



South Eastern Circuit's response to the Sentencing Council's Reduction in sentence for a guilty plea guideline consultation

*Questions pertaining to this response, to, Duncan Atkinson QC
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Introduction

1. The South Eastern Circuit (SEC) represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice and across England and Wales. It is the largest Circuit in the country. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners.
2. The SEC suggests that it is able to bring to the present consultation a very wide range of experience of practitioners across the South East of England, both experienced and young, and appearing in both the Crown Court and Magistrates' Courts. This experience allows us to make practical suggestions in responding to the present consultation.

General Comments

3. The SEC recognises that an increase in early guilty pleas would be of significant benefit to the criminal justice system, especially in terms of avoiding wasted case preparation costs, and to the victims of crime. However, that benefit will only actually serve the interests of justice where those guilty pleas are entered because the defendants in question genuinely accept their guilt.
4. The current 'Reduction in Sentence for a Guilty Plea' guideline, published in July 2007, has worked well to encourage genuine guilty pleas by ensuring that defendants receive a discount or credit when sentenced following a guilty plea. The guideline was operated in conjunction with the guidance of the Court of Appeal in *Caley* [2012] EWCA Crim 2821 to ensure that the sliding scale of credit that it contained has encouraged defendant's to consider pleading guilty at an early stage of the proceedings, whilst at the same time protecting those who should not be pleading guilty from being pressured into doing so. It has also operated with a degree of realism, recognising the value to many defendants of receiving focused legal advice before arraignment, and the importance of that advice being based on a proper understanding of the prosecution's case based on the evidence it has served.
5. Whilst we understand the reasons why the Sentencing Council now seeks to revisit the 2007 guidelines, it is important that the benefits of the operation of the present scheme are not lost, and the fairness of the scheme reduced, in pursuance of the imperative of earlier pleas.

6. The Early Guilty Plea scheme was a protocol signed up to by the London Courts on 28 May 2013. It incorporated time limits for service of the IDPC (initial details of the prosecution case). Cases sent to the Crown Court under this scheme were identified by the CPS or the defence in order that an Early Guilty Plea Hearing could take place. This allowed a guilty plea to be entered at a stage earlier than the PCMH. In other cases where there were no guilty pleas there was a date set for a preliminary hearing and directions issued with a PCMH following thereafter. We recognise that the role out of the Better Case Management Scheme will both alter and expand the process by which defendants will be encouraged to enter their pleas at an early stage.
7. The Criminal Procedure Rules (October 2015), Part 8, Rule 8.3 defines the content of the IDPC to be:

8.3. Initial details of the prosecution case must include—

- (a) where, immediately before the first hearing in the magistrates' court, the defendant was in police custody for the offence charged—
 - (i) a summary of the circumstances of the offence, and
 - (ii) the defendant's criminal record, if any;
- (b) where paragraph (a) does not apply—
 - (i) a summary of the circumstances of the offence,
 - (ii) any account given by the defendant in interview, whether contained in that summary or in another document,
 - (iii) any written witness statement or exhibit that the prosecutor then has available and considers material to plea, or to the allocation of the case for trial, or to sentence,
 - (iv) the defendant's criminal record, if any, and

(v) any available statement of the effect of the offence on a victim, a victim's family or others.

8. The definition of the IDPC has not necessarily been drafted with a view to encouraging an early guilty plea.
9. In our experience, the content and sufficiency of IDPC has varied across police forces in England and Wales. Where the quality of evidence supplied as part of the IDPC amounts to all, or all key, statements and exhibits which support the prosecution case and provide sufficient evidence for a jury to properly convict upon it then a defendant is likely to be more inclined to listen to sensible advice given by his lawyers regarding entering a guilty plea. Indeed the Sentencing Council's own research into attitudes to guilty plea reduction supports that.
10. If the IDPC is inadequate or does not amount to sufficient evidence for a jury to properly convict a defendant is unlikely to wish to enter a guilty plea despite the fact that he would receive credit for doing so when sentenced.
11. It is therefore vitally important that the new guideline seeks to further define the IDPC which is necessary, and that the credit structure within the guideline properly recognises that deficiencies in IDPC are a proper reason for a defendant to wish to delay pleading. This would mitigate any likelihood that a defendant would not plead guilty for the wrong reasons and would ensure that the police show a defendant the strength of the prosecution case at an early stage rather than allowing a defendant to plead not guilty and lose credit and then revealing further evidence.
12. Furthermore, the criminal justice system would not be adversely affected if a defendant was given fuller details of the prosecution case at an early

stage when compared with the consequential effect of any delay in serving a comprehensive IDPC.

