

Sentence Discounting: Sentencing and Plea Decision- Making

Literature Review

Submitted to the Scottish Sentencing Council in May 2019

Published December 2020

Authors: Dr Jay Gormley, Dr Rachel McPherson and Professor Cyrus Tata
Centre for Law, Crime & Justice, The Law School, University of Strathclyde

Literature review prepared for the consideration of the Scottish Sentencing Council.
The views expressed are those of the authors and do not necessarily represent
those of the Council.

Sentence Discounting: Sentencing and Plea Decision-Making

**Dr Jay Gormley, Dr Rachel McPherson and Professor Cyrus Tata
Centre for Law, Crime & Justice, The Law School, University of Strathclyde**

Literature Review

Report to the Scottish Sentencing Council

May 2019

TABLE OF CONTENTS

1.1 PLEA DECISION-MAKING AND SENTENCING: CONTEXT	4
1.1 INTRODUCTION	4
1.1.2 <i>Terminology</i>	4
1.2 THE PRE-TRIAL DECISION-MAKING CONTEXT	6
1.3 LAWYER-CLIENT RELATIONS AND THE IMPACT OF CHANGES TO FEE STRUCTURES.....	10
1.4 THE SENTENCE DIFFERENTIAL AND THE CONTEXT OF 'PLEA NEGOTIATION'	11
1.5 CONCLUSION	12
2.0 SENTENCING AND PLEA DECISION-MAKING: ISSUES AND DEBATES	12
2.1 INTRODUCTION	12
2.2 THE SENTENCE DIFFERENTIAL CONTROVERSY.....	13
2.3 VICTIM RATIONALE	14
2.3.2 <i>Limitations of the Victim Rationale</i>	14
2.4 REMORSE RATIONALE.....	16
2.4.1 <i>Limitations to the Remorse Rationale</i>	18
2.5 EFFICIENCY RATIONALES	19
2.5.2 <i>Limitations to the Efficiency Rationale</i>	21
2.6 CONCLUSION	24
3.0 – SCOTS LAW	25
3.1 INTRODUCTION	25
3.2 A BRIEF HISTORY OF SCOTS LAW IN RELATION TO THE SENTENCE DIFFERENTIAL.....	25
3.3 APPLYING THE SENTENCE DISCOUNT	27
3.3.2 <i>Overwhelming Evidence</i>	28
3.4 PRESUMPTION AGAINST SHORT SENTENCES AND SENTENCE DISCOUNTING.....	29
3.5 CONCLUSION	30
4.0 THE LAW GOVERNNING SENTENCING AND PLEA DECISIONS IN OTHER DECISIONS IN OTHER JURISDICTIONS	31
4.1 – INTRODUCTION.....	31
4.2 ENGLAND AND WALES.....	31
4.3 THE REPUBLIC OF IRELAND	33
4.4 CYPRUS	35
4.5 CANADA	36
4.6 HONG KONG.....	37
4.7 SOUTH AFRICA.....	38
4.8 AUSTRALIA	40
4.9 NEW ZEALAND	42
4.10 NIGERIA.....	42

4.11 INDIA.....	43
4.12 CONCLUSION	44
5.0 SENTENCING AND PLEA-DECISION-MAKING: EMPIRICAL EVIDENCE.....	45
5.1 INTRODUCTION.....	45
5.2 PUBLIC CONFIDENCE	45
5.3 OFFICIAL DATA.....	49
5.4 CONCLUSION	52
6.0 KEY GAPS IN KNOWLEDGE ABOUT SENTENCING AND PLEA DECISION-MAKING	53

1.1 Plea Decision-Making and Sentencing: Context

1.1 Introduction

Although the evidentially-contested trial is the focus of popular culture and textbook commentary, in common with other English-speaking countries, such trials are *relatively* rare in Scotland. In practice, most Anglo-American systems resolve criminal cases that proceed to court by way of a guilty plea. People often plead guilty following some explicit or implicit agreement between the state (either the prosecution¹ or the judge depending on the jurisdiction) and the defence. The effect of a plea on a sentence is, as shall be seen, contingent and direct consideration of a guilty/not guilty plea is only one component of a complex set of dynamics.

It is crucial to understand the context in which persons accused of an offence make their pleading decisions in order to assess the state of knowledge concerning the relationship between sentencing and plea decision-making. Thus, this chapter briefly sets out the context of pre-trial decision-making (before a person's pleading), lawyer-client relations, and plea negotiation. However, first, it is essential to clarify some terminology.

1.1.2 Terminology

What term should refer to the potential difference in a sentence specifically because of a guilty plea (as opposed to a not guilty plea)? Various terms are encountered in case law, legislation, and textbooks around the world use different terminologies including: 'sentence discount,' 'sentence reduction,' 'allowance in respect of a guilty plea,' 'adjustment' 'trial tax,' 'trial premium,' and 'trial penalty.' While all these terms refer the same differential (between the sentence if pleading not guilty compared to pleading guilty), the various terms carry different normative implications. Some argue that the effect of different sentences based on how a person pleads is to 'reward' those who admit their guilt. Others argue that considering how a person pleads in sentencing undermines the presumption of innocence by 'penalising' those who exercise their right to be presumed innocent and put the state to proof.

Much depends upon what one sees as the 'default' or 'baseline sentence.' Terms such as 'reduction' and 'discount' imply that the baseline sentence is that which would have been passed if the accused pled not guilty and was convicted at trial of the same charges. Thus, from this perspective, the post-trial sentence is the baseline sentence, and the sentence differential is

¹ In Scotland, there is no statistical data available from the Crown Office and Procurator Fiscal Service (COPFS) on the prevalence of charge negotiation or fact negotiation. However, such practices are widely thought to be routine.

considered a discount that is deducted from that baseline sentence. However, some consider the 'baseline sentence' to be the sentence following a guilty plea. For example, Lynch suggests that "in a system where ninety percent or more of cases end in a negotiated disposition, it is unclear why the 'discounted' punishment imposed in that ninety percent of cases should not rather be considered the norm."²

While section 196 of the Criminal Procedure (Scotland) Act 1995 does not provide a name for the sentence differential due to the nature and timing of a plea, the first 'guideline judgment' concerning section 196 (*Du Plooy v HMA*) used the term "sentence discount."³ As such, there is a basis to use the term 'sentence discount' in the Scottish context. However, some legal practitioners in Scotland find the term 'discount' disagreeable.⁴ Those who disagree with the term 'discount' suggested that there were negative connotations and preferred different terminology, such as 'reduction.' Interestingly, statute and guidance in England and Wales use the term 'reduction.' Yet, in England and Wales, Dawes et al found that the notion of "reductions did not sit well with people."⁵ Moreover, research by Wilson and Ellis suggests that the term 'reduction' in England and Wales might be detrimental to public confidence.⁶

Since there is no consensus in the literature, or amongst practitioners, regarding the terminology, (and because the issue is inherently controversial), this report uses the neutral term 'plea-dependent sentence differential,' (or 'sentence differential'⁷ for short).⁸

² Lynch, G.E., 2003. Screening versus Plea Bargaining: Exactly What Are We Trading Off? *Stanford Law Review*, 55(4), pp.1399-1408 at 1402.

³ *Strawhorn v. McLeod*, 1987 SCCR 413. *Strawhorn* used the terms "sentence discount" and "plea bargaining." See also: Scottish Office Home and Health Department, 1994. *Firm and Fair: Improving the Delivery of Justice in Scotland*. [PDF] Available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272019/2600.PDF> p.23.

⁴ Gormley, J., 2019. *The Nature and Extent of Sentence Discounting for Guilty Pleas in Scottish Sheriff Court Summary Cases*. PhD Thesis: University of Strathclyde.

⁵ Dawes, W., Harvey, P., McIntosh, B., Nunney, F., & Phillips, A., 2011. *Attitudes to guilty plea sentence reductions*. London: Sentencing Council of England and Wales. [PDF] Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Attitudes_to_Guilty_Plea_Sentence_Reductions_web1.PDF> p.2.

⁶ Wilson, P. and Ellis, R., 2013., Communicating Sentencing: exploring new ways to explain adult sentences. DUCKFoOT Research and Development Ltd. Ministry of Justice Analytical Series 2013. [PDF] Available at: Ministry of Justice <<https://goo.gl/S8SPEs>> [Accessed 7 March 2019]. p.11.

⁷ Where the literature being discussed uses terms like 'sentence reduction', 'trial tax', 'discount' those terms will be referred to also.

⁸ 'Sentence differential' is also a term used in: Gormley, J., and C, Tata., 2019. To Plead or Not to Plead. 'Guilt' is the Question. in In C Spohn and P Brennan (eds) *Sentencing Policies and Practices in the 21st Century* (Taylor & Francis). In press; and Alschuler, A.W., 1981. The changing plea bargaining debate. *California Law Review*, 69, pp.652-730.

1.2 The Pre-trial Decision-Making Context

In deciding whether to alter a sentence due to how persons plead, a Scottish court is required to consider the stage at which any guilty plea has been tendered and the circumstances in which it is tendered.⁹ It is often considered desirable for this guilty plea to be tendered at an ‘early’ stage. However, the criminal justice journey for persons accused of an offence begins much earlier than the first opportunity for a guilty plea. A person’s criminal justice journey begins at the stage where they become the object of police suspicion. The decision-making and preparation which occurs in these preliminary stages can be of crucial importance to the defence’s assessment of whether pleading guilty is an appropriate route for the person accused of an offence to take. Therefore, in order to contextualise the sentence differential and the decision over whether to plead guilty or not guilty, an overview of pre-trial stages in Scottish criminal procedure is provided.

The landscape of rights for a suspect and a person accused of an offence have changed significantly in Scotland in recent years following the high profile case of *Cadder*.¹⁰ The case, “turned a spotlight on the law of evidence in the pre-trial stage, drawing attention to this initial period of questioning, to its central role in the criminal process as a whole, and to the key rights which the law accords to those who are held by the state in this way.”¹¹ Most significantly, the case demanded that those detained by the police must be *offered access* to legal advice. Subsequent law reform has come most recently through the Criminal Justice (Scotland) Act 2016.¹² The Act replaces the previous status of ‘detention’ with that of ‘arrest.’ After being charged, the status of the individual is that of ‘officially accused.’ The 2016 Act, in keeping with the previous emergency legislation enacted in the immediate aftermath¹³ of *Cadder*, holds that under normal circumstances, a person can be held in police custody for 12 hours.¹⁴

A person in custody now has the right to consult with a solicitor at any time¹⁵ - this may be by face to face consultation, but commonly takes the form of telephone communication.¹⁶ When being

⁹ Section 196(1) Criminal Procedure (Scotland) Act 1995. Hereinafter ‘section 196.’

¹⁰ 2011 SC (UKSC) 13.

¹¹ McDiarmid, C., 2018. “Cadder and Beyond” chapter in Duff, P.R. and Ferguson, P.R. (eds.) *Scottish Criminal Evidence Law: Current Developments and Future Trends*. Edinburgh: Edinburgh University Press. at 20.

¹² Hereinafter ‘2016 Act.’

¹³ Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

¹⁴ 2016 Act, s.9. This must be reviewed after a period of six hours by a constable not involved in the case (s.13). There can be a further 12 hour extension in limited circumstances, see s.11.

¹⁵ 2016 Act, s.44.

¹⁶ Law Society of Scotland, 2015. *Police Station Interviews: Advice and Information from the Law Society of Scotland*. at 7–8. [PDF] Available at: <<http://www.lawscot.org.uk/media/473309/Police-Station-Adviceand-Information-March-2015-Section-F-Division-Advice.PDF>> [Accessed 21 Feb 2019].

interviewed by the police about an offence that the constable has reasonable grounds to believe that the person has committed, an individual has the right to have their solicitor present.¹⁷

During these preliminary stages, a solicitor can begin offering advice pertaining to the alleged offence - even before a person is charged. Upon charge, the person accused of an offence can (usually) no longer be questioned by the police.¹⁸ The procedure thereafter will be dictated by whether the matter is to be heard under solemn¹⁹ or summary procedure.²⁰ Solemn matters are generally those which are more serious and would be tried before a jury. The solemn procedure usually commences in the Sheriff Court under a petition hearing, although alternatively an indictment can be served without a petition.²¹ There are also circumstances where a procedure can be commenced by the service of an indictment, but this is unusual. The calling of a petition before the sheriff will normally involve the person accused of an offence making 'no plea' and thereafter, much will depend on the crown's position and the court's attitude towards bail or any further enquiries which are required to be conducted by the authorities. Where bail is to be granted, the matter will be continued for further examination, and the person accused of an offence will be liberated. If the person accused of an offence is remanded, the matter will be continued for further examination, and normally the person accused of an offence will return to court within seven days, where they will either be released on bail or remanded and fully committed for trial. At this stage, time limits become significant for all parties.

From this point, a guilty plea can be tendered at any time up to and including the trial itself. The section 76 procedure enables a person accused of an offence (who wishes to have their matter dealt with by way of a guilty plea at an early stage) to notify the crown of this intention and have the matter accelerated.²² The fact of a 'section 76 letter' is something that the court may have regard to in sentencing, and this regard can contribute to the sentence differential permitted by section 196.

Where it is considered that the procurator fiscal may proceed on a petition, the police should not liberate a person accused of an offence after charge.²³ It is the normal practice that a person accused of an offence is arrested on a petition warrant and held in custody to appear in court on

¹⁷ 2016, s.32.

¹⁸ Authorisation must be sought for questioning after this stage, as per the 2016 Act, s.35.

¹⁹ Solemn cases are heard in either the Sheriff Courts or the High Courts.

²⁰ Summary cases typically involve less serious offences and are not jury triable. Summary cases are heard in either the Sheriff Courts or the Justice of the Peace Courts. Most persons who are proceeded against in court are prosecuted under summary procedure.

²¹ *O'Reilly v HM Advocate*, 1984 S.C.C.R. 352.

²² The Criminal Procedure (Scotland) Act 1995 (herein after 'CPSA'). This appearance would not be referred to as a trial.

²³ CPSA, s.22.

the next working day. There are some circumstances (usually pertaining to the age of a person accused of an offence or the fact that the crime libelled is historical) where the crown indicates to the person accused of an offence that it holds a petition warrant for their arrest and invites them to attend voluntarily. Whatever the outcome following a person accused's appearance on the petition warrant, an indictment invariably follows which sets a date in the Sheriff Court for a First Diet or a Preliminary Hearing in the High Court. At either of these hearings, if the person accused of an offence does not tender a plea of guilty, a trial date is set. On the first occasion, when the person accused of an offence appears before a sheriff, a decision will be made about whether bail should be granted.²⁴

Under summary procedure, the police officer who has charged the individual can detain them in custody, liberate the person accused of an offence on a written undertaking, or liberate them for report.²⁵ Under summary procedure, the person accused of an offence must be served with a complaint.²⁶ Where someone accused of an offence is detained, the complaint must be served on them whilst she or he remains in custody. Where the complaint has been served, and the person accused is present, they will be asked to plead to the charge in question.²⁷ It is possible for a plea to be intimated to the court the absence of the person accused.²⁸ In the case of a not guilty plea being tendered, typically, dates are then be set for an Intermediate Diet and Trial Diet (although an accused can tender a guilty plea at the Intermediate Diet).²⁹

During these pre-trial stages, under both types of procedure, consultations can (and normally do) continue to take place between the person accused and his/her lawyer(s) to discuss all aspects of the case. In High Court cases, counsel will be instructed by the defence, either an advocate or solicitor-advocate. This will be arranged by the solicitor who is instructed by the person accused. The solicitor will be involved in all pre-trial consultations, even in cases where counsel is instructed since counsel are advised against having one to one contact with clients.³⁰ Socio-legal research

²⁴ Previously a person accused of an offence could not be granted bail if appearing on petition for a charge of murder, however, bail can now be granted, depending on public interest and safety considerations as per CPSA, s.23B. For further detailed information about the decisions surrounding bail application see COPFS, *The Book of Regulations*, Chapter 8. [PDF] Available at: <http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Book_of_Regulations/Book%20of%20Regulations%20-%20Chapter%208%20-%20Bail.PDF> [Accessed 21 Feb 2019].

²⁵ CPSA, s.22.

²⁶ CPSA, s.138.

²⁷ CPSA, s.144(1).

²⁸ CPSA, s.144(2).

²⁹ CPSA, s.148.

