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**REDUCTION IN SENTENCE FOR A GUILTY PLEA GUIDELINE CONSULTATION**

Office of the Sentencing Council

April 2016

**May 2016**

**Introduction**

The Birmingham Law Society is the largest provincial local law society with a membership of some 4,500 representing solicitors, barristers and paralegals working in the West Midlands area.  The Society is responding to the consultation relating to proposals for amendment to the guideline for reductions in sentence for a guilty plea.

**Responses to the specific questions posed in section 3**

***1(a) Is the rationale in the key principles section set out clearly?***

Yes, we agree that the rationale is set out clearly as enumerated in the key principles.

***1(b) Do you agree with the stated purposes of operating a reduction for guilty plea scheme?***

Yes.

***1(c) Do you agree that the guideline does not erode the principle that it is for the prosecution to prove the case?***

We do not agree.  Simply stating in the guideline that it should not impact on the burden resting on the prosecution to prove the case is insufficient in itself to provide the safeguard intended.

All parties to criminal proceeding are under increasing pressure, brought to bear as the result of cuts to public funding arising from broader austerity measures.  The focus of those investigating, prosecuting and managing cases has increasingly been brought to bear on identifying cases that will be contested and reducing them in number.  Robust case management aims to identify guilty pleas at the earliest occasion.  Those advising defendants are duty bound to advise of the existence in reduction for guilty plea at an ever earlier stage.  Initially a reduction was uniformly given at a plea and case management hearing, in many areas irrespective of what had come before that stage.

Early Guilty Plea Hearings introduced a mechanism to identify likely guilty pleas before service of the prosecution case.  Further changes have resulted in ever more abbreviated service of the prosecution case, such that in some cases a summary prepared by the investigating officer replaces service of evidence, whether in the form of witness statements or exhibits.  The parties are reliant on the accuracy and sufficiency of that summary.  There have been many instances where the evidence served at this stage is not sufficient to advise the defendant.  There have also been many instances where an officer’s summary or interpretation of key evidence is incorrect.  There are also many occasions when a guilty plea can be identified but the basis of that plea is not capable of resolution.

The system works well on most occasions in relation to simple cases but falls down in any case involving complexity.  For instance, cases involving theft in breach of trust or fraud where the quantum of the case is in issue.  Defendants need to know precisely what they are pleading guilty to.  Judges need sufficient information to be able to identify the aggravating, mitigating features and where a case should be positioned with reference to the sentencing guidelines.  Advisers are not able to provide concrete advice on sentence where the information served is abbreviated.  This commonly arises in cases involving the making or possession of indecent child images.  An increasing number of cases reach the Crown Court without a schedule of sample image content or proper breakdown of the classes of image.

The defence can only assist with early identification of guilty pleas (and the pertinent issues in contested cases) when they are supplied with suitable disclosure.  Each new measure introduced in recent years has eroded the quality of material served.  The impact upon early guilty pleas of sound advice to the defendant from his lawyer should not be underestimated.  The mantra “the defendant knows if he is guilty” does not take any account of the reality of the situation in respect of a very significant number of defendants who have limited understanding and appreciation of what constitutes evidence against them.  Guilty pleas at an early stage are as likely to arise (and probably more so) as a result of robust and forthright advice to the defendant as the defendant volunteering his guilt.  The provision of advice in such terms is necessarily hampered by any lack of information about the prosecution case.  As a consequence, many more defendants would enter not guilty pleas at the first hearings only then to be given the advice that they should have had at that first hearing.  Whilst this may entail guilty pleas being entered at the later stage (and before the day of trial) the suggested reduction is unlikely to act as the incentive that it is currently.  This point is also particularly relevant to 4b.

We remain concerned that the increasing pressure to indicate guilty pleas at ever earlier stages in the process runs the risk of pleas of convenience being entered, which do not reflect the true guilt of the defendant.  It is too often heard in our courts that “the defendant knows if he is guilty” at a stage when the defendant’s adviser may be seized of insufficient evidence to judge whether a plea of convenience is being entered.  It is not an uncommon experience to review a case which was described as strong in the case summary to find that claims for evidence are not reflected in the served material.  Similarly, it is not uncommon to find that purported ‘admissions in interview’ are nothing of the sort.  There are occasions when a practitioner can only discharge their duty to provide concrete advice on the evidence when the prosecution case has been served.

