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# SENTENCE REDUCTIONS FOR GUILTY PLEAS

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A review of policy, practice and research

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# EXECUTIVE SUMMARY

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- Most convictions in England and Wales in the Crown Court and the magistrates' courts arise as a result of the defendant entering a guilty plea. Courts are explicitly required to consider the guilty plea when passing sentence by section 73 of the Sentencing Code (previously section 144 of the Criminal Justice Act 2003). Defendants who plead guilty and who waive their right to a trial are normally entitled to a sentence reduction. All common law jurisdictions offer sentence reductions to defendants who forgo their right to trial and instead plead guilty.
- The primary source of guidance in England and Wales regarding the levels of reduction appropriate in cases of a guilty plea is the definitive guideline issued by the Sentencing Council in 2017 to replace an earlier guideline issued in 2007.
- Two principal justifications currently exist for offering sentence reductions to defendants who plead guilty. First, a guilty plea saves witnesses from having to attend court to give evidence. This may require multiple appearances and can be time-consuming and stressful. Second, a plea, particularly if entered early in the criminal process, conserves criminal justice system resources. The police, the Crown Prosecution Service and the court system all conserve resources when a trial is avoided. A guilty plea may be considered evidence of remorse on the part of defendants, but this factor is considered elsewhere in the sentencing methodology.
- The sentencing guideline recommends a sliding scale of sentence reductions: later guilty pleas attract a more modest sentence reduction. If a plea is indicated at the first stage of the proceedings, a sentence reduction of one-third of the custodial sentence should be awarded. The guideline also specifies that one-third is the maximum reduction appropriate across all cases. A plea entered after the first stage attracts a maximum reduction of one-quarter. The reduction awarded should decrease to a maximum of one-tenth on the first day of trial. The guideline includes a series of exceptions to the recommended reductions. These allow a departure from the recommended maximum reductions. For example, if there were circumstances which significantly affected the defendant's ability to understand what was alleged against them or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner. In addition, there is a separate regime for young defendants.
- A guilty plea may also affect the type of sentence imposed. For example, a court may take a guilty plea into account by reducing a custodial sentence to a community order or by reducing a community order to a fine.
- The 2017 guideline modified a previous guideline issued in 2007. The new guideline sought to increase the consistency of plea-based reductions to sentence and to encourage defendants who intended to plead guilty to do so at the first opportunity – rather than later in the criminal process. In the years preceding 2017, a significant proportion (approximately one-third) of trials were avoided close to the trial date for different reasons. A proportion of these so-called 'cracked trials' arose as a result of the defendant entering a guilty plea well after the first opportunity. The guideline was not intended to affect the overall rate of guilty pleas entered.

- Research conducted prior to the introduction of the latest guideline revealed that courts were broadly following the 2007 guideline's recommended reductions. Thus, almost all (89%) of defendants who entered an early plea received the one-third reduction recommended by the 2007 guideline. The empirical pattern of reductions diverges to a greater degree for pleas entered at a later stage due to circumstances such as late service of evidence or late compliance with disclosure obligations. No comparable data have been published to determine whether the pattern of sentence reductions has changed as a result of the new guideline.

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# 1. SCOPE OF REVIEW

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All common law jurisdictions offer sentence reductions to defendants who plead guilty rather than elect to be tried. The reductions vary in magnitude but a reduction of one-third if the plea is entered early is common, although a number of jurisdictions award lesser reductions while across the US the reduction is often in excess of one-third.<sup>1</sup> This report reviews the current law and practice regarding plea-based sentence reductions in England and Wales. We do not discuss plea negotiations, although these may affect the volume and timing of guilty pleas entered. Nor does the report explore the issue of sentence appeals in cases where the defendant enters a guilty plea, although this has been identified in the academic literature as being worthy of attention.<sup>2</sup> The focus is on the guideline issued by the Sentencing Council which came into effect on 1 June 2017. We provide a summary of the limited data trends over the period 2010-2020 and a review of current developments, including the Sentencing Council's recent (November 2020) research report assessing the impact of the guideline.

## 2. BACKGROUND

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Most defendants are convicted after entering a guilty plea, rather than following a trial. In 2019/20, 78.6% of cases concluded in the magistrates' courts were resolved by a guilty plea (Crown Prosecution Service, 2020, p. 31). The figure was slightly lower (73.3%) in the Crown Court (Crown Prosecution Service, 2020, p. 34). Defendants plead guilty for a variety of reasons. For example, some may experience remorse and express this through a guilty plea. Many defendants perceive a high likelihood of being convicted at trial and wish to secure the reduced sentence available if they plead guilty. Others may plead guilty to avoid the stress arising from going to trial (Gormley and Tata 2020).

Regardless of their motives, it has long been the case in England and Wales that defendants who plead guilty are entitled to some mitigation of sentence (i.e. a reduction in the severity of the sentence). In 1972, the Court of Appeal stated that 'the man who pleads guilty can expect less severe punishment than one who pleads not guilty'.<sup>3</sup> The 1993 Royal Commission on Criminal Justice noted

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1 For example, the sentencing guideline regulating plea reductions in New Zealand recommended a one-third reduction at the first reasonable opportunity. Other jurisdictions as diverse as Canada and Hong Kong award a reduction of approximately one-third. Research by the Sentencing Advisory Council in Victoria found that the most common sentence reduction was in the range of one-third. For discussion of plea-based regimes and plea negotiations see Flynn and Freiberg (2018); Cole and Roberts (2018); Cheng (2018); Sentencing Advisory Council (2015).

2 Under the Magistrates' Court Act 1980 (section 108), no right of appeal exists for defendants convicted following a guilty plea in the magistrates' courts. Defendants convicted following a guilty plea in the Crown Court enjoy the same rights of appeal held by defendants convicted after trial.