³⁰ Faculty of Advocates, *Guide to the Professional Conduct of Advocates*. Edinburgh: Parliament House. at pp.10-11 para. 4.5-4.6. [PDF] Available at: <http://www.advocates.org.uk/downloads/guidetoconduct_5thedition.PDF> [Accessed 21 Feb 2019].

which has examined pre-trial consultations has pointed to problems such as fitting cases into pre-determined categories familiar to the lawyer³¹ and the problems that may arise when consultations which are undertaken in prison.³² Against the backdrop of this criticism, however, what must be recognised is the legal framework of rules and regulations³³ in which such pre-trial preparations take place. A crucial part of this regulation comes from the Scottish Legal Aid Board (SLAB).³⁴ Legal aid is the state-funded scheme to allow people to access legal help in both civil and criminal cases free of charge.³⁵ Legal aid is income assessed and according to an 'interests of justice test,' meaning that in more serious matters (e.g. where a person may lose her liberty or livelihood), legal aid is invariably available.³⁶ It was previously the position that on the person accused of an offence's first appearance it was at the court's discretion whether or not the accused should benefit from legal aid.³⁷ The only legal aid which is now granted 'at the bar' is that which concerns a witness warrant - normally involving the question of contempt of court. Otherwise, at the first appearance from custody, the person accused is given the opportunity to be represented, even if by the duty solicitor. It is possible to be remanded and not qualify for legal aid because of personal financial circumstances, but that is unusual.

Advocates are not instructed by clients but by clients' solicitors. Their relationship is, therefore, different, as recognised at p.10 para 4.2, *Id.* For discussion about the distinction between solicitor and counsel see Shiels, R.S. 2013. *Criminal Advocacy and Defective Representation*. Edinburgh: W. Green.

³¹ McConville, M., Hodgson, J., Bridges, L. and Pavlovic, A., 1994. *Standing Accused: The Organisation and Practices of Defence Solicitors in Britain*. Oxford: Clarendon Press, at p.100 esp. Their study found that often the advice provided to the person accused of an offence was just to say 'no comment' to the police. No assistance with a defence was provided and in an overwhelming number of cases, advisers at the police station "showed no willingness to assist clients in constructing a positive story to avoid liability" (at 96). The same study reported that when clients meet with lawyers at their offices for the first time, the interviews (consultations) which take place are often constructed around "confrontational modes of discourse" which "discourage clients from telling their own stories, instead operating as forcing measures intended to pressure clients into accepting a particular case theory" (at 136).

³² McPherson, R., 2013. *Access to Justice: Women who kill, self-defence and pre-trial decision-making*. PhD Thesis: Glasgow Caledonian University. p.123-125. Due to the small number of private consultation areas, the person accused of an offence may be forced to consult with the defence team in an open plan area. This can provide particular problems where the material being discussed is especially private or sensitive in nature to the person accused of an offence.

³³ See, for example, Faculty of Advocates, *Guide to the Professional Conduct of Advocates*. Edinburgh: Parliament House. [PDF] Available at: <http://www.advocates.org.uk/downloads/guidetoconduct_5thedition.PDF> [Accessed 21 Feb 2019]; Law Society of Scotland, *Code of Practice for Criminal Work*. [Online] Available at: <<https://www.lawscot.org.uk/members/rules-and-guidance/rules-and-guidance/>> [Accessed 21 Feb 2019].

³⁴ The other part being Law Society guidelines on etiquette. See for example, The Law Society of Scotland, *Rules and Guidance*. [Online] Available at: <<http://www.lawscot.org.uk/rules-and-guidance>> [Accessed 21 Feb 2019].

³⁵ Scottish Legal Aid Board, *Information for the Public*, available at: <http://www.slab.org.uk/public> [Accessed 21 Feb 2019].

³⁶ Scottish Government, 2018. *Rethinking Legal Aid: an independent strategic review*. [PDF] Available at: <<https://bit.ly/2JymHuD>>. [Accessed 21 Feb 2019].

³⁷ Scottish Legal Aid Board, *Criminal Legal Assistance if you are not in custody*, at p.7, available at: <http://www.slab.org.uk/getting-legal-help/PDF/4_criminal_NOT_in_custody.PDF> [Accessed 21 Feb 2019].

1.3 Lawyer-Client Relations and the Impact of Changes to Fee Structures

It is a fundamental legal principle that the decision as to how to plead belongs to the person accused of an offence. No explicit or subtle pressure should interfere with that free choice. In this way, the role of the defence lawyer is not to interfere with that choice, but to be 'instructed' by his/her client and legal advice is given only in the client's best interests. However, this 'consumer sovereignty model' appears to be wide of the mark. The payment structure governing how defence lawyers are remunerated has been transformed in recent years. The overriding aim of successive governments and the Scottish Legal Aid Board (SLAB) has been to encourage the expeditious disposal of cases wherever possible. In 1999 Scotland moved from a system in summary cases in which defence firms itemised their bills to SLAB according to the time spent and type of work undertaken (also known as 'time and line') to a new system of 'fixed payments' whereby the defence lawyer's firm was to be paid an overall fee for completing the case. The idea behind the change was to make the system more efficient by discouraging defence lawyers from undertaking 'unnecessary' work - such as excessive client contact and preparation and to save the cost of trials compared with early guilty pleas. Defence lawyers were to be paid a fixed amount depending on when the case concluded. Activities like case preparation and client contact were no longer to be paid as separate items.

An independent evaluation was undertaken which investigated the impact of the change in the payment system on overall legal aid spending, lawyer firm incomes, case preparation and management, and the trajectories and outcomes of cases.³⁸ Overall, the policy had very mixed results. Detailed economic analysis showed that the new fixed fee structure did not cut spending. Those specialist firms which were prepared to work more intensively by taking on more cases than they did before, and spending less time per case, found they could make a very significant income from the new scheme. In that sense, it was suggested by some lawyers that the new fee arrangements permitted, even encouraged, a new kind of exploitation, where defence lawyers were prepared to take on more cases. Overall, case preparation levels declined as a direct result of the new fee structure, and this was not offset by systematic advance disclosure to the defence of prosecution evidence. (Previously the defence had subcontracted its own investigations).

Most intriguingly of all, the policy had the *net* effect of postponing the point at which people pled guilty – the exact opposite of what was intended. This latter finding was partly due to another consequence of the policy: a sharp reduction in levels of lawyer-client contact. Officials believed

³⁸ Tata, C., and Stephen, F., 2006. "Swings and roundabouts": do changes to the structure of legal aid make a real difference to criminal case outcomes? *Criminal Law Review*, 46: 722–41; Stephen, F., and Tata C., 2006. *Impact of the Introduction of Fixed Payments into Summary Legal Aid: Report of an Independent Study*. [PDF] Available at: <https://www.webarchive.org.uk/wayback/archive/20180517120752mp_/http://www.gov.scot/Publications/2007/06/22104314/16> [Accessed 21 February 2019] p.220.

that defence lawyers spent (and billed for) too much time in communication with their clients. By introducing fixed fees, lawyer-client contact was financially discouraged. But this also meant that lawyers tended to have less time to speak to their clients to persuade them that pleading guilty at the earliest opportunity might be in their best interests. A key implication from this and subsequent research appears to be that lawyer-client contact may, contrary to certain assumptions, tend to have the *overall net effect* of encouraging (not delaying as is often supposed) earlier pleas of guilty.³⁹ Subsequent research suggests that in summary cases defence lawyers now rely much more heavily on disclosable summaries of the evidence provided to them by the prosecution.⁴⁰

1.4 The Sentence Differential and the Context of ‘Plea Negotiation’

A central factor expected to encourage appropriate early guilty pleas is the real and perceived impact of the plea on sentencing outcomes. The sentence differential is part of a set of practices constituting what is commonly known as ‘plea negotiation,’ ‘plea bargaining,’ or “state induced guilty pleas.”⁴¹ Plea negotiation is an umbrella-term encompassing a range of practices whereby the person accused gives up his/her right to trial and pleads guilty in (explicit or implicit) exchange for some real or perceived benefit. Although there are various definitions, Alschuler advocates a broad definition and argues that plea negotiation “seems best defined as the exchange of any concession, actual or apparent, for a plea of guilty.”⁴² This flexible and straightforward definition is useful for describing the complex and variable practices that occur internationally to encourage early guilty pleas.

The types of plea negotiation that occur, and which actors are involved, vary by jurisdiction and plea negotiation can occur with or without judicial involvement. Thus, plea negotiation is not just a distinctly US phenomena – though the US does have plea negotiation/bargaining practices that are significantly different from countries such as Scotland.⁴³

³⁹ Tata, C., 2007. In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and ‘Ethical Indeterminacy’ in Criminal Defence Work. *Journal of Law & Society* 34(4) 489-519.

⁴⁰ Bradshaw, P., Sharp, C., Duff, P., Tata, C., Barry, M., Munro, M., McCrone, P., 2012. *Evaluation of the Reforms to Summary Criminal Legal Assistance and Disclosure*. [PDF] Available at: <<https://www.webarchive.org.uk/wayback/archive/20170706154937mp/http://www.gov.scot/Resource/0039/00398050.pdf>> [Accessed 21 February 2019].

⁴¹ McConville, M., and Marsh, L., 2014. *Criminal judges: legitimacy, courts, and state-induced guilty pleas in Britain*. Edward Elgar Publishing.

⁴² Alschuler, A., 1992. An Exchange of Concessions. *New Law Journal* 142(6559), pp.937-941. p.937.

⁴³ The significant differences between Scottish and US plea negotiation (which can vary by state) mean that this review will not focus on the USA. However, some references are made to US practices and the accompanying literature where relevant.

There are two primary forms of plea negotiation which operate in Scotland.⁴⁴ First, 'charge negotiation' (and the related 'fact negotiation') is a practice whereby the prosecution and defence agree on which charges to amend or delete in exchange for a guilty plea to the remaining charge(s). The second form is 'implicit sentence negotiation' whereby the defence offers a guilty plea in the hope of a reduced sentence compared with the sentence which would be passed for the same charge(s) if the person was to be found guilty after a trial. In Scotland, sentence negotiation is implicit. Unlike some other countries, Scottish judges do not participate in explicit discussions about the likely sentencing outcome if the individual pleads guilty. Nor is there any judicial indication of how a sentence may or may not differ based on how an individual pleads. This limited judicial involvement differs from jurisdictions such as England and Wales where a person accused of an offence may receive an indication of their sentence if pleading guilty.⁴⁵

1.5 Conclusion

It is essential to recognise that all the various forms of plea negotiation arise as a consequence of a process which is key to understanding the dynamics of plea decision-making. Moreover, there are several forms of plea negotiation, of which the sentence differential stemming from section 196 is only one. Consequently, it cannot be properly understood in isolation. While the sentence differential is important, it should be understood as only one of several interlocking factors in plea decision-making and sentencing.

2.0 Sentencing and Plea Decision-Making: Issues and Debates

2.1 Introduction

Plea negotiation is a common practice among Anglo-American jurisdictions that can lead to a plea-dependant sentence differential. Today, even some inquisitorial systems have plea negotiation-like practices.⁴⁶ However, despite the pervasiveness of plea negotiation, it is controversial. This chapter begins by briefly summarising this controversy. The first criticism is that the sentence

⁴⁴ Leverick, F., 2004. Tensions and balances, costs, and rewards: the sentence discount in Scotland. *Edinburgh Law Review*, 8(3), pp.360-388. pp.360-363

⁴⁵ This is known as a "Goodyear indication" and the principles were set out in *R v Goodyear*, [2005] EWCA Crim 888.

⁴⁶ For example, see Thaman, S. ed., 2010. *World Plea Bargaining: Consensual Procedures and the Avoidance of the Full Criminal Trial*. Durham: Carolina Academic Press; and Lovene, F., 2013. *Plea Bargaining and Abbreviated Trial in Italy*. Warwick School of Law Research Paper No. 2013/11 (Special Plea Bargaining Edition, editor Jackie Hodgson). [PDF] Available at: <<https://dx.doi.org/10.2139/ssrn.2286705>> [Accessed 20 March 2019].

differential might undermine the presumption of innocence. The second criticism is that the sentence differential might encourage the innocent to plead guilty. The third criticism is that the sentence differential undermines the principles of sentencing and public confidence in the justice system.

Next, in light of these criticisms, the chapter explores why sentence differentials exist. There are three typical rationales in favour of the sentence differential.⁴⁷ The first rationale is the 'victim rationale' which justifies the sentence differential on the basis that the assumedly commensurate guilty pleas spare victims the ordeal of giving evidence at trial. The second rationale is the remorse rationale. The remorse rationale supposes that the sentence differential is justified as guilty pleas demonstrate remorse and that remorse should be considered in sentencing. The third rationale can be called the 'efficiency rationale' or the 'utilitarian rationale.' The efficiency rationale supposes that the sentence differential is justified as it encourages early guilty pleas, thereby saving resources such as court time.

2.2 The Sentence Differential Controversy

The first criticism of the sentence differential is that it undermines the presumption of innocence. The presumption of innocence is the "golden thread" throughout the web of the criminal law.⁴⁸ Though the presumption of innocence has always been qualified, the ideal represents the rule of law value that in order to punish an individual, the state must prove its case beyond reasonable doubt. In Anglo-American systems, the presumption of innocence is embodied in the evidentially contested adversarial trial. The criticism is that the sentence differential works to undermine this safeguard and that guilty pleas mean reduced protections against wrongful convictions. Thus, critics argue that plea negotiation undermines the legitimacy of Anglo-American justice systems.

The second criticism of plea negotiation is that it encourages the innocent to plead guilty. While it may be thought unlikely that the innocent would plead guilty, critics argue that the sentence differential encourages this. Ascertaining whether there has been a wrongful conviction is notoriously difficult and, as such, reliable statistical information is hard to derive. However, critics would point out that some offenders do claim to be innocent after pleading guilty. For example, Blumberg, in his seminal work, found that the "largest group of defendants (51.6 per cent) were those who re-asserted their 'innocence' after a public plea of guilty."⁴⁹

The third criticism is that plea negotiation undermines the principles of sentencing and public confidence in the justice system. By contrast to the other criticisms (which suggest the sentence

⁴⁷ Leverick, F., 2013. The rise and fall of the sentence discount. *Scots Law Times* pp.259-264.

⁴⁸ *Woolmington v DPP*, [1935] UKHL 1.

⁴⁹ Blumberg, A.S., 1979. *Criminal Justice: Issues & Ironies*. New York: New Viewpoints. p.91.

differential disadvantages persons accused of an offence), the concern with this criticism (broadly speaking) is that:

“It involves the court’s passing a sentence that, in its considered judgment, is less than the offence truly warrants.”⁵⁰

In sum, each of these criticisms raises serious concerns that policymakers have struggled to reconcile in advocating the sentence differential. The first two criticisms relate to the threats that plea negotiation poses to defendants’ rights, due process, and legitimacy. The third criticism relates to concerns that plea negotiation works to unduly benefit offenders. While these criticisms are longstanding, and not covered in detail here, they are important to note since they relate to fundamental cornerstones of the legitimacy of Anglo-American criminal justice systems.

2.3 Victim Rationale

Having set out the controversy surrounding the sentence differential, this review now turns to look at the three broad rationales advanced in its favour. The first rationale in favour of the sentence differential is the victim rationale. The premise of this rationale is that victims will benefit from the guilty pleas encouraged by the sentence differential through being spared the ordeal of a trial.⁵¹ This rationale may be especially relevant to crimes of a violent or sexual nature where trials may be particularly difficult for victims. Indeed, while there have been improvements to protect better vulnerable victims giving evidence, there are few who would argue that it is not an arduous experience for some.

The stress of giving evidence, recounting traumatic events and being cross-examined in the adversarial tradition can take a toll. Moreover, the ordeal may extend beyond giving evidence to the potential anxiety that an upcoming court appearance can bring – making earlier guilty pleas desirable for such victims (especially those that prevent the need for witnesses to be cited). As such, the sentence differential may be justified on the basis that the harm done to some victims following an offence is lesser where there is no trial.

2.3.2 Limitations of the Victim Rationale

One of the main limitations to the victim rationale is that, as noted in *Gemmell v HMA*, in some cases (especially summary cases), there will be no victims to spare. For example, with offences concerning the supply of drugs, there may not be an identifiable victim. In such cases, the only witnesses may be professionals such as police officers and expert witnesses. While there may be an efficiency benefit in saving witness time, professional witnesses are seldom spared an ordeal.

⁵⁰ *Gemmell v HMA*, [2011] HCJAC 129, para 34.

⁵¹ *Tata C.*, and *Gormley J.*, 2016; *Gormley J.*, and *Tata C.*, 2019; *Leverick F.*, 2004.