The cost savings and other benefits of Transforming Summary Justice, Criminal Justice Simple Speedy Summary and Better Case Management are apparent when simple cases are identified early and removed from the pool of contested cases.  However, many of the changes made to the process of cases before the courts have resulted in delays before the point of charge.  An increasing number of defendants face long periods bailed to return awaiting decisions on charge.  The Home Office consulted on the proposal to limit the police power to bail to return, other than in exceptional cases, to twenty-eight days but those proposals have not been enacted.  The desire for robust management, early service of evidence and plea at the first appearance has resulted in many of the delays in the court system of old being replicated for defendants in the investigation stage.

By way of example a defendant in a recent case heard in West Mercia made admissions on the day of his arrest.  He assisted the officers by identifying computer equipment which would yield indecent images of children.  He spent a protracted period subject to bail with stringent conditions in excess of those ultimately found to be appropriate within the terms of a Sexual Harm Prevention Order.  A period of nine months passed from the date of his admissions to the date of sentence.  The case may on the face of it have appeared to indicate the success of improving efficiency in the court process, there being a single hearing at the magistrates’ court and single hearing at the Crown Court.  That analysis, however, belies the reality of the case and ignores the impact upon the defendant.  The position is not uncommon and becomes significantly exacerbated when young witnesses and complainants in serious violent and sexual offences spend prolonged periods waiting for charging decisions.

***1(d) Do you agree that factors such as admissions in the pre-court process should be taken into account as mitigating factors before the application of the reduction for a guilty plea?***

Yes.  However, the greatest impact upon a defendant’s decision to admit matters during the investigation stage is the level of information disclosed by the investigating officers.  If the police persist in withholding information from advisers, they will remain duty bound to advise their clients to reserve their right to silence until such time as the solicitor has sufficient material on which to advise.

It places the solicitor attending the detained person in an invidious position to be obliged to turn their focus to the credit achievable for admissions made in interview before a sensible provisional assessment can be made of the prosecution case.  The funding of advice at the investigation stage provides for limited advice and assistance to a detainee in person but makes no provision for any form of attendance or investigation outside of that attendance before charge.  The funding regime creates a disincentive to solicitors to become fully engaged in preparation before a defendant is charged.

***2 Do you agree with the approach taken in the draft guideline to overwhelming evidence, i.e. that the reduction of a guilty plea should not be withheld in cases of overwhelming evidence?***

We agree with the draft guideline.  We agree that the disadvantages of the proposed alternative outweigh the benefits.  We welcome the proposed amendment to the guideline.  We agree that victims and witnesses derive the same benefits in the early resolution of cases involving overwhelming evidence.  We also point out that the increasing limits on service of evidence at the early stage of proceedings can create a situation in which it may not be clear that a case is overwhelming based on the initial details of the prosecution case but that the view may alter on better service of the case.  This commonly arises with service of CCTV evidence or forensic examination of computers and mobile phones seized from defendants, which lag behind service of the initial details of the prosecution case.

To reduce the amount of credit given at the stage at which it becomes apparent that the case has become overwhelming is likely to create a disincentive to resolving cases at that stage.  Whenever a defendant perceives that they have nothing or not much to lose by proceeding to trial they are more likely to put off the decision to take responsibility for their actions.  This is also particularly true of cases which, while they may be overwhelming may only proceed if the complainant remains motivated to support the prosecution.  That is particularly true of cases involving domestic violence.

We do not think that allowing discretion to reduce credit at a later stage is preferable for the reasons given above.

***3a******Is the method of applying a reduction at the first stage of the proceedings set out clearly?***

Yes.  We do not propose any amendment to how the guideline is set out.

***3b Do you agree with capping the maximum reduction at one third?***

In our experience it is very rare for a defendant to receive a reduction in sentence of more than the proposed cap of one third.  Judges may be assisted to resolve cases at an early stage if they are provided with the discretion to indicate a greater discount at an early stage in proceedings.  There are exceptional cases in which the flexibility to offer greater discounts will assist to resolve matters at an early stage.

In a case heard at Nottingham Crown Court in the last twelve months the Judge indicated at a preliminary hearing that defendants pleading guilty at that stage would receive a 40% discount in sentence.  That indication was deliberately given in what was a highly complex case involving fraudulent evasion of duties on importation of substances to the UK.  There were many defendants alleged to have been involved in a myriad of different roles from organising importation with sellers in Europe, arranging transport, receiving, distributing, processing and ultimately bringing the product to market in the UK.  Until the indication was given the case showed all the hallmarks of being contested by all defendants at the outset, with the usual domino effect of pleas as the case progressed and further evidence was served.  The indication provided an early and meaningful incentive for defendants who might otherwise have ignored credit for plea.  Indeed, it secured a guilty plea from the principal party to the conspiracy, saving considerable time when the matter proceeded to trial for a smaller discrete group of defendants lower down the chain of events.