3 *Gomez, Cooper and Bovington* (Court of Appeal, 5 October 1972 5238/B/71), cited in Thomas (1979, p. 52).

that '[f]or many decades defendants who plead guilty in the Crown Court have been regarded by the Court of Appeal as usually entitled to a discount or reduction in their sentence. The usual range of discount is 25% to 30%' (1993, p. 110).<sup>4</sup> The Royal Commission concluded that: 'Provided that the defendant is in fact guilty and has received competent legal advice about his or her position, there can be no serious objection to a system of inducements designed to encourage him or her so to plead' (1993, p. 110). The Royal Commission also endorsed the approach of the Court of Appeal that 'other things being equal, the earlier the plea the higher the discount' (1993, p. 111).

The following year, the requirement for courts to take into account a guilty plea at sentencing was placed on a statutory basis for the first time by section 48 of the Criminal Justice and Public Order Act 1994.<sup>5</sup> Section 144 of the Criminal Justice Act 2003 (now section 73 of the Sentencing Code, in substantively similar terms) explicitly required courts to consider the guilty plea when passing sentence:

*In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that court or another court, a court must take into account:*

*(a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and*

*(b) the circumstances in which this indication was given.<sup>6</sup>*

The statute does not specify how a guilty plea should affect the sentence.<sup>7</sup> Guidance on the appropriate level of reduction has been provided by the Court of Appeal (in guideline judgments) and by the Sentencing Council in a definitive guideline (discussed below). Consequently, there are two sources of guidance on sentence reductions: case law and the guideline. The Sentencing Council's guideline was updated in 2017 (Sentencing Council 2017a) to reflect developments in case law since the 2007 guideline (Sentencing Guidelines Council 2007).

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4 According to The Royal Commission, the *primary* reason for the discount was to encourage guilty defendants to plead accordingly and thus save the resources that would have been expended on a trial. Sparing witnesses the need to give evidence at court is described as a 'subsidiary' reason applicable in some types of cases (1993, p. 110).

5 Section 48 of the Criminal Justice and Public Order Act 1994 was repealed and replaced by section 152 of the Powers of Criminal Courts (Sentencing) Act 2000 which did not make any substantive amendments to the provision. This, in turn, was replaced by section 144 of the Criminal Justice Act 2003.

6 This is, in fact, a precise repetition of the original wording introduced by section 48(1) of the Criminal Justice and Public Order Act 1994.

7 Ashworth describes the provision as 'remarkably allusive', in part because it 'merely hints at the principle that the discount should be larger, the earlier the plea is entered' (2015, p. 180).

### 3.

## RATIONALES FOR PLEA-BASED SENTENCE REDUCTIONS

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There are three principal rationales for offering sentence reductions to defendants who plead guilty (Leverick 2004). First, to acknowledge a defendant's genuine remorse. Second, to recognise that a guilty plea spares victims and other witnesses from having to testify at trial. The third rationale relates to the benefits guilty pleas bring by conserving criminal justice resources. The 2017 guideline is founded upon the following rationales:

*An acceptance of guilt:*

*a) normally reduces the impact of the crime upon victims;*

*b) saves victims and witnesses from having to testify; and*

*c) is in the public interest in that it saves public time and money on investigations and trials.*

(Sentencing Council 2017a, p. 4)

Remorse thus is not part of the rationale for a reduction but remains relevant for the purposes of sentencing; it is considered within the offence-specific guidelines as a mitigating factor separate to any sentence reduction.<sup>8</sup> In almost all cases, a guilty plea results in cost and time savings for the police, the Crown Prosecution Service, the courts, victims and witnesses (whether police officers or otherwise).<sup>9</sup> Indeed, even a relatively minor case proceeding to trial can result in significant inconvenience for victims and witnesses due to the waiting involved and the repeated appearances which may be necessary.

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8 A guilty plea conserves resources regardless of whether the offender is remorseful. The remorse felt by an offender is therefore a separate consideration to be quantified on an individual basis. It does not follow, of course, that a person pleading guilty in the face of overwhelming evidence is remorseful. Their decision may be purely pragmatic. Similarly, some offenders who plead not guilty but who are convicted following a trial may after conviction feel and express remorse. This may bode well for their subsequent rehabilitation and may therefore justify some personal mitigation.

9 Across all courts, the Law Society has calculated that 'a conservative estimate of the total cost of a day of court time' is £2,692 (Law Society 2018). This estimate does not include significant costs such as 'the attendance of other professionals associated with particular types of cases such as Crown Prosecution Service prosecutors or probation service attendance in criminal cases, nor does it include the cost of legal representation in a case' (Law Society 2018).

## 4. THE DEFINITIVE GUIDELINE ON PLEA- BASED SENTENCE REDUCTIONS

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The first guideline on reductions in sentence for a guilty plea was issued by the Sentencing Guidelines Council in 2004.<sup>10</sup> According to the Foreword to that guideline, its purpose was ‘to promote consistency in sentencing by providing clarity for courts, court users and victims so that everyone knows exactly what to expect’ (Sentencing Guidelines Council 2004, p. i). In respect of the appropriate level of reduction for an early guilty plea, the 2004 guideline specified a maximum reduction of one-third,<sup>11</sup> reducing to a maximum of one-quarter after a trial date had been set and one-tenth at the door of the court/after the trial has begun. This echoed the long-standing approach of the Court of Appeal that earlier guilty pleas should attract a higher discount than later pleas.

This guideline was updated by the Sentencing Guidelines Council in 2007 to provide greater clarity as to when the ‘first reasonable opportunity’ to enter a guilty plea was likely to arise in indictable only offences.<sup>12</sup> The revised guideline also introduced a new approach to the level of discount available for an early guilty plea in circumstances in which the prosecution case is ‘overwhelming’. In these cases, it stated that it may be justified to depart from the normal level of reductions and a guilty plea entered at the first reasonable opportunity may attract only a 20% reduction.

The Sentencing Council had a duty under the Coroners and Justice Act 2009 to issue a guilty plea guideline and the Council issued a new version in 2017.

