Sentencing Council

Sentencing Council meeting: **23 October 2015**
Paper number: **SC(15)OCT04 – Guilty Pleas**
Lead Council members: **Alison Saunders, Michael Caplan, Julian Roberts and Tim Holroyde**
Lead official(s): **Ruth Pope**
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1 ISSUE

1.1 At the meeting in September 2015, the Council agreed, subject to two caveats, to consult on the draft guilty plea guideline, with emphasis in the consultation paper on presenting the proposals in the context of the changes and initiatives in the criminal justice system and explaining the wider system benefits associated with the guideline.

1.2 It was also agreed that further work should be carried out on the resource assessment to ensure that the benefits to the police and CPS are properly reflected and that the assessment is presented in a manner that does not give a spurious accuracy to any estimates based on assumptions about offender and sentencer behaviour. This will be presented to the Council in November, as it should be seen as part of a package with the consultation document.

1.3 The last time the Council considered the content and format of the guideline in any detail was at the March 2015 meeting. Changes were subsequently made to aid clarity and a small research exercise was carried out in March 2015 with sentencers to test how the guideline would be construed. The version the Council is asked to consider today takes into account the results of that research. Some of these issues were covered in the paper to the May Council meeting, but were not discussed by Council.

2 RECOMMENDATION

2.1 The Council is asked to consider the draft guideline at **Annex A** and finalise the version of the guideline for consultation. The consultation document and revised, narrative resource assessment can then be presented to the November meeting to be signed off for consultation from February to April 2016.

2.2 The Council is asked to consider the results of the research exercise which are provided at **Annex B** and to consider the issues arising from this. (see paragraphs 3.2 – 3.5)

2.3 The Council is asked to consider the draft guideline in its entirety, but in particular the following:

- amendments to allow discretion in some youth cases D1 and D2 (see paragraphs 3.6 – 3.8);
- an exception at F2 which allows an additional seven days for plea where the initial details of the prosecution case (IDPC) is not served before the first hearing (see paragraphs 3.9 – 3.12);
- an exception at F3 to allow for discretion in cases where cross examination is pre-recorded (see paragraphs 3.13 – 3.14); and
- additions to the offences to which an appropriate custodial sentence may apply at F8 and F9 (see paragraphs 3.15 – 3.16).

3 CONSIDERATION

Clarity of the guideline (amendments made in March-May 2015)

3.1 Following the March Council meeting Katharine Rainsford suggested amendments to the guideline to make it clearer and easier to read and understand. The amended version was 'road tested' with sentencers and some further amendments were made as a result. The various amendments are summarised below:

- The extract from the Criminal Justice Act 2003 in section A has been slightly reformatted to make it clearer.
- Section B of the guideline has been re-named 'Key principles', and has been slightly reworded.
- At section C the word 'stage' has replaced the word 'step' to avoid any possible suggestion that these equate to steps in an offence specific guideline.
- Section D has been altered to move the contents of the initial paragraph to a footnote. Paragraphs D1 and D2 have been re-worded.
- In E2 the words 'additional' and 'overall' have been italicised to give them emphasis. E3 has been re-worded.

- F1 has been re-worded to make it clear that all three conditions must be present for the exception to apply.
- F4, F5, F6 and F7 have been reworded to make them clearer.
- Minor changes have been made to section G; splitting a paragraph into two and removing a footnote.

Question 1: **Does the Council agree with the proposed drafting changes?**

Further issues raised by the road testing exercise

3.2 A number of judges in the research voiced concerns about the reference to suspended sentences at E1. The Council has previously approved the inclusion of 'reducing a custodial sentence to a suspended sentence order' as an example of how a guilty plea may be taken into account by imposing one type of sentence rather than another. In such cases the guideline states that there should be no further reduction for the guilty plea. Judges in the research exercise said that it was normal practice to both suspend a sentence and reduce the term in response to a guilty plea. At previous Council discussions on this point members agreed that in most cases the decision to suspend was made for reasons other than the plea (such as the offender having caring responsibilities) and the guilty plea reduction was applied by reducing the term. The option to use the guilty plea to change an immediate custodial sentence to a suspended sentence was therefore included in the guideline as an example of an alternative to reducing the term. In the light of this, the concerns raised by the judges in the research are surprising, but it is significant that a number of judges commented on this.

Question 2: Does the Council wish to amend or clarify the wording at E1?

3.3 Some of the participants raised the question of what mechanism would be used for a defendant to satisfy the first condition at F1:

> The offender has stated to the court and/or the prosecutor what he knows he has done at or before the first stage of the proceedings

Some alternative phrases were suggested by participants, but these do not provide a much clearer indication of the mechanism that should be used. The Council may feel that any attempt to specify the means by which such admissions should be made are likely to cause more problems than they solve and that the use of the simple English phrase of 'what he knows he has done' is clear and unambiguous.

Question 3: **Does the Council wish to amend the wording at F1*?***

3.4 The results of the road testing indicate that sentencers are likely to interpret the exception at F4 (which in the version tested was F2) more widely than the Council had intended. Members will recall that this exception was intended to give judges in very complex cases the flexibility to incentivise a guilty plea after the first stage. The Council had envisaged this applying chiefly to serious fraud cases such as those commonly tried at Southwark Crown Court.

3.5 Interpretations by research participants of what is meant by 'a very substantial amount of court time' vary but start as low as four weeks. If the intention is for only a very small number of cases to be caught by this exception, then an alternative form of words is needed. Alternative suggestions include:

> if the trial was likely to have taken in excess of eight weeks and/or would have involved a **very** substantial number of witnesses having to give evidence.
>
> in cases of serious or complex fraud or if the trial was likely to have involved a **very** substantial number of witnesses having to give evidence.

***Question 4:* To which cases and in what circumstances should the exception at F4 apply?**

Parity between youths and adults

3.6 At the March meeting of the Council it was pointed out that a youth charged with an indictable only offence which is treated as a grave crime would be required to plead at the allocation hearing in order to obtain the maximum reduction, whereas an adult charged with the same offence would not be required to plead until the first hearing in the Crown Court.

3.7 The proposed solution to this potential inequality or unfairness is to give the court the discretion to treat the first hearing at the Crown Court as the first stage of proceedings for youths in appropriate cases. The proposed wording at D1 (with footnotes) is as follows:

(e) For offences sent or committed to the Crown Court as grave crimes – the allocation hearing at the youth[1] court **unless** it would be in the interests of justice to treat the first hearing at the Crown Court as the first stage[2];

And at D2:

(e) For offences sent to the Crown Court as grave crimes – up to and including the first hearing at the Crown Court **unless** the interests of justice test at D1(e) above applies in which case until the time expires for the service of a defence statement;

[1] For youths jointly charged with an adult the allocation hearing may be in the adult magistrates' court.

[2] If, taking into account all the circumstances of the case, the Crown Court considers that for reasons of parity with an adult (whether or not there is a co-accused adult) it would be in the interests of justice to do so, it can treat the first hearing at the Crown Court as the first stage of the proceedings.

