the circumstances of some cases, factors such as the seriousness of the offence, the need to protect the community from the offender, and the offender's prior criminal history may dominate the sentencing considerations and the guilty plea may only result in a small reduction.

5.30 While further research would be needed to understand which factors appear to correlate with greater or lesser discounts, an examination of discounts by reference to imprisonment length (which reflects the seriousness of the offence and the circumstances of the case and the offender) suggests that the length of the sentence and the amount of the discount are related, as is explored next.

Sentence length and discount amount

5.31 While there is some authority for the proposition that 'the more serious the crimes, the greater the weight to be given to a guilty plea',[221] in practice, the longer the sentence of imprisonment imposed, the smaller the reduction is likely to be *as a proportion of the overall sentence*.

Figure 16: Guilty plea discount in higher court cases, by sentence length, 2009–10 to 2013–14[222]



219. *R v Morton* [1986] VR 863, 867. See also: Freiberg (2014), above n 82, 378.

220. Freiberg (2014), above n 82, 379, citing *Hall v The Queen* (1994) 76 A Crim R 454 (Crockett and Southwell JJ). See also: Roberts and Bradford (2015), above n 196, 202.

221. Freiberg (2014), above n 82, 379, citing *Hall v The Queen* (1994) 76 A Crim R 454 (Crockett and Southwell JJ). Phillips CJ dissented on this point: 'I agree with the other members of the Court that the applicant's plea of guilty was a mitigating factor. However, I do not think it necessarily follows that the more serious the crimes of an offender, the greater weight to be given to a plea of guilty'.

222. Court Services Victoria, unpublished data.

5.32 During the reference period, cases with a sentence of imprisonment of two years or less received an average (mean) discount of 39.3% and a median discount of 33.3% of the total effective sentence for the guilty plea. Figure 16 shows that as sentences of imprisonment became longer, both the mean and median percentage discounts for the guilty plea decreased. For total effective sentences of more than 10 years' imprisonment, the mean discount was 17.7% and the median discount was 17.4%. The mean discounts in each of the categories displayed in Figure 16 were all significantly different from each other.[223]

Plea timing and discount amount

5.33 For imprisonment cases, guilty plea sentence discounts were compared at the four key plea timing stages, two of which can be considered 'early' pleas and two of which can be considered 'late' pleas:

- **Early pleas** – (1) guilty pleas indicated during the committal stage (in the Magistrates' Court) and (2) guilty pleas entered during the pre-trial hearing stage in the higher courts; and
- **Late pleas** – (3) guilty pleas entered at the door of the court and (4) guilty pleas entered during trial.

5.34 However, as discussed at [5.20]–[5.23], in some of the cases recorded in the data as having a 'late' guilty plea, the plea may have carried similar weight to an 'early' guilty plea because the offender pleaded guilty at the first practicable opportunity. The degree of difference between the discounts for 'early' and 'late' guilty pleas must be understood in this context. Had such cases been able to be characterised as 'early' or 'first opportunity' guilty pleas, rather than being recorded as 'late' guilty pleas, it is possible that the difference in discounts for cases with early and late pleas would have been greater.

5.35 While the most common sentence discount across all plea timing stages is 20% to less than 30% (Figure 15), there was a small, but statistically significant difference between the average (mean) sentence discounts at each plea stage:[224]

- for cases in which the guilty plea was indicated during the committal stage, the average (mean) discount was 30.0%, which was slightly (but statistically significantly) larger than the mean discount of cases in which the plea was entered at the door of the court (28.0%) and (statistically) significantly larger than the mean discount for pleas during trial (24.7%); and
- for cases in which the guilty plea was entered during the pre-trial hearing stage, the average (mean) discount was 29.2%, which was (statistically) significantly larger than the discount for cases in which the plea was entered during trial.

5.36 No other statistically significant differences between the groups were found. There was no significant difference in sentence discounts between a plea indicated during the committal stage and a plea entered during the pre-trial hearing stage. Similarly, there was no significant difference between pleas entered at the door of the court and during trial in terms of the sentence discount given.

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223. Data on imprisonment length reduction for each of the categories were found to be significant through Welch's ANOVA: ($F(3, 776.02) = 407.26$, $p < 0.001$), with a Games-Howell post-hoc test.

