CBA RESPONSE TO
THE SENTENCING COUNCIL CONSULTATION ON THE REDUCTION IN SENTENCE FOR A GUILTY PLEA GUIDELINES

The Criminal Bar Association ("CBA") represents the views and interests of practising members of the criminal Bar in England and Wales. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education, training and assistance with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

The CBA is the largest specialist Bar association, with over 4,000 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country.

This response to the Sentencing Council's consultation on its proposed guidelines for reduction in sentence for early guilty pleas ("the Guidelines") has been prepared and provided on behalf of the entire membership of the CBA.

Overview

The CBA has been a strong supporter of the reforms that the criminal justice system is undergoing, through Better Case Management (BCM), the Digital Case System (DCS), and other measures intended to restore excellence as the standard for all criminal advocacy. However, we believe that the laudable drive for efficiency risks bringing with it a diminution of essential constitutional safeguards in due process and judicial independence. The reforms are being bolted on to structures that are crumbling because of historic underfunding.

We recognise that the new arrangements will have teething troubles, but we see disturbing trends that will become institutionalised unless prompt action is taken to get rid of them. The CPS is failing to comply with its obligations to serve enough evidence for defendants and their advisers to assess the cases; prisons are unable to provide visits on time; and most worrying of all, many judges and magistrates are making unreasonable demands for pleas to be entered too early, encapsulated in the phrase 'your client knows if he's guilty or not'. Judges need to remember that efficiency is the servant of justice not its master. They are not there to achieve statistical targets dictated by officials. They must honour the 'Overriding Objective: 'that criminal cases be dealt with justly'. Efficiency and expedition are only part of the story. While our system remains adversarial, the Judge is the umpire, not a player on the pitch. The CBA deprecates any tendency to erode the Judge's

constitutional position by accident, through lack of resource or a drive to increase guilty pleas without proper adherence to the principles that underpin the rule of law.

We therefore view the proposals in the Consultation Paper with caution; they are not bad in themselves, but they must be seen in context. The CJS is undergoing an extraordinary change to its working practices and the full consequences are yet to emerge. Unless the courts act vigorously to make sure that the Crown respects and adheres to the Criminal Procedure Rules, we foresee significant problems ahead. Without proper checks there is a serious risk that these proposed Guidelines will simply reinforce the bad practices that we see beginning to creep in.

Question 1

Is the rationale in the key principles section set out clearly?

The consultation begins by noting that "the principle that a court should take into account the timing and circumstances of any guilty plea in determining sentences is laid down by Parliament in legislation" and we also note that the Council's aim, as with all guidelines, is to ensure fairness and consistency in sentencing in all courts.

The CBA also recognises the desirability of encouraging defendants who are guilty and who wish to plead guilty to do so as early in the court process as possible, subject to proper safeguards of defence rights.

The rationale is clearly explained. However, after the clear exposition of the benefits to the criminal justice system, including witnesses, victims, the police and the CPS the consultation states at Page 8: -
"Defendants have a clear right to require the state to prove the case against them to a criminal standard. The guideline is directed only at defendants wishing to enter a guilty plea and nothing in the guideline should create pressure on defendants to plead guilty."

Thus there is only a passing reference to the conflict in principles which the reduction in sentence for guilty pleas inevitably creates. On the one hand, it is axiomatic that the responsibility is on the state to prove the case against any defendant, and the only certainty that the state will be able to do that lies with a full analysis of the evidence which the state has gathered, and an assessment of the admissibility of that evidence. On the other hand the stage at which the current proposals allow a defendant full credit for a guilty plea lies before such evidence would have been served. Few defendants wish to enter a guilty plea if they have an alternative and thus there will clearly be pressure upon all defendants to either plead guilty before they know if the state can prove the case against them or lose credit for their plea.

However we welcome the aim of the current revolution in the process of the criminal justice system the aims of which are to speed up the processes, reduce the number of unnecessary hearings and introduce greater efficiency. These have always been the aims of the CBA and we foresee benefits for everyone involved in the criminal justice system. We are however anxious to ensure that these benefits are not achieved at the cost of injustice to defendants, some of whom are known to be vulnerable individuals.