### ***Objectives of the 2017 Guideline***

The Sentencing Council noted in its pre-guideline consultation document that the previous guideline was ‘not always applied consistently’ (2016, p. 5) and the new guideline was intended to ‘provide more certainty’ (2016, p. 6). The 2017 guideline makes it clear that its purpose is only to encourage *earlier* guilty pleas and not *more* guilty pleas:

*If the guidelines are successful, the proportion of pleas entered at the earliest stage of the court process will increase; the percentage of guilty pleas entered late in the process will decline.*

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<sup>10</sup> The Sentencing Guidelines Council was the precursor body to the Sentencing Council. The Sentencing Guidelines Council was advised by the Sentencing Advisory Panel which consulted on issues before issuing its advice. Both organisations were abolished in 2010 and replaced by the Sentencing Council.

<sup>11</sup> The Sentencing Advisory Panel had noted that whilst the Court of Appeal had never formally set out the appropriate level of discount, ‘a reduction of one-third has generally been accepted as the normal approach’ (cited in House of Commons Home Affairs Committee 2004, para. 17). In 2010, the Government proposed increasing the maximum reduction for a guilty plea to one-half in its *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* Green Paper, noting that: ‘The sentencing framework has long recognised the benefits of early guilty pleas in terms both of efficiency and of sparing victims needless worry’ (Ministry of Justice 2010, para. 216). However, in June 2011, then Prime Minister, David Cameron, announced that his Government would not take this proposal forward.

<sup>12</sup> The most serious offences which can be tried only in the Crown Court.

*However, the overall proportion of cases resolved through a guilty plea should remain largely unchanged. (Sentencing Council 2017b, para. 2.2)*<sup>13</sup>

### ***'Cracked Trials' and Guilty Pleas***

Sentence reductions for a guilty plea may save resources by reducing the volume of 'cracked trials'. This term refers to a scheduled trial which is cancelled close to opening. The prosecution may offer no evidence at trial – effectively 'dropping the case'<sup>14</sup> – or the defendant may plead guilty near or after the commencement of the trial. Some impending trials are cancelled close to the trial date as a result of the defendant changing plea from not guilty to guilty. By the time a case nears the trial stage, a significant amount of resources may have been expended.<sup>15</sup> For example, trials require legal professionals to prepare, courts to allocate time, and any witnesses to be warned to attend court. In 2013, so-called 'cracked trials' accounted for almost 40% of trials (Sturge 2019, p. 10). One possible benefit of the 2017 guideline may have been a reduction in the number of such cracked trials, by encouraging defendants who intend to plead guilty to do so early rather than late in the process.<sup>16</sup>

### ***Structure of 2017 Guideline***

The 2017 guideline, like the offence-specific guidelines, adopts a staged approach for courts to follow when determining the appropriate sentence reduction for a guilty plea. The following five stages should be followed:

**Stage 1:** Determine the appropriate sentence for the offence(s) in accordance with any offence specific guideline.

**Stage 2:** Determine the level of reduction for a guilty plea in accordance with this guideline.

**Stage 3:** State the amount of that reduction.

**Stage 4:** Apply the reduction to the appropriate sentence.

**Stage 5:** Follow any further steps in the offence specific guideline to determine the final sentence.  
(Sentencing Council 2017a, p. 5)

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<sup>13</sup> The consultation document for the revised guideline noted that: 'The guideline is directed only at defendants wishing to enter a guilty plea and nothing in the guideline should create pressure on defendants to plead guilty' (Sentencing Council 2016, p. 8).

<sup>14</sup> For example, where it has decided not to proceed (such as where a guilty plea from a co-accused is accepted) or where there are issues with witnesses.

<sup>15</sup> By the police initially, then the Crown Prosecution Service, the Legal Aid Agency and finally Her Majesty's Courts and Tribunals Service.

<sup>16</sup> The relationship between guilty plea reductions and 'cracked trials' is not a new concern. The Royal Commission on Criminal Justice advocated making the system of sentence reductions more 'effective' because they believed a 'clearer system of graduated discounts would help alleviate the problem of "cracked" trials' (1993, p. 111).

### ***Guideline Levels of Plea-Based Sentence Reductions and Changes to the Guideline***

As with earlier versions, the 2017 guideline prescribes levels of sentence reduction according to a sliding scale: later guilty pleas attract more modest reductions. If a plea is indicated at the first stage<sup>17</sup> of the proceedings, a *maximum* reduction of **one-third** should normally be made. A plea entered after the first stage should attract a maximum reduction of **one-quarter** (subject to several exceptions noted in the guideline). The reduction should decrease to a maximum of **one-tenth** if the defendant pleads guilty on the first day of trial. The reduction may decrease still further, possibly even to **zero** if the plea is entered during the trial. The guideline also provides a limit on the sentence reduction available in cases of murder.<sup>18</sup>

Sentence reductions only apply to the punitive aspect of a sentence and not to ancillary orders such as periods of disqualification from driving. A guilty plea may also change the type of sentence imposed. For example, in recognition of a guilty plea, a sentence of immediate custody may be changed to a community order or a community order may be reduced to a fine.

### ***Exceptions to the Guideline Recommended Maximum Reductions***

Different provisions contained in a separate guideline apply to cases involving defendants aged under 18.<sup>19</sup> In addition, the guideline recognises several categories of exceptions to the levels of reduction. If an exception applies, a court may award a greater reduction than the levels specified in the guideline. One exception reflects late disclosure by the Crown. For example, if a defendant entered a plea later than the first opportunity as a result of the Crown having served the evidence in the case late, or having not completed its disclosure requirements in a timely manner, a court may award the maximum reduction associated with an early plea. Another key exception is made for defendants who for one reason or another had a reduced ability to understand what was alleged against them. Defendants who enter a later plea only as a result of their diminished capacity to enter an informed plea earlier may therefore still be entitled to the full one-third reduction.<sup>20</sup>

The guideline notes that in considering whether this exception applies, sentencers should distinguish between cases where it was necessary to receive advice and/or evidence, and cases where the defendant delays pleading in order to further assess the strength of the prosecution's case or the likelihood of a conviction. Courts are thus required to distinguish between late pleas arising from a reasonable lack of understanding and late pleas which are simply a result of strategic

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17 The first stage will normally be the first hearing at which the defendant's plea or indication of plea is sought and recorded by the court.