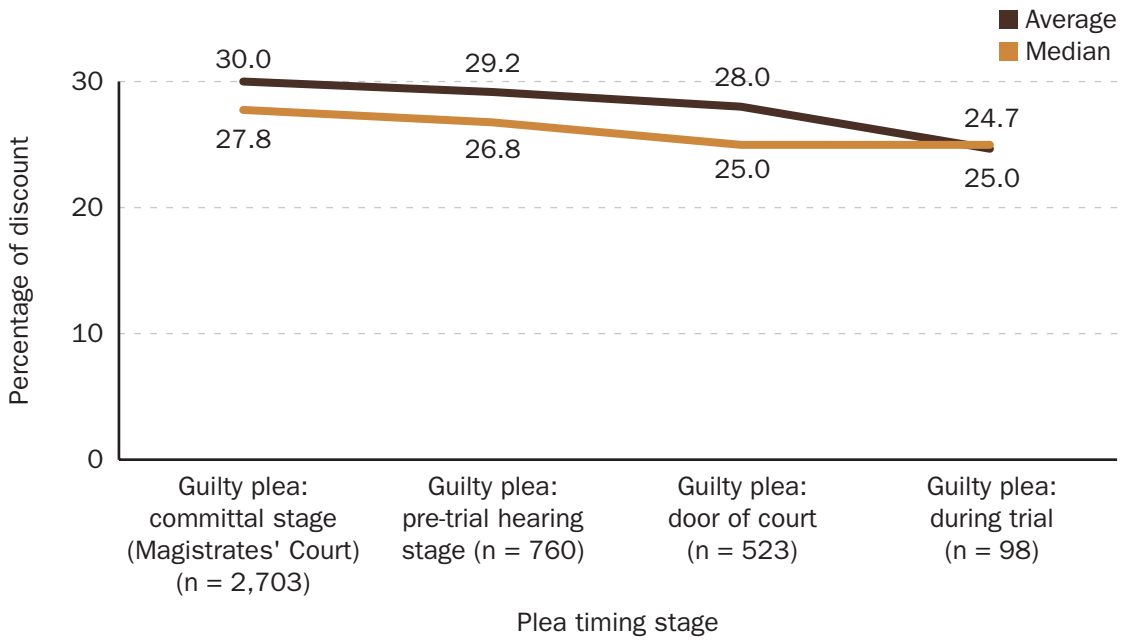
224. A one-way ANOVA found an overall significant difference in imprisonment length reduction for the stages at which a plea was entered: ($F(3, 4080) = 10.11$, $p < 0.001$). Post-hoc testing, using Hochberg's GT2, was subsequently used to pinpoint which pairs of stages of entering a plea were significantly different from each other.

5.37 Consistent with sentencing principles and with research elsewhere,[225] these results suggest that, overall in imprisonment cases, early guilty pleas (pleas indicated during the committal or pre-trial hearing stages) attract slightly (but statistically significant) greater sentence discounts than late guilty pleas (entered at the door of the court or during trial).

5.38 Turning to the median, Figure 17 shows that the median discount was similar for the 'early' pleas (committal stage and pre-trial hearing stage): 27.8% and 26.8% respectively. The median discount was identical for the 'late' pleas: a 25% discount in the sentence that the court would have imposed but for the guilty plea. While there was a 2–3 percentage point difference in the discount given in cases with early and late pleas, and this discount was statistically significant,[226] the difference was smaller than might be expected, given that the stage at which a plea is entered is a relevant sentencing consideration.

5.39 However, as discussed, the distinction between plea timing stages is muddied by cases in which a late plea warrants similar treatment to an early plea because the offender pleaded guilty at the first practicable opportunity.[227] If it was possible to combine such cases with early plea cases and compare the combined group to the remaining late plea cases, the differences between the two groups may be more pronounced.

Figure 17: Average (mean) and median plea-based discount, based on timing of guilty pleas, higher courts imprisonment cases, 2009–10 to 2013–14[228]



225. See, for example: Wren and Bartels (2014), above n 7, 378; Roberts and Bradford (2015), above n 196, 201.

226. See further: [5.35].

227. See further: [5.20]–[5.23].

228. This figure uses all the 4,199 cases displayed in Figure 15 that had a quantifiable discount, minus 115 cases in which the data for the stage of entering a plea were unknown or ambiguous.