3.8 The flowchart at page A8 has also been amended accordingly.

Question 4: **Does the Council consider that the proposed wording on youths adequately deals with the concerns raised at the March meeting?**

Suggested additions to the guideline

3.9 The guideline is predicated on the assumption that in the vast majority of cases a defendant will have all the information he needs to plead at the first stage of proceedings. Part 8 of the Criminal Procedure Rules sets out the requirements for providing the initial details of the prosecution case (IDPC):

8.2.—(1) The prosecutor must serve initial details of the prosecution case on the court officer—

(a) as soon as practicable; and

(b) in any event, no later than the beginning of the day of the first hearing.

(2) Where a defendant requests those details, the prosecutor must serve them on the defendant—

(a) as soon as practicable; and

(b) in any event, no later than the beginning of the day of the first hearing.

(3) Where a defendant does not request those details, the prosecutor must make them available to the defendant at, or before, the beginning of the day of the first hearing.

3.10 In situations where the prosecution fails to serve the IDPC in accordance with the rules, it is submitted that a defendant should not be disadvantaged in terms of the available guilty plea reduction. This is particularly likely to be an issue when a defendant is produced in custody. The additional exception at F2 is designed to deal with this situation.

F2. Initial details of the prosecution case (IDPC) not served before the first hearing.

If an offender charged with an either way or indictable only offence who has requested the IDPC, is not served with those details at or before the beginning of the day of the first hearing **and** he indicates a guilty plea to the court and the prosecutor within seven days of service of the IDPC, the plea should be taken as having been indicated at the first stage of proceedings.

3.11 As drafted, the exception does not apply to summary offences. The rationale for this is that potential delays in service of IDPC are likely to particularly affect defendants charged with either-way offences (especially those produced in custody) who currently would expect to receive a one-third reduction for an early plea at the Crown Court, but under the proposed guideline would only receive a one-fifth reduction for a plea at that stage. In such cases, the time between charge and first appearance may leave insufficient time for the IDPC to be made available by the beginning of the day of the first hearing. Whilst the same time constraints may apply

to defendants produced in custody charged with summary only offences, the issues in such cases are likely to be more easily resolved on the day.

3.12 In all cases, if insufficient information is served for a defendant to know whether or not he has committed the offence the exception at F1 is engaged.

Question 5: Does the Council agree to include the exception at F2 in the draft guideline? If so, should this exception apply in section G (murder)?

3.13 An exception has been added at F3 to deal with cases where cross-examination of a vulnerable witness is pre-recorded:

> **F3. Pre-recorded cross-examination**
> Where cross-examination has taken place pursuant to section 28 of the Youth Justice and Criminal Evidence Act 1999 a reduction **up to** but not exceeding the maximum of one-third **may** be made for a plea indicated after the section 28 hearing if it would benefit victims or witnesses in the case to do so.

3.14 Currently, for the purposes of legal aid, in section 28 cases the trial is deemed to have begun when the cross-examination takes place and, if that interpretation is applied to the guideline, any plea entered after that point would receive a maximum reduction of one-tenth in accordance with D3. In such cases there is, in effect, an additional stage in proceedings: that between the s28 hearing and the remainder of the trial. It will frequently the case that the cross-examination will have taken place before all of the evidence is available, in particular forensic evidence. A plea shortly after the hearing has taken place would therefore still result in savings across the criminal justice system. Trials are frequently fixed as much as a year after the cross-examination (they are fixed because they involve vulnerable witnesses), so a plea after the cross-examination could benefit both the witness who has been recorded (by providing an outcome) and other witnesses still scheduled to give evidence. On the other hand, it is important that any exception does not undermine the overall principles of the guideline. The proposed factor allows a judge discretion to award a higher reduction if it would benefit victims or witnesses in the case to do so, but as worded would not allow a higher reduction on the basis of savings in terms of time and resources.

Question 6: Does the Council agree to include the exception as drafted at F2 in the draft guideline? If so, should this exception apply in section G (murder)?

3.15 The exceptions at F8 and F9 relating to minimum sentences have been amended to include the following offences:

- section 139 Criminal Justice Act 1988 and section 1 Prevention of Crime Act 1953: offences of having article with blade or point or offensive weapon in public place where the offender has a relevant previous conviction;
- sections 139AA Criminal Justice Act 1988: offence of threatening with article with blade or point in public or on school premises or offensive weapon on school premises.

3.16 In view of the number of offences to which an 'appropriate custodial sentence' can now apply, the description of the offences has been simplified.

Question 7: Does the Council agree to the revisions to F8 and F9 in the draft guideline?

3.17 It is hoped that the content of the draft guideline for consultation can be agreed at this meeting which will allow a final consideration of the guideline, consultation document, resource assessment and communications handling at the November Council meeting, with a view to launching the consultation in February 2016.

Question 8: Looking at the content overall, is the Council content to consult on this version of the guideline?

4 IMPACT

4.1 The resource impact of the guideline has been discussed by the Council at previous meetings. A further consideration of this issue will take place next month.

5 RISKS

5.1 The Council will be aware that the guilty plea guideline is likely to be controversial and may attract criticism. The time between signing off the consultation paper at next month's Council meeting and the consultation launch in February 2016 has been allowed to enable stakeholder engagement and careful media handling.

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A. APPLICABILITY OF GUIDELINE

The Sentencing Council issues this guideline as a draft guideline in accordance with section 120 of the Coroners and Justice Act 2009.

Section 144 of the Criminal Justice Act 2003 provides:
(1) In determining what sentence to pass on an offender who has pleaded guilty to an offence[1] 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.

When issued as a definitive guideline this guideline will apply regardless of the date of the offence to all individual offenders aged 18 and older, to organisations, and to offenders aged under 18, subject to legislative restrictions such as those relevant to the length of Detention and Training orders. The guideline applies equally in magistrates' courts (including youth courts) and the Crown Court.

B. KEY PRINCIPLES

Although an accused is entitled not to admit the offence and to put the prosecution to proof of its case, an acceptance of guilt:

a) normally reduces the impact of the crime upon victims;
b) saves victims and witnesses from having to testify;
c) is in the public interest in that it saves public time and money on investigations and trials.

A guilty plea produces greater benefits the earlier the plea is made. In order to maximise the above benefits and to provide an incentive to those who are guilty to indicate a guilty plea as early as possible, the guideline makes a clear distinction between a reduction in the sentence available at the first stage of the proceedings and a reduction in the sentence available at a later stage of the proceedings.

The purpose of reducing the sentence for a guilty plea is to yield the benefits described above and the guilty plea should be considered by the court to be independent of the defendant's personal mitigation. Thus factors such as admissions at interview, co-operation with the investigation and demonstrations of remorse should **not** be taken into account in determining the level of reduction. Rather, they should be considered separately and prior to any guilty plea reduction, as potential mitigating factors.

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.