18 The maximum reduction for murder is one-sixth or five years, whichever is less. As with other offences the reduction awarded diminishes the later the plea is entered. A guilty plea entered to a murder charge on the day of trial carries a maximum reduction of one-twentieth of the minimum term for murder (Sentencing Council 2017a, p. 8).

19 These provisions provide concessions for younger defendants who may have additional difficulties understanding the criminal process. See Section 5 of the 'Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery Definitive Guideline'. Available at: <https://www.sentencingcouncil.org.uk/publications/item/sentencing-children-and-young-people-definitive-guideline/>.

20 The guideline states: 'Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done, a reduction of one-third should still be made' (Sentencing Council 2017a, p. 7).

decisions by the defendant.<sup>21</sup> Finally, the guideline also makes it clear that courts may depart from the sentence reductions listed in the event that following the guideline's levels would be contrary to the interests of justice to do so.<sup>22</sup>

### ***Changes Introduced by the 2017 Guideline***

The 2017 guideline modified the previous guideline in several respects. One change was that the 2017 guideline specifies *maximum* levels of reduction. The previous (2007) guideline specified recommendations for levels rather than maximums. This shift in direction may have resulted in fewer reductions in excess of one-third, and possibly a closer 'fit' between the guideline levels of reduction and those actually awarded by courts. It is unclear how many cases attracted a sentence reduction over one-third<sup>23</sup> but reductions over one-third should be less common as a result of the new guideline. Another significant change is that in the definitive, revised guideline, in order to benefit from the maximum reduction of one-third a defendant must plead guilty, or indicate a guilty plea at the first hearing. This applies to all cases, including indictable only cases. However, the exception involving late disclosure may still be relevant.

### ***Sentence Reductions when Prosecution Case is Overwhelming***

The 2017 guideline clarified another issue which may have been a source of inconsistency. For decades, a guilty plea was regarded as a tangible way for the defendant to evidence their remorse for the crime. Mitigation was offered in recognition that by choosing to plead guilty, the defendant spared the state the costs of proving the crime, and victims and witnesses from having to testify. However, if the offender had been caught 'red-handed' and the prosecution had a strong case to which there was no apparent defence, the defendant had little choice but to plead guilty. In this sense, the traditional rationale may have seemed less compelling. Reflecting judicial practice, the previous guideline took the position that it 'may not be appropriate to give the full reduction' (Sentencing Guidelines Council 2007, p. 6). The 2007 guideline proposed a more modest reduction of 20% (rather than one-third at first opportunity) if the defendant entered a guilty plea under these circumstances.<sup>24</sup> The latitude in the guideline may have resulted in some inconsistency in reductions awarded in such cases. The 2017 guideline eliminates this departure from the normal reductions; defendants are entitled to the full reduction appropriate to the timing of their plea.<sup>25</sup> This aligns the guideline with recent case law.<sup>26</sup>

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21 A striking example is provided by the decision in *R. v Markham and Edwards* in which two 14-year-old defendants were awarded guilty plea credit of one-sixth in a case of murder where one defendant had pleaded guilty after the first opportunity and the other defendant did not plead guilty to murder at all (having accepted only that she had participated in the killing with 'murderous intent'). [2017] EWCA Crim 739.

22 This discretion to depart from the guideline applies to all of the Sentencing Council's guidelines (section 59 of the Sentencing Code; previously section 125 of the Coroners and Justice Act 2009).

23 Roberts and Bradford report approximately 10% of cases receiving a reduction over one-third using data from a single year, 2010-2011 (2015, Table 2). No more recent data are available.

24 This was an amendment to the earlier, 2004, guideline issued by the Sentencing Guidelines Council which had stated in relation to caught 'red-handed' cases that: 'Since the purpose of giving credit is to encourage those who are guilty to plead at the earliest opportunity, there is no reason why credit should be withheld or reduced on these grounds alone. The normal sliding scale should apply' (2004, para. 5.2).

25 At the time of writing (November 2020), proposals have been made to return to the previous arrangement, whereby defendants who had little choice but to plead guilty ('caught red-handed' cases) received little or no reduction to their sentence.

26 *R. v Wilson* [2012] EWCA Crim 386; and *R. v Caley* [2012] EWCA Crim 2821.

There are several justifications for the new policy. First, if the goal of the reductions is to save time, money, and spare witnesses and victims from having to appear at court, this objective is also achieved when the defendant faces an overwhelming case.<sup>27</sup> Without the prospect of such a significant reduction, defendants in such cases have one less convincing reason to plead guilty, which may increase the number of cases resolved following a costly trial. The consequence is that more trials will be necessary and more victims and witnesses required to testify. The question of court caseload has become particularly pressing as a result of court closures related to the pandemic. On 30 June 2020, there were 421,539 outstanding cases in the magistrates' courts and 42,707 outstanding cases in the Crown Court (Ministry of Justice 2020a, Tables M1 and C1).

Second, denying the reduction in these cases muddies the rationales for plea-based reductions. The 2017 guideline makes a clear distinction between genuine remorse and a guilty plea as factors in sentencing. The former is taken into account at Step Two of the offence-specific guidelines, and the latter at a later step. Defendants in England and Wales<sup>28</sup> can therefore clearly see the effect of their plea, independent of other considerations such as remorse or providing assistance to the police or the Crown Prosecution Service. Finally, to encourage a discretionary approach to determining the appropriate level of reduction in cases where the evidence is overwhelming would result in greater uncertainty regarding the regime. A principal objective of the guideline is to promote greater certainty with respect to the levels of reduction awarded.