Discount amount: interaction between sentence length and plea timing

5.40 This section touches on how both sentence length and plea timing may interact to influence the degree of discount given for the guilty plea.

5.41 The influence of sentence length on discounts for guilty pleas could potentially either obscure or explain differences in the discounts awarded for early and late guilty pleas. Indeed, imprisonment length may be a better predictor of the percentage discount for a guilty plea than plea timing. For example, Figure 16 shows that the longer the sentence of imprisonment, the smaller the guilty plea discount is likely to be (as a proportion of the sentence). If the distribution of sentence lengths differs across plea timing stages, it is difficult to determine which factor, if any, may be influencing the discount.[229] It is likely that other factors are also at play, such as the offence type, the offender's age, prior offences, and prospects of rehabilitation.

5.42 For example, Roberts and Bradford found 'significant variation … in levels of reduction across offense categories', such as that 'homicide cases attracted, on average, lower levels of reductions than theft cases'.[230] They also found that 'mitigating factors exercised a significant inflationary effect on the magnitude of the reduction, and aggravating factors had the opposite effect'.[231] While their study was undertaken in England and Wales, in which courts 'are statutorily required to comply with a sentencing guideline that regulates plea-based reductions',[232] their findings raise an interesting question, in light of the findings demonstrated in Figure 16. If plea discounts (overall) significantly decrease as sentence length increase, is this a product of the sentence length itself? Or does it reflect other factors that affect sentence length, such as offence type and aggravating and mitigating factors? Where does plea timing fit into the equation? These questions warrant future exploration.

5.43 To control for the likely influence of sentence length, plea-based discounts at each plea timing stage were compared for the two most commonly imposed imprisonment sentence lengths in the higher courts during the reference period:[233]

- two to less than three years' imprisonment (20.6% of the 4,199 cases with a quantifiable discount); and
- three to less than four years' imprisonment (20.7% of the 4,199 cases).

5.44 The difference in the sentence discounts across the four plea timing stages in imprisonment cases (Figure 17) remained once the sample was limited by imprisonment length, although the difference was more subtle and harder to detect through significance testing.

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229. The average imprisonment sentence length for cases across the four plea timing stages was investigated using the same data displayed in Figure 17. Welch's ANOVA ($F(3, 393.43) = 10.56$, $p < 0.001$) with a Games-Howell post-hoc test found a significant difference between the imprisonment sentence lengths in cases with a guilty plea during the committal stage (mean length 47.9 months) and those with a guilty plea during the pre-trial hearing stage (mean length 54.2 months), and between the imprisonment sentence lengths for cases with a guilty plea during trial (mean length 78.5 months) and any other stage. Imprisonment sentences for cases with a guilty plea at the door of the court (mean length 49.6 months) were also significantly lower than cases with a guilty plea during trial, but not significantly different from the committal or pre-trial hearing groups.

230. Roberts and Bradford (2015) above n 196, 201.

231. Ibid 202.

232. Ibid 189.

233. For consistency, the pool of cases was limited to those with a quantifiable sentence reduction from the 6AAA statement (4,199 cases from Figure 15).

5.45 For cases sentenced to two years to less than three years' imprisonment (TES):

- the average (mean) reduction for cases with guilty pleas indicated during the committal stage (31.9%) was slightly (but significantly) greater than that for guilty pleas at the door of the court (29.3%);[234]
- cases with a guilty plea during trial received the lowest average (mean) reduction (29.2%). While this was not significantly different from the discount at other stages, this may be because the small number of cases with guilty pleas during trial (15 cases) made significance testing less reliable; and
- no significant differences in sentence reductions were found between any other plea timing stage.

5.46 For cases sentenced to imprisonment of three years to less than four years (TES), while the average (mean) discount gradually decreased as pleas grew later,[235] none of these incremental differences was found to be statistically significant.[236]

5.47 A possible reason for the reduction, or removal, of statistically significant differences for imprisonment sentences of two to less than three years, and three to less than four years, may be the very low number of cases in some of the plea timing stages, which may make finding significant differences harder. To remedy this, the plea timing stages were combined into two groups: 'early pleas' (committal and pre-trial hearing stages) and 'late' pleas (door of the court and during trial).