The guideline applies only to the punitive elements of the sentence and has no impact on ancillary orders including orders of disqualification from driving**.**

C. THE APPROACH

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

[1] 'offence' includes breach of an order where this constitutes a separate criminal offence but not breach of terms of a sentence or licence.

D. DETERMINING THE LEVEL OF REDUCTION

D1. Where a plea is indicated[2] at the first stage of the proceedings a reduction of **one-third** (and not more than one-third) should be made (subject to the exceptions in section F). This will be the first point at which the charge is put to the offender in court and a plea (or indication of plea) is sought.

For offenders aged 18 or older the first stage of the proceedings will be:
(a) For summary offences - up to and including the first hearing at the magistrates' court;
(b) For either way offences - up to and including the allocation hearing at the magistrates' court;
(c) For indictable only offences - up to and including the first hearing at the Crown Court.

For offenders under the age of 18 the first stage of the proceedings will be:
(d) For offences dealt with in the youth court – the first hearing at the youth court;
(e) For offences sent or committed to the Crown Court as grave crimes – the allocation hearing at the youth[3] court **unless** it would be in the interests of justice to treat the first hearing at the Crown Court as the first stage[4];
(f) For offences sent to the Crown Court under any other provision[5] – up to and including first hearing at the Crown Court.

D2. After the first stage of the proceedings the maximum level of reduction is **one-fifth** (subject to the exceptions in section F).

For offenders aged 18 or older the **one-fifth** reduction should be made for pleas indicated:
(a) For offences dealt with in magistrates' courts – up to 14 days after the first hearing;
(b) For either way offences sent to the Crown Court for trial – up to and including the first hearing at the Crown Court;
(c) For indictable only offences - until the time expires for the service of a defence statement.

For offenders under the age of 18 the **one-fifth** reduction should be made for pleas indicated:
(d) For offences dealt with in the youth court – up to 14 days after the first hearing;
(e) For offences sent to the Crown Court as grave crimes – up to and including the first hearing at the Crown Court **unless** the interests of justice test at D1(e) above applies in which case until the time expires for the service of a defence statement;
(f) For offences sent to the Crown Court under any other provision – until the time expires for the service of a defence statement.

D3. Sliding scale of reduction thereafter

The reduction should be decreased from **one-fifth** to a maximum of **one-tenth** on the first day of trial proportionate to the time when the guilty plea is first indicated relative to the progress of the case and the trial date (subject to the exceptions in section F). The reduction may be decreased further, even to zero, if the guilty plea is entered during the course of the trial.

E. APPLYING THE REDUCTION

E1. Imposing one type of sentence rather than another

The reduction in sentence for a guilty plea can be taken into account by imposing one type of sentence rather than another; for example:

- by reducing a custodial sentence to a community sentence,
- by reducing an immediate custodial sentence to a suspended sentence order, or
- by reducing a community sentence to a fine.

In such cases there should be no further reduction on account of the guilty plea.

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[2] A plea is indicated for the purpose of this guideline either by entering the plea in court or by a formal notification of the plea to the prosecution and the court. In cases where the offender is given the opportunity to enter a plea by post (in accordance with Criminal Procedure Rule 37.8) doing so will constitute a formal notification of the plea.
[3] For youths jointly charged with an adult the allocation hearing may be in the adult magistrates' court.
[4] If, taking into account all the circumstances of the case, the Crown Court considers that for reasons of parity with an adult (whether or not there is a co-accused adult) it would be in the interests of justice to do so, it can treat the first hearing at the Crown Court as the first stage of the proceedings.
[5] Section 51A Crime and Disorder Act 1998

E2. More than one summary offence

When dealing with more than one summary offence, the aggregate sentence is limited to a maximum of six months. Allowing for a reduction for each guilty plea, consecutive sentences might result in the imposition of the maximum six month sentence. Where this is the case, the court **may** make a modest *additional* reduction to the *overall* sentence to reflect the benefits derived from the guilty pleas.

E3. Keeping an either way case in the magistrates' court to reflect a guilty plea

Reducing a custodial sentence to reflect a guilty plea may enable a magistrates' court to retain jurisdiction of an either way offence rather than committing the case for sentence at the Crown Court. In such cases a magistrates' court may pass a sentence of up to six months.

E4. Sentencing up to 24 months detention and training order for youth offences

A detention and training order of 24 months may be imposed on an offender aged under 18 if the offence is one which but for the plea would have attracted a sentence of detention in excess of 24 months under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000.

F. EXCEPTIONS

F1. Further information or advice necessary before indicating plea

Where **all three** of the following apply:

1. The offender has stated to the court and/or the prosecutor what he knows he has done at or before the first stage of the proceedings (see D1 above); and
2. had insufficient information about the allegations to know whether he was guilty of the offence; and
3. it was necessary for him to receive advice and/or to see evidence in order for him to decide whether he should plead guilty;

a reduction of one-third should be made where the guilty plea is indicated immediately after he receives the advice and/or sees the evidence.

For the avoidance of doubt this exception does not apply where an offender has exercised his right not to admit what he knows he has done until he sees the strength of the evidence against him.

F2. Initial details of the prosecution case (IDPC) not served before the first hearing

If an offender charged with an either way or indictable only offence who has requested the IDPC, is not served with those details at or before the beginning of the day of the first hearing **and** he indicates a guilty plea to the court and the prosecutor within seven days of service of the IDPC, the plea should be taken as having been indicated at the first stage of proceedings.

F3. Pre-recorded cross-examination

Where cross-examination has taken place pursuant to section 28 of the Youth Justice and Criminal Evidence Act 1999 a reduction **up to** but not exceeding the maximum of one-third **may** be made for a plea indicated after the section 28 hearing if it would benefit victims or witnesses in the case to do so.

F4. Exceptionally complex and time consuming cases in the Crown Court

A reduction **up to** but not exceeding the maximum of one-third **may** be made for a plea indicated later than the first stage of the proceedings if the trial was likely to have taken up a **very** substantial amount of court time and/or would have involved a **very** substantial number of witnesses having to give evidence.

F5. Newton Hearings and special reasons hearings

In circumstances where an offender's version of events is rejected at a Newton Hearing[6] or special reasons hearing[7], the reduction which would have been available at the stage of proceedings the plea was indicated should normally be halved. Where witnesses are called during such a hearing, it may be appropriate further to decrease the reduction.

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[6] A Newton hearing is held when an offender pleads guilty but disputes the case as put forward by the prosecution and the dispute would make a difference to the sentence. The judge will normally hear evidence from witnesses to decide which version of the disputed facts to base the sentence on.

[7] A special reason hearing occurs when an offender is convicted of an offence carrying a mandatory disqualification from driving and seeks to persuade the court that there are extenuating circumstances relating to the offence that the court should take into account by reducing or avoiding disqualification. This may involve calling witnesses to give evidence.

F6. Offender convicted of a lesser or different offence

If an offender is convicted of a lesser or different offence to that originally charged, and he has earlier made an unequivocal indication of a guilty plea to this lesser or different offence to the prosecution and the court, the court should give the level of reduction that is appropriate to the stage in the proceedings at which this indication of plea (to the lesser or different offence) was made.