We welcome the clear statement of principle in the consultation that the purpose of reducing the sentence for a guilty plea is to: -

- reduce the impact of the crime upon victims;
- save victims and witnesses from having to testify;

- save public time and money on investigations and trials

and 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."
We also welcome the proposal that the reduction will apply regardless of the strength of the evidence against an offender and that the strength of the evidence should not be taken into account when determining the level of reduction.

This clarity of approach is to be welcomed and should mean that defendants can be clearly and simply advised upon the likely reduction and courts will apply the guidelines consistently.

Do you agree:

(a) with the stated purposes of operating a reduction for guilty plea scheme?

Yes. As explained above, the purposes of the scheme are clearly articulated and we agree with them.

(b) that the guideline does not erode the principle that it is for the prosecution to prove its case?

Although the Guideline does not *per se* erode the principle, for the reasons set out above there is a clear tension between the principle and the effect of the guideline. The Guidelines must expressly state they require that Crown to comply strictly with its obligation to provide the defence with the documents and other material stipulated for each stage of the proceedings (as set out in the principles of Better Case Management, Transforming Summary Justice and the Criminal Procedure Rules and the Criminal Practice Directions). While we note F2 in respect of service of IDPC, this principle needs greater reinforcement and the requirement for complete and timely service should be incorporated expressly within the Guidelines. Our members are consistently reporting that although the CPS is failing to comply with its obligation, despite its express commitment "…to reviewing the case and providing the initial details of the prosecution case (IDPC) to the defence prior to the first hearing". Defendants are appearing at the first hearing in the magistrates court without the court even being furnished with a charge sheet, let alone the details of the case in the IDPC as required by the Criminal Procedure Rules and the Criminal Practice Direction.

There are serious practical issues that we fear are emerging as a result. Some defendants are beginning to think that the appropriate response to the Crown's failure to meet its obligations to serve the IDPC is to assume that no case is made out and to demand an application to dismiss. Others see a virtue in pleading not guilty resulting in long-off trial dates, believing that time will make it more likely that cases will crumble. We cannot stress highly enough that if the Courts fail to require the Crown to meet these obligations then we forsee grave risks to the public interest.

We take no pleasure in observing that our members (and our instructing solicitors) report that it has become increasingly difficult to engage with the lawyers at the CPS prior to a PTPH. It is not unknown for even prosecution counsel to be instructed and to attend court without access to the case papers at the PTPH, let alone defence counsel. The only reason we even mention such matters here is to strip away any illusion that the defence receives as a matter of course sufficent material in sufficient time to make it possible to fulfil obligations under the "duty of engagement" in advance of the PTPH.

We have begun to believe that it is possible the current timescales for requiring a PTPH to be held at the Crown Court within 28-35 days, reinforces these problems rather than solves them. We recognise that the new system is at a very early stage and that it may be several more months before a concensus develops about these issues. But this only reinforces the need for the context to be very carefully assessed before the Guidelines are finalised.

Lest the teething problems become institutionalised, we urge the Sentencing Council to build specific provisions into the guidelines, so that due process in guilty plea cases is maintained.

This can very simply be achieved by the Guidelines stating that time does not begin to run until the prosecution has provided all the information which it is required to provide in accordance with the requirements set out in the Criminal Procedure Rules and the Criminal Practice Directions. This may mean that the definition of the first stage of the proceedings may have to be re-considered. Alternatively the Guidelines could retain the definition with the proviso "providing all information required to be served by the Criminal Practice Directions has been served."

(c) 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?

Yes, as set out above, we agree that admissions, co-operation with the investigation and demonstrations of remorse should be considered separately to the formal assessment of a reduction for a guilty plea. This faithfully reflects the comments of the Court of Appeal in *R v Caley and others* [2012] EWCA Crim 2821.

Question 2

(a) 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?

Yes. We are of the view that the proposed approach is correct. We agree that a reduction for a guilty plea should not be withdrawn in cases where the evidence may be termed "overwhelming". This avoids any argument as to what "overwhelming" means and avoids inconsistency between different judges and courts.

The alternative approach proposed within the consultation is unattractive for the reasons rehearsed therein and one consequence of the alternative approach is that it causes great difficulty to legal advisers to provide advice to the lay client.

Further, if any reduction is to be withdrawn in such circumstances, there would have to be a formal assessment by the sentencing Judge as to the strength of any case, which would inevitably cause delay in that submissions as to merits would need to be advanced by both the Crown and the Defence.