5.48 When the discounts for 'early' and 'late' pleas were compared, the significant difference in plea-based discount returned. For cases sentenced to two to less than three years' imprisonment, the average (mean) discount for 'early' pleas (31.9%) was slightly (but statistically significantly) larger than the average (mean) discount for cases with 'late' pleas (29.2%).[237] For cases sentenced to three to less than four years' imprisonment, the average discount for cases with early pleas (29.2%) was slightly (but statistically significantly) larger than that for cases with late pleas (27.2%).[238]

5.49 These findings suggest that, while the timing of guilty pleas appears to influence the discount that they attract, other factors such as sentence length (or possibly factors that influence sentence length, such as offence type) also appear to be influential. Future research could examine further the interaction of factors such as age, offence type, sentence length, and plea timing on the discounts given for guilty pleas.

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234. A one-way ANOVA found an overall significant difference in imprisonment length reduction for the stages at which a plea was entered: ($F(3, 848) = 2.80$, $p < 0.05$). Post-hoc testing, using Hochberg's GT2, was subsequently used to pinpoint which pairs of stages of entering a plea were significantly different from each other and found that the only two pairs that significantly differed was between people entering a plea at the committal stage and people entering a plea at the door of the court. It is interesting to note that the one-way ANOVA only reached significance at the $p < 0.05$ level after controlling for imprisonment length, compared with the greater significance level of $p < 0.001$ for the data in Figure 17 (which did not attempt to control for imprisonment length). This may indicate that sentence reductions for a guilty plea may be better predicted by controlling for imprisonment length, rather than the stage of entering a plea.

235. The discount decreased from 29.3% for cases with a guilty plea at the committal stage to 28.7% at the pre-trial hearing stage, to 27.3% at the door of the court, and to 26.6% for guilty pleas during trial. The data on discounts for guilty pleas entered during trial should be interpreted cautiously because very few people pleaded guilty at this stage (13 cases).

236. A one-way ANOVA did not find an overall significant difference in imprisonment length reduction for the stages at which a plea was entered: ($F(3, 847) = 2.34$, ns).

237. ($F(1, 850) = 8.41$, $p < 0.01$).

238. ($F(1, 849) = 6.35$, $p < 0.05$).

Youth justice centre orders

Percentage discount for guilty plea

5.50 There were 122 youth justice centre order cases in which the sentence length was reduced because of the guilty plea and the 6AAA statement had sufficient information to calculate the level of discount. Figure 18 shows the range of discounts for these cases.

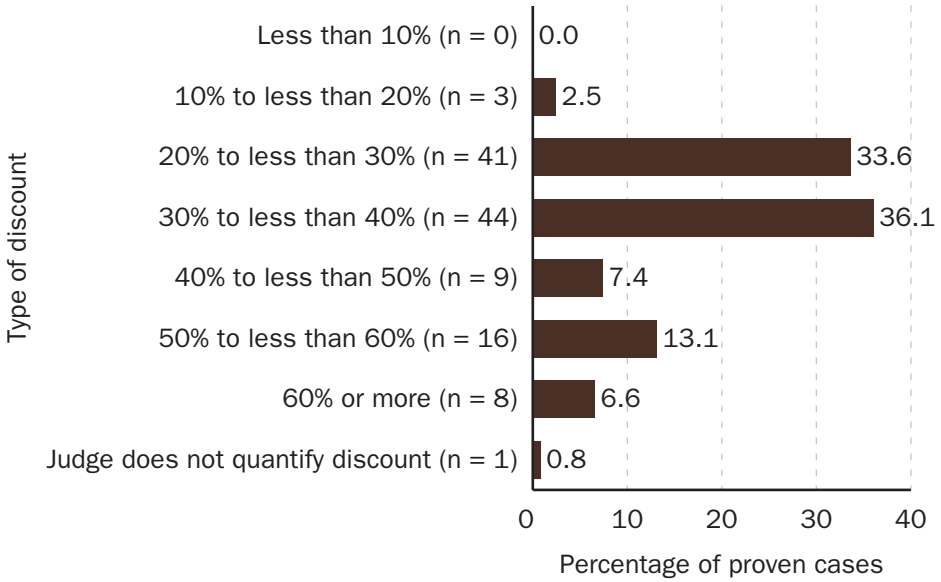
5.51 The most common sentence discount given was between 30% and 40% (36.1% of cases). A further 33.6% of cases received a discount of between 20% and 30% of the sentence that would have been imposed but for the guilty plea. In one case in which the judge did not quantify a discount, the judge indicated that a longer sentence in a youth justice centre would have been given but for the plea of guilty, but he did not decide on a final sentence length.