F7. Minimum sentence under section 51A of the Firearms Act 1968

There can be no reduction for a guilty plea if the effect of doing so would be to reduce the length of sentence below the required minimum term. Where there is a finding of exceptional circumstances which justifies not passing the required minimum term, no further reduction for a guilty plea will normally be appropriate.

F8. Appropriate custodial sentences for persons aged 18 or over when convicted under the Prevention of Crime Act 1953 and Criminal Justice Act 1988 and prescribed custodial sentences under the Power of Criminal Courts (Sentencing) Act 2000

In circumstances where:

- an *appropriate* custodial sentence of at least six months falls to be imposed on a person aged 18 or over who has been convicted under sections 1 or 1A of the Prevention of Crime Act 1953; or sections 139, 139AA or 139A of the Criminal Justice Act 1988 (certain possession of knives or offensive weapon offences) **or**
- a *prescribed* custodial sentence falls to be imposed under section 110 of the Power of Criminal Courts (Sentencing) Act 2000 (drug trafficking offences) or section 111 of the Power of Criminal Courts (Sentencing) Act 2000 (burglary offences),

The maximum reduction available for a guilty plea is one-fifth of the *appropriate* or *prescribed* custodial period.

F9. Appropriate custodial sentences for persons aged at least 16 but under 18 when convicted under the Prevention of Crime Act 1953 and Criminal Justice Act 1988

In circumstances where an *appropriate custodial sentence* of a Detention and Training Order of at least four months, falls to be imposed on a person who is aged at least 16 but under 18 who has been convicted under sections 1 or 1A of the Prevention of Crime Act 1953; or sections 139, 139AA or 139A of the Criminal Justice Act 1988 (certain possession of knives or offensive weapon offences) the court may impose any sentence that it considers appropriate, having taken into consideration the general principles in this guideline.

G. MANDATORY LIFE SENTENCES FOR MURDER

Murder is the most serious criminal offence and the sentence prescribed is different from all other sentences. By law, the sentence for murder is imprisonment (detention) for life and an offender will remain subject to the sentence for the rest of his life.

Given the special characteristic of the offence of murder and the unique statutory provision in Schedule 21 of the Criminal Justice Act 2003 of starting points for the minimum term to be served by an offender, careful consideration has to be given to the extent of any reduction for a guilty plea and to the need to ensure that the minimum term properly reflects the seriousness of the offence. Whilst the general principles continue to apply, (both that a guilty plea should be encouraged and that the extent of any reduction should reduce if the indication of plea is later than the first stage of the proceedings), the process of determining the level of reduction will be different.

Determining the level of reduction

Whereas a court should consider the fact that an offender has pleaded guilty to murder when deciding whether it is appropriate to order a whole life term, where a court determines that there should be a whole life minimum term, there will be no reduction for a guilty plea.

In other circumstances,

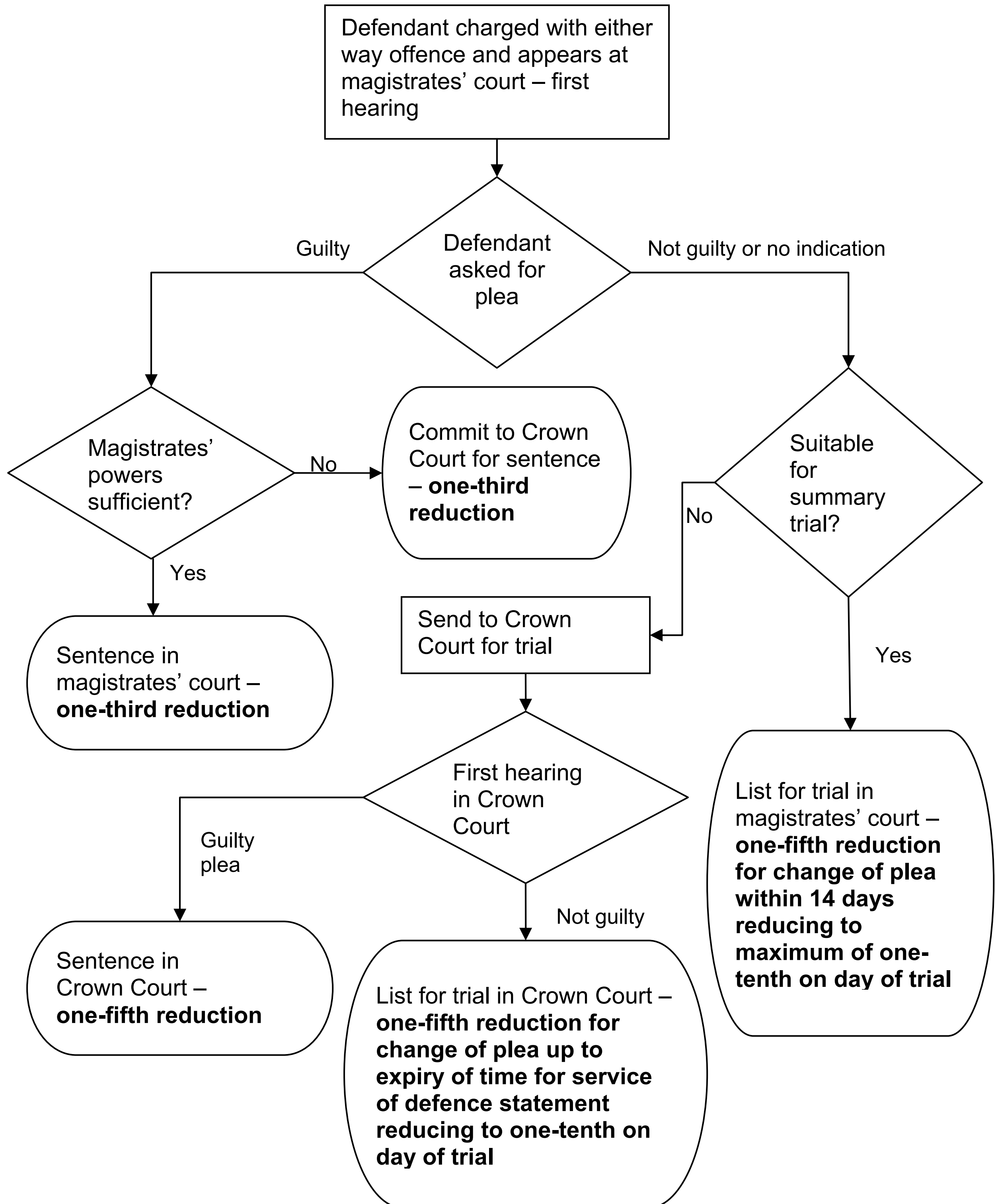
- the Court will weigh carefully the overall length of the minimum term taking into account other reductions for which the offender may be eligible so as to avoid a combination leading to an inappropriately short sentence;
- where it is appropriate to reduce the minimum term having regard to a plea of guilty, the reduction will not exceed one-sixth and will never exceed five years;
- The maximum reduction of one sixth or five years (whichever is less) should only be given when a guilty plea has been indicated at the first stage of the proceedings. Lesser reductions should be given for guilty pleas after that point, with a maximum of one twentieth being given for a guilty plea on the day of trial.