## 5. KEY ISSUES

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### (a) Vulnerable Defendants

Some defendants may be vulnerable in ways that affect their decision to plead. For example, a defendant with limited cognitive abilities may enter a guilty plea without being fully aware of the consequences of the plea or a criminal conviction. As noted above, the 2017 guideline acknowledges this possibility for adults in Section F, which lists exceptions to the guideline's recommended reductions. Despite these provisions, some academics have warned that 'vulnerable defendants may end up understanding neither the elements of the offence charged nor the relevance of exculpatory material' (Peay and Player 2018, p. 935).<sup>29</sup> Issues other than cognitive impairments or youth may also affect a defendant's likelihood of entering a guilty plea:

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<sup>27</sup> The pre-guideline consultation document noted that: 'The benefits apply regardless of the strength of the evidence against an offender. The strength of the evidence should not be taken into account when determining the level of reduction' (Sentencing Council 2016, p. 14).

<sup>28</sup> Defendants who plead guilty in other common law countries receive a sentence generally without knowing the specific reduction arising from their plea (e.g. Cole and Roberts 2018). The lack of transparency also impairs the ability of lawyers to advise clients contemplating entering a guilty plea.

<sup>29</sup> See also Howard (2020) for research and discussion of advising mentally vulnerable clients with respect to plea.

*These vulnerabilities [to wrongfully pleading guilty] vary, but include those with learning difficulties, autism, mental illness or personality disorder, and also arise from issues relating to gender and/or black and minority ethnic (BAME) status. What they have in common is that they may all make individuals more susceptible to the incentive to offer an early plea of guilty to the offence or offences charged. (Peay and Player 2018, p. 3)*

Additionally, Helm argues that '[t]hese incentives are likely to be more influential for those of lower socio-economic status since they are more likely to have an urgent need to be released from custody, or find the time and costs involved in trial to be prohibitive' (2019a, p. 445; see also Helm 2019b). Finally, unrepresented defendants may have a limited understanding of the legal process and may be more likely to enter a guilty plea when this is inappropriate (Gibbs 2016). Other factors may also play a role. Indeed, such is the complexity and diversity of these vulnerabilities that many defendants may be vulnerable:

*Defendants who appear in front of the criminal courts are not a random sample of the population. They disproportionately include those who are rendered vulnerable and disadvantaged in various ways, whether by education, by employment, by birth or by bad luck... levels of learning disability, mental illness and mental disorder generally are disproportionately high; there is significant evidence of racial disparity in the flow of cases into court; and that amongst women, histories of personal trauma rooted in physical and sexual abuse are commonly in evidence amongst the sentenced population. (Peay and Player 2018, pp. 940–941)*

## (b) Sentence Reductions and Racial Disproportionality

Minority ethnic defendants may be disproportionately affected by plea-based sentence reductions. The Ministry of Justice provides information on racial disproportionality in the criminal justice system and reports that Black, Asian and Minority Ethnic (BAME) disproportionality was found to be particularly pronounced in areas including: defendants being tried at Crown Court rather than magistrates' courts; in custodial remand and plea at Crown Court; and in custodial sentencing (Uhrig 2016, p. 1). While plea-based sentence reductions are formally neutral, they may contribute to BAME disproportionality. If some BAME defendants are less likely to plead guilty they will be less likely to receive sentence reductions. If they plead guilty later, they will receive reduced sentence reductions. These trends may contribute to the disproportionate number of BAME persons in the prison population.

Recent data from the Ministry of Justice reveal a guilty plea rate of 57% for Black defendants in 2018, lower than the plea rate for White defendants (70%), which is a higher plea rate than for other ethnic categories (Ministry of Justice 2019, Table 5.11).<sup>30</sup> The difference in plea rates between Black and White defendants has been observed in the statistics for many years now.<sup>31</sup> One reason why BAME defendants may plead guilty less often (or later) is 'a trust deficit in many BAME communities' and

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<sup>30</sup> Mixed ethnicity defendants: 64%; Asian: 56%; Chinese or other: 56% (Ministry of Justice 2019, Table 5.11).

<sup>31</sup> In 2012, guilty plea rates were 72% for White defendants and 57% for Black defendants (Ministry of Justice 2019, Table 5.11; see also Hood (1992) for earlier data and discussion).

that ‘what begins as a ‘no comment’ interview can quickly become a Crown Court trial’ (Lammy 2017, p. 6 and p. 29).<sup>32</sup>

*The reason that so many BAME defendants plead not guilty, forgoing the opportunity to reduce sentences by up to a third, is that they see the system in terms of ‘them and us’... Many BAME defendants trust neither the advice of solicitors paid for by the government, nor that the [criminal justice system] will deliver on the promise of less punitive treatment in exchange for prompt admissions on guilt. (Lammy 2017, p. 6)*

Consequently, a lack of trust, a desire for trial by jury, and a greater tendency to plead not guilty may contribute to more severe sentences for BAME defendants through lower sentence reductions. In this way, there is the risk that sentence reductions (while formally neutral) are regarded by some scholars as indirectly discriminatory (e.g. Tonry 2009).