Likewise, other non-victim witnesses may be thought to be less vulnerable and thus less in need of protection.

This lack of a victim to spare in some cases poses a number of questions. If the sentence differential is justified, at least in part, by a victim rationale, should it be reduced in cases where there is no victim? Who ought to be considered a victim? For example, should family members of a deceased person be regarded as victims? Furthermore, it cannot be assumed that all victims want to be 'spared' trial. What victims want and need is a complex question, and so it is difficult to make sweeping generalisations. Even where there are victims who may need to give evidence, it is important to note that 'victims' are not a homogeneous group.

While some victims may desire and benefit from the sentence differential and potentially concordant guilty pleas, some may not. Indeed, in some cases, victims will not wish for the person accused of an offence to be prosecuted. In other cases, some victims may prefer the trial as an opportunity to be heard and to learn more about the offender in order to obtain closure. The suitability of the trial process as a venue for victims expressing their views is debatable, but in many cases the trial may be the only venue available.⁵² Victims may thus find catharsis in their involvement in the trial. By contrast, some victims may come to "see plea bargaining as a practice which removes them from the criminal justice system."⁵³ In other cases, victims may not desire a guilty plea if the existence of a perceived 'discount' means the offender is not thought to be serving a proportionate sentence. Moreover, the existence of the sentence differential may also lead to the suspicion that expressions of remorse on the part of the offender may not be sincere.

Thus, victims are not a homogeneous group, and victims' interests can both provide reasons for and against the sentence differential. Where victims do not desire the case to be settled, practices intended to 'spare' them may become harmful and resented:

"Victims' concerns may provide disincentives for plea bargaining. The press, victims, and families often point out the glaring defects of plea agreements. Victims have a tremendous emotional stake in seeing that perpetrators of crimes against them receive appropriate punishment. Other victims' interests, however, may point toward settlement by plea."⁵⁴

⁵² Restorative Justice is not widely available in Scotland. See Leverick F., 2004. p.373; and Scottish Government, 2019. *Uses of Restorative Justice: evidence review*. [Online] Available at: <<https://www.gov.scot/publications/rapid-evidence-review-uses-restorative-justice/pages/1/>> [Accessed 4 May 2019].

⁵³ Darbyshire, P., 2000. The mischief of plea bargaining and sentencing rewards. *Criminal Law Review*, pp.895-910. p.6.

⁵⁴ Hollander-Blumoff, R., 1997. Getting to guilty: Plea bargaining as negotiation. *Harvard Negotiation Law Review*, 2, pp.115-148.

In sum, victims pose numerous challenges for the criminal justice system and general rationales relating to the sentence differential. ‘Sparing victims’ will not always be a valid reason for the sentence differential, and some victims may even resent the sentence differential - though it may be a relevant factor in some cases. If victims resent the sentence differential, then the normative and symbolic role of the courts as dispensing just decisions may be undermined in the eyes of victims and the public.

2.4 Remorse Rationale

While not all those who plead guilty appear remorseful, genuine remorse is typically expected to accompany a guilty plea.⁵⁵ In that sense, guilty pleas may be considered to part of a display of remorse. Indeed, it seems intuitive that a remorseful defendant would accept their guilt and plead guilty. As such remorse, indicated in part by a guilty plea, is a factor that has been recognised as relevant to sentencing:

“That expressions of remorse – when believed – mitigate punishment in law and diminish the social disapproval of transgressors in more informal settings is by now a commonplace observation amply documented both in legal and criminological scholarship and in experiments in social psychology, respectively.”⁵⁶

As to why remorse justifies altering a sentence, there are at least five general possibilities. Firstly, it may be that “empathy is a key determinant of punitiveness” and judges are better able to empathise with the remorseful defendant.⁵⁷ Secondly and thirdly, it may be that those who show remorse are thought to be more morally worthy of leniency, or less likely to re-offend than those who are not:

“Wrongdoers who are regarded as remorseful are viewed as more worthy of mercy, safer for re-inclusion into the community, and more similar to their law-abiding neighbors than those who have not shown remorse or whose expressions of remorse are judged as not credible.”⁵⁸

⁵⁵ Dawes et al, 2011. p.31.

⁵⁶ Weisman, R., 2009. Being and doing: The judicial use of remorse to construct character and community. *Social & Legal Studies*, 18(1), pp. 47-69. p.48. Regarding remorse and acceptance of responsibility see also R v Harper [1968] 2 QB 108; and O’Hear, M.M., 1996. Remorse, cooperation, and acceptance of responsibility: the structure, implementation, and reform of Section 3E1. 1 of the Federal Sentencing Guidelines. *Northwestern University Law Review*, 91, pp.1507-1573.

⁵⁷ Lovegrove, A., 2013. Sentencing and Public Opinion: An Empirical Study of Punitiveness and Lenience and Its Implications for Penal Moderation. *Australian & New Zealand Journal of Criminology* 46(2), pp.200–220. doi:10.1177/0004865812470119. p.202.

⁵⁸ Weisman, R., 2009. Being and Doing: The Judicial Use of Remorse to Construct Character and Community. *Social & Legal Studies*, 18(1), 47–69. p.49.

Fourthly, those who feel remorse may be thought to have suffered the “pains of guilt” and, accordingly, be less in need of further punishment.⁵⁹ Finally, it may be that part of the goal of punishment is communicating the wrongfulness of specific actions so that:

“That the offender comes to recognise and repent the wrong she has done, and its implications for her relationships with the victim and with her fellow citizens.”⁶⁰

If a defendant is already remorseful, then less punishment may be required to achieve the communicative aim. Thus, for several reasons, remorse may be argued to be an important factor in sentencing decisions, and the recognition of remorse can relate to the criminal justice system’s key symbolic and normative functions as a protector, and vindicator, of core societal values.

However, while the person accused may demonstrate remorse through a guilty plea, some jurisdictions attempt to separate remorse from the plea-dependent sentence differential. Jurisdictions that separate remorse from the sentence differential typically consider remorse as a part of general mitigation. For example, the English and Welsh guidelines state that:

“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.”⁶¹

Yet, this separation can be difficult in practice. Where there is a guilty plea, there is usually an indication of remorse on the part of the offender. Indeed, it is unusual for an offender to plead guilty but claim they have no remorse for their actions.⁶² This close connection between remorse, guilty pleas, and the sentence differential can make separating remorse impractical – especially if sentencing is a ‘holistic’ exercise that is difficult to split up according to supposedly autonomous individual factors.⁶³

⁵⁹ See Rodogno, R., 2009. Shame, guilt, and punishment. *Law and philosophy*, 28(5), p.429.

⁶⁰ Duff, R. A., 2003. Probation, punishment, and restorative justice: Should AI Turism be engaged in punishment? *The Howard Journal of Criminal Justice*, 42(2), 181-197. P.188.

⁶¹ Sentencing Council of England and Wales, 2017. section B.

⁶² Though some offenders do claim to be innocent after pleading guilty. See Blumberg, A. S., 1967. *Criminal justice*. Quadrangle Books; and Tata, C., 2010. A sense of justice: The role of pre-sentence reports in the production (and disruption) of guilt and guilty pleas. *Punishment & Society* 12(3), pp.239-261.

⁶³ Tata, C 1997 Conceptions and Representations of the Sentencing Decision Process. *Journal of Law & Society*, 24(3), pp.395-420; and Tata, C., 2007. Sentencing as Craftwork. *Social & Legal Studies*. 16(3), pp.425-447.

2.4.1 Limitations to the Remorse Rationale

The proper role of remorse in sentencing is complex.⁶⁴ As noted later, remorse may be a reason for the sentence differential that the public is more approving of than efficiency. However, it is hard to locate a non-contentious principled basis for the sentence differential based on remorse. Remorse, it might be argued, is mostly irrelevant to proportionate sentencing as it does not affect the culpability of an offender or the harm caused:

“Whether the offender expresses remorse for his crime, and apologises to the victim does not affect the seriousness of the offence. However, numerous studies have shown that the expression of remorse decreases the severity of sentences recommended by the public... In addition, research on actual sentencing decisions has shown that remorseful offenders are sentenced more leniently.”⁶⁵

As such, on the basis of principled sentencing, it could be argued that the remorse rationale is limited in its ability to justify the sentence differential. Indeed, the most robust basis for the consideration of remorse appears to rest in its possible links to other espoused aims of sentencing, such as rehabilitation. However, there is surprisingly little evidence demonstrating that defendants who plead guilty are less likely to re-offend. Part of the limitation of the remorse rationale is that genuine remorse is difficult, if not impossible, to identify. Thus, even if remorse does contribute to rehabilitation and other desired ends, guilty pleas may not. Indeed, it has been noted that:

“The principle of recognising remorse is rarely disputed, though some commentators point out that it is impossible for a judge to accurately estimate the sincerity of remorse.”⁶⁶

As long as the sentence differential exists, or is perceived to exist, a guilty plea does not necessarily indicate remorse. Thus, even if a principled basis for the sentence differential based on remorse is accepted, genuine remorse might be impossible to identify as long as the sentence differential exists. Incentives to plead guilty can result in tactical guilty pleas rather than remorseful ones. Consequently, since the “first strategic guilty plea until the present, no one has been able to tell simply by examining a defendant's plea whether or not he was remorseful.”⁶⁷ These limitations make remorse a tenuous basis for justifying the sentence differential.

⁶⁴ See Tudor, S.K., 2008. Why should remorse be a mitigating factor in sentencing? *Criminal Law and Philosophy*, 2(3), pp.241-257.

⁶⁵ Hough, M., Roberts J.V., Jacobson, J., Moon, N., and Steel, N., 2009. *Public Attitudes to the Principles of Sentencing: Sentencing Advisory Panel Research Report 6*. [PDF] Available at: <<http://eprints.bbk.ac.uk/3796/1/3796.pdf>> p.3.

⁶⁶ Roach Anleu, S.L., and Mack, K., 1997. Sentence discount for a guilty plea: time for a new look. *Flinders Journal of Law Reform*, 1(2), pp.123-143. p.123.

⁶⁷ Alschuler, A., 1981. P.662.

2.5 Efficiency Rationales

The 'efficiency rationale' (sometimes known as the 'utilitarian rationale') is "perhaps the only one that is almost universally applicable."⁶⁸ This rationale is articulated in almost all jurisdictions and, "the desire to minimize the number of fully contested trials appears to be a universal criminal justice objective."⁶⁹ The basis of this rationale is that the sentence differential can be justified because of the resources it saves through encouraging early guilty pleas.

Policy makers in several jurisdictions have variously demonstrated a belief that the sentence differential reduces costs and caseload pressures. Even inquisitorial systems are not immune to these pressures. While estimating the costs of trials is difficult, and variable, it has been argued that:

"There is little doubt that guilty pleas save the Scottish criminal justice system an enormous amount of time and money. In terms of time, in the Scottish adversarial system, it is still the case that, by and large, every crucial fact has to be proved beyond reasonable doubt by oral testimony in court and the defence has the right to cross-examine Crown witnesses (and vice versa). We have already seen that the proportion of cases settled by a guilty plea ranges from 63% to 97%, depending on the level of court in which the case is prosecuted. If all of these cases had instead to be taken to trial, without a huge injection of additional resources the system simply could not cope and the resulting delays would be enormous."⁷⁰

In making the efficiency argument, there are generally two assumptions. The first assumption is that the financial costs involved in encouraging early guilty pleas are negligible.⁷¹ The second assumption is that the sentence differential contributes to early guilty pleas. While both these assumptions may appear intuitive, neither has been empirically verified in Scotland. This lack of verification is notable as, for example, there are various important reasons (beyond a simple

⁶⁸ Leverick, F., 2013. p.259.

⁶⁹ Hodgson, J., 2015. *Plea Bargaining: A Comparative Analysis*. In: James D. Wright (editor-in-chief), *International Encyclopaedia of the Social & Behavioral Sciences*, 2nd edition, Vol 18. Oxford: Elsevier. pp. 226–231. ISBN: 9780080970868. P.226.

⁷⁰ Leverick, F., 2006. Plea and confession bargaining in Scotland. *Electronic Journal of Comparative Law*, 10, pp.1-23. Available through: EJCL website <<https://www.ejcl.org/103/art103-8.PDF>> [Accessed 7 March 2019] p.19.

⁷¹ For example, time spent plea bargaining by the defence and prosecution, potential court delays attributable to plea bargaining, extra court diets to encourage early guilty pleas, etc.

acceptance of guilt) why a person may plead guilty that have little to do with the sentence differential.⁷²

Leverick argues that efficiency savings are the only convincing reason for the sentence differential.⁷³ As such, it could be argued that efficiency is the primary justification in favour of the sentence differential. However, even assuming the sentence differential saves resources, the focus on efficiency can, in some contexts, be considered as running contrary to principled sentencing. Sentencing is often argued to be primarily (though not exclusively) based on the seriousness of the offence, which is generally considered to be based on the culpability of the offender when committing the crime and the harm caused by the offence.⁷⁴ Efficiency is not directly relevant to harm or culpability at the time an offence was committed. This irrelevance to seriousness poses issues in terms of principled sentencing. For example, Maslen and Roberts have argued that:

“An assessment of reduced culpability correspondingly mitigates the seriousness of the offence. However, the relevance of some other mitigating factors—especially those that do not affect our assessment of culpability or harm—is more contentious.”⁷⁵

Moreover, in the context of a criminal justice system, ‘efficiency’ is about more than resources expended. Justice, legitimacy, and fairness are all vital attributes of a truly efficient justice system. For example, as Audit Scotland has observed:

“Currently, the sheriff court system publicly reports its efficiency as the proportion of summary cases completed within 26 weeks. On its own, this is not a measure of efficiency and other measures are needed to assess efficiency fully.”⁷⁶

⁷² See Feeley, M., 2017. *The process is the punishment*. In *Crime, Law and Society: Selected Essays*. Routledge, pp. 139-188. Routledge.

⁷³ Leverick, F., 2004. p.380.

⁷⁴ For a discussion of proportionate sentencing see Von Hirsch, A. and Ashworth, A., 2005. *Proportionate sentencing: Exploring the principles* (Vol. 17). Oxford: Oxford University Press.

⁷⁵ Maslen, H., and Roberts, J., 2013. *Remorse and Sentencing: An Analysis of Sentencing Guidelines and Sentencing Practice*. In (Ed.), *Sentencing Guidelines: Exploring the English Model*: Oxford University Press. [Online] Available at: <<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199684571.001.0001/acprof-9780199684571-chapter-8>> [Accessed 7 March 2019] p.122.

⁷⁶ Audit Scotland, 2015. *Efficiency of prosecuting criminal cases through the sheriff courts*. [PDF] Available at <http://www.audit-scotland.gov.uk/uploads/docs/report/2015/nr_150924_sheriff_courts.PDF> [Accessed 7 March 2019]. p.5.

However, it would be imprudent to assume that the efficiency rationale could never have a moral foundation. While sometimes maligned (and clearly a justification that requires close scrutiny), the efficiency rationale need not be entirely devoid of ethical content:

“It is important to note that the efficiency argument, properly made, is not necessarily amoral. The justice system runs on public money, and there is a moral duty to ensure it is spent wisely. Thus, the efficiency rationale can be made in such a way to provide it with a moral (utilitarian) foundation.”⁷⁷

Thus, the efficiency rationale need not entail giving up on “high moral” principles.⁷⁸ However, if attempting to maintain principles, the efficiency rationale needs to be carefully implemented. As Leverick highlights, there are a lot of potential risks to be managed.⁷⁹ Whether and how the efficiency rationale might be balanced to maintain “high moral principles” in practice is beyond the scope of this literature review – though this review can note that to do so the state of knowledge needs to be improved (see section 6). All that this review can highlight is that, in theory, the efficiency rationale could have more virtuous qualities than is sometimes assumed. This point is important given that efficiency may be the primary reason for the sentence differential in several jurisdictions.

2.5.2 Limitations to the Efficiency Rationale

In most jurisdictions, policymakers have assumed that the sentence differential will encourage the expedient disposal of cases via early guilty pleas.⁸⁰ At face value, the efficiency argument looks compelling. Comparisons between the costs of an evidentially contested trial and an early guilty plea typically show significant differences.⁸¹ However, there are at least four caveats to this argument that are worth noting.