5.52 The average (mean) reduction for youth justice centre orders for pleading guilty was 35.9%, while the median was 33.3%.

Discount by plea timing

5.53 In 107 out of the 122 cases that received a youth justice centre order, the offender indicated the guilty plea during the committal stage. Therefore, the level of discount at each plea timing stage cannot be compared meaningfully, as the number of cases at the other plea timing stages is too small.[239]

Figure 18: Discount in length of youth justice centre order because of the guilty plea, higher court cases, 2009–10 to 2013–14[240]



239. There were six cases with a guilty plea at the pre-trial hearing stage, six at the door of the court, and three in which plea timing was unknown.

240. The total pool of cases shown in this graph does not include cases with a 6AAA statement in which the guilty plea changed the sentence type (that is, not a youth justice centre order), cases in which a 6AAA statement was not made, and cases in which it was unknown or ambiguous if a 6AAA statement was made due to missing sentencing remarks.

Eligible fines

Percentage discount for guilty plea

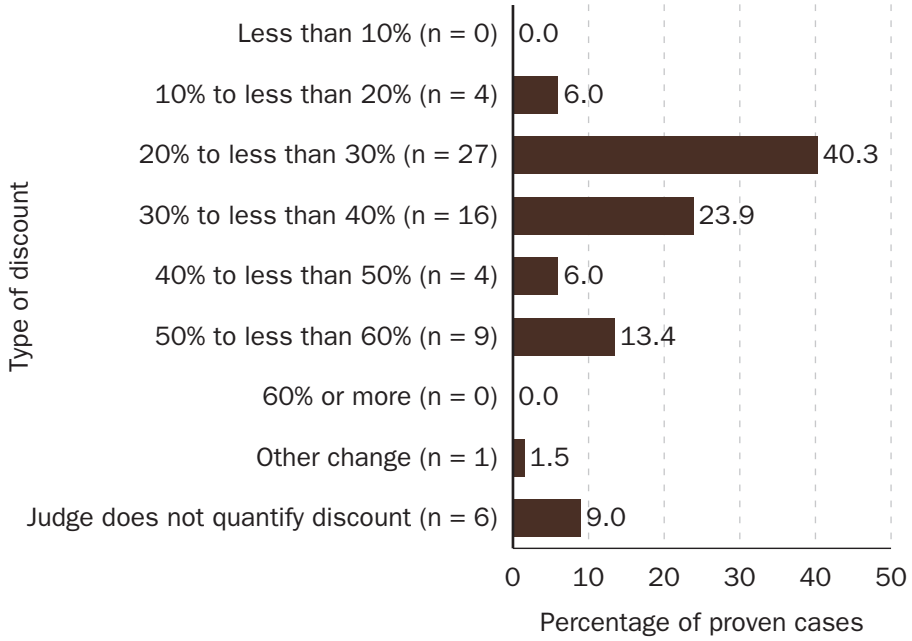
5.54 Figure 19 shows the discounts given for the guilty plea in cases in which the offender was sentenced to a fine above the prescribed amount (10 penalty units for individual fines or 20 penalty units for aggregate fines). There were 67 cases in which the 6AAA statement had sufficient information to calculate the discount given for the guilty plea.[241]

5.55 The majority of cases with a quantifiable discount for the guilty plea (40.3% of cases) had a discount in the 20–30% range. The range of discounts for guilty pleas in cases with fines was narrower than the range for imprisonment and youth justice centre orders, with no discounts of 60% or higher. The average (mean) plea-based reduction was 31.6%, while the median was 28.9%.

5.56 In one case, the sentencing judge stated that but for the guilty plea, the fine would have remained the same but the accompanying custodial sentence would have been longer. In six cases, the judge stated the fine would have been much higher but for the guilty plea, without deciding on a final dollar amount.