The exceptions relating to further information or advice necessary before indicating a plea and Newton hearings outlined at F1 and F4 above, apply to murder cases.

Appendix 1

Flowchart illustrating reductions for either way offences

(offences that can be tried in a magistrates' court or the Crown Court**)**

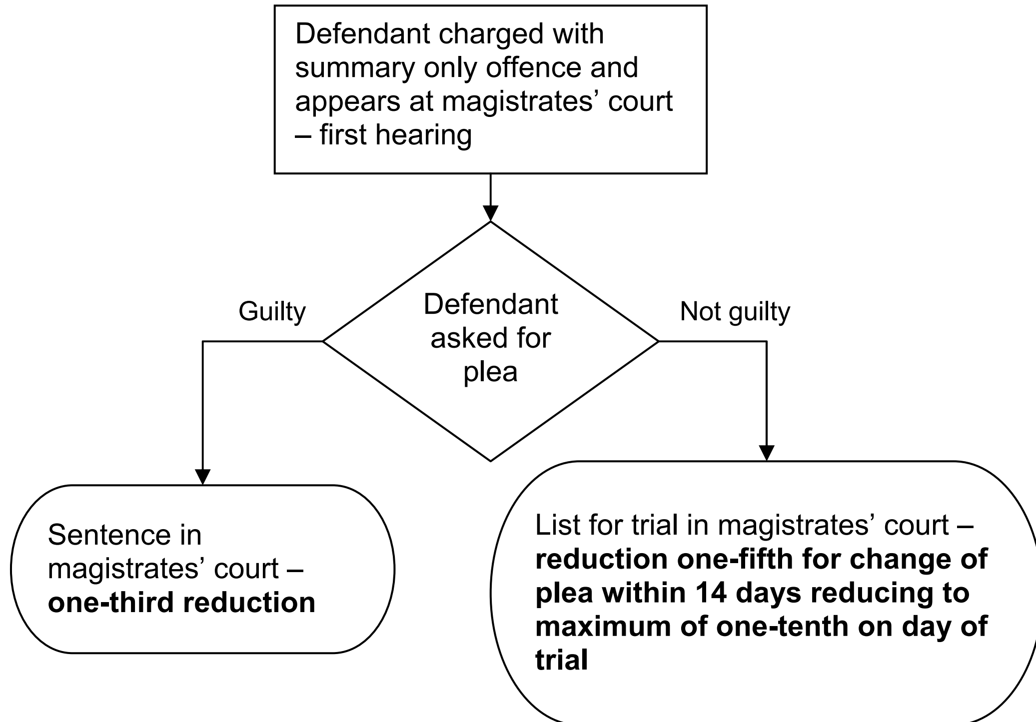


For illustrative purposes only please refer to the guideline for detailed guidance

Appendix 2

Flowchart illustrating reductions for summary only offences

(offences that can be tried only in a magistrates' court**)**

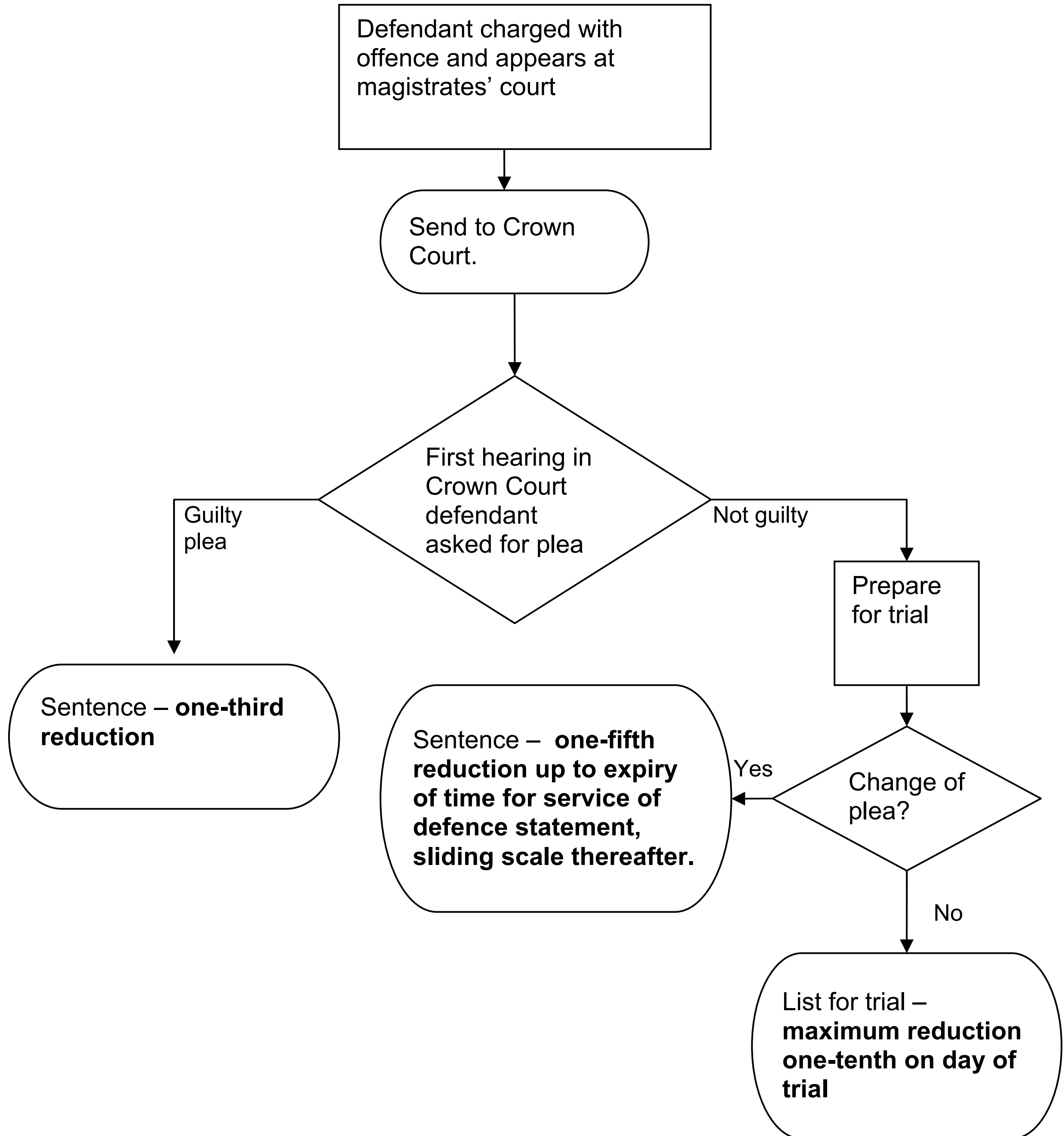


For illustrative purposes only please refer to the guideline for detailed guidance