First, to the extent that pecuniary efficiency works to the detriment of other vital attributes of the justice system, its merit as a justification for the sentence differential is reduced:

“The difficulty is that efficiency is a flimsy basis upon which to justify sentence discounting when weighed against the risks it entails. There are at least three concerns: sizeable discounts may induce the innocent to plead guilty; those who take their case to trial because they are entitled to be presumed innocent are

⁷⁷ Gormley J., and Tata C., 2019.

⁷⁸ *Gemmell v HMA*, para 34.

⁷⁹ Leverick, F., 2012. p.234.

⁸⁰ “The conventional wisdom is that litigants bargain toward settlement in the shadow of expected trial outcomes.” Bibas, S., 2004. Plea Bargaining outside the Shadow of Trial. *Harvard Law Review*, 117(8), pp.2463-2547. doi:10.2307/4093404. p.2464.

⁸¹ Leverick, F., 2006. p.19; and *Gemmell v HMA*, paras 34-35.

unfairly penalised for doing so; and the criminal justice system may lose public credibility if sentences are passed which do not adequately reflect the seriousness of the offence.”⁸²

Secondly, the link between caseload/cost pressures and sentence differentials is surprisingly tenuous.⁸³ The lack of a clear correlation suggests a need to scrutinise exactly why sentence differentials occur. Indeed, the difficulty in definitively showing a link between caseloads and sentence differentials suggests that sentence differentials may be driven by factors beyond the three common rationales noted above. Notably, research into court operations has suggested that social dynamics in courts may contribute to plea negotiation.⁸⁴

Thirdly, policymakers’ assumptions that the sentence differential contributes to the expedient disposal of cases are untested. There is surprisingly little research on the ability of the sentence differential to encourage early guilty pleas.⁸⁵ The notion that defendants plead based on the perception of likely trial outcomes (rationally choosing the lesser option where available) is intuitive.⁸⁶ However, plea decision-making is complex and may operate differently for a number of reasons:⁸⁷

“There are undoubtedly cases in which defendants are willing to plead guilty without any expectation of sentencing leniency (cases, for example, in which they are remorseful, sense no chance of victory at trial, or seek to avoid the process costs that exercise of the right to trial would incur), these are cases in which the bargaining process - the offering of apparent concessions - is simply unnecessary.”⁸⁸

⁸² Leverick, F., 2012. Sentence discounting for guilty pleas: a question of guidelines. *Edinburgh Law Review*, 16(2), pp.233-238. p.234.

⁸³ Eisenstein, J., and Jacob, H., 1977. *Felony justice: An organizational analysis of criminal courts*. Boston: Little, Brown; Feeley, M., 1979. *The process is the punishment*. In *Crime, Law and Society* (pp. 139-188). Routledge. New York: Russell Sage Foundation; Mather, L. M., 1979. *Plea Bargaining Or Trial?: The Process of Criminal-Case Disposition*. Lexington, MA: Lexington Books; Heumann, M., 1975. A note on plea bargaining and case pressure. *Law & Society Review*, 9(3), pp.515-528; Vogel, M.E., 2007. *Coercion to compromise: Plea bargaining, the courts, and the making of political authority*. Oxford University Press.

⁸⁴ Galanter, M., 1974. Why the haves come out ahead: Speculations on the limits of legal change. *Law and Society Review*, 9, p.95.

⁸⁵ There has not been a thorough government sponsored evaluation dedicated to examining the impact of section 196.

⁸⁶ See Mnookin, R.H. and Kornhauser, L., 1978. Bargaining in the shadow of the law: The case of divorce. *Yale Law Journal*, 88, pp.950-997.

⁸⁷ For example, see Bibas S., 2004; and Jacob, H., 1992. The Elusive Shadow of the Law. *Law & Society Review*, 26(3), pp.565-590.

⁸⁸ Alschuler, A.W., 1981. The changing plea bargaining debate. *California Law Review*, 69, pp.652-730. p.657.

Indeed, in terms of sentence differentials being potentially limited in their ability to encourage early guilty pleas, Dawes et al found that:

“There was little evidence from the research that increasing the reduction further would encourage more offenders to plead guilty at an earlier stage, given the reduction only becomes a driver of entering a guilty plea at such a point that an offender considers a conviction to be the likely outcome.”⁸⁹

More evidence is needed concerning why defendants choose to plead guilty or not guilty. This evidence may confirm or rebut the assumption that the sentence differential plays a significant role in many early guilty pleas. Evidence might also enable an assessment of whether other forms of plea negotiation (such as charge negotiation) create contrary incentives to plead guilty at a later stage. For example, while early guilty pleas increase the sentence differential, practices of charge negotiation and fact negotiation may encourage later guilty pleas:

“I think most defence agents will tell you that. The time for [the defence lawyer] to put the screws on to get a good plea is probably... on the morning of trial.”⁹⁰

Since Goriely et al published their research in 2001, there have been several significant changes to the Scottish criminal justice system. For instance, it is unclear how innovations such as remote prosecution ‘marking hubs’ affect the stage at which early guilty pleas are tendered. However, while designed to promote efficiency, these innovations may hinder plea negotiation and early guilty pleas in some cases:

“Prior to centralisation of certain functions contact could be made via the local procurator fiscal office. Whereas centralisation of certain functions may have financial, efficiency and consistency benefits to the organisation itself, this requires to be balanced against the ability for defence practitioners to be able to engage effectively with those dealing with the casework within COPFS.”⁹¹

Fourthly, the efficiency argument for the sentence differential, by its nature, is focused upon defendants. The assumption is that defendants’ choices regarding pleading lead to ‘cracked trials’ and ‘churn.’ As such, the assumption is that the sentence differential can be used to change these behaviours by encouraging those who know they are guilty to plead guilty sooner. But how much

⁸⁹ Dawes et al, 2011. p.2.

⁹⁰ A Procurator Fiscal Interview from Goriely et al, 2001. p.80.

⁹¹ The Law Society of Scotland, 2016. *Justice Committee - Inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service*
The Law Society of Scotland's response. [PDF] Available at:
<<https://www.lawsco.org.uk/media/9669/crim-written-evidence-justice-committee-inquiry-into-the-role-and-purpose-of-copfs-law-society-of-scotland-submitted-2.PDF>> [Accessed 7 March 2019] p.3.

of the 'inefficiency' regarding pleading practices is due to defendants? There is evidence that in England and Wales 'inefficiencies' such as 'cracked trials' are not exclusively the result of defendants' decision-making.⁹² Instead, these inefficiencies may also be related to the complex dynamics of plea decision-making and plea negotiation more generally – such as late disclosure or plea offers being accepted by the prosecution at a late stage.

2.6 Conclusion

In sum, there are significant challenges that might suggest that the sentence differential is undesirable. Consequently, justifying the sentence differential is a difficult task that, "involves balancing public interest concerns that are, on the face of it, irreconcilable."⁹³ Three primary rationales may be drawn upon to justify the sentence differential. Some have argued that the efficiency rationale is the most persuasive. However, there are reasons to doubt that the sentence differential will always operate to improve efficiency. Moreover, the remorse rationale and victim rationale continually crop up in various forms around the world. For example, in Scotland concerning "early guilty pleas" generally, it has been noted that all three rationales play a role in public policy:

"Public policy at present appears to be (rightly) that legal aid payments should reflect the earliest point a person could show remorse and avoid trauma for victims and expense across the police and justice system.

It may be that the earliest point for an admission of guilt and remorse will shift to the police station interview..."⁹⁴

Consequently, in practice, it may be that all three rationales are argued to provide a basis for the sentence differential depending on the facts and circumstances of the case. Indeed, perhaps, given the criticisms levied against the sentence differential, all three rationales are sometimes necessary to provide a convincing justification depending upon the case.

⁹² McConville M., and Marsh L., 2014. pp.100-103.

⁹³ Leverick, F., 2013. The rise and fall of the sentence discount. *Scots Law Times*, pp.259-264. P.259.

⁹⁴ Evans, M., 2018. *Rethinking Legal Aid: An Independent Strategic Review*. [PDF] Available at: <<https://www2.gov.scot/Resource/0053/00532544.PDF>> [Accessed 7 March 2019] p.72.

3.0 – Scots Law

3.1 Introduction

This chapter explores Scots law on the sentence differential. The chapter begins by providing an overview of section 196, which ensures a sentence differential is permissible (but not required) in Scotland. The chapter then explores the rationale for a sentence differential in Scotland and relevant case law. Next, the chapter explores how the sentence differential operates and how it may interact with the presumption against short sentences. In examining Scots law, the chapter makes some comparisons between the Scottish position and that in England and Wales (see section 4.2 for a brief discussion of the sentence differential in England and Wales).

3.2 A Brief History of Scots Law in Relation to the Sentence Differential

In Scotland, sentence discounting is permitted by section 196 of the Criminal Procedure (Scotland) Act 1995. Section 196 states that:

“(1) In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall 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 that indication was given.”

Accordingly, section 196 requires that, when sentencing, a judge have regard to the stage and circumstances of any guilty plea. However, section 196 does not set out how a judge is to ‘take into account’ the fact of a plea. The courts have interpreted section 196 to permit (but not require) a sentence discount.

The formal law concerning sentence discounting has been developed by the courts. ‘Guideline judgments’ can be issued under the powers conferred by sections 118(7) and 189(7) of Criminal Procedure (Scotland) Act 1995 to address important questions regarding sentencing. Two guideline judgments relate to the sentence differential (*Du Plooy v HMA*,⁹⁵ and *Spence v HMA*).⁹⁶ There is also the notable case of *Gemmell v HMA*.⁹⁷ *Gemmell v HMA* is not a ‘guideline judgment’ as it was not issued under the powers conferred by the Criminal Procedure (Scotland) Act 1995.

⁹⁵ 2005 JC 1.

⁹⁶ 2008 JC 174.

⁹⁷ [2011] HCJAC 129.

However, *Gemmell v HMA* was the first time that sentence discounting was considered by a full bench of the High Court of Justiciary and carries significant precedential value.

In terms of operation, Scottish case law has suggested that “the discount should normally not exceed a third of the sentence.”⁹⁸ Case law has also suggested that “in general, the discount will be the greater the earlier the plea.”⁹⁹ Moreover, case law has also elucidated the basis of sentence discounting. Earlier reviews and consultations had not “sought to advance any serious justification for offering sentence discounts; they simply assumed that discounts were part of the system.”¹⁰⁰ Accordingly, *Du Plooy v HMA* was the first attempt to formulate the basis for section 196, and the court noted that:

“Despite the enactment [of section 196], there has been no discussion in this jurisdiction as to the basis of... any allowance” (though perhaps some inferences could have been drawn from the White Paper).¹⁰¹

Du Plooy v HMA suggested that there are three rationales for the section 196 sentence ‘discount’: efficiency, sparing victims, and remorse (see sections 2.3 to 2.5). However, *Gemmell v HMA* marks “a distinct change in tone on the part of the court”.¹⁰² *Gemmell v HMA* pointed out that the utilitarian rationale is “not an exercise in Benthamite philosophy.”¹⁰³ Instead, it was clarified that the sentence differential:

“Is a statutory encouragement of early [guilty] pleas... The primary benefit that is realised in every case is the saving of administrative costs and the reduction of the court's workload.”¹⁰⁴

Consequently, the court clarified that remorse is to be considered as part of general mitigation separately from the consideration of any sentence differential stemming from section 196. Thus, *Gemmell v HMA* suggests that Scots law now favours the efficiency/utilitarian rationale as the primary justification for the sentence discounting.¹⁰⁵

⁹⁸ *Du Plooy v HMA*, para 26.

⁹⁹ *Du Plooy v HMA*, para 78.

¹⁰⁰ McConville M., and Marsh L., 2014. p.196.

¹⁰¹ *Du Plooy v HMA*, para 6 referring to the *Modernising Justice* White Paper arising from the Bonomy Review

¹⁰² Leverick, F., 2013. P.259.

¹⁰³ *Gemmell v HMA*, paras 34-35.

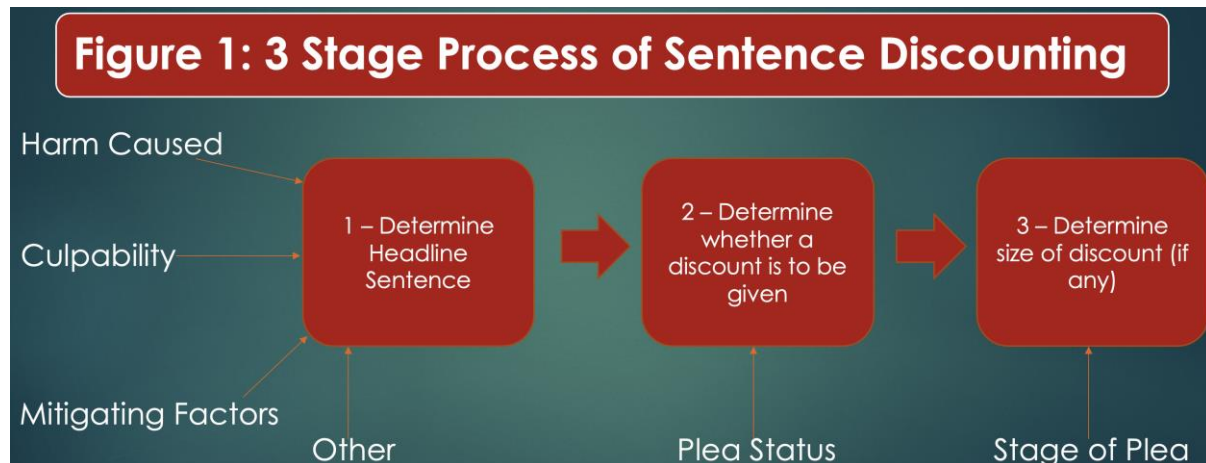
¹⁰⁴ *Gemmell v HMA*, para 34.

¹⁰⁵ *Murray v HMA*, [2013] HCJAC 3 seemed to affirm this position.



3.3 Applying the Sentence Discount

For the sentence discount, *Gemmell v HMA*¹⁰⁶ suggests that a judge should sentence in three stages.¹⁰⁷ Stage 1 encompasses the judge calculating the suitable headline sentence by considering all the facts and circumstances of the case (including mitigating and aggravating factors). The judge then considers the sentence discount (or differential) in stage 2 and stage 3.



Gemmell v HMA expressed concern over section 196's potentially negative effects on public confidence and noted that:

“That the court's discretion to allow a discount should be exercised sparingly and only for convincing reasons.”¹⁰⁸

Gemmell v HMA and *Murray v HMA* also note that there is no sliding scale for the sentence discount and that individuals are not entitled to any particular discount.¹⁰⁹ Thus, a guilty plea at the first opportunity in Scotland need not result in a discount and, if it does, the discount may be less than the one-third that case law suggests as a maximum for a guilty plea at the first opportunity.

Consequently, the application of sentence discounts in Scotland is a matter that is largely left to the discretion of individual judges: subject to a desire in *Gemmell v HMA* for “some broad general principles.”¹¹⁰ On the one hand, the Scottish approach may offer individual judges greater flexibility in sentencing. However, Roberts and Ashworth have argued that uncertainty regarding the sentence differential may deter early guilty pleas:

¹⁰⁶ *Gemmell v HMA*, para 27.

¹⁰⁷ *Gemmell v HMA* also addressed several specific practical questions relating to disqualification from driving and penalty points; extended sentences; public protection; and minimum penalties set by law.

¹⁰⁸ *Gemmell v HMA*, para 77.

¹⁰⁹ *Geddes v HM Advocate*, [2015] HCJAC 43. *Geddes* also notes that the selection of the appropriate discount is primarily a matter for the sentencing judge.

¹¹⁰ *Gemmell v HMA*, para 32.

“In neighbouring Scotland there is little clarity with respect to the magnitude of discounts, a sliding scale on the English model being rejected in Murray ([2013] HCJAC 129). This lack of clarity is self-defeating. As Leverick notes, “If defendants cannot predict with confidence that a discount will be awarded or suspect that it will be minimal, they may elect to take their chances at trial” (2014, p. 343).”¹¹¹

As a result, the discretionary nature of sentence discounts may provide defendants with less certainty, which may be detrimental to early guilty pleas if “a well understood system of discounts is likely to result in early pleas in a significant proportion of cases which currently plead [guilty] at or shortly before the trial.”¹¹²

3.3.2 Overwhelming Evidence

One question raised by the efficiency rationale is whether the strength of the evidence against the person accused of an offence ought to affect the sentence discount. On the one hand, there is an argument that where the evidence is overwhelming the potential cost savings from a guilty plea will often be reduced. As such, the argument is that the sentence discount should be reduced accordingly. On the other hand, there is an argument that those cases where guilt is more certain are the ones that should be encouraged to plead guilty through a sentence differential.¹¹³ Those favouring the latter position point out that in cases of overwhelming evidence, there is less threat to the presumption of innocence and less chance of an innocent person being encouraged to plead guilty.