We have no doubt that the indication assisted those advising defendants and saved the costs attendant to preparation of the case and many more weeks of trial.

***3c Do you agree with the restricting the point at which the one third reduction can be made to the first stage of the proceedings?***

Our preference would be for a guideline which provides certainty but allows for the judiciary to hear representations.  In practice there are many factors affecting the decision made by the defendant.  The decision to plead guilty often arises from the receipt of robust advice from a solicitor and/or barrister funded to provide representation.  There are occasions when defendants are not advised at the police station and where funding can’t be resolved by the first hearing, in which the defendant does not have the benefit of appropriate advice.

At present advocates are able to make representations to persuade the judge to give maximum credit at a stage after the first appearance.  It is submitted that is consistent with a system in which service of evidence is limited in the early stages.  Judges are well equipped to distinguish deserving cases from those where the defendant has inappropriately delayed a guilty plea, or has “played the system”.

***3d Do you agree with the definition of first stage of the proceedings for adults and youths for each type of offence at D1?***

We agree with the proposed definition of first stage of the proceedings.

***4a Is the method of determining the reduction after the first stage of proceedings set out clearly?***

We agree that the method of determining the reduction in plea is set out clearly.

**4b Do you agree with restricting the reduction to one fifth after the first stage of proceedings?**

We do not agree with the proposed restriction of reduction to one fifth after the first stage of proceedings has been passed.  The premise appears to be to mark a greater step than the current guideline of a one quarter reduction in sentence.  We note that no rationale has been given for creating a steeper drop in the reduction given.

We anticipate that this may prove to be a disincentive for guilty pleas at the stage post first hearing.  There is a tendency for there to be a natural lull in the defendant’s involvement in proceedings once they have been arraigned and until the prosecution comply with directions to serve the prosecution case.  The steeper drop in the reduction in sentence results in there being a correspondingly shallower drop between that stage and the first day of trial.

It is our view that a 25% reduction in sentence at the stage when full service of the prosecution case has been achieved is more likely to encourage guilty pleas at that point.

**4c Do you agree with the definition of the point at which a one fifth reduction can be given at D2?**

The effectiveness of setting the points given at D2 will depend entirely on what is achieved in those time frames.  Unless the parties are placed in a better position to review the case and advise on evidence it is unlikely that a material change in the defendant’s position will arise.

In summary trial proceedings where the prosecution comply with a direction to finalise disclosure in a fourteen day period and the defence are able to obtain instructions there may be an increase in the number of guilty pleas indicated to the court.  Where further disclosure, such as CCTV evidence, telephone evidence, the provision of witness statements, recordings or transcripts of recorded interviews are not provided in a timely fashion there will be little impetus on the defendant to review their stance.  We submit that allowing a period of twenty-eight days after the trial is fixed at the first appearance is more likely to mean that meaningful progress is made in the case.

We question why a distinction is made between the stages applied to either way and indictable cases for adult defendants.  In reality there is no difference in the way in which those cases proceed.  Both are sent for trial at the first hearing at the magistrates’ court and proceed to a plea and trial preparation hearing (PTPH) twenty-eight days later (in most areas).  The service of evidence is abbreviated in both cases to initial details of the prosecution case.  There is no set variation in the quality or quantity of evidence served for the first hearing.  There is a higher proportion of indictable cases in which the defendant is remanded in custody pending the PTPH.  We therefore submit that the appropriate point for the reduction to be given should be the same in those cases, namely twenty-eight days after the prosecution have complied with s.3 Criminal Procedure and Investigations Act 1996.

We also submit that the point should be triggered not by the prosecution “stating” that it has complied but in fact having complied, i.e. the date that material is received by the defence.  The prosecution increasingly serves its case digitally by secure e-mail and it should be simple to establish the date of service from the e-mail correspondence.

Otherwise we agree with the point at which reduction is given after the first stage of proceedings.

***4d Do you agree with the sliding scale of reduction (at d3) thereafter?***

We agree with the sliding scale of reduction leading to a one tenth reduction in sentence for pleas entered on the day of trial.