Appendix 3

Flowchart illustrating reductions for indictable only offences (excluding murder)

(offences that can be tried only in the Crown Court**)**

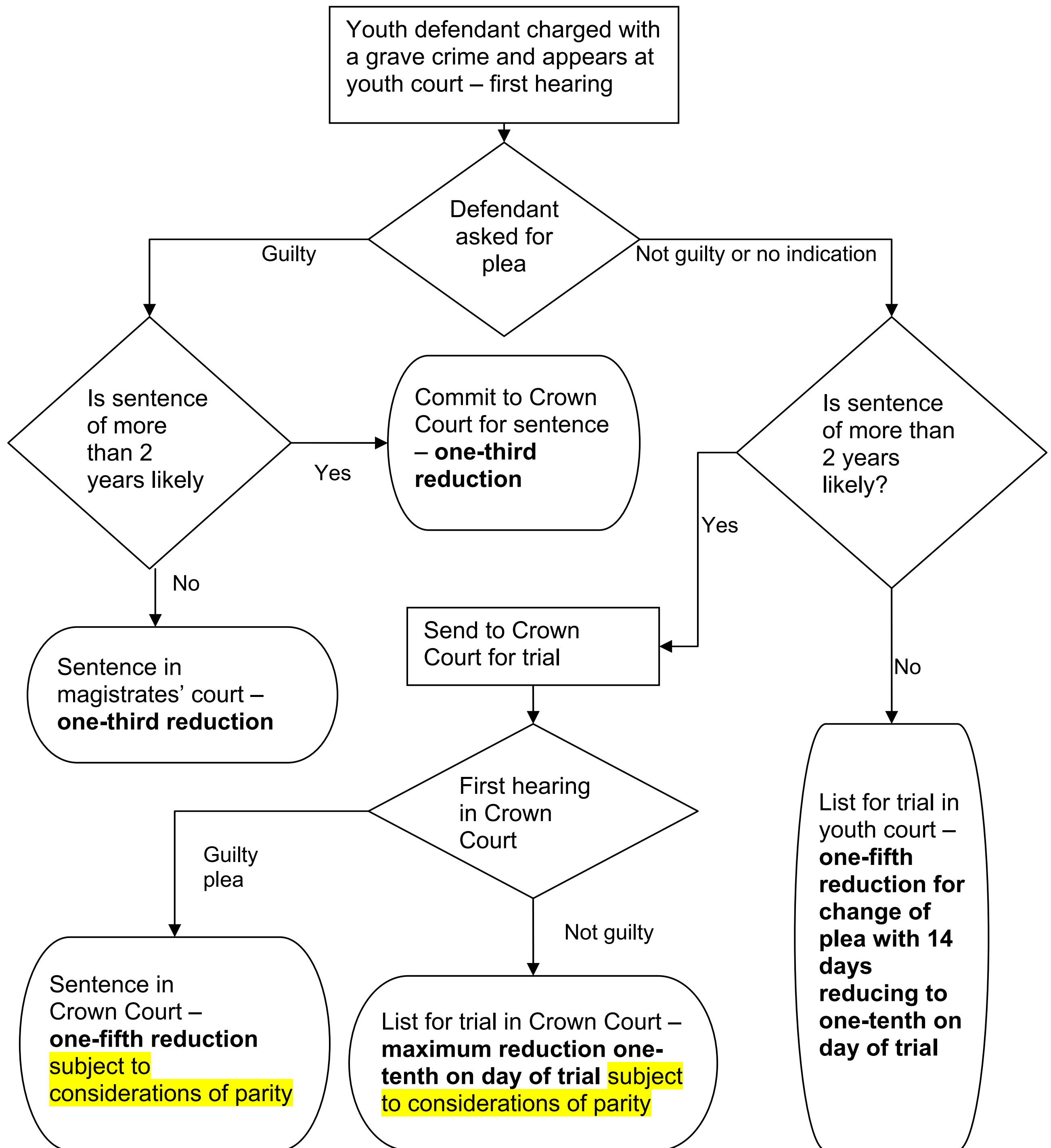


For illustrative purposes only please refer to the guideline for detailed guidance

Appendix 4

Flowchart illustrating reductions for offenders aged under 18 years

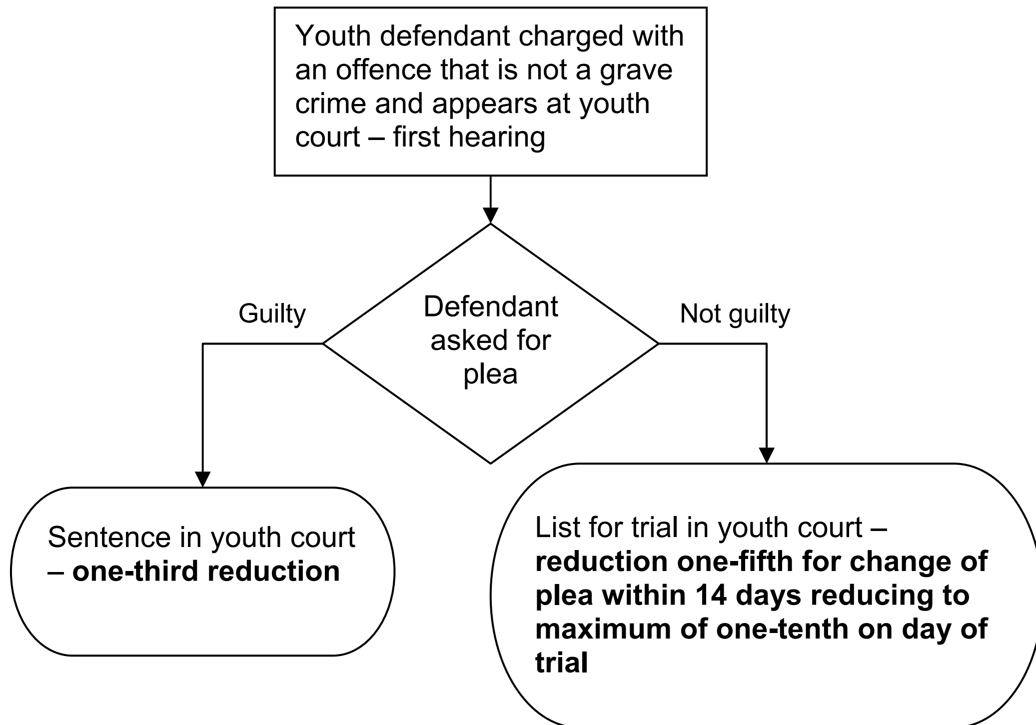
(offences that can be tried in a youth court or the Crown Court**)**



For illustrative purposes only please refer to the guideline for detailed guidance

Appendix 5

Flowchart illustrating reductions for offenders aged under 18 years - offences that must be dealt with in the Youth Court