5.57 The small number of fine cases makes it difficult to draw conclusions about the level of discounts for guilty pleas.

Figure 19: Cases with eligible fines by percentage of discount given for the guilty plea, higher court cases, 2009–10 to 2013–14[242]



241. This does not include cases in which the offender would have received a different sentence type (that is, not a fine) but for the guilty plea, cases without a 6AAA statement, or cases in which it was unknown or ambiguous whether the court made a 6AAA statement.

242. Ibid.

Discount by plea timing

5.58 As was the case with youth justice centre orders, the number of eligible fine cases was too low to compare the discount at each guilty plea stage.

5.59 Of the 67 cases in which a fine was reduced because of the guilty plea, 28 had a plea indicated during the committal stage, 15 had a guilty plea indicated at the pre-trial stage, 11 had a guilty plea indicated at the door of the court, and seven had a guilty plea indicated during trial. The remaining six cases had insufficient data to ascertain plea timing.

Conclusion

5.60 While many jurisdictions, like Victoria, provide for reductions in sentence for a guilty plea, there is limited research on the level of reductions given by the courts and the variables that influence discount length.

5.61 Section 6AAA of the *Sentencing Act 1991* (Vic) requires sentencing judges (in certain circumstances) to state the sentence that they would have imposed but for the defendant's guilty plea (the '6AAA statement'). The 6AAA statement provides insight into the court's treatment of, and the value placed on, the offender's guilty plea. In an individual case, the 6AAA statement informs the offender, and others, of the sentence that the offender would have faced if he or she had not pleaded guilty. More broadly, 6AAA statements provide insight into the notional 'discounts' being awarded for guilty pleas in Victorian courts, which can be calculated by subtracting the actual sentence from the notional sentence disclosed in the 6AAA statement. A unique feature of these data is that the information about the plea-based reduction comes directly from the sentencing judges.

5.62 During the reference period, 7,073 cases had 6AAA statements with sufficient information to analyse the effect of the guilty plea on the offenders' sentences. The actual sentences imposed were compared with the notional sentences in the 6AAA statement to ascertain whether the guilty plea changed the sentence type or length.

5.63 In one-third of cases with a 6AAA statement, the guilty plea changed the type of sentence that was imposed. For example, a large proportion of offenders sentenced to a suspended sentence, an intensive correction order, a community-based order, or a community correction order would have faced a sentence of immediate imprisonment if they had not pleaded guilty.

5.64 In the remaining two-thirds of cases (in which the guilty plea did not change the sentence type), the offender would have received a longer sentence had he or she not pleaded guilty. But for his or her guilty plea, the offender would have been sentenced to a longer term (or a higher dollar amount) in almost all imprisonment cases, just under half of youth justice centre order cases, and two-thirds of fine cases.

5.65 Offenders sentenced to imprisonment and/or eligible fines (and who did not receive a different sentence type because of their guilty plea) were most likely to receive a discount of between 20% and 30% of their imprisonment length or fine amount because of their guilty plea. Offenders sentenced to a youth justice centre order were most likely to receive a discount of 30–40% due to their guilty plea.

5.66 For sentences of imprisonment, the proportion of the sentence discount for the guilty plea was related to both the sentence length and the timing of the guilty plea. Offenders who received shorter sentences of imprisonment and/or indicated a plea at an early stage tended to receive a larger discount (as a proportion of their sentence) than offenders who were sentenced to a longer sentence and/or indicated a plea at a later stage.

5.67 When sentence length was held constant (by examining plea timing and sentence discounts at two fixed imprisonment lengths), the relationship between plea timing and the sentence discount was still present (though statistically weaker). This suggests that plea timing, independent of sentence length, is an important factor in determining the level of discount.

5.68 Other factors (not studied in this report) that may influence the degree of discount may include the offence type and the offender's age, prior criminal history, and prospects of rehabilitation.

6. Conclusion

6.1 Focusing on cases sentenced in the Victorian higher courts over the five years to June 2014, this report has examined whether offenders plead guilty (and at what rate), the timing of their guilty plea, and the difference that the guilty plea makes to their sentence.