***4e Do you agree with treating the trial as having started when pre-recorded cross examination has taken place?***

We agree with the identification of the start of the trial.

***5a Is the paragraph on imposing one type of sentence rather than another clear?***

Yes.

***5b Do you agree that it may be appropriate to reflect a guilty plea by suspending a period of imprisonment?***

We agree that it may be appropriate to reflect a guilty plea by suspending a period of imprisonment.  We welcome the proposal that it is made clear that where mitigation already achieves that aim the length of sentence should reflect the credit for the stage at which a guilty plea was entered.  We also submit that the judiciary should retain the discretion to reflect the point of a guilty plea in the length of the custodial element of a suspended sentence in appropriate cases.

***5c Do you agree that when the guilty plea reduction is reflected in imposing a different (less severe) type of sentence that no further reduction should be made?***

We do not agree that this proposal will always be appropriate.  We submit that it would be preferable to provide the judiciary with the discretion to decide how the credit should be applied and to fix sentence accordingly.  There may otherwise be cases in which on strict interpretation the judiciary will feel constrained in exercising their powers.

We have indicated above our view that reduction for an early guilty plea should be capable of reducing an immediate to a suspended sentence but also to assist in fixing the term of the custodial element.

***6a Is the guidance at paragraphs E2 to E4 clear?***

*Yes.*

***6b Do you agree with the guidance at E2 that there should be provision for a further reduction in cases where consecutive sentences (after guilty plea reduction) for summary offences total to the maximum of six months?***

We agree with the proposed provision for a further reduction in sentence for multiple summary offences where consecutive sentences are imposed.

***6c Are there any other jurisdictional issues that the guidelines should address?***

We do not have any further proposals regarding jurisdictional issues.

**7a Is the guidance at paragraph F1 clear?**

Yes.

***7b Do you agree that the exception is a necessary safeguard?***

We agree that there may be a limited number of cases in which the safeguard will apply and where, as the present guidance stands, there is room to argue for a full discount from sentence to be awarded.

***7c******Do you agree that the right cases are captured by this exception?***

We agree that cases in which the defendant has no recall of the incidents giving rise to the charge fall within the exception.  It can readily be seen that defendants suffering with poor mental health or from intoxication may have greater reliance on served evidence, particularly CCTV footage, than defendants who can give cogent instructions regarding their actions. The inclusion of the safeguard is welcomed in providing support for submissions.  However, there may be cases not captured by the exception where the justice of the situation requires for a broader discretion to review the stage at which the guilty plea was entered.

***8a Is the guidance at paragraph F2 clear?***

Yes

***8b Do you agree that the exception will ensure that defendants will know what the allegations are against them before being required to enter a plea?***

We agree that the proposal will preserve the defendant’s ability to secure a reduction in sentence for a timely plea in cases where IDPC is not served.  It will not of itself ensure the defendant knows the detail of the allegations and is in a position to enter a plea unless IDPC is served in a timely fashion after the first hearing, in cases where the obligation to serve the material earlier has not been adhered to.  Moreover, the defendant’s ability to access legal advice and make an informed choice of plea is predicated on there being funding in place to secure advice within the fourteen-day period specified.  We propose as an alternative that the period be specified as fourteen days from the date of service of the IDPC bundle on the defence/defendant (in cases where it is not served before the first hearing).

The present intention is for service of the IDPC prior to the first hearing (other than for defendants remanded in custody overnight).  In reality in the West Midlands area only a small proportion of firms are being regularly served with digital IDPC prior to the first hearing.  It is accepted that the quality of the material served is highly dependent on the quality of file build by the police.

When the defendant has been represented at the police station the process is considerably more efficient (subject to the quality of disclosure given in the pre-interview stage by the police).  There is a need to overcome the view apparently held by police officers that it is to any party’s advantage for defendants to be unrepresented during the investigation stage.  If criminal justice is to move away from being treated as a game, it requires effort by all parties.

Where the defendant is not represented there are likely to be delays in obtaining funding, identification of the firm instructed and service of IDPC.  It is common for defendants to instruct a solicitor when they attend the court.  Indeed, many will seek the advice of the duty solicitor having had no previous experience of the criminal justice system.  In such cases all the planned progress intended in the twenty-eight day period post charge is lost.