### (c) The Risk of Innocent Defendants Pleading Guilty

As long as it is possible to plead guilty, there is a risk that any defendant (even if innocent) may do so, and this risk is much discussed in the academic literature (e.g. Ashworth 2015, p. 182).<sup>33</sup> This risk increases if sentence reductions are significant. This underscores the need to ensure that defendants have access to legal representation<sup>34</sup> which should serve as a safeguard – although it is not necessarily always guaranteed (McConville et al. 1994).<sup>35</sup>

It is unclear what form of evidence would resolve the question of whether current levels of reduction are excessive. In many cases, the impact of the sentence reduction on time served in prison will be modest, thereby reducing the risks of innocent defendants pleading guilty simply to obtain the sentence reduction. A concrete example illustrates the point. A defendant who pleads after the first opportunity but before the day of trial is entitled to a maximum reduction of one-quarter of the custodial sentence. Assuming an eight-month sentence without a plea, the sentence after a plea will be six months, half of which will be served in prison. The guilty plea reduces the offender’s time in prison by one month: they will serve three months instead of four.<sup>36</sup> The question then is whether these levels of reduction create sufficient pressure on the defendant to plead guilty if he or she has a defence to the charge. Of course, the attraction of a reduction in time served does

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32 Shute, Hood and Seemungal (2005) found that minority ethnic defendants had less confidence than white defendants in the fairness of magistrates’ courts. It is possible that this may discourage some defendants from entering a guilty plea in the magistrates’ courts and if this distrust leads them initially to elect for trial by jury in an either-way case (for an offence that can be tried in the magistrates’ courts or in the Crown Court) then even if they later change their plea to guilty they are unlikely to be awarded the full one-third reduction in sentence as this will not be the first opportunity to enter such a plea.

33 This concern was also considered by The Royal Commission on Criminal Justice, which noted that: ‘This risk cannot be wholly avoided and, although there can be no certainty as to the precise numbers... it would be naive to suppose that innocent persons never plead guilty because of the prospect of the sentence discount’ (1993, p. 110).

34 Little official data are available for the magistrates’ courts where most cases are heard. However, Gibbs found that magistrates and district judges interviewed estimated that the proportion of unrepresented defendants, ranged from 15% to 40% of non-traffic cases (2016, p. 4). Though, in the Crown Court the vast majority of defendants will have legal representation.

35 For academic commentary on guilty pleas and the likelihood of wrongful convictions through wrongful pleas, see Nobles and Schiff (2019; 2020).

36 Defendants facing long prison sentences in the event of a conviction are likely to see greater benefit in pleading guilty. The proportionate reduction may be the same but a one-third reduction will reduce the time served in custody by several years for the longest prison terms.

not speak to the possibility that defendants who perceive a guilty plea may result in their avoiding a prison sentence altogether (discussed later in this paper).

Research involving offenders reported by the Sentencing Council suggests that the magnitude of the reductions offered were not a significant factor affecting their decision to plead. The report notes that: 'The main factor determining whether or not offenders plead guilty was the likelihood of being found guilty at trial' (Dawes et al., 2011 p. 32). Although the research involved only a small number of defendants, this suggests that it is the likelihood of conviction rather than the magnitude of reduction following a guilty plea that was the primary determinant in the decision to plead guilty. However, the data are far from robust on this question and more (and more up to date) research is needed.

#### (d) Guilty Pleas and Sentence Indications

Sentencing guidelines promote greater transparency and certainty at sentencing. A guilty plea guideline should help defendants make an informed decision regarding their plea. Leverick notes that without certainty, defendants pleading guilty 'even at the earliest opportunity cannot be confident that their plea will result in a sizeable discount' (2014, p. 343). In order to enter an 'informed' plea, defendants need to know (a) the nature, if not the full strength of the prosecution's case; and (b) the consequences of entering a guilty plea. Procedural requirements regarding the service of evidence and compliance with disclosure requirements aim to ensure the first element; the second requires information from the court and the guideline. Defendants need to have a reasonably accurate idea of the likely sentence reduction if they plead guilty. Legal advisers provide advice, based on the guideline. The guideline's staged levels of reduction are clearly stated in the guideline which is available on the Sentencing Council's website. Yet defendants also need to know what kind of sentence is likely to be imposed. The procedure of 'sentence indications' is the means by which defendants in the Crown Court may better understand the consequences of entering a guilty plea. At the same time, a number of scholars maintain that if the court states the sentence that will be imposed in the event of a plea, this creates additional pressure on the defendant (see Campbell, Ashworth and Redmayne 2019; Ashworth 2015).

## 6. RESEARCH FINDINGS

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#### (a) Judicial Conformity with the Guideline

Section 59 of the Sentencing Code requires that courts 'must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case'. However, section 59 of the Sentencing Code also allows a court to deviate from guidelines where it is satisfied that following it, 'would be contrary to the interests of justice'. Thus, understanding how sentence reductions operate in the real world requires more than just an analysis of guidelines and case law.

Insight into how judges applied the previous guideline was provided by the Crown Court Sentencing Survey (CCSS).<sup>37</sup> The survey was discontinued prior to the implementation of the 2017 guideline and cannot provide data on how the current guideline has affected the pattern of sentence reductions in practice. Nevertheless, some findings of the CCSS are worth noting.

The Sentencing Council's data from 2014 reveal that courts were broadly following the guideline's recommended reductions. Thus, of all defendants who admitted guilt before or at the Plea and Case Management Hearing (PCMH) in 2014, 76% received a sentence reduction of one-third (Sentencing Council 2015, Figure 5). The empirical pattern of reductions diverges to a greater degree for pleas entered at a later stage for a number of reasons. For example, if the service of the Crown's case or compliance with disclosure requirements was delayed for some reason, the defendant would only be sufficiently informed of the case against him or her at a later stage.

Academic studies using the CCSS data also confirm that judges were following the 2007 guideline in terms of allowing one-third reductions for guilty pleas at the first opportunity with a sliding scale for later guilty pleas (Roberts and Bradford 2015; Pina-Sánchez, Brunton-Smith and Li 2020). There is some limited evidence that in considering sentence reductions, factors beyond those noted in the guidance could have an influence. For example, one analysis of CCSS data found that different types of offences may attract different levels of sentence reductions. These differences emerged after researchers had controlled for other relevant case factors.<sup>38</sup> Another assessment of the CCSS data found that an offender's remorse (a mitigating factor) also affected sentence reductions – although 'these undue influences are small in magnitude, particularly in comparison to the large sentence adjustment associated with the timing of the plea' (Pina-Sánchez, Brunton-Smith and Li 2020, p. 280).<sup>39</sup> These findings relate to the period prior to the 2017 guideline.