6.2 Since the commencement of section 6AAA of the *Sentencing Act 1991* (Vic) in 2008, sentencing judges (in certain circumstances) have been required to declare the sentence that they would have imposed had the offender not pleaded guilty. This requirement was intended to improve confidence in the justice system by making sentence discounts explicit and transparent, both in individual cases (by making it clear to all parties the difference that the guilty plea made to the sentence) and more generally (by requiring these discounts to be recorded). As a result, information about plea-based discounts – sourced directly from the sentencing judges – is now available for analysis. The very high compliance rate with section 6AAA by higher court judges has provided a dataset of more than 7,000 higher court cases with sufficient detail to analyse the sentence reductions awarded for guilty pleas.

6.3 During the reference period, in one-third of cases with a 6AAA statement, the guilty plea changed the sentence type that the offender received (for example, an offender who would have been sentenced to imprisonment but for the guilty plea was instead sentenced to a youth justice centre order).

6.4 In the remaining two-thirds of cases – including almost all imprisonment cases – the sentence type did not change but the offender would have received a longer sentence had he or she not pleaded guilty. The most common discount for sentences of imprisonment was between 20% and 30% (in 44.9% of cases), and between 30% and 40% in a further 26.8% of cases.

6.5 Consistent with sentencing policy and with research elsewhere, in imprisonment cases, the average discount was slightly (but statistically significantly) larger for the group of cases with 'early' guilty pleas (during the committal stage or the pre-trial hearing stage) than for cases with 'late' guilty pleas (at the door of the court or during trial).

6.6 The discount amount was also associated with sentence length. The average (mean) discount for cases with longer sentences of imprisonment was (statistically) significantly smaller than the average discount for cases with shorter sentences of imprisonment.

6.7 When sentence length was held constant (by examining plea timing and sentence discounts at two fixed imprisonment lengths), the relationship between plea timing and the sentence discount was still present (although statistically weaker). These findings suggest that plea timing and sentence length are both associated with the discount amount.

6.8 By making discounts for guilty pleas more transparent, section 6AAA was expected to encourage people who intended pleading guilty to do so as early as possible, without encouraging inappropriate guilty pleas. A finding consistent with this objective is that, in the County Court of Victoria over the last 10 years, a significantly higher proportion of guilty pleas are being entered at an earlier stage in proceedings (during the committal stage). At the same time, there is no indication that defendants are under increasing pressure to plead guilty; in fact, the guilty plea rate slightly decreased over the same ten-year period.

6.9 While these findings are consistent with the intent of section 6AAA, it was introduced in a period of considerable parallel reforms aimed at encouraging early guilty pleas, including reforms to pre-trial processes, earlier provision of evidence to the defence, a change in policy at the Office of Public Prosecutions intended to facilitate early discussion between the parties, and greater case management by the courts. It is therefore not possible to identify which of the reforms (if any) may have caused this shift.

6.10 The data also revealed statistically significant differences in plea rates and timing across different offences, sentence types, and age groups. However, it does not necessarily follow that there are causal links between a particular factor and plea rates and timing. It is likely that many factors work in different combinations to influence whether, and when, a person pleads guilty.

6.11 The report cautions that the new Victorian baseline sentencing scheme may increase the complexity of plea negotiations and sentencing for baseline (and related) offences. This may delay guilty pleas and undo some of the progress in plea timing found in this report.