***8C Do you agree that the exception should apply to either way and indictable only offences but not to summary offences?***

No we submit that the exception should apply equally in any case where the IDPC has not been served in the time frame required.  Although we agree that the issues in summary cases are often less complex than more serious counterparts we do not agree that robust case management is assisted by making a distinction between indictable/either way cases and summary cases in this context.  Irrespective of the nature of the charge the defendant has a right to know in advance not only the nature of the charges they face but the detail of the case.  One of the present difficulties in cases of all levels of seriousness arises at the point where detail of the offence is provided during the sentencing exercise which is not contained in the abbreviated disclosure bundle.  That may take the form of witness statements or victim impact statements that have not been served on the defence, albeit provided to the prosecutor.  Our experience is that when this arises the defendant is required to give dock instructions which may lead to cases being fixed for trial of issue, for instance as to the specific mechanics of an attack, damage caused to property, property stolen or the value of loss caused.

***8d Do you agree that fourteen days is the appropriate extension?***

We agree that a fourteen-day period is a sufficient extension but from the point of service of the IDPC bundle, as opposed from the date of the hearing.

***9a Is the guidance at paragraph F3 clear?***

Yes.

***9b Do you agree with the proposed reduction in cases where an offender’s version of events is rejected at a Newton or special reasons hearing?***

We agree with the proposed reduction in credit given where an offender’s version of events is rejected after a trial of issue.  However, we submit that a distinction is to be made with regards to the approach in a case where special reasons are advanced not to disqualify or endorse a driver’s licence with penalty points.  In such cases the burden rests on the defendant to establish the special reason and invariably involves his/her giving evidence and calling defence witnesses.  The issue for the hearing relates not to the substantive penalty in the main but to the endorsement of the defendant’s licence.  We can envisage circumstances where notwithstanding the finding of special reasons the court proceeds to disqualify or endorse.  In such cases the court ought not to reduce the credit given for an early plea.  It is rare in such cases for the complainant or civilian witnesses to be required to give evidence and the same considerations as in cases with an apparent victim/complainant do not always apply.

***10a  Is the guidance at paragraph F4 clear?***

Yes

***10b Do you agree that it is a necessary exception for the small number of cases to which it applies?***

We agree that the exception is welcome.  As indicated above our preference is for a broader judicial discretion to enable advocates to make representations in cases which merit full credit when pleas are entered at a point after the first stage in proceedings.

***10c Do you agree that the exception is worded appropriately to capture the right cases?***

The wording allows for interpretation of the phrases “very substantial amount of court time” and “very substantial number of witnesses” but gives no guidance as to what will comprise substantial as opposed to very substantial circumstances.  The exception is likely to be used extremely rarely in practice.  What constitutes a very substantial case in one court centre may differ to another and there is risk that the exception will not be applied uniformly.  The explanation provides a helpful example and it may assist to provide further examples, albeit not intended as a restrictive list, to guide judges and practitioners.

***11a Is the guidance at paragraph F5 clear?***

Yes.

***11b Do you agree with the proposed treatment of cases where an offender is convicted of a different or lesser offence?***

We understand the aim to encourage early pleas where lesser offences may be available.  However, a reduction in credit in the circumstances envisaged in the examples may inhibit defendants from taking a sensible approach to their case.  There are instances when a defendant will make an offer outside the court without a formal plea being confirmed on the court record.  Where the parties confirm that an approach was made but rejected at that stage the defendant should not be penalised due to the informality of that process.

A degree of flexibility is of great advantage to advocates engaged in negotiation on behalf of their client.

***12 Is the guidance at paragraphs F6 to F8 accurate and clear?***

Yes.

***13a Is the guidance in section G on reduction for a guilty plea in cases of murder clear?***

Yes.

***13b Do you agree with the guidance in such cases?***

Yes

***14 Do you agree that section G in the SGC guideline can be omitted from the new guideline?***

We suggest that section G is retained in the new guideline, despite the point made regarding its being well understood by judges, as a reminder of the principles for judges and practitioners alike.  The guidance in its existing form is clearly written and accessible.

***15a Are the flowcharts at appendices 1 to 6 clear?***

Yes.

***15b Do you agree that it is helpful to include the flowcharts?***

Yes.

***15c Is there any other explanatory information that it would be useful to include?***

No.

***16a Are there any further ways in which you thin victims can or should be considered?***

No.

***16b Are there any equality or diversity matters that the Council should consider?  Please provide evidence of any issues where possible.***

No.

3 May 2016

 
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John Hughes

President

Birmingham Law Society