Scots law has traditionally resisted reducing the sentence differential based on the strength of the evidence. The court in *Du Plooy v HMA* took the view that:

“As to cases in which the plea of guilty might be said to have been ‘practically inevitable’, it may be said that, where the evidence against an accused is strong, he could hardly have refused to offer such a plea, and that in these circumstances the sentencer should take the view that this lessens the value of the plea to the criminal justice system. However, that view cannot be pressed too far.”¹¹⁴

¹¹¹ Roberts, J.V., and Ashworth, A., 2016. The evolution of sentencing policy and practice in England and Wales, 2003–2015. *Crime and Justice*, 45(1), pp.307-358. footnote 46.

¹¹² The Summary Justice Review Committee, 2004. *Report to Ministers*. [PDF] Available at <<https://www2.gov.scot/Publications/2004/03/19042/34216>> [Accessed 7 March 2019] para 14.12.

¹¹³ Leverick, 2003. p.836.

¹¹⁴ *Du Plooy v HMA*, para 21.

This question of practically inevitable guilty pleas arose more recently in *Saini v Procurator Fiscal*. *Saini* also noted that the strength of the crown's case was not typically a factor relevant to the sentence differential.¹¹⁵

3.4 Presumption Against Short Sentences and Sentence Discounting

The Criminal Justice and Licensing (Scotland) Act 2010 introduced a statutory presumption against short custodial sentences (hereinafter 'the presumption'). Section 17 states:

“A court must not pass a sentence of imprisonment for a term of 3 months or less on a person unless the court considers that no other method of dealing with the person is appropriate.”

Initially, the presumption was against sentences of 3 months or less though, at the time of writing, the Scottish Government is committed to increasing the presumption against custodial sentences to 12 months or less through a statutory instrument.¹¹⁶ However, it is important to note that the 2010 Act is by no means a prohibition on passing short sentences of imprisonment, but merely a presumption unless the court considers no other method appropriate for which it has to state its reasons. This has led some academics to suggest that the presumption may not be a departure from existing law but “simply a reminder to sentencers of the existing injunction that custody should be ‘a last resort.’”¹¹⁷

The effect of the three month presumption appears to have been limited. The Government's own commissioned research suggests that the three month presumption “has had little impact on sentencing decisions.”¹¹⁸ The Government's recent consultation on extending the presumption observed that, “despite the introduction of this presumption, the use of short-term sentences has remained relatively constant.”¹¹⁹ Additionally, other research commissioned by the Scottish

¹¹⁵ *Saini (Michael) v Procurator Fiscal, Dundee*, [2017] HCJAC, para 4.

¹¹⁶ Scottish Government, 2018. *Justice Vision and Priorities Delivery Plan: Overview of Progress 2017/18 And New Activity for 2018/19*. [PDF] Available at: <<https://www.gov.scot/publications/justice-vision-priorities-delivery-plan-overview-progress-2017-18-new/pages/9/>> [Accessed 7 March 2019].

¹¹⁷ Tata, C., 2015 *Sentencing and penal policy in the 'new' Scotland: consultation on extending the presumption against short custodial sentences*. Scottish Consortium on Crime and Criminal Justice. pp. 1-13.

¹¹⁸ Scottish Government, 2015. *Consultation on Proposals to Strengthen the Presumption against Short Periods of Imprisonment*. [PDF] Available at: <<https://www2.gov.scot/Resource/0048/00485797.PDF>> [Accessed 7 March 2019].

¹¹⁹ Scottish Government, 2016. *Consultation on Proposals to Strengthen the Presumption Against Short Periods of Imprisonment: An Analysis of Responses*. [PDF] Available at: <<https://consult.gov.scot/community-justice/short-periods-of-imprisonment/results/00497741.pdf>> [Accessed 24 March 2019].

Government found that “there was little sign of PASS figuring prominently or explicitly in judicial decision-making.”¹²⁰

Since it seems unlikely that any judicial sentencer would take a decision she or he considers not to be ‘appropriate,’ the key question concerning the effectiveness of the presumption (whatever its size) becomes one of ‘confidence in alternatives to prison.’¹²¹ At present, there is:

“A widespread perception of insufficiently credible and community-based sentences compared with imprisonment; and secondly a feeling that there has to be ‘a last resort’ for those who do not comply with community-based sentences.”¹²²

In the light of these challenges, it might be suspected that in a significant proportion of cases where a short custodial sentence is an option the court will consider “that no other method of dealing with the person is appropriate” and that prison is the last resort. Thus, policies relating to the sentence differential and sentence lengths are likely to be limited in effect if they run contrary to judicial wisdom and practice:

“There was a clear view amongst respondents, however, that extending the presumption would not achieve the policy aim of reducing the use of short-term sentences unless steps were also taken to bring about changes in sentencing practices and/or there was a commitment to developing and resourcing robust and evidence-based community justice services.”¹²³

Relating this point back to the sentence differential, it seems that judges are unlikely to dispense what they perceive to be unjust sentences by either the plea-dependent sentence differential or a presumption against short sentences. Thus, it remains to be seen how a 12 month presumption would be given effect in practice. However, the Scottish Sentencing Council may wish to consider whether a sentence differential ought to enable a sentence to cross the presumptive threshold.

3.5 Conclusion

The future will bring continued questions regarding the sentence differential. The possible extension of the presumption against short custodial sentences to 12 months may be one of the

¹²⁰ Anderson, S., Hinchliffe, S., Homes, A., McConville, S., Wild, A., Hutton, N., and Noble, S., 2015. *Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences* Scottish Government. [PDF] Available at: <<https://bit.ly/2WT8pHE>> [Accessed 6 March 2019]. p.141.

¹²¹ Tata, C., 2018. ‘Reducing Prison Sentencing through Pre-Sentence Reports’: Why the Quasi-Market Logic of ‘Selling Alternatives to Custody’ Fails’. *Howard Journal of Crime and Justice* 57(4): 472-494

¹²² Tata, C., 2015. pp.7-8.

¹²³ Scottish Government, 2015. p.2.

most significant. For its part, the Scottish Sentencing Council may wish to consider how the sentence differential and presumption may work together– especially for summary cases. Such guidance could consider the interaction between judicial discretion, the presumption, and the sentence differential. Together an increased presumption and the sentence differential *might* result in *some* (not all) cases receiving a non-custodial sentence where presently the sentence would be custodial. In such a case, the council may consider whether the maximum level of a CPO *might* be given with no further discount – the discount is that the offender is not going to prison.

4.0 The Law Governing Sentencing and Plea Decisions in Other Decisions in Other Jurisdictions

4.1 – Introduction

This chapter provides an overview of the legal frameworks in different countries to show how they give effect to the sentence differential. This overview outlines a variety of legal arrangements governing sentencing and guilty plea practices operating in jurisdictions that are roughly comparable to Scotland.

4.2 England and Wales

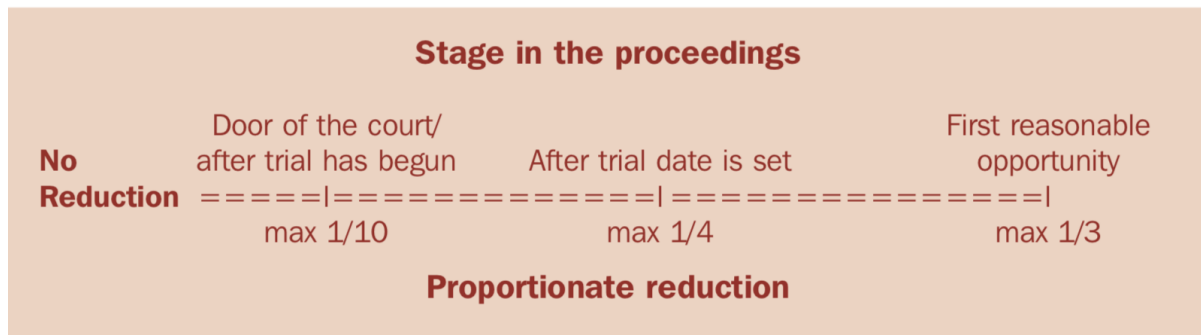
In England and Wales, there is a statutory obligation on judges to “take into account” the fact of a guilty plea. The obligation to consider a guilty plea arises from section 144 of the Criminal Justice Act 2003. However, while the fact of a guilty plea must be considered, the statute does not require a judge to ‘reduce’ a sentence. Indeed, on its own, the statute provides little detail regarding how the sentence differential should operate.

Before the establishment of non-judicial bodies to draft guidelines, the courts in England and Wales issued ‘guideline judgments.’ The guidelines were “a judgment on an individual appeal that was expanded to deal with sentencing for several variations of the particular offence.”¹²⁴ Today, the courts in England and Wales can provide guidance through precedent.¹²⁵ Moreover, England and Wales now have a Sentencing Council (SC), which replaced the Sentencing Advisory Panel (SAP) and the Sentencing Guideline Council (SGC) in 2010.

¹²⁴ Ashworth, A., 2006. The Sentencing Guideline System in England and Wales. *South African Journal of Criminal Justice*, 19, pp.1-23. p.2.

¹²⁵ For example, see *R. v Wilson (Paul Anthony)*, [2012] EWCA Crim 386; and *R. v Caley (David)*, [2012] EWCA Crim 2821.

Guidelines relating to the sentence differential were among the first to be issued by the SGC. The SGC's first guideline on "reduction in sentence for a guilty plea" applied to offences on or after 10 January 2005.¹²⁶ In terms of the operation of the sentence differential, the SGC guideline promoted the efficiency rationale and the victim rationale – with remorse being considered separately as part of general mitigation. Moreover, the SGC guideline established that any sentence 'reduction' should reduce on a sliding scale the later a person pleads guilty and that the maximum reduction is one-third.



127

These SGC guidelines were subsequently reviewed and updated in 2007.¹²⁸ More recently, the SC issued new guidance concerning the sentence differential in 2017.¹²⁹ These updates have sought to keep the guidance in-line with changes in the law, improve efficiency, and also to clarify points where uncertainty appeared to exist in practice. Under the 2017 guidelines, many of the fundamentals established in 2004 by the SGC remain. The maximum sentence reduction continues to be one-third, and it still operates on a sliding scale.

Moreover, the efficiency and victim rationales are still used as the basis for the sentence reduction. However, it is important to note that the 2017 guideline is not intended to create more guilty pleas,

¹²⁶ Sentencing Guidelines Council, 2004. *Reduction in Sentence for a Guilty Plea Guideline*. [PDF] Available at: <<https://www.legal-tools.org/doc/8e6f1c/PDF/>> [Accessed 7 March 2019].

¹²⁷ Sentencing Guidelines Council, 2004. *Reduction in Sentence for a Guilty Plea Guideline*. [PDF] Available at: <<https://www.legal-tools.org/doc/8e6f1c/PDF/>> [Accessed 7 March 2019].

¹²⁸ Sentencing Guidelines Council, 2007. *Reduction in sentence for a guilty plea: Definitive guideline*. [PDF] Available at <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-a-Guilty-Plea-SGC-Web.PDF>> [Accessed 7 March 2019].

¹²⁹ Sentencing Council of England and Wales, 2017. *Reduction in Sentence for a Guilty plea Definitive Guideline*. [PDF] Available at: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-Plea-definitive-guideline-SC-Web.PDF>> [Accessed 21 February 2019].

but only to encourage those who will plead guilty to do so earlier.¹³⁰ To achieve early guilty pleas, the 2017 guideline aimed “to improve clarity and consistency in the application” of guilty plea reductions.”¹³¹

The 2017 guideline is stricter than the previous 2007 version in some regards. For example, under the 2017 guideline, to receive the maximum reduction in an ‘either-way’ or indictable only offence a guilty plea must be entered in the Magistrate’s Court. Under the 2007 guideline, the maximum reduction could have been (and often was) given for a guilty plea in the Crown Court. However, another notable difference between the 2007 and 2017 guidelines relates to the cases where there is overwhelming evidence. The 2007 guideline limited the sentence reduction in such cases to 20% as the efficiency benefits of a guilty plea were thought to be less. By contrast, the 2017 guideline sets no such limit for cases where the evidence is overwhelming.

4.3 The Republic of Ireland

The Court of Appeal has issued sentencing guidelines about a small number of offences, but otherwise, judicial discretion is allowed within the perimeters of the maximum and minimum sentences which have been set by the Oireachtas (the legislature of the Republic) under Constitutional Law. The starting point for the court is the factual basis of the offence. The appropriate sentence must then be considered in light of the given circumstances, such as the impact on the victim and any aggravating factors. Lastly, mitigation should be considered. Entering a guilty plea can be viewed as a mitigatory factor (although deciding to exercise one’s right to go to trial is not to be considered an aggravator). Although the mechanics of this process have recently been the subject of discussion in Kelly¹³² where it was stated:

“One does not simply apply the mitigating factors to the maximum sentence and come up as a result with the appropriate sentence. On the contrary, he says, one looks first at the range of penalties and locates where on the range the particular case should lie and one then applies the mitigating factors after having performed that exercise.”¹³³

¹³⁰ Sentencing Council of England and Wales, 2017b. *Final Resource Assessment: Reduction In Sentence For A Guilty Plea*. [PDF] Available at: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Guilty-plea-resource-assessment.PDF>> [Accessed 7 March 2019].

¹³¹ Sentencing Council of England and Wales, 2017c. *Reduction in sentence for a guilty plea: Research report*. [PDF] Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Guilty-plea-research-report_final.PDF> [Accessed 7 March 2019].

¹³² [2005] 2 I.R 321.

¹³³ At 324.

Cahillone notes the (controversial) increase in the ordering of compensation in criminal cases, which have the effect of reducing the sentence given. She also discusses the power of the judge to suspend all or part of the sentence imposed.¹³⁴ Conditions for good behaviour can be attached to this decision, and if the condition is breached, the original sentence can be reinstated.¹³⁵ Of plea negotiation in an Irish context, O'Malley notes that the subject is "vexed" with many lawyers refusing to acknowledge its existence in Ireland.¹³⁶ Although recognising the obvious benefits of negotiation, he notes the principal ethical consideration is that a defendant must not be incentivised or pressured into entering a guilty plea. He notes that one of the leading Irish cases on sentencing negotiation is McAuley, where a group of men pled guilty to manslaughter during their murder trial, receiving substantially lower sentences than would have been imposed otherwise.¹³⁷

There is no unified approach to offer plea-dependent sentence differentials. Some legislation, such as the Misuse of Drugs Act 1997, stipulates that a guilty plea can be taken into account, and O'Malley suggests that the reality is that most guilty pleas will result in a shorter sentence, but ultimately the discretion lies with the sentencing judge.¹³⁸ The positive effects of sentencing discount have previously been called into question by the Law Reform Commission, which has asked whether it is fair to "allow a reduction at all if it rests on little more than a pious aspiration?"¹³⁹

Eamonn Barnes discusses his view from his perspective as the first director of public prosecutions in Ireland. He comments that he became aware of the practice in Ireland for prosecution counsel to attend at the judge's chamber with counsel, to ascertain whether the judge had a view on the sentence which might be imposed.¹⁴⁰ He notes that "in the absence of legislation such practice was thoroughly undesirable and should be stopped... I issued a circular instruction to that effect. Prosecution counsel are not authorised to enter into any bargain or agreement about sentences and as far as I know they do not ever do so."

¹³⁴ As per the Criminal Justice Act 2006

¹³⁵ See Cahillone, L. 2017. *How does a judge decide on the length of a prison sentence?* Available at: <<https://www.rte.ie/eile/brainstorm/2017/1206/925374-how-does-a-judge-decide-on-the-length-of-a-prison-sentence/>> [Accessed 20 March 2019]

¹³⁶ O'Malley, T. 2008. *Sentencing and the Prosecutor*. Presentation delivered as part of the 9th Annual National Prosecutors' Conference. Transcript available at: <<https://www.dppireland.ie/filestore/documents/PRK03J~R.PDF> at p.4> [Accessed 20 March 2019]

¹³⁷ [2001] 4 I.R. 160.

¹³⁸ O'Malley has argued elsewhere that the judicially developed principles have guidelines which can complement formal sentencing guidelines. See O'Malley, T., 2017. Judgment and Calculation in the Selection of Sentence. 28 *Criminal Law Forum*. 361.