13. More than that, we suggest that requiring the prosecution to provide sufficient detail of its case before a defendant is expected to respond to it is a necessary safeguard for the vulnerable, and especially the young, who might otherwise erroneously enter a guilty plea on a superficial understanding of the allegations against them, or feel pressured into doing so for a multiplicity of reasons. It also increases the prospects of defendants pleading guilty to more serious offences than the prosecution's evidence, and the justice of the case, in fact warrant.
14. On the other hand, whilst it is acknowledged that there are a number of cost and time benefits where a defendant pleads guilty at an early stage, there will always be cases where a defendant chooses to plead not guilty despite the wealth of evidence against him. This can be for a number of reasons including but not limited to: the defendant being on bail, the fact that the defendant does not wish to admit his wrongdoing, or because the defendant would prefer take his/her chances with a jury. There is also a danger that those who ought to plead guilty do not do so closer to the trial date because there is a lack of incentive to do so under the draft guideline.
15. Given this complex reality, we suggest that it is necessary that the Guideline is not only clear but also realistic. It should encourage and reward early guilty pleas, but should also make proper allowance for those who do not feel able to take advantage of that reward at an early stage, but still ought to be given a proper incentive to plead before the system is put to the cost, and the victim to the strain, or a trial

Response to questions

Question 1: Is the rationale in the key principles section set out clearly?

1. Yes.

Question 1A: Do you agree with the stated purposes of operating a reduction for guilty plea scheme?

2. Yes.

Question 1B: Do you agree that the guideline does not erode the principle that it is for the prosecution to prove its case?

3. The principle of the prosecution proving its case is eroded if the prosecution are no longer required to serve comprehensive evidence as part of the IDPC. Care has also to be taken to avoid any risk that the prosecution authorities will do the bare minimum in investigating and proving its case, potentially underselling the seriousness of the offending in order to achieve a quick resolution rather than a just one.
4. We consider that it is unrealistic to expect defendants to plead guilty on the basis that they would do so because they know that they are guilty, regardless as to whether there is any evidence against them. In our collective experience, defendants want to see the strength of the evidence against them rather than assume the police could obtain it. The Sentencing Council research into attitudes to guilty plea reduction supports that.
5. The principles enunciated in the draft guideline also appear to assume that all defendants will know whether they are guilty or not in the absence of seeing any evidence. There are many instances where this will not necessarily be the case. For example, in situations where a defendant was intoxicated at the time of an assault for which he erroneously believed he

was acting in self-defence, or is suffering from illness or disability that result in an absence of, or a confusion of, recollection. Where the defendant was present at a fast moving incident with others, and needs to see closed circuit television footage to understand his role in the context of the actions of others. These situations readily arise in cases of assault and public order offences where defendants will readily plead guilty once shown objective evidence that did not fit their own recollection of what occurred. Similarly, where the Crown's case involves a joint enterprise where the defendant is a secondary participant, and the details of his actions and their timing may be critical to guilt or innocence.

Question 1C: 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 guilty plea?

6. Yes.
7. We agree with the approach set out in the draft guideline. Pre-court admissions and any other assistance given to the police ought to be considered as mitigating factors prior to the application of any discount for a guilty plea. This is particularly so where it is likely to mean that the burden of collating further evidence by the police is lessened, and the stress of the proceedings for victims of and witnesses to crime is reduced.

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

8. Yes.
9. We believe that the approach of the draft guideline fits with the principle that it should be incumbent on the prosecution to prove its case.