Appendix: Offence statutory references

Table A1: Statutory references for offences in Tables 2–5 and Figures 8–9

Offence	Statutory reference
Aggravated burglary	*Crimes Act 1958* (Vic) s 77(1)
Attempted armed robbery	*Crimes Act 1958* (Vic) sub-ss 75A(1), 321M
Armed robbery	*Crimes Act 1958* (Vic) s 75A(1)
Attempted burglary	*Crimes Act 1958* (Vic) sub-ss 76(1), 321M
Burglary	*Crimes Act 1958* (Vic) s 76(1)
Common law assault	Common law offence
Criminal damage (intentionally damage/destroy property)	*Crimes Act 1958* (Vic) s 197(1)
Cultivate narcotic plants in a non-commercial quantity[a]	*Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 72B
Culpable driving causing death	*Crimes Act 1958* (Vic) s 318
Dangerous driving causing death	*Crimes Act 1958* (Vic) s 319(1)
Defraud the Commonwealth (Cth) (historical offence)	*Crimes Act 1914* (Cth) s 29D
Fail to provide safe working environment	*Occupational Health and Safety 1985* (Vic) s 21(1) and *Occupational Health and Safety Act 2004* (Vic) s 21(1)
Gross indecency with a child under the age of 16 (historical offence)	*Crimes Act 1958* (Vic) s 50(1)(a)
Incest (by natural parent/lineal ancestor/step-parent) with a child under 18[b]	*Crimes Act 1958* (Vic) s 44(1A)
Incest (by de facto parent)[c]	*Crimes Act 1958* (Vic) s 44(2)
Indecent act with a child under 16	*Crimes Act 1958* (Vic) s 47(1)
Indecent assault	*Crimes Act 1958* (Vic) s 39(1)
Indecent assault on a male person (historical offence)	*Crimes Act 1958* (Vic) sub-s 68(3A) or sub-s 68(3B)
Intentionally cause serious injury	*Crimes Act 1958* (Vic) s 16
Knowingly deal with proceeds of crime	*Crimes Act 1958* (Vic) s 194(2)
Persistent sexual abuse of/maintain a sexual relationship with a child under 16[d]	*Crimes Act 1958* (Vic) s 47A
Manslaughter	Common law offence
Murder	Common law offence

Table A1 *cont.*

Offence	Statutory reference
Obtain financial advantage by deception	*Crimes Act 1958* (Vic) s 82(1)
Obtain financial advantage by deception – against Commonwealth entity (Cth)	*Criminal Code Act 1995* (Cth) sch 1 s 134.2
Obtain property by deception	*Crimes Act 1958* (Vic) s 81(1)
Possess drug of dependence	*Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 73(1)
Prohibited person possess/carry/use firearms	*Firearms Act 1996* (Vic) s 5(1)
Rape	*Crimes Act 1958* (Vic) s 38
Sexual penetration with a child aged between 10/12 and 16[e]	*Crimes Act 1958* (Vic) s 45(2)(c)
Sexual penetration with a child aged under 10/12[f]	*Crimes Act 1958* (Vic) s 45(2)(a)
Theft	*Crimes Act 1958* (Vic) s 74(1)
Traffick a drug of dependence in a large commercial quantity[g]	*Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71
Traffick a drug of dependence in a non-commercial quantity[h]	*Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71AC
Use carriage service to access child pornography (Cth)	*Criminal Code Act 1995* (Cth) sch 1 s 474.19(1)(a)(i)
Use carriage service to groom a child under 16 (Cth)	*Criminal Code Act 1995* (Cth) sch 1 s 474.27(1)
Use carriage service to procure a child under 16 to engage in sexual activity (Cth)	*Criminal Code Act 1995* (Cth) sch 1 s 474.26(1)
Use carriage service to transmit indecent communications to a child under 16 (Cth)	*Criminal Code Act 1995* (Cth) sch 1 s 474.27A

a. Additional coding was required for this offence (see further: [1.42]).

b. Additional coding was required for this offence (see further: [1.42]).

c. Additional coding was required for this offence (see further: [1.42]).

d. On 1 December 2006, section 47A of the *Crimes Act 1958* (Vic) was amended by the *Crimes (Sexual Offences) Act 2006* (Vic) to update the offence of 'maintain a sexual relationship with a child' to 'persistent sexual abuse of a child'.

e. On 17 March 2010, section 45(2) of the *Crimes Act 1958* (Vic) was amended to increase the minimum age of victims of this offence from 10 to 12 years. The new age limit applies to offences committed on or after 17 March 2010. The charges in this report include the version of the offence committed both before and after 17 March 2010. Additional coding was required for this offence (see further: [1.42]).

f. On 17 March 2010, section 45(2) of the *Crimes Act 1958* (Vic) was amended to increase the minimum age of victims of this offence from 10 to 12 years. The new age limit applies to offences committed on or after 17 March 2010. The charges in this report include the version of the offence committed both before and after 17 March 2010. Additional coding was required for this offence (see further: [1.42]).

g. Additional coding was required for this offence (see further: [1.42]).

h. Additional coding was required for this offence (see further: [1.42]).

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