There is little detailed information available on the effect of the 2017 guideline on courts' conformity with the guideline's levels of reduction, although in its recent report, the Sentencing Council cites the views of its advisory group which 'noted that there was evidence that the guideline was being followed' (Sentencing Council 2020, p. 18).

## (b) Effect of the Guideline on Plea Rates, Timing of Pleas, and 'Cracked Trials'

As noted earlier, one objective of the guideline was to encourage defendants *intending to plead guilty* to enter their plea earlier rather than later in the criminal process. The guideline did not aim to change the overall rate of cases resolved by a guilty plea. Trends indicate that overall guilty plea

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37 The CCSS was a paper-based survey conducted between 1 October 2010 and 31 March 2015. The CCSS collected data on sentencing and the factors considered by judges during the sentencing process. Judges indicated on the form the sentence reduction that had been awarded for a guilty plea. While the CCSS provided some data on the application of sentence reductions, it only ran for a relatively short period of time.

38 Homicide offences attracted more modest reductions than theft offences. By contrast, assault, drug, and robbery offences seemed to attract higher reductions than theft offences (see Roberts and Bradford 2015, pp. 201-202). Earlier research also found that the proportionate reductions were greater for some offences. Flood-Page and Mackie report that for rape the reduction was in excess of 50% (1998, p. 91).

39 Since remorse is taken into account at Step Two of the offence-specific guidelines methodology, by the time plea is considered (at Step Four), there should be no effect due to this factor.

rates remained stable following the introduction of the guideline. Ministry of Justice statistics from the eight quarters prior to the introduction of the guideline (2015 and 2016) reveal an average guilty plea rate of 67.5% in the Crown Court; the average in the eight quarters after 2017 (2018 and 2019) was 67% (Ministry of Justice 2020b, Crown Court plea tool). The Sentencing Council summarises trends separately for the Crown Court and the magistrates' courts and also concluded that as anticipated, the guideline had not changed the proportion of defendants who pleaded guilty (Sentencing Council 2020, p.2).

The Ministry of Justice Crown Court plea tool provides the volume of pleas entered at different points in the process. As can be seen in Table 1 below, the percentage of all guilty pleas entered prior to trial was declining prior to the guideline, from 70% in 2014 to 60% in 2017. There has been little change in past two years (2018 and 2019). Table 1 also shows that the proportion of cracked trials (as a percentage of all guilty pleas) was rising before 2017, and also appears to have stabilised since: this category accounted for 28% of guilty pleas in 2016, 30% in 2019.

**Table 1**  
**Distribution of Guilty Pleas by Timing, 2014-2019, Crown Court**

	<i>2014</i>	<i>2015</i>	<i>2016</i>	<i>2017</i>	<i>2018</i>	<i>2019</i>
<b>GP Prior to Trial</b>	44,697 70%	42,406 66%	36,544 64%	31,123 60%	26,084 58%	25,157 61%
<b>Cracked Trial</b>	14,702 23%	16,236 25%	16,119 28%	16,772 32%	13,977 31%	12,501 30%
<b>GP during Trial</b>	312 <1%	337 <1%	417 <1%	349 <1%	395 <1%	355 <1%
<b>GP, Other hearings/ Unknown</b>	4,582 7%	5,410 8%	4,377 8%	3,502 7%	4,513 10%	3,421 8%
<b><i>Guilty Plea</i></b>	<i>64,293</i>	<i>64,389</i>	<i>57,457</i>	<i>51,746</i>	<i>44,969</i>	<i>41,434</i>
<b><i>Total</i></b>	<i>100%</i>	<i>100%</i>	<i>100%</i>	<i>100%</i>	<i>100%</i>	<i>100%</i>

Source: Ministry of Justice (2020b, Crown Court plea tool); percentages rounded

## 7. RESEARCH GAPS

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### (a) Impact of the 2017 Guideline on Sentencing Practice

Earlier sections of this paper have documented trends in the guilty plea rate and the proportion of cracked trials. The Sentencing Council has noted that:

*Other benefits that are expected to result from the proposed guideline are:*

- *The enhanced clarity of the guideline will result in a more consistent application across courts in England and Wales;*
- *Defence practitioners will have a clearer idea of the likely outcome for the defendant if he or she enters a guilty plea at different stages of the criminal process and they will be better able to advise clients; and*
- *The guideline will facilitate the work and enhance the effectiveness of other initiatives in the criminal justice system to ensure more timely and effective decision-making. (Sentencing Council 2016, p. 7)*

These potential benefits of the guideline have yet to be evaluated. A key function of the Sentencing Council's guidelines is to provide a more consistent approach to sentencing. The question of consistency in levels of sentence reduction awarded in different courts has not been addressed to date. In addition, it would be interesting to note whether in practice the pattern of plea-based sentence reductions more closely tracks the guideline's recommendations.

Other indicators of interest include the volume of reductions in excess of one-third. For example, as noted, the 2017 guideline prescribes 'maximum' reductions, rather than recommendations. Reductions in excess of one-third may increase the likelihood of wrongful convictions; they may prove too powerful an incentive to plead guilty. In addition, large reductions will undermine proportionality at sentencing if two defendants convicted of the same crime and with the same backgrounds receive very different sentences because one was convicted following a trial while the other pleaded guilty.<sup>40</sup> Research should explore the magnitude of reductions awarded, to determine whether any cases receive reductions in excess of one-third (the guideline maximum).