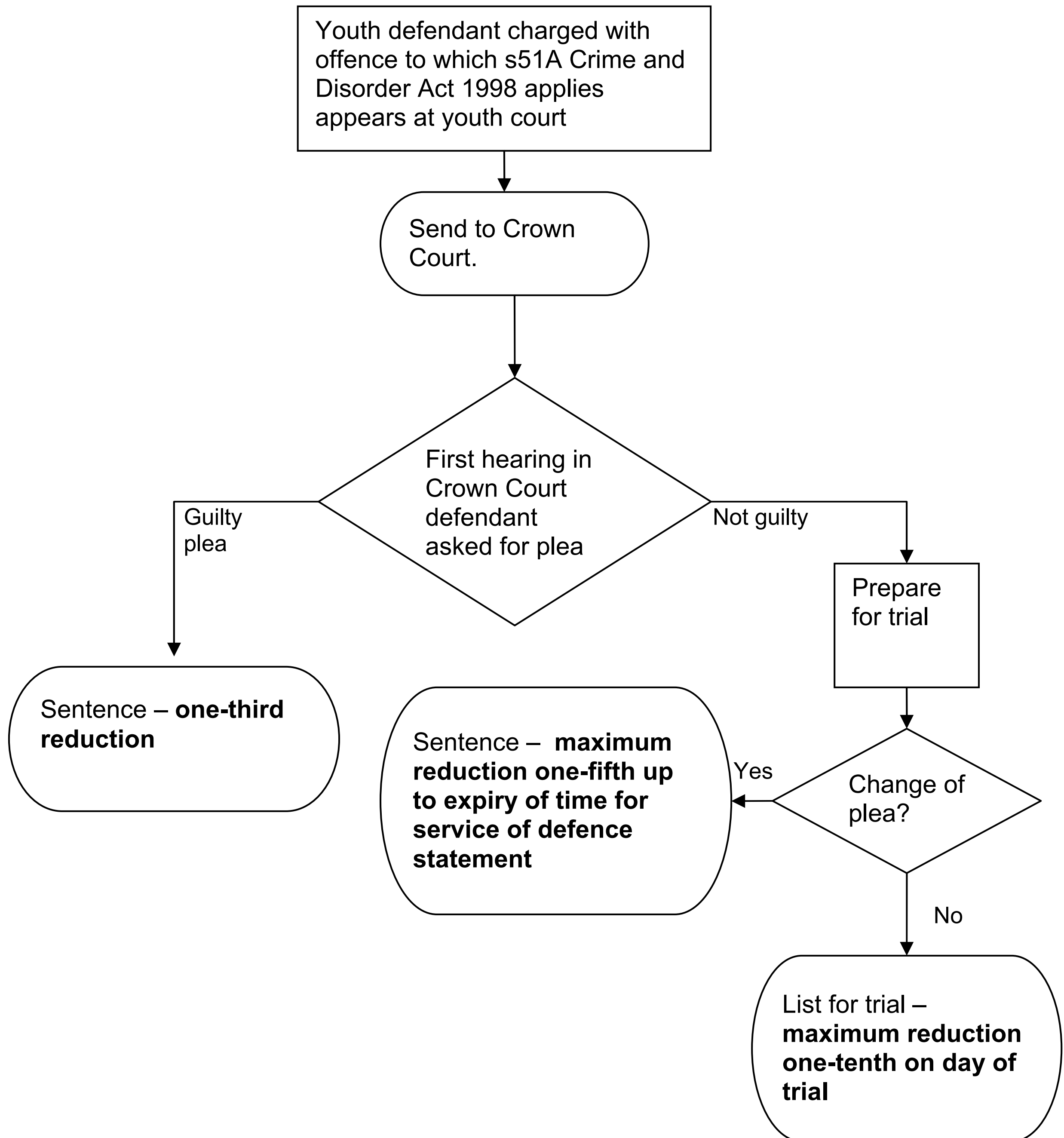


For illustrative purposes only please refer to the guideline for detailed guidance

Appendix 6

Flowchart illustrating reductions for offenders aged under 18 years (excluding murder)

(offences that must be tried in the Crown Court**)**



For illustrative purposes only please refer to the guideline for detailed guidance

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Notes on research to explore sentencers' understanding of the draft sentence reduction for a guilty plea guideline

Background and aims

This research feeds into the final stages of development of the draft sentence reduction for a guilty plea guideline. It aimed to examine, in detail, how sentencers construe the guideline, in order to ensure that the final draft is clear, easy to understand and straightforward to apply across courts (where there are different processes and different cultures regarding guilty pleas and the reductions given).

Method

The research consisted of twenty in-depth interviews in total, held with 10 Crown Court judges, 3 recorders, 1 district judge and 6 magistrates. Participants were spread across courts and across the country. The discussion focused exclusively on sentencers' understanding of the text (e.g. 'Is anything unclear or ambiguous in this section?' 'Please can you summarise this section in your own words') and some guilty plea reduction scenarios were also tested.

This summary covers only the more substantive points that sentencers made, so not all the sections of the guideline are referred to.

Findings are preliminary only at this stage; analysis and quality assurance is continuing. The sample size is small and findings should therefore be interpreted with caution, since they are the views of an interested few, which should not be taken as representative of all sentencers. The research exercise also required sentencers' to scrutinise the guideline in a way that probably would not mirror real life. Therefore when we say, for example, that sentencers gave the expected reduction in our scenarios, this serves our current purpose in inferring that the guideline is clear. However, it may not give a very good indication of how the judges and magistrates would act had they not been directed to read parts of the guideline very closely.

Summary of findings

Section B – Key principles

1. Section B was generally clear to sentencers. The only ambiguity was that one judge and one magistrate both said they were not clear what 'greater benefits' are (in bullet point d) over and above bullet points a. to c., so they misconstrued this as meaning *other* benefits not mentioned above, rather than as intended (benefits are greater if the defendant pleads earlier).

2. Almost all of the judges spontaneously spotted the change regarding overwhelming evidence in Section B, although some of the magistrates had to be prompted to notice this. All the sentencers gave the expected 1/3 reduction in a scenario where the defendants were caught red handed or caught on CCTV i.e. they did not reduce the credit because of overwhelming evidence, further suggesting this point was understood.

Section C – The approach

3. Section C was also generally seen as clear. However, a couple of the judges noted that there is no guidance as to where totality fits (they said they would consider this before guilty plea, so the reduction is from the overall sentence). Several also seemed to think that the 'steps' were meant to correspond to those in the offence-specific guidelines, and so they were confused that Step 1 in the guilty plea guideline encompasses multiple steps in, say, the drug offences guideline.

4. Linked to the misunderstanding that Step 1 maps directly onto Step 1 in other guidelines (encompassing culpability, harm and starting points and ranges but *not* aggravating and mitigating factors), a couple of the judges and one magistrate felt that Section C contradicted the key principles, because these state that consideration of mitigation *precedes* reduction for plea, whereas they thought C inferred that aggravation and mitigation are, by default, part of 'Step 5 – follow the remainder of the decision-making process' i.e. to be considered *following* reduction for a guilty plea.