¹³⁹ Law Reform Commission, 1993. *Consultation Paper on Sentencing*, para 1.74.

¹⁴⁰ Barnes, E., 2002. Reflection on Twenty-Five years as Ireland's First Director of Public Prosecutions. Chapter in O'Mahoney, P. (ed) *Criminal Justice in Ireland*. Institute of Public Administration: Dublin. pp100-101.

Thus, the position in Ireland remains that there is no formal mechanism by which the sentence differential operates. However, it may be widely believed that, in reality, early guilty pleas are likely to see a shorter sentence returned.

4.4 Cyprus

Cyprus is a common law system, although some of that common law has been codified in the form of 'Chapters.' Kapardis describes the sentencing system in Cyprus as being modelled on the sentencing system in England and Wales.¹⁴¹ Out of court disposals (such as fines) appear to be the most commonly imposed sanctions, with short prison sentences also very common. The Criminal Code imposes maximum sentences. As a member of the European Union, Cyprus is also bound by the Article 6 obligation in relation to the accused person's right to a fair trial.

Little has been published in English on sentencing in Cyprus, Greece, and other countries in the region. That which has been written in English has called for greater consistency of sentencing practices and more research into sentencing in the region.¹⁴² Santis recently completed a socio-legal thesis on judicial discretion and the role of mercy in a Cypriot context.¹⁴³ Although the defence agent does not have a formal role in sentencing, their importance is recognised by Santis. Summarising the view of judges interviewed in his study, he comments:

"Although they view the speech in mitigation as a most important facet of the sentencing process, they also express their dislike for it becoming an insincere and portentous endeavour. This, however, does not mean that the role of the defence advocate in the plea in mitigation cannot be creative in the sense of him becoming an 'author,' aiming to produce an empathic narrative on behalf of his client, analogous to a work of literature."¹⁴⁴

The main aims of sentencing have been set out by cases such as *AG v Vasiliotis alias Kaizer and Another*.¹⁴⁵ In sentencing, the court is required to take into account: (i) the intention of the legislator (ii) the facts of the case and (iii) the circumstances of the accused person including aggravating factors (such as premeditation) and mitigation, which includes, separately, remorse¹⁴⁶ and the

¹⁴¹ Kapardis, A., 2003. Sentencing in Cyprus: Structures, Penal Aims and Case Law, 34 *Rechtstheorie* 85 at 85. There is no Sentencing Council in Cyprus.

¹⁴² Oxford Centre for Criminology, 2017. *Sentencing form in Aegean States: An International Conference in Cyprus*. [Online] Available at: <<https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2017/11/sentencing-reform-aegean-states-international>> [Accessed 21 March 2019].

¹⁴³ Santis, N.G., 2010. *Judicial Punishment and Mercy in Cyprus*. PhD Thesis: University of Edinburgh.

¹⁴⁴ At p.227.

¹⁴⁵ [1967] 2 C.L.R. 20.

¹⁴⁶ *Politics v Police*, 1973 2 C.L.R 211.

immediate admission of guilt.¹⁴⁷ However, there is no formal system to implement the sentence differential. Any account taken of a guilty plea is at the discretion of the sentencing judge. Indeed, Kapardis notes that plea negotiation is not a feature of the Cypriot system at all.¹⁴⁸ Yet, in Santis' study, judges recognised that there might have been some out of court negotiation which had occurred between prosecution and defence,¹⁴⁹ suggesting some tension between the law in practice and in theory.

4.5 Canada

Sentencing structure in Canada is very similar to that adopted in England and Wales. Indeed, in his comparative study, Roberts comments that the common elements of the jurisdictions outweigh any differences by a considerable margin.¹⁵⁰ In keeping with such similarity, Scott notes that the majority of criminal cases are dealt with in Canada by way of a guilty plea.¹⁵¹ She discusses the increased acceptance and indeed encouragement of plea negotiation and joint submissions for sentencing which have occurred in Canada since 1995, against the historical background of disapproval and reluctance.

Ashworth and Roberts and have argued that, by contrast to England and Wales, the sentence differential in Canada is difficult to empirically verify, lacking guidelines and official recordings of the sentence reductions awarded by the courts.¹⁵² Perhaps somewhat improving certainty for persons accused of an offence is that following from *R v Anthony-Cook*,¹⁵³ it is now the position that judges should not deviate from 'joint submissions' - an agreement between the prosecution and the defence about the appropriate sentence achieved at a resolution meeting. Prior to the decision in *Anthony-Cook*, the Court of Appeal had confirmed that the final say in sentencing always lies with the judge.¹⁵⁴ In practice, at this time, the courts were reluctant to overturn sentences that had been jointly submitted.¹⁵⁵ The position in *Sinclair* was that there should only be a departure from the joint submission where there are "cogent" reasons for doing so. In *Anthony-Cook* this was further elucidated, with the court commenting that there should only be a departure

¹⁴⁷ Ahmad x. a. v. Aryoxportag [1993] 2 A.A.A. 35.

¹⁴⁸ At 95.

¹⁴⁹ P 209 s. 7.3.3

¹⁵⁰ Roberts, J.V., 2012. Structuring sentencing in Canada, England and Wales: A tale of two jurisdictions. *Criminal Law Forum*, 23(4), pp.319-345.

¹⁵¹ Scott, Z.L., 2018. An Inconvenient Bargain: The Ethical Implications of Plea Bargaining in Canada. 81 *Saskatchewan Law Review* 53. Scott disapproves of this development and in relation to sentence bargaining echoes concerns which have been raised elsewhere: that accused persons are incentivised to plead guilty and punished for exercising their right to trial (p.78).

¹⁵² Roberts J.V., and Ashworth, A., 2016. section III(E).

¹⁵³ *R v Anthony-Cook*, 2016 SSC 43.

¹⁵⁴ Section 606(1.1)(b)(iii) of the *Criminal Code of Canada*; *R v Thomas*, 2000 MCBA 148; *R v Sinclair* 2004 MCBA 48.

¹⁵⁵ *R v Divito*, 1990 CarswellMan 447 (WL Can) (CA).

from a joint submission in very limited circumstances such as where the sentence being submitted would be against public interest or the administration of justice itself.¹⁵⁶

More specifically, the Court of Appeal held that the trial judge had wrongly applied the 'fitness' test, which was a less stringent test than should have been applied. Instead, the 'public interest' test was the appropriate one when considering whether it was appropriate to deviate from the joint submission. Where it is expected that there will be a departure from the joint submission, it was previously advised that the court must advise that this is being considered and allow for justifications to be tendered in support of the position submitted.¹⁵⁷ Previously it had also been outlined that a guilty plea should not be accepted where the accused person maintains innocence.¹⁵⁸ In *Anthony-Cook*, the court offered a six-part test for judges to apply when considering departing from the joint submission: that the submission on an "as-is" basis;¹⁵⁹ that the public interest test is applied;¹⁶⁰ that the trial judge is able to make further enquiries;¹⁶¹ that an opportunity is provided for further submissions to the court to be made;¹⁶² that an opportunity is provided to withdraw the guilty plea,¹⁶³ and that clear and cogent reasons are provided for the ultimate decision.¹⁶⁴

The case led to considerable commentary, some of which has reflected on the fact that the case appears to be in keeping with the increasingly evident theme of 'efficiency,' which is also apparent in the recent case of *R v Jordan*¹⁶⁵ concerning undue delay within the courtroom.¹⁶⁶

4.6 Hong Kong

The landscape in Hong Kong is also comparable to that in England and Wales in relation to the sentence differential. Hong Kong offers defendants who opt to plead guilty a one-third 'discount' off a sentence of imprisonment or financial penalty. Cheng and Chui conducted a qualitative study of plea negotiation in Hong Kong. They describe the sentence differential as "inflexible" compared to other jurisdictions due to the fact that at the time of their writing the discount was given without

¹⁵⁶ *R v Anthony-Cook*, 2016 SSC 43.

¹⁵⁷ *R v Sinclair*, 2004 MCBA 48.

¹⁵⁸ *R v Dennis*, 2005 QCCA 1089.

¹⁵⁹ *R v Anthony-Cook*, 2016 SSC 43 at para 51.

¹⁶⁰ *R v Anthony-Cook*, para 52.

¹⁶¹ *R v Anthony-Cook*, paras 53-57.

¹⁶² *R v Anthony-Cook*, para 58.

¹⁶³ *R v Anthony-Cook*, para 59.

¹⁶⁴ *R v Anthony-Cook*, para 60.

¹⁶⁵ 2016 SSC 27.

¹⁶⁶ See Hunter Burns Law, 2017. *The New Law on Joint Submissions*. [Online] Available at: < <https://hunterburnslaw.com/the-new-law-on-joint-submissions/> > [Accessed 1 March 2019].

regard to the timing of the guilty plea,¹⁶⁷ nor the strength of the prosecution case is.¹⁶⁸ This position has recently changed.

In recent cases heard before the Court of Appeal,¹⁶⁹ it was decided to bring Hong Kong's practice concerning the sentence differential closer to that of England and Wales. The practice now to be adopted is that where a guilty plea is entered on the first day of the trial or thereafter, the appropriate discount to be given is 20 percent from the starting point¹⁷⁰ for sentence. Where guilty pleas are made during the trial, the discount offered should usually be less than 20 percent, but should depend on the individual circumstances. The Appeal Court referred to available statistics on the tendering of guilty pleas in their three courts (District, Magistracy, and Court of First Instance) noting that in 2015 in the Magistracy of 9,811 defendants whose trials were fixed upon their pleas of "not guilty", 3,657 defendants (32.27 percent) pleaded guilty to some or all of the charges brought against them at or after commencement of the trial.¹⁷¹

Under Hong Kong's *prosecution code*, the role of plea negotiations more generally is similarly formally recognised and regulated.¹⁷² Such negotiations are not to be accepted where the person accused of an offence maintains their innocence.¹⁷³ Where an agreement is made, the code stipulates that an agreement of a statement of facts which can be presented to the court should be provided.¹⁷⁴ Furthermore, the prosecutor is obliged, where appropriate, to consult with the main investigator in charge of the investigation and inform any victims of the reasons why such negotiations are considered appropriate, taking into account their views, where reasonable.¹⁷⁵

4.7 South Africa

Bekker notes that at the time of his writing, there was a "dearth" of empirical work on plea negotiation and negotiations in a South African context.¹⁷⁶ He highlights the 'official' position in relation to negotiation at that point: that no formal plea system exists, but informal plea and charge

¹⁶⁷ Cheng and Chui., 2014. p.401.

¹⁶⁸ Cheng and Chui., 2014. P.407.

¹⁶⁹ *HKSAR v. Ngo Van Nam*, CACC 418/2014 and *HKSAR v. Abdou Maikido Abdoukarim*, CACC 327/2015.

¹⁷⁰ The 'starting point' is taken to be the hypothetical sentence following conviction after a trial.

¹⁷¹ *HKSAR v. Ngo Van Nam*, CACC 418/2014 and *HKSAR v. Abdou Maikido Abdoukarim*, CACC 327/2015.

¹⁷² Department of Justice of the Hong Kong Special Administrative Region, 2018. *Prosecution Code*. [Online] Available at: <<https://www.doj.gov.hk/eng/public/pubsoppapcon.html#13>> [Accessed 28 February 2019]. Section 13.1.

¹⁷³ S. 13.4.

¹⁷⁴ S. 13.2.

¹⁷⁵ S. 13.4.

¹⁷⁶ Bekker, PM., 2001. American plea bargaining in statutory form in South Africa. *The Comparative and International Law Journal of South Africa*, 34(3), pp. 310-325.

negotiations take place between the defence and the prosecution. Kerscher echoes this view in his 2013 thesis, which compares plea negotiation in Germany to the position adopted in South Africa.¹⁷⁷

In 2001, section 105A was introduced into the Criminal Procedure Act 51 of 1997,¹⁷⁸ which permits negotiations between the prosecution and the accused person, including negotiations about sentencing.¹⁷⁹ Where such an agreement is submitted, no trial takes place.¹⁸⁰ The introduction of s.105A followed a report from the Law Reform Commission on sentencing agreements,¹⁸¹ and for Kercher, it resolved previous uncertainty about the legality of plea negotiation.¹⁸² Sentence differential percentages are not prescribed. Instead, the accused person tenders their guilty plea in exchange for the prosecutor proposing a lenient sentence to the court or recommendation of a specific sentence.

The agreement must be in writing, and the accused person must be represented legally. The agreement must take place prior to the guilty plea being tendered. The court has no input into the agreement but must be told of its existence. Furthermore, the court must be satisfied that the agreement is just. If not, it is open to them to pass their own sentence. Watney is of the view that the complainant's representations, and in particular any disagreement they feel over the agreement, may be a factor that the court takes into consideration when concluding about whether the agreement is 'just.'¹⁸³

A sentencing agreement can only be considered by the court once it is satisfied that the accused person admits the allegations in the charge in respect of the agreement which has been entered into.¹⁸⁴ To satisfy itself of this, the court may ask questions of the prosecutor, complainer and accused person, including those which pertain to previous convictions.¹⁸⁵ Du Toit points out that under this procedure, the court is in the position of considering the agreement made under s.105A

¹⁷⁷ Kerscher, M., 2013. *LLM Thesis: Plea Bargaining in South Africa and Germany*. Stellenbosch University. [PDF] Available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.847.5304&rep=rep1&type=PDF> [Accessed 1 March 2019]. See p.10 where he comments that South African statistics are rare.

¹⁷⁸ Inserted by s.2 of Act 62 2001.

¹⁷⁹ Although Kerscher notes that many prosecutors may not use the formal procedure, out of habit. See Kerscher, M., 2013. p.10.

¹⁸⁰ As such, Kerscher concludes that the terminology of 'pre-trial agreement' is not suitable for the South African context (at p.69) as per his understanding of pre-trial which is the stage before the prosecution files a charge against the person accused of an offence. In the current work, a broader definition of this terminology has been adopted, as evidenced in section 1.

¹⁸¹ South African Law Commission. 2001.Project 73.

¹⁸² Kerscher, M., 2013. p.36.

¹⁸³ Watney, M. 2006. Judicial scrutiny of plea and sentence agreements. *TSAR* 224.

¹⁸⁴ S.105A (7)(a)

¹⁸⁵ S.105A (7)(b)(i).

before the accused has been convicted.¹⁸⁶ The National Director of Public Prosecutions has now provided directives on the plea and sentence agreements in respect of section 105A(11) from 2010 onwards.¹⁸⁷

4.8 Australia

As a federation, Australia comprises of nine jurisdictions, six of which are individual states: New South Wales, Victoria, Queensland, Western Australia, South Australia, and Tasmania.¹⁸⁸ Western Australia is governed by the Sentencing Act 2017. Under this, a defendant may be offered a 'discount' of up to 40 percent if she or he enters a guilty plea within four weeks of their first court appearance.¹⁸⁹ The court has discretion in terms of determining the percentage by which the sentence will be reduced. Factors to inform this decision include: whether it is disproportionate to the seriousness of the offence or would "affect public confidence in the administration of justice;" the stage at which the guilty plea is tendered (and whether a guilty plea could have reasonably been tendered earlier); the original offence the defendant was charged with and whether plea negotiations have already taken place; in the situation of multiple offences being charged, whether a guilty plea has been tendered to all.¹⁹⁰

In New South Wales,¹⁹¹ the position in relation to the sentencing discount was historically recognised under common law.¹⁹² Under this common law, it was recognised that judges had discretion about offering a discount for a guilty plea and that the person accused of an offence could not be penalised for exercising their right to go to trial by pleading not guilty. In 2018, Part 3 Div 1A Crimes (Sentencing Procedure) Act 1999¹⁹³ replaced the common law position with statutory regulation and specifically two distinct positions depending on whether the offences pertain to proceedings commenced before or after April 2018 when the Act was incepted. Where

¹⁸⁶ Du Toit, E., De Jager, F.J., Paizes, A., Skeen, A.S., and Van Der Merwe, S.E., 2011. *Commentary on the Criminal Procedure Act*, Revision Service 46.

¹⁸⁷ National Prosecuting Authority of South Africa, 2010. *Directives issued in terms of section 105A(11) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977)*. [PDF] Available at: <<https://www.npa.gov.za/sites/default/files/Library/Plea-and-Sentence-Agreement-Directives-with-effect-from-2010-10-22.PDF>> [Accessed 1 March 2019].

¹⁸⁸ The remaining jurisdictions are the two Australian Territories within mainland Australia (Northern Australia and Australian Capital Territory). Australian Commonwealth Government is the final jurisdiction.