10. We believe that departing from the rule of permitting the full reduction in certain cases introduces uncertainty for defence practitioners and defendants. Often it is also arguable as to whether a case is in fact overwhelming. There will be considerable scope for differences of opinion, which will undermine the proper aspiration of sentencing consistency that underpins much of the Sentencing Council's work.
11. We also believe that the incentive of the full reduction ought to remain even where there is overwhelming evidence. Prosecution witnesses may be disadvantaged if a defendant chooses not to plead guilty because there is no benefit to them and it is likely that they would prefer that a defendant pleads guilty because they would not be required to give evidence in a trial.

If Not:

Question 2B: Do you think that the alternative approach (of allowing the court discretion to apply a lower reduction after the first stage of the proceedings) is preferable?

12. This question does not apply as we agree with the primary approach of the draft guideline.

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

13. We agree that the proceedings are set out clearly in the draft guideline.

Question 3B: Do you agree with capping the maximum reduction at one-third?

14. Yes.

15. We agree that the one-third reduction strikes the correct balance between, on the one hand, providing an incentive to those who are guilty to plead guilty early on, and on the other hand, not placing undue pressure on those who are not guilty to plead guilty because of a concern about a more severe sentence.

Question 3C: Do you agree with restricting the point at which the one-third reduction can be made to the first stage of the proceedings?

16. We do not agree with the draft guideline's proposal to shift the application of the one-third reduction for either way offences to the first appearance at the magistrates' court. This is particularly problematic given that the regime under the draft guideline is far more prescriptive than the reduction that is applied at present under the current guideline.
17. In our view, there are a number of problems with effectively advancing to an earlier stage the point at which a defendant can receive maximum credit for a guilty plea from the first Crown Court appearance to the magistrates' court.
- a. Inadequate service of papers: The papers that are provided at the first appearance are often inadequate and do not amount to sufficient evidence for a jury to properly convict upon. Although the recent initiatives, including Transforming Summary Justice require the early service of papers by the CPS, anecdotal evidence from our junior members suggest that the service of papers remains late (on the day at best) and inadequate. For the purpose of either way offences, it is often the case that only the charge sheet and a police summary is served on the defence, particularly where the Crown anticipate a guilty plea.

- b. There is also a variance of practice on the part of police and the CPS across the different magistrates' court, particularly in relation to the service of papers.
- c. There are many either way offences that can be as serious as indictable only offences where, under the proposals, a defendant would be expected to enter a guilty plea in the magistrates court to gain maximum credit. For example, multi-million pound frauds, wounding or causing grievous bodily harm contrary to section 20, violent disorder, sexual assault (section 3 of the Sexual Offences Act 2003), and aggravated burglary.
- d. It is unfair to shift the burden of advising on potentially extremely serious offences for which lengthy sentences may follow onto representatives at the magistrates' court. Often the legal representative at the magistrates' court may be a very junior barrister and quite likely a pupil barrister because of the fees paid for attendances. Further, it would be difficult to assess what would be appropriately senior representation in advance as the initial details are only served on the day. We do not suggest that junior members of the bar or solicitors who do appear at the magistrates' court are not capable of advising on plea at that stage. But we consider it essential that those charged with serious offences should be given an opportunity to be advised by a representative of the appropriate level of seniority prior to entering pleas. It is unfair to expect a pupil barrister or junior barrister appearing in the magistrates' court to bear the burden of potentially losing their client a substantial proportion of their credit. We remind the

Sentencing Council that the fee for appearing in the magistrates' court is £50 or less for many junior barristers.

18. In our view, for the reasons set out above, defendants should be entitled to maximum credit for any guilty plea when entered at their first appearance in the Crown Court in respect of either way offences that are committed as well as indictable only offences.

19. In any event, for the reasons identified at para.17 above, it is unrealistic to expect that a greater number of defendants will plead guilty at the magistrates' court for serious offences.

20. Those who choose to do so may well be sentenced in the Crown Court in any event so lessening the benefit of entering a guilty plea at an early stage. Further, indicating a guilty plea at an early stage in the magistrates court could be afforded greater credit similar to admissions made in interview.