If not:

(b) 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?

In the light of our answer above we make no observation.

Question 3

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

In its current form, section D is easily digestible. We note however the use of the term "allocation hearing". There is rarely if ever a separate allocation hearing at the Magistrates' Court; a determination as to venue is done at the first appearance.

Do you agree:

(a) with capping the maximum reduction at one-third?

Yes; we form the view that there are no credible or compelling grounds to contend that that the reduction should be increased or decreased from the present capping of one-third.

(b) with restricting the point at which the one-third reduction can be made to the first stage of the proceedings?

Yes, given the available exemptions that apply, but kindly note our response in respect to (c) below.

We reiterate the need for the obligations as to service of material to have been met. Professionally we are obliged to advise our client whether or not the Crown are able to prove the case against him or her; that obligation applies whether or not the defendant has made any admissions that may, or may not, be reliable. There must be an emphasis upon proper service by the Crown or both the presumption of innocence and the burden of proof are seriously undermined.

(c) with the definition of first stage of the proceedings for adults and youths for each type of offence at D1?

We take no issue in respect of summary only matters or indictable only matters. We however are of the firm view that either way offences should be split between those cases where the Magistrates Court decline jurisdiction and those where they accept jurisdiction. In the former, the case is akin to an indictable only matter, and thus there should be no difference in the manner in which it is treated. We observe that it is often the most junior advocates, including pupils who conduct such hearings. Whilst we make no criticism of their competency, the lay client charged with a serious either way offence often wishes to receive advice from advocates with relevant Crown Court trial experience.

In R v *Caley* the Court of Appeal accepted that the Crown Court was the first reasonable opportunity to plead guilty. What justification is there from departing from this authority?

This is an important principle with serious practical consequences. Many matters that are 'either way' offences are extremely serious indeed. Some historic sex offences, frauds, offences such as theft and drug offences may in theory be 'either way' but where the values involved are large they are inevitably sent to the Crown Court: they are 'either way' in theory only. Such cases are plainly destined for the Crown Court and it is only right that the defendant is advised by an expert who practises in the Crown Court, and that may not the person appearing at the first appearance at the magistrates court. It is fanciful to equate them to summary only matters simply because the class of offence, for example theft, could be tried summarily if the value were small. It is both right in principle and reasonable in practice to equate an either way offence where the magistrates decline jurisdiction with an indictable offence.

There is an additional reason for the rationale applying to the reduction for early guilty pleas continuing to apply up to the PTPH. The additional cost of sending a case to the Crown Court is not commensurate with the 13% reduction in credit. The Crown ought to have made a charging decision based upon material that is already available and easily capable of being "uploaded to the system". In reality if the Crown has fulfilled its obligations properly then there ought to be little extra work done between the first appearance at the magistrates court and the PTPH, which means insignificant

expense is incurred if a plea is delayed until PTPH. We do not accept that in such circustances that a a 13% loss of credit justified.

Question Four

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

Yes

Do you agree:

with restricting the reduction to one-fifth after the first stage of proceedings?

This is not an easy question to answer but on balance our answer is 'No': we would suggest a reduction to a quarter (25%).

If the rationale of the Guideline is to encourage early guilty pleas we believe the unintended consequence of the reduction to one-fifth (20%) may be to increase the number of contested matters, or matters that crack at trial. There is a risk that with such a marked difference between one-third (33%) and 20%, defendants would be minded not to plead if they have not done so at the first hearing because the difference between 20% and one-tenth (10%) is negligible in real terms. The difference however between say 25% and 10% may well provide the necessary motivation for defendants to furnish their guilty pleas at a relatively stage.

Let us provide an example in real terms. A defendant is facing sentence of 6 years. If they pleaded guilty at the first opportunity it would be 4 years. If they receive a reduction of only 20% they would be facing a sentence of 5 years – more or less; defendants may not be interested in the fine calculation that it would be 4 years and 10 months. We suspect that most defendants would opt to take their chances in such circumstances. A reduction of 18 months (25%) however is more attractive. We realise that these margins may seem small in the abstract, but they often have much more weight in the minds of those to whom they are aimed – criminal defendants.

with the definition of the point at which the one-fifth reduction can be given at D2?