¹⁸⁹ Sections 39 and 40.

¹⁹⁰ Section 40(5)(a)-(f).

¹⁹¹ For a fuller account of the position in New South Wales see: Judicial Commission of New South Wales, 2018. *Sentencing Bench Book: Guilty Plea to be Taken into Account*. [Online] Available at: <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/guilty_plea.html#p11-504> [Accessed 12 March 2019].

¹⁹² See *Siganto v The Queen* (1998) 194 CLR 656 with the utilitarian benefit explicitly recognised in *R v Borkowski*, 2009 195.

¹⁹³ As amended by the Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017

the court accepts a guilty plea, it has a duty to ensure that the person accused of an offence adequately understands the charge he or she is pleading to.¹⁹⁴ The maximum discount offered under the new law is 25 percent and does not apply to a sentence of life imprisonment, those who were under 18 at the time of the offence (and under 21 at the time of proceedings) and Commonwealth offences. Interestingly, the offender bears the onus of proving that there are grounds for the sentencing discount to apply, and this must be proved to the balance of probabilities.¹⁹⁵ The court must indicate how the discount was calculated and any reasons for refusing to apply it.¹⁹⁶

A discount of 25 percent may be given if the plea is accepted in committal proceedings¹⁹⁷ and this will be reduced to a discount of ten percent if the guilty plea is tendered at least 14 days before the first day of trial¹⁹⁸ and five percent in any other case.¹⁹⁹

Guidelines on the guilty plea discount were set out in *R v Thomson and Houton*,²⁰⁰ where it was agreed that: the sentencer should explicitly state if a guilty plea has been taken into account; the effect of the plea should be quantified as much as is possible; the utilitarian value should be assessed within the range of the 10-25 percent discount; that in some instances this will change the nature of the sentence, but that in other cases, it will not.

In Victoria, the court is required to consider the submission of a guilty plea (and the stage at which it was tendered) when choosing a sentence. Where a guilty plea has been taken into account, the court must provide a specified sentence discount.²⁰¹ The same position is adopted in Queensland: the courts must take into account a guilty plea and the stage at which it has been tendered,²⁰² and a similar position is also adopted in Tasmania, although this has recently been the subject of review by their Sentencing Advisory Council.²⁰³

¹⁹⁴ S. 192(2) Criminal Procedure Act 1986.

¹⁹⁵ S.25F(5).

¹⁹⁶ S.25F(5).

¹⁹⁷ S.25D(2)(a).

¹⁹⁸ S.25D(2)(b).

¹⁹⁹ S.25D (2)(c).

²⁰⁰ (2009) 49 NSWLR 383.

²⁰¹ S.6AAA Sentencing Act 1991.

²⁰² Penalties and Sentencing Act 1992.

²⁰³ Sentencing Advisory Council, 2018. *Statutory Sentencing Reductions for Pleas of Guilty: Final Report No 10*. [PDF] Available at:

https://www.sentencingcouncil.tas.gov.au/_data/assets/PDF_file/0003/449553/Web-version-Sentencing-Discounts-Final-Report-October-2018.PDF > [Accessed 18 April 2019].

4.9 New Zealand

The purposes of sentencing in New Zealand are governed by the Sentencing Act 2002, which includes objectives and values reflective of the restorative justice practices long associated with the country. In terms of the factors which must be considered at sentencing, the Act stipulates that amongst other factors, the culpability of the offender and whether restorative justice measures have been engaged with must be taken into account. In terms of charge negotiation, current practices are informal - a fact which has been the subject of recent petitioning by New Zealanders.²⁰⁴ Changes to how trials are funded have seen the state increasingly incentivised to negotiate with the defence.²⁰⁵ Despite this, it would appear that sentencing and plea negotiation remains, in terms of the formal law, unregulated.

4.10 Nigeria

The Constitution of the Federal Republic of Nigeria 1991 does not refer to plea negotiation references or regulation, and for a long time, it was considered that there was no legal basis for such negotiation within the county. The only officially recognised reference to plea negotiation is in the Lagos State Administration of Criminal Justice Law 2007²⁰⁶ which provides the Attorney-General with the power to accept an agreement where it is deemed to be in the public interest.

For Mordi, the creation of the Economic and Financial Crimes Commission in 2004 “surreptitiously smuggled” the plea bargain into statutory laws.²⁰⁷ This allows agreement to be reached over the offence and sentence. Where there is a sentence agreement in place, it must be considered by the judge or magistrate whether the sentence is appropriate, whether they would have imposed a lesser or greater sentence than the one which has been proposed and whether the defendant has been informed about the potential for a greater sentence.²⁰⁸ The prosecutor and the defendant may not enter into a similar plea and sentence agreement.²⁰⁹ Where there has been an agreement reached between the prosecutor and the defence, the judge “signs in” to this agreement and is thereafter bound to follow it. Under this legislation, the practice of negotiation is required to be a

²⁰⁴ Report of the Justice Committee, 2017. *Petition 2014/91*. [Online] Available at: <https://www.parliament.nz/resource/en-NZ/SCR_76192/817b1a549eb62c0c2b9aa55a44d52fc8289b61ee> [Accessed 8 March 2019].

²⁰⁵ Garrett, D., 2018. Plea bargaining in New Zealand - a primer. [Online] Available at: <https://www.kiwiblog.co.nz/2016/05/guest_post_david_garrett_-_plea_bargaining_in_new_zealand_a_primer.html> [Accessed 8 March 2019].

²⁰⁶ Section 75.

²⁰⁷ Mordi, C.A., 2018. The Use of Plea Bargain in Nigerian Criminal Law, 9(2) *Beijing Law Review* 153 at 153.

²⁰⁸ Criminal Justice Law 2011 s.76(8).

²⁰⁹ Criminal Justice Law 2011 s.76(10)(c).

voluntary practice, with the defendant and their lawyers being under no obligation to come to an agreement with the prosecution.²¹⁰

Whilst recognising the EFCC Act, Agedbite refers to a recent decision by the Court of Appeal,²¹¹ to support his view that plea negotiation cannot be justified under the EFCC Act or the similar Criminal Procedure Act section 14 (which relates to charge negotiation specifically).²¹²

There continues to be limited legal authority on the practices which take place within the country, although the advantages of pre-trial negotiation have been explicitly recognised.²¹³ Adetomiwa argues that Nigeria is not yet in a position to practice such negotiations due to the widespread nature of corruption. Adetomiwa notes that to do so may “endanger the growth of our young democratic system.”²¹⁴ Using a series of recent examples, Mordi draws a link between the rise of economic and financial crimes in Nigeria and the rise in plea bargains taking place whilst also discussing the role that mediation has traditionally had (and continues to have) in Nigerian dispute resolution.²¹⁵ Agedbite also recognises the link between plea negotiation practices and financial crime, noting that often part of the agreement is for the defendant to return some of the money which has been the subject of the person accused of an offence's financial gain and referring to the colloquial “celebrity juice” terminology which has been associated with such agreements.²¹⁶

4.11 India

Plea negotiation was formally introduced in India through the Criminal Procedure (Amendment) Act 2005, which amended the existing Code of Criminal Procedure. Chapter XXIA regulates plea negotiation over 12 sections. This comes against the historical backdrop of disapproval of such negotiation practices.²¹⁷ The High Court identified the rationale of efficiency in *State v Gurajat v Natwar Harchanji Thakor*.²¹⁸ The Law Commission's 154th Report formally recommended plea negotiation be adopted in India as a way to address the high number of pending criminal cases.²¹⁹

²¹⁰ Mordi, C.A., 2018. The Use of Plea Bargain in Nigerian Criminal Law, 9(2) *Beijing Law Review* 153.

²¹¹ *Federal Republic of Nigeria v Lucky Igbinedion*, 2014 LPELR-22760 (CA).

²¹² Adebite, K., 2019. *Plea Bargaining in Nigeria: Any legal foundation?* Available at: <<https://www.thelawyerschronicle.com/plea-bargaining-in-nigeria-any-legal-foundation/>> [Accessed 8 March 2019].

²¹³ *Federal Republic of Nigeria v Lucky Igbinedion*, 2014 LPELR-22760 (CA).

²¹⁴ Adetomiwa, B., 2018. *The Concept of Plea Bargaining in Nigeria*, Available at: <<http://www.mondaq.com/Nigeria/x/753394/Crime/The+Concept+of+Plea+Bargaining+in+Nigeria>> [Accessed 8 March 2019].

²¹⁵ Mordi, C.A., 2018.

²¹⁶ Adebite, K., 2019.

²¹⁷ See *State of Uttar Pradesh v Chandrika* 2000 Cr.L.J 384 (386)

²¹⁸ 2005 Cr.L.J 2957.

²¹⁹ Law Commission of India, 1996. *One Hundred and Fifty Fourth Report on The Code of criminal Procedure, 1973 (Act No.2 of 1974)*. [Online] Available at:

The Malimath Committee further pointed to the benefits which could be gained by adopting efficiency measures such as negotiation into the Indian system.

The negotiating itself includes charge negotiation, fact negotiation and sentence negotiation. An agreement struck, including that over sentencing, must be voluntary. It can only be applied to offences where the punishment is less than seven years, and the practice excludes those offences carried out against women and children under the age of 14 and those which impact the socio-economic position of the country. The defendant should be advised in advance of their sentence before tendering a guilty plea. The first example of this type of negotiation took place in the case of banker *Sakha-ram Bandekar*, who confessed to embezzlement from the Reserve Bank of India, although the court rejected Bandekar's plea.²²⁰

Under section 265C, the court must notify both the public prosecutor and the victim of any agreement which is taking place. 265E pertains to the disposal of the case. Proceeding under section 265D must be completed, which includes preparation of a report (signed) relating to the punishment of the defendant. The court can provide the minimum punishment, or if a minimum is not provided, they can pass one-fourth of the punishment for the offence.

4.12 Conclusion

Chapter Four has provided a brief overview of different jurisdictions. The general trend is that most jurisdictions implement, either formally or informally, some plea-dependent sentence differential. However, there is no single and inevitable way for the sentence differential to operate. Instead, there is a myriad of ways that the sentence differential operates around the world. In some jurisdictions, these practices are left to develop from the bottom-up. In other jurisdictions, policymakers have sought (though not always successfully) to purposely create or reform the sentence differential to achieve desired ends.

<https://www.scribd.com/document/317586434/Law-Commission-Report-No-154-The-Code-of-Criminal-Procedure-1973-Act-No-2-of-1974-Vol-I#from_embed> [Accessed 12 March 2019].

²²⁰ See Times of India, 2007. *First Plea Bargaining Case in City*. [Online] Available at: <<https://timesofindia.indiatimes.com/city/mumbai/First-plea-bargaining-case-in-city/articleshow/2458523.cms>> [Accessed 12 March 2019].

5.0 Sentencing and Plea-Decision-Making: Empirical Evidence

5.1 Introduction

This section examines empirical information concerning the sentence differential and its operation. First, the section explores research regarding the potential effects of the sentence differential on public confidence. While public opinion is not always founded on accurate information, public confidence in the justice system is vital in several regards. Secondly, this section explores what empirical data exists concerning the size of the sentence differential. Robust empirical information is important to inform debates on the sentence differential.

5.2 Public Confidence

Public confidence is an important consideration that is related to a criminal justice system's perceived legitimacy. As such, it is worth considering carefully whether sentence discounting might adversely affect public opinion. However, public opinion is not simple to gauge:

“It is hard to derive valid and reliable measures of the degree to which sentencing practice is in step with public opinion. It involves comparison of hundreds of thousands of individual sentencing decisions with the opinions of people who are likely to be neither well informed about sentencing, nor to have thought about the issues in any depth. The most basic approach - and the least informative - is to ask samples of the population if they think that court practice is adequate. This has been done in many jurisdictions, and the consistent response is that large majorities think that sentencing is too lenient.”²²¹

Thus, while securing public confidence is important, assessing public confidence is difficult. There is a risk that if policy and practice are guided by limited assessments of lay opinions that this can lead to penal populism.²²² Indeed, it has been argued that the historical strength of Scottish criminal justice is that it better resisted penal populist trends than England and Wales.²²³ Consequently, it may be that:

²²¹ Hough, M., and Kirby, A., 2013. *The Role of Public Opinion in Formulating Sentencing Guidelines*. In (Ed.), *Sentencing Guidelines: Exploring the English Model*: Oxford University Press, pp.140-156. p.147.

²²² See Hough, M., 2002. Populism and punitive penal policy. *Criminal Justice Matters*, 49 (1), pp.4-5.

²²³ McNeill, F., 2011. *Determined to Punish? Scotland's choice*. In G. Hassan and R. Ilet (eds) *Radical Scotland: Arguments for self-determination*, Edinburgh: Luath Press: 128-142.

“There should be a degree of alignment between sentencing practice and public opinion, but that the aim should be to secure public tolerance of court practice, rather than a close coupling of sentencing practice to public opinion.”²²⁴

While information specific to Scotland is limited, in England and Wales figures suggest that the public generally believes that guilty pleas are considered during sentencing.²²⁵ However, the sentence differential is a contentious matter as far as public opinion is concerned. In *Gemmell v HMA* it was noted that:

“The allowance of substantial discounts may cause the sentencing decisions of the criminal courts to lose credibility and in this way may erode the authority of the courts generally.”²²⁶

In reaching this conclusion, *Gemmell* drew on research by Clarke et al and noted that:

“The problem with the policy of sentence discounting was seen in three different ways: a lack of equivalence if the offender received a reduced sentence for pleading guilty in relation to the severity of the crime and the effect on the victim; a perception that the principle is concerned with saving court time and costs, and prison costs, rather than sparing the victim from an ordeal; and a perception that an accused would use the sentence discount principle as an opportunity to play the system.”²²⁷

The court also drew on the work of Darbyshire in articulating its concern that the sentence differential could lead to a visible injustice if co-accused receive vastly different sentences for the same offence. These concerns formed part of the basis for Lord Gill’s opinion that “the court’s discretion to allow a discount should be exercised sparingly and only for convincing reasons.”²²⁸

In its consultation for the 2017 guidelines regarding the sentence differential, the English and Welsh Sentencing Council did not seek views on sentence discounting generally.²²⁹ Thus, the consultation provided limited opportunity to examine public opinion. However, there is evidence

²²⁴ Hough, M., and Kirby A., 2013. p.140.

²²⁵ Office for National Statistics, 2018. *Crime Survey England and Wales (CSEW) perceptions of the Criminal Justice System and the sentencing process, selected years and periods from the year ending March 2013 to the year ending September 2017*. [XLS] Available at <<https://goo.gl/Dqwnvf>> [Accessed 7 March 2019].

²²⁶ *Gemmell v HMA*, para 74.

²²⁷ *Gemmell v HMA*, para 75.

²²⁸ *Gemmell v HMA*, para 77.

²²⁹ Sentencing Council of England and Wales, 2016. *Reduction in Sentence for a guilty plea Guideline Consultation*. [PDF] Available at: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-sentence-for-a-guilty-plea-consultation-paper-web.PDF>> [Accessed 7 March 2019].

that public opinion is not generally in favour of ‘reductions’ or ‘discounts.’²³⁰ Firstly, proposals in England and Wales for discounts of up to 50% “were swiftly abandoned by the coalition Government for precisely this [public opinion] reason.”²³¹ Secondly, there is research regarding public opinion and the sentence differential by Dawes et al. This research included quantitative face-to-face surveys and qualitative discussion groups with the general public. Dawes et al found that:

“The public were generally unaware of the nuances of the guilty plea reductions principle and initially tended to be generally unsupportive of reductions in sentencing for those entering a guilty plea.”²³²

Dawes et al partly linked the public’s disinclination towards sentence ‘discounting’ to the limitations of the efficiency rationale:

“The public assume that the key motivation for the guilty plea sentence reduction is to reduce resources (time and money), but they prefer the idea of it as something which helps prevent victims having to give evidence and experiencing emotional trauma whilst doing this. There is a strong sense that the drive for cost savings should not impact on a system effectively delivering justice.”²³³

These findings would suggest that the notion of a sentence ‘discount’ or ‘reduction’ is problematic for the public. Indeed, Dawes et al found that the public may have been more in favour of a trial tax:

“The language and discourse of the reductions did not sit well with people. They were very resistant to the idea of an offender being ‘rewarded’ for admitting they were guilty of an offence; rather they spontaneously suggested that defendants should be further penalised for not admitting guilt if they are subsequently found guilty.”²³⁴

This finding chimes with research conducted in Scotland:

²³⁰ As will be noted, there was limited support for the sentence differential when it was viewed as increasing a sentence.