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

21. Yes.

22. Although we do not agree with restricting the point at which the one-third reduction can be made in respect of either way offences and offences sent or committed to the Crown Court as grave crimes from the youth court.

Question 4: Is the method of determining the reduction after the first stage of the proceedings set out clearly?

23. Yes.

Question 4A: Do you agree with restricting the reduction to one-fifth after the first stage of proceedings?

24. No.

25. We believe that the reduction ought to be reduced to one-quarter in the first instance. We believe that the reduction from one-third to one-fifth is unlikely to encourage more defendants to plead guilty at the first stage of proceedings; but rather it is likely to dissuade those who ought to plead guilty to do so at a later stage with a consequential and significant burden on the criminal justice system.

26. We also believe that the 14-day restriction following the first stage of proceedings is unnecessarily prohibitive and unrealistic. It does not allow sufficient time for those defendants who may have problems assimilating information including those with learning difficulties and mental disorders. It is also likely to cause unnecessary prejudice for defendants that may intend to plead guilty but have not had an opportunity to consult fully with their legal representatives due to delays in seeking appointments in prison's following service of papers which may often not be their fault. Defence practitioners frequently encounter problems with arranging timely conferences with their clients within prison and also in getting funding for legal aid.

27. We consider the 28 day-time limit in respect of indictable only offences to be more reasonable.

28. We also believe that there may be merit, if there is to be a time limit to be specified, for it to be the same across all types of offences.

Question 4B: Do you agree with the sliding scale reduction (at D3) thereafter?

29. Yes.

Question 4C: Do you agree with treating the trial as having started when pre-recording cross-examination has taken place?

30. Yes.

31. We agree that where there is a case involving pre-recorded cross-examination, that ought to be taken as the start of the trial. However, the draft guideline also needs to make clear what is deemed to be the start of the trial in the majority of cases in which that provision does not apply. We suggest that in other cases a trial should be deemed to have started when a jury is sworn.

Question 5: Is the paragraph on imposing one type of sentence rather than another clear?

32. Yes. We agree that this is a helpful and important addition to the guideline which may well result in more guilty pleas being entered.

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

33. Yes.

Question 5B: 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?

34. Yes.

Question 6A: Is the guidance at paragraphs E2 to E4 clear?

35. Yes.

Question 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?

36. Yes.

37. In our view, this discretion may be useful to ensure that the system allows for an incentive to some to plead guilty in situations where otherwise there would not be any such proper encouragement.

Question 6C: Are there any other jurisdictional issues that the guideline should address?

38. We are not aware of any other jurisdictional issues.

Question 7: Is the guidance at F1 clear?

39. Yes, subject to our view as to the necessary safeguards and exceptions set out below.

Question 7A: Do you agree that the exception is a necessary safeguard?

40. We agree that the exception is a necessary safeguard.

41. However, we believe that it is important that the exception is not too narrowly conceived. It must address those whose vulnerability, illness or intoxication hampers their ability to address the case without independent evidence as much as those cases whose complexity factually or legally make proper legal advice in advance of plea essential.

Question 7B: Do you agree that the right cases are captured by this exception?

42. See our answer to question 7A.

Question 8: Is the guidance at F2 clear?

43. Not as presently expressed.
44. We can envisage many cases in which a limited approach by prosecution agencies to the requirement for IDPC – initial details of prosecution case – will provide too little detail to expect defendants to enter guilty pleas. Moreover, where the case has not been investigated properly or fully then the true picture will not be available for the sentencing judge. It is therefore not sufficient for the exception at F2 to address cases where no IDPC has been provided. It also needs to address what we anticipate will be a large number of cases where, on an objective analysis, the content of IDPC provided is inadequate.
45. F2 as presently drafted would encourage minimal levels of content for IDPC, in order to satisfy the requirement that some is forthcoming, without any check on that process from the courts being able to reject that IDPC and require a proper level of disclosure before a defendant is expected to plead.

Question 8A: 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?