We believe that 14 days in the Magistrates' Court and Youth Court is an unrealistic deadline and is simply not practicable. 14 days provides little time for there to be a review of the papers (if necessary), a conference arranged and conducted with the Client and the intention to plead communicated to the Court. Legal Aid solicitors and the most junior members of the Bar are routinely overworked and cannot guarantee availability within two weeks of a hearing. It is impossible in many parts of the country to arrange legal visits in prison in that time. (It is going to take several years for reform of the prison estate to begin to make available sufficient video link facilities to address this problem.) We would propose at least 21 days for there to be any meaningful progress.

We take no issue in respect of the time tabling in the Crown Court, save we repeat our earlier observation that we see no reason why either way cases sent to the Crown Court are treated any differently from indictable only matters.

We also believe that more thought should be given to the right time for the application of the reduction in the Youth Court.

Youths should not be equated with adults in summary courts simply because both are summary procedures. Firstly, we believe that youths should be treated differently to adults as they are not equipped to make quick decisions on plea. Secondly, in the youth court defendants can be sentenced to up to 2 years DTO; this compares very unfavourably with the adult maximum of 6 months. Youths and adults should therefore be treated differently as much more may be at stake in the Youth Court. Thirdly, if they are committed to the Crown Court under PCCSA, it means they are facing a substantial custodial sentence which to a youth is very substantial indeed. Once the case arrives in the Crown Court that should be the first opportunity for the defendant to enter his plea. Therefore we believe that the caveat in the guidelines should be removed, "unless it's unjust…" and the first hearing at the Crown Court should simply become the stage at which full credit is given.

with the sliding scale reduction (at D3) thereafter?

We take no objection to a sliding scale save we propose that the sliding scale start at one quarter, not one-fifth.

with treating the trial as having started when pre-recording cross-examination has taken place?

Yes. On the one hand it could be argued that such cross-examination may take place before all the costs of fully preparing a case for trial have been incurred and before the court has had to allocate a fixed listing for a trial and thus part of the rationale of the guideline would have been met. However, on the other hand, given the rationale of the scheme includes reducing the impact of proceedings on victims and witnesses, and given that pre-recording cross-examination is intended to be used with the most vulnerable witnesses, we feel that it would be objectionable to give a reduction in sentence to a defendant who waited until after such a witness had been subjected to cross-examination and deny it to a defendant who waited until after a witness in a trial had been cross-examined.

Question Five

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

Yes

Do you agree:

That it may be appropriate to reflect a guilty plea by suspending a period of imprisonment?

Yes.

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

Yes.

Please give reasons where you do not agree.

Question 6

Is the guidance at paragraphs E2 to E4 clear?

The guidance in E2 states "the court may make a modest additional reduction to the overall sentence to reflect the benefits derived from the guilty pleas".
This does not appear to be clear. What are the criteria which the court should take into account? Is this an oblique reference to co-operation with the authorities or something else? In our view the guideline should state either that the court should, or should not, make an additional reduction to reflect the benefit derived from the guilty plea.

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?

Given the utilitarian rationale for the guideline it would appear that the approach should be that the court should make a further modest reduction.

Are there any other jurisdictional issues that the guideline should address?

None of which we aware.

Question 7

Is the guidance at F1 clear?

We believe that there is a potential lack of clarity in the phrase – or at least the application of the phrase "had insufficient information about the allegations to know whether he was guilty of the offence".

Do you agree:

that the exception is a necessary safeguard?

We definitely believe that that exception is both necessary and essential.

that the right cases are captured by this exception?

As the consultation itself states "The situations where this exception would apply are likely to be rare and may vary considerably on their facts" and so it is difficult to predict whether all the right cases and only the right cases are captured by this exception. We can foresee the possibility of considerable differences of opinion as to whether and if the defendant has "had insufficient information about the allegations to know whether he was guilty of the offence" but we can not improve upon the formulation of the exception.

Question 8

Is the guidance at F2 clear?

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?

Yes, this is important. For the reasons set out previously it would be better if the guidance said "If the prosecutor has not made the IDPC in accordance with the Criminal Procedure Rules and Criminal Practice Directions".

that the exception should apply to either way and indictable only offences but not to summary offences?