### (b) Understanding the Defendant's Perspective

To fully understand the effectiveness of plea-based sentence reductions and the key issues discussed above, it is necessary to understand defendants' perspectives. Research should explore defendants' views and experiences regarding plea decision-making to determine whether, and to

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<sup>40</sup> The principle of proportionality requires that the severity of sentence reflects the harm caused and the culpability of the offender. These two dimensions underpin the definitive sentencing guidelines by determining the offence category. A defendant's plea is unrelated to either harm or culpability.

what extent, concerns about vulnerable defendants are founded. This research may involve solicitors who are well placed to document any adverse effects on vulnerable defendants. The Sentencing Council published limited research findings on this issue in 2011, as have academic researchers (e.g. Jacobson, Hunter and Kirby 2015) and this work should be continued. Additionally, research should also involve interviews with defendants. Research should explore whether the exceptions and safeguards to protect vulnerable defendants are sufficient, or whether additional measures are necessary. It is also important to know whether any defendants in custody plead guilty simply to secure release, rather than in recognition of their guilt. Finally, the effects of the move towards active case management on defendants' plea decisions is also worthy of further attention (see Johnston 2020).

### (c) Effects on Plea Rates and Timings of Pleas

As noted, the Sentencing Council's guideline aimed to shift the distribution of pleas over time, to reduce the number of pleas entered after the first opportunity. Whether it has been successful in discouraging late pleas can only be established by comparing the distribution of pleas before and after the introduction of the guideline. Some preliminary trends have been presented in this report, and the Sentencing Council's recent research also concluded that the guideline had not affected the timing of pleas entered,<sup>41</sup> but more granular analyses are needed. Finally, as the Sentencing Council noted in its consultation, there was evidence that the previous guideline had not always been applied consistently, and that levels of reduction 'in some cases appear[ed] to be higher than those recommended by that guideline' (Sentencing Council 2016, p. 5), future research should explore the impact of the new guideline on the two issues of consistency and excessive levels of reduction.

### (d) Plea-Based Changes to the Nature of the Sanction

While the most easily identifiable (and in all probability the most common) effect of a guilty plea is to reduce the length of a prison sentence, in some cases a guilty plea may change the nature of the sanction imposed. To date, no data have been available to determine how frequently a guilty plea changes the nature, rather than the quantum of sanction. Research should examine such cases, with a view to determining whether particular categories of offender or offence are more or less likely to benefit from a change in sanction (rather than a reduction in sentence length). Research conducted before the first guilty plea guideline was introduced suggested that plea seldom influenced whether the courts imposed a custodial sentence (Flood-Page and Mackie 1998, p. 90). Although, as noted, firm conclusions cannot be drawn on the basis of the limited data available, if wrongful pleas are being entered, it is more likely they will arise from defendants in custody (see Helm 2019a; 2019b). The incentive to plead guilty is likely to be stronger for two general categories of defendant: (i) individuals detained on remand awaiting trial; and (ii) those who believe that entering a guilty plea will change the sentence they receive from a prison term to a community order.

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<sup>41</sup> 'This research also indicated that the guideline did not seem to have any noticeable impact on the timings of defendants' pleas; the reasons reported in the small sample of defendants included in this work highlighted that they would have pleaded guilty at the same stage regardless of the guideline' (Sentencing Council 2020, p. 18).

### (e) Cost Savings

Another critical question is how much expense is saved by sentence reductions.<sup>42</sup> The Sentencing Council's Resource Assessment published in 2017 provided 'optimistic' and 'pessimistic' estimates of the costs of the new guideline on prison, probation and court services. The biggest potential costs relate to the possibility that smaller sentence reductions will mean more expenditure on prison places (the upper end of the pessimistic estimates for extra prison expenditure, excluding capital costs, was £30 million per year by 2021/22). Looking beyond just prison costs and factoring in potential savings in other areas, the pessimistic scenario predicted £20 million in costs by 2021/22, rising to £30 million by 2031/32.<sup>43</sup> By contrast, the optimistic scenario envisaged a yearly saving of £10 million per year by 2019/20.<sup>44</sup> The Sentencing Council's recent report estimates that the impact of the guideline to date falls somewhere between the two projections, but no costings are currently available. It is important to better understand the cost of the regime as, one 'key issue on which evidence is insufficient is whether defendants would plead guilty in the absence of any incentive by way of a reduction in sentence length' (Peay and Player 2018, p. 931). Research should determine the fiscal impact of the guideline. This research would need to estimate the cost savings to the police, the Crown Prosecution Service, the court system and on defendants' legal aid arising as a result of changes introduced by the 2017 guideline.

### (f) Attitudes of the Public and Crime Victims to Plea-Based Sentence Reductions

Finally, research conducted by the Sentencing Council found limited public knowledge of the plea-based sentence reductions (Dawes et al. 2011). In addition, the Sentencing Council reported findings from small samples of victims, witnesses, and offenders. This research is a decade old now, and it would be worthwhile revisiting the issues now, several years after the new guideline has been in place.

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<sup>42</sup> McConville and Marsh (2014) writing before the 2017 guideline questioned whether the cost savings are in fact significant (see pp. 224-225).

<sup>43</sup> As the Sentencing Council notes, any costs incurred must be considered within the wider context of non-monetary benefits arising from earlier guilty pleas. These relate to victims and witnesses.

<sup>44</sup> Though it is noted that these savings may be not 'cashable'.

## 8. CONCLUSION: TRANSPARENCY, PREDICTABILITY AND JUDICIAL DISCRETION

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All common law countries offer sentence reductions to defendants who plead guilty. The plea-reduction scheme in England and Wales is unique in that it is founded upon a public-facing guideline which recommends specific levels of reduction. Sentence reductions for a guilty plea are therefore more predictable and transparent in this jurisdiction. Research suggests that in practice courts are following the guideline's recommended levels of reduction. The guideline creates a number of exceptions which a court may draw upon to award a reduction other than the one specifically recommended. In addition, courts may depart from the guideline if following the guideline would be contrary to the interests of justice. With respect to plea-based reductions, this means awarding a greater reduction in cases which conform to one of the exceptions. Whether this level of judicial discretion is insufficient, appropriate or excessive can only be established through additional empirical research.

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