46. See our response to question 8. There is a need for the exception to cover both the failure to provide IDPC and the failure to provide adequate IDPC.
47. We also consider that 14 days of service of IDPC is too short a period in which to indicate a guilty plea. If a defendant requires the assistance of legal advice, and especially when he is seeking such advice whilst in prison, this timescale is unrealistic and we would suggest that a period of 28 days is more appropriate.

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

48. Yes

Question 8C: Do you agree that 14 days is the appropriate extension?

49. See our answer to question 8A above

Question 9A: Is the guidance at F3 clear?

50. Yes.

Question 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?

51. Yes.

We agree with the proposed reduction in general, but we believe that the proposed reduction should remain the same whether witnesses are called or not. It is ultimately a matter for the prosecution, or the court, as to whether any witnesses are called. If such a caveat is to be included, we believe it would be more appropriate to say where prosecution witnesses were required to attend by the defence.

Question 10A: Is the guidance at F4 clear?

52. No.

53. We do not believe that the phrases 'very substantial amount of court time' and 'very substantial number of witnesses' are sufficiently defined. If the exception is intended to capture complex fraud trials and similar cases, then it may be easier for practitioners and courts to follow to refer to 'Very High Cost Cases' or 'Exceptional Case Contract Case'. Also, cases can be very complex without necessarily being witness heavy or time intensive,

and the exception ought to recognise cases of legal, technical or factual complexity as well.

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

54. We agree that it is necessary for there to be an exception in cases likely to take up significant court time and involve many more witnesses than is the norm thereby allowing judges to sentence with a greater reduction than one-tenth.

Question 10C: Do you agree that the exception is worded appropriately to capture the right cases?

55. See our comment in respect of question 10A.

Question 11A: Is the guidance at F5 clear?

56. Yes.

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

57. We agree.

Question 12: Is the guidance at F6 to F8 accurate and clear?

58. Yes.

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

59. Yes.

Question 13B Do you agree with the guidance in such cases?

60. We agree with the guidance.

Question 14: Do you agree that Section G in the SGC guideline can be omitted from the new guideline? Please give reasons where you do not agree.

61. We agree.

Question 15A: Are the flowcharts at appendices 1 to 6 clear?

62. The flowcharts are clear.

63. Although it should be noted that we do not agree that for either way offences the maximum reduction should be restricted to the first hearing at the magistrates' court.

Question 15B: Do you agree that it is helpful to include the flowcharts?

64. We agree it is helpful to include flowcharts.

Question 15C: Is there any other explanatory material that it would be useful to include?

65. No.

Question 16A: Are there any further ways in which you think victims can or should be considered?

66. We believe that victims may be adversely impacted by the changes proposed in the draft guideline that restricts the amount of reduction that can be applied if a defendant does not plead guilty at the first stage of proceedings. We believe it may lead to some guilty pleas that occur earlier on in the process, but that there are conversely likely to be fewer guilty pleas later on in the process which overall will result in less court time being saved.

67. The Council recognises that this draft guideline is not intended to impact upon the proportion of guilty pleas: 'This guideline is designed to affect the timings of pleas rather than the rates of plea.' (p.33). In our view, the changes will result in fewer guilty pleas overall as many defendants will not be inclined to plead guilty at such an early stage and will then lose any incentive to plead later on in the proceedings.

68. For that reason, we believe that the pessimistic scenario outlined in the resource assessment is the more likely outcome and this will adversely impact on the overall effectiveness of the criminal justice system because more trials will be required and more victims required to attend court.

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

69. We believe that the draft guideline may adversely impact vulnerable defendants, both those with learning difficulties or those who are mentally disordered and youths, unless the exceptions are amended and some time limits altered in the ways we have suggested above.

70. It is always difficult to advise defendants who either have a mental disorder or have learning difficulties/disabilities. Understandably, defence practitioners are reluctant to advise such clients to plead guilty where the papers served by the CPS are inadequate.

71. We believe that where a 14 day time limit applies, such as following the first appearance for summary only offences, this is likely to be a disadvantage for those defendants who find it difficult to process information quickly.