If the rationale of the guidance at F2 is that a defendant should have sufficient information to enter a plea at the first stage of the proceeding, we find that the distinction between the category of offence is without foundation. Moreover, whilst it is suggested that those charged with summary offences can still advance an exception under F1, the same can be said of all offences.

That 14 days is the appropriate extension?

We believe that 14 days is an arbitrary deadline and one that is not practical. 14 days provides little time for there to be a review of the papers (if necessary), a conference arranged and conducted with the Client and the intention to plead communicated to the Court. Even assuming papers are made available on the DCS in time (which is broadly not our experience), it is impossible in many parts of the country to arrange legal visits (whether by video-link or in person) at prisons in that time We would propose at least 21 days for there to be any meaningful progress.

<u>Question 9</u>

Is the guidance at F3 clear?

The guidance is clear, however, there are often cases where the Newton issues concerns multiple factual issues for resolution. The consultation states that "The exception at F3 reflects the current position in the SGC guideline" however our understanding is that the Current Guideline simply says "taken into account". We note that the consultation says "The draft guideline (like the SGC guideline) suggests that the reduction for a guilty plea should be halved but allows a degree of discretion for the sentencer depending on the circumstances of the case. A key factor will be whether the benefits of the guilty plea (especially to victims and witnesses) have been eroded by the necessity for a Newton or special reasons hearing."

We believe that it is important to retain a significant degree of discretion or serious injustice could result, even where a witness has to be called, if the findings after the Newton hearing were partially in the defendant's favour. We deprecate the erosion of trust in the judgment of Crown Court Judges that is implied by this proposed change.

Let us give a real life example to illustrate the principle that discretion must be retained. In a case some years ago at Guildford Crown Court a gamekeeper and a landowner pleaded guilty to offences involving their use of firearms as a threat (no shots were fired at anyone) to break up an illegal 'rave' on private land. They had no defence in law but pleaded significant provocation. The alleged victims of their actions alleged they had behaved dangerously and violently. After a lengthy Newton hearing at which a large number of the 'victims' gave evidence the judge found as a fact that the defendants had suffered significant provocation, the prosecution witnesses were not truthful and the sentences were significantly reduced.

We realise that much of that mitigation survived the Newton hearing and so their sentences were much reduced in any event, but it would appear unjust that the defendants should be deprived of the benefit of a reduction to their sentence because a Newton hearing had to be held to dispel most of the untrue allegations made against them, although they would have retained the full benefit if all the untrue allegations had been defeated.

Given that defence accounts may be upheld in full or in part, whilst there is a discretion afforded by the Guidelines, there should be express mention of "upheld in full or in part".

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?

Yes.

Question 10

Is the guidance at F4 clear? Do you agree:

The guidance may appear clear but we believe that it will be applied inconsistently.

that it is a necessary exception for the small number of cases to which it applies?

Yes, it is an exception that is necessary, although we question whether it is right to limit it to only cases that are very substantial.

that the exception is worded appropriately to capture the right cases?

We would suggest that the Guidelines contain clear guidance or an indication by way of example what is meant by the term "very substantial" or "substantial" in an attempt to ensure consistency of application. There is obviously a great potential benefit to securing guilty pleas in cases of multiple complainants, even where the case may not be "very substantial" and these are often the cases where it is difficult to achieve agreement between defence and prosecution as to the pleas tendered and negotiations may take some time and not be completed until well after the "first stage in the proceedings". It would obviously not be in the public interest for such negotiations to be sabotaged by the guillotine coming down on the time available for the full reduction for satisfactory guilty pleas.

Question 11

Is the guidance at F5 clear?

Yes.

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

Yes.

Question 12

Is the guidance at F6 to F8 accurate and clear?

Yes.

Question 13

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

Yes

Do you agree with the guidance in such cases?

Yes

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.

Yes

Question 15

Are the flowcharts at appendices 1 to 6 clear?

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

Yes. We submit that the flowchart in Appendix 1 illustrates very clearly our submission that it would be unjust for someone sent for trial on a complex high value either way offence where the magistrates court has declined jurisdiction to only receive a 20% reduction in sentence for a guilty plea at the PTPH.

Is there any other explanatory material that it would be useful to include?

None we can think of

Question 16

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

No. But we are firmly of the view that the matters we raise above are as much in the interests of victims and the wider public as anyone else.

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

No