²³¹ Leverick, F., 2013. p.260.

²³² Dawes et al, 2011. p.1.

²³³ Dawes et al, 2011. p.4.

²³⁴ Dawes et al, 2011. p.2.

“There was strong opposition to sentence discounting in the public focus groups; indeed, they preferred the approach of an increased sentence for anyone pleading guilty late in the day.”²³⁵

However, as highlighted above, gauging public opinion is a difficult task. It is crucial to note that, in part, negative public attitudes concerning the sentence differential may have been influenced by a general perception of sentencing as unduly lenient. This perception of sentencing as unduly lenient might contribute to an aversion to any further perceived leniency. These negative views of sentencing as too lenient are reflected in several sources such as ONS statistics.²³⁶

Figures such as those from the ONS might be taken to suggest that the courts should increase sentence severity. However, such a conclusion would appear to be premature. Instead, the issue is that the general public is typically uninformed (or misinformed) about sentencing practice. Limited public knowledge concerning sentencing is problematic because it tends to correlate with ill-founded negative perceptions of sentencing:

“People are misinformed about the extent to which the courts use custody, and their perspectives on sentencing are shaped by the mistaken belief that the courts are lenient. Any attempt to accommodate public opinion on sentencing principles will achieve little until these misperceptions about current practice are addressed.”²³⁷

A poorly informed public poses many difficulties. As the issue is mostly an information deficit, more severe sentences (or fewer ‘discounts’) are unlikely to improve public confidence. Indeed, research suggests that when the public is more informed that “the overall tendency was clearly to leniency.”²³⁸ Moreover, Ellis and Wilson’s research also suggested that that respondents’ confidence in the fairness of sentences could improve when interviewees were better informed.²³⁹

Consequently, the challenge criminal justice systems face is not to increase sentence severity on the false premise that the public desire this. Indeed, there is a tenuous link between actual

²³⁵ Scottish Government, 2003. *Modernising Justice in Scotland: The reform of the High Court of Justiciary*. [PDF] Available at: <<https://www2.gov.scot/Resource/Doc/47102/0025117.PDF>> [Accessed 7 March 2019]. p.26, para 105.

²³⁶ Office for National Statistics, 2018. Table 1 (“Perceptions of adults aged 16 and over who feel sentences passed by the courts are tough or lenient, year ending March 2013 to year ending March 2017, CSEW”); Table 2 (Perceptions of the Criminal Justice System (CJS), year ending March 2013 to year ending March 2017, CSEW).

²³⁷ Hough, M., Roberts, J.V., and Moon, N., 2009. Public attitudes to sentencing purposes and sentencing factors: An empirical analysis. *Criminal Law Review*, (11), pp.771-782. pp.ix-x. See also White R. and Perrone S., 2015. *Crime, Criminality and Criminal Justice, 2nd ed.* Oxford University Press, Australia. ISBN 9780195520125, p.498.

²³⁸ Lovegrove, A., 2013. p.213.

²³⁹ Wilson P., and Ellis, R., 2013. p.21.

sentence severity and perceived severity. Instead, the challenge appears to lie in communicating actual sentencing practice to the public more accurately. The sentence differential, especially if presented as a matter of ‘discounting,’ may be particularly unpopular among the public for two key reasons. Firstly, sentence ‘discounting’ for efficiency reasons is felt to be less desirable than alterations to the sentence intended to spare victims or reflect remorse. Secondly, in light of limited public understanding, sentence discounting may be unpopular if it is perceived to benefit offenders already believed to have benefited from lenient sentences.

5.3 Official Data

In Scotland, there is a statutory requirement that judges state whether they have taken account of a guilty plea in sentencing and its effect on the sentence. There is also a requirement that courts record the stated sentence differentials. For example, Practice Note 1 of 2008 requires that the court record the size of the ‘discount’ in a form such as:

“The sentence imposed was discounted in terms of section 196 of the Criminal Procedure (Scotland) Act 1995 and would otherwise have been X.”²⁴⁰

However, despite this requirement on the court to record the stated effect of a plea on sentences, official data is unable to provide significant insight into routine sentencing practices. Indeed, Chalmers has noted the unexpected difficulty of relying on official datasets:

“Statistics on guilty pleas and trial outcomes are surprisingly difficult to obtain. The regular statistical bulletin, Criminal Proceedings in Scottish Courts, includes figures for the number of persons convicted, but that consists of both those who plead guilty and those who are found guilty after trial. Data published by the Crown Office do identify the proportion of cases which go to trial but do not give the outcome of those trials.”²⁴¹

Datasets held by various institutions, which are not publicly accessible, are also limited due to what is recorded and how it is recorded.²⁴² For instance, some institutions record data based on a ‘principal offence’ which limits the ability to reflect cases with multiple offences. Other institutions record data on a charge level basis meaning that any data extracted cannot show whether periods

²⁴⁰ Lord Justice General, 2008. *Criminal Courts Practice Note (No.1): Recording of Sentencing Discount*. [PDF] Available at: <https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/pn01_2008.PDF?sfvrsn=14> [Accessed 7 March 2019].

²⁴¹ Chalmers, J., 2006. *Supplementary written submission. For Justice 1 Committee on Criminal Proceedings etc. (Reform) (Scotland) Bill*. [PDF] Available at: <http://archive.scottish.parliament.uk/business/committees/justice1/inquiries/crimProc/CrimProc_44_JamesChalmersRF.PDF> [Accessed 21 February 2019].

²⁴² For example, while previous convictions may be important at sentencing, these will not be reflected in some datasets.

of imprisonment run concurrently with others or form part of a cumulative sentence.²⁴³ Moreover, this literature review also reveals that no research in Scotland has explicitly focused on the sentence differential. The best research that statistically examined the sentence differential in Scotland pre-dates section 196 and relevant case law. This research was a by-product of a study comparing the work of publicly-employed defence solicitors with their legally-aided counterparts in private firms.²⁴⁴ That research showed that, except for sexual offence cases, there did not appear to be an overall statistically significant sentencing difference between otherwise similar cases caused by the type of plea.²⁴⁵ However, this was not a dedicated study of the sentence differential and, as we saw earlier, the tone of the law is, arguably, now warmer towards sentence differentials than it was in the *Strawhorn v McLeod* era. Consequently, there is little contemporaneous research about the empirical extent of the sentence differential in Scotland.

Some have contrasted the limited data available in Scotland with that of England and Wales. For example, Roberts and Ashworth argue that:

“Greater clarity exists in England and Wales as a result of three significant developments. First, as noted, the individual guidelines themselves provide a relatively clear indication of the sentence ranges that may be imposed for specific offenses. Second, a generic guideline applicable across all offenses identifies specific levels of reduction that should be awarded to reflect a guilty plea. Third, the CCSS [Crown Court Sentencing Survey] makes it possible to determine the extent to which the guidelines are actually followed in practice.”²⁴⁶

Of course, the first two features (guidelines) cannot provide evidence of the normal reality in the courts. Guidelines may be followed to a greater or lesser extent. However, one feature that is argued to contribute to the greater clarity in England and Wales is the use of the Crown Court Sentencing Survey (CCSS) whereby:

²⁴³ For example, if a person is convicted of two charges and is given 2 years imprisonment on charge one and 2 years imprisonment on charge two, the data cannot show whether the sentence length was 4 years or if it was 2 years.

²⁴⁴ Goriely, T., Duff, P., Henry, A., Knapp, M., McCrone, P., & Tata, C., 2001. *The Public Defence Solicitors' Office in Edinburgh: An Independent Evaluation*. Edinburgh: Scottish Executive. [PDF] Available at: https://www.webarchive.org.uk/wayback/archive/20180516003755mp_/http://www.gov.scot/Resource/Doc/156742/0042137.PDF > [Accessed 7 March 2019].

²⁴⁵ Goriely et al, 2007; see also Tata, C., Goriely, T., McCrone, P., Duff, P., Henry, A., Knapp, M., Sherr, A., and Lancaster, B., 2004. Does mode of delivery make a difference to criminal case outcomes and clients' satisfaction? The public defence solicitor experiment. *Criminal Law Review* - London, 2004. pp.120-136.

²⁴⁶ Roberts, J.V., and Ashworth, A., 2016. section III(E).

“The [Sentencing] Council collected data on the timings and levels of guilty pleas using the Crown Court Sentencing Survey, which ran from 1 October 2010 to 31 March 2015.”²⁴⁷

The CCSS aimed to provide the Sentencing Council of England and Wales with data that could assist in creating and monitoring the use and effect of guidelines. In terms of operation:

“The paper-based survey was completed by the sentencing judge (or other sentencer) passing sentence in the Crown Court. It collected information on the factors taken into account by the judge in working out the appropriate sentence for an offender and the final sentence given. It was designed to assist the Sentencing Council with fulfilling its duties under section 128 of the Coroners and Justice Act 2009.”²⁴⁸

Several analyses have made use of the CCSS data.²⁴⁹ Certainly, the CCSS has provided a source of data in England and Wales that is not available in Scotland. For example, in 2013, the survey showed that:

“90 per cent of offenders sentenced at the Crown Court pleaded guilty to the offence. Most frequently, where a guilty plea was made, the plea was entered at an early stage of the proceedings, with 81 per cent of offenders pleading guilty either before or at the Plea and Case Management Hearing (PCMH). Where a plea was entered at this stage, 76 per cent were granted the highest level of reduction. A further 20 per cent were granted a reduction of between 21 and 32 percent; and 4 per cent were granted a reduction of 20 per cent or less.”²⁵⁰

Equivalent information to this is not available in Scotland. However, notwithstanding its advantages, the CCSS was not a panacea to resolve the issue of limited sentencing data. For

²⁴⁷ Sentencing Council of England and Wales, 2016. p.5.

²⁴⁸ Sentencing Council of England and Wales, 2019. *Crown Court Sentencing Survey*. [Online] Available at <<https://www.sentencingcouncil.org.uk/analysis-and-research/crown-court-sentencing-survey/>> [Accessed 7 March 2019].

²⁴⁹ For example, Roberts, J.V. and Bradford, B., 2015. Sentence reductions for a guilty plea in England and Wales: Exploring new empirical trends. *Journal of Empirical Legal Studies*, 12(2), pp.187-210; and Pina-Sanchez, J., 2013. *An Empirical Analysis of the Determinants of guilty plea Discount*. Report. Cathie Marsh Centre for Census and Survey Research (CCSR), Manchester. [PDF] Available through: <http://hummedia.manchester.ac.uk/institutes/cmist/archive-publications/reports/2013-04-Guilty_Plea_Report.PDF> [Accessed 7 March 2019].

²⁵⁰ Sentencing Council of England and Wales, 2015c. *Crown Court Sentencing Survey Annual Publication January to December 2013 England and Wales*. [PDF] Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/418508/cccs-annual-2013.PDF> p.5.

example, in 2013, the national response rate was about 60%, and in some Crown Courts, it was as low as 8%.²⁵¹ As such, it is worth noting that the CCSS is no longer in use:

“Following an external review, the survey was ended on 31 March 2015. In its place, the Council plans to conduct bespoke data collections in both the Crown Court and magistrates’ courts to inform the development of specific guidelines.”²⁵²

Consequently, while it does appear that there has been more information available concerning England and Wales than Scotland, it should be noted that there are still limitations. For example, despite Roberts and Ashworth noting that greater certainty exists in England and Wales,²⁵³ Dawes et al found that:

“Many [defendants] stated that it was not always clear how the guilty plea had been taken into account... this meant that some offenders were unsure about whether or not to plead guilty as they could not be sure by how much the sentence would be reduced.”²⁵⁴

Thus, despite the existence of guidelines and the CCSS, Dawes et al suggest limitations to the state of knowledge about the sentence starting point prior to any “reduction” in England and Wales. These limitations may affect the evidence base for future policy making and the likelihood that defendants will plead guilty early due to the sentence differential. Consequently, it may be that in the future the CCSS will be one useful resource for those aiming to understand the reality of the sentence differential better.

5.4 Conclusion

This chapter has provided an overview of what is known about the sentence differential and its effects in the real world. It noted the potentially detrimental effects that the sentence differential may have on public confidence. However, it was also seen that public opinion might not be based on accurate information. As such, the key challenge may be communicating with the public rather than reforming current practice. However, the ability to do so is hampered by the lack of high-quality information about the everyday reality of sentencing practices for different kinds of cases in Scotland. Existing information on current practices regarding the sentence differential is limited. These limitations are not unique to Scotland, and other jurisdictions have grappled with them.

²⁵¹ Sentencing Council of England and Wales, 2015c, p.3.

²⁵² Sentencing Council of England and Wales, 2019.

²⁵³ Roberts, J.V., and Ashworth, A., 2016. section III(E).

²⁵⁴ Dawes et al, 2011. p.22.

6.0 Key Gaps in Knowledge about Sentencing and Plea Decision-Making

Any analysis of the sentence differential should be cognisant that there are three key factors likely to affect the operation of the sentence differential (and early guilty pleas) of which we know relatively little.

First and foremost, we know remarkably little about lay perspectives of the sentence differential in Scotland – particularly those of the accused person. We need to know how accused persons decide how to plead. Do they base their decisions on rational criteria? Are their decisions based upon certain beliefs and assumptions regarding the justice system? Does the sentence differential stemming from section 196 factor into their decision making in any significant fashion? Despite these questions being fundamental to the sentence differential's ability (or lack thereof) to encourage early guilty pleas, little is known about how accused persons understand, interpret, and ascribe meaning to the criminal process. Most policy development in this area has relied on what professionals believe about how accused persons think, react, and make sense of their world. While legal professionals can offer valuable insight, it cannot be assumed to be a perfect and unmediated representation of the perceptions and experiences of accused persons.

Second, if a clear sentence differential is thought to encourage early guilty pleas,²⁵⁵ then it is problematic that there is no usable, high-quality empirical data which might clarify the operation of the sentence differential. Information is needed from which we can better understand the operation of the sentence differential. As noted in section 5.3, available data is severely limited in its ability meaningfully to reflect cases and sentencing practice accurately. Indeed, there is a risk that the limited data currently available in Scotland might give a misleading impression of sentencing practice and the work of the courts. This lack of usable and high-quality empirical data poses many challenges for policymakers and for informing those accused persons. Moreover, the lack of empirical data is also problematic in terms of public confidence. As noted in section 5.2, poorly informed public opinions on sentencing may give rise to cynicism about sentencing – such as a mistaken belief that sentencing is unduly lenient or unprincipled. To rebut such false premises, one requirement would seem to be the presentation of high-quality empirical data on sentencing and the sentence differential. In the absence of this data, the intricate work undertaken in sentencing appears to go underappreciated. Furthermore, without that high-quality data about normal sentencing practices, policy development is rendered more difficult.

²⁵⁵ The Summary Justice Review Committee, 2004. *Report to Ministers*. [PDF] Available at <<https://www2.gov.scot/Publications/2004/03/19042/34216>> [Accessed 7 March 2019]. paragraph 14.12.

Thirdly, and related to the two previous points, more needs to be known and understood about the influence of the sentence differential on early guilty pleas and efficiency. We need to know more about the effects of the sentence differential on plea decision-making and early guilty pleas. It is assumed that a sentence differential will encourage early guilty pleas. However, there is no evidence concerning how the sentence differential affects pleading decisions. Might it be that the odds of conviction rather than potential sentence severity influence pleading decisions? Might accused persons believe that delaying a guilty plea leads to a tactical advantage that is reflected in the sentence? Might the effect of the sentence differential be perceived to be negligible, especially in summary cases (which constitute about 94% of convictions in the courts)²⁵⁶ where the sentences are generally lower? Without information on the effect of the sentence differential, it is impossible thoroughly to evaluate its impact or its merit in terms of efficiency. Thus, at the moment, the efficiency rationale underpinning the sentence differential is based on various assumptions and educated guesses, which may or may not be correct, rather than a solid evidence base.

²⁵⁶ Scottish Government, 2019. *Criminal proceedings in Scotland 2017-2018*. [Online] Available at <<https://www.gov.scot/publications/criminal-proceedings-scotland-2017-18/pages/4/>> [Accessed 20 March 2019]. Chart 4.

Scottish Sentencing Council
Parliament House
Parliament Square
Edinburgh
EH1 1RQ

sentencingcouncil@scotcourts.gov.uk
www.scottishsentencingcouncil.org.uk

© Crown copyright 2020
ISBN: 978-1-912442-22-5