Section D – Determining the level of reduction

5. Judges noticed the changes to the percentage reductions awarded at different stages in the proceedings as outlined in Section D, although for a small minority this was only after prompting. A number of the magistrates did not notice the changes until prompted, but this was perhaps not surprising given that their knowledge of reductions for guilty plea beyond the standard 1/3 at the first hearing, and 1/10 on the day of trial, seemed to be generally low.

6. The judges had no difficulties in understanding Section D, but some judges were resistant to treating either way and indictable only cases differently, given that arrive in the Crown Court through the same mechanism, and, in some courts, very quickly after the allocation hearing, a period in which no additional work has been carried out by the CPS. Fairness was also seen as a consideration in this respect: one judge pointed out that because something is an 'either way' offence it is not necessarily less serious than an indictable only, using the example of a very serious theft compared to a low key robbery, implying he did not think it was necessarily fair that the latter would be given a longer window for full credit than the former.

7. There was also some general resistance to denying the either way cases full credit at their first appearance in the Crown Court, because this tends to focus the defendant's mind on the seriousness of his circumstances and prompts pleas. However, one judge noted that this change supports comments he has heard from district judges to the effect that they warn either way defendants that their credit will diminish if they fail to plead in the lower court, but they feel this is then undermined by the judges giving full credit in the Crown Court. The district judge we spoke to welcomed this change.

8. For indictable only cases, many judges characterised service of the defence statement as a movable feast, which leaves open the question of what happens when the judge extends this time, and made some judges wonder whether there is a perverse incentive to ask for extensions. There was some sense that the meaning (statutory time, or court time?) should be clarified.

9. One judge noticed a possible practical problem with the guideline if the single case management hearing is introduced. He said that he could not imagine how you could have this single hearing without either a plea of guilty or a defence statement. If this were the case, it would mean that the time for a defence statement would expire before the first hearing in the Crown Court, rendering the two key points in indictable only cases problematic.

10. The flowcharts were generally welcomed as a good innovation. A recorder and relatively newly appointed judge both said that they could imagine solicitors using these to explain guilty plea reduction in its simplest terms to defendants. Because of this, one felt that the guilty and not guilty pathways should be reversed in the chart, to facilitate explaining the process to someone on the other side of a desk. One judge suggested that the flowcharts should be ordered in levels of seriousness, and some judges noted the need for consistent terminology across the guideline and the chart (e.g. the term 'allocation hearing' does not appear on the 'either way' flowchart). A couple of magistrates said they could envisage using the flowcharts in the retiring room, or in a training context.

Section E1 – imposing one type of sentence rather than another

11. The phrasing of Section E1 was seen as unambiguous, but with specific reference to suspended sentences, a number of judges noted that in practice they often reduce *and* suspend the sentence in response to the guilty plea, which would seem to contradict the guideline's instruction that the reduction can only be the transformation of the sentence, implying that otherwise this is double-counting.

12. One judge in particular felt that this stipulation in the guideline contravened all *'existing principles'* in suspending a sentence. He and another judge noted that if the reduction could only be used *either* to transform the sentence *or* reduce its length, the suspended sentence would be longer than the immediate custodial term (e.g. a 12 month immediate custodial sentence would reduce to 8 months for an early guilty plea, but the suspended sentence would remain at 12). If the sentence was breached and subsequently invoked, the time served would then be longer than if an immediate custodial sentence had been imposed in the first instance. Additional consideration might therefore be given to how the transformation from an immediate custodial to a suspended sentence should work.

Section E2 – more than one summary offence

13. Magistrates understood Section E2 about giving a small additional discount in cases of more than one summary offence, and they all gave the expected third reduction in a scenario which tested this. However, it jarred with several who felt this was a double discount, or reward for committing more offences. The district judge, however, said that this was something he often did, to make sure the guilty plea is really incentivised in a situation where the maximum total sentence is 26 weeks.

Section E3 – keeping an either way case in the magistrates' court to reflect a guilty plea

14. For Section E3, there was some sense from less experienced magistrates that they would only retain jurisdiction if the likely or maximum sentence was 9 months' (rather than, for example, if the MSCG says 'Crown Court'). However, more experienced magistrates and the district judge said they did retain jurisdiction in these cases, basing the decision on a general sense of the severity of an offence, rather than the predicted outcome if it was sent to the Crown Court. In this context, for a couple of the magistrates, the phrase *'may enable'* seemed to have overtones of manipulating the sentence in order to retain jurisdiction.

Section F1 – further information or advice needed

15. In Section F1, although a few judges and magistrates liked the phrase 'what he knows he has done', some found it very hard to envisage, in practice, how the defendant would state this, i.e. through what mechanism? How formal does this have to be? There was also sense that expecting the defendant to state what he knows he was done was a little unrealistic, particularly from the more advocacy-minded judges, who noted that a solicitor will have advised a client not to make admissions, and that if the defendant makes some admissions and then chooses to plead not guilty this could damage his case. Those judges who found the phrase imprecise or were concerned about its implementation suggested alternative wordings e.g. '*he has admitted an element of the offence*' or '*the offender has by himself or through his representative made it clear to the court or the prosecution that there are matters in the case with which he takes no issue.'*

16. Some of the sentencers also failed to read the three bullet points in F1 as conditions that all need to be met.

17. Despite these issues, almost all of the judges gave the expected 1/5 reduction in a scenario which necessitated a judgement call as to whether or not the defendant needed more advice. One judge who gave 1/4 seemingly invoked the current sliding scale, rather than the new one, when he sentenced this case.

Other exceptions in F

18. The remaining Sections in F did not present any problems in terms of clarity. In particular, judges were given a scenario with a Newton hearing (Section F3) and all gave the expected reduction. Asked about what length of trial they thought would think worthy of qualifying under exception Section F2, many judges said a trial lasting more than 4 weeks, but there was no consensus around a 'rule of thumb' for a substantial number of witnesses. A couple of judges noted that large amounts of material to read can also constitute complexity. A couple of judges also suggested that some sex offence trials could also be included under exceptions, because of the particular value of the plea in saving very vulnerable witnesses from having to give evidence, and in having the victim's version of events accepted by the defendant.

General comments

19. There were indications in this research that judges felt it would be challenging to change the status quo in guilty plea reduction. In particular one or two judges referred to holistic sentencing and back calculating the sentence, and their own or their colleagues' cultural resistance to, for example, no longer giving a ¼ reduction for a plea at PCMH. One or two judges also inferred that they did not think defendant behaviour would change easily – for example, several said that a 1/5 reduction may be so low that defendants will decide to 'take their chance' and go to trial, and one judge noted the importance of other factors in determining when defendants plead e.g. retention of privileges such as visiting rights whilst on remand.

20. However, when asked about the draft guideline compared to the current, sentencers almost universally said the draft is clearer, albeit more prescriptive.

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