



Response to the Sentencing Council Consultation

Reduction in Sentence for a Guilty Plea Guideline – 11 February 2016 to 5 May 2016

The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Environmental Litigation Working Party.

The Sentencing Council has issued a consultation on Reduction in Sentence for a Guilty Plea Guideline Consultation. It is seeking views on:

- The principles on which the reduction for a guilty plea should be based;
- The levels of reduction that should be available;
- The stage in the court process at which different levels of reduction should apply;
- Any exceptions to the reductions available at various stages;
- The regime that should apply in the case of murder;
- The clarity and accessibility of the guideline; and
- Anything else that should be considered.

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The new guideline when brought into existence will be used by the courts in conjunction with guidelines for sentencing particular offences, where they exist such as the Sentencing Guideline for Environmental Offences.

The Sentencing Council state that its aim is to ensure that the reduction in sentences for guilty pleas should be applied fairly and consistently and that the new guideline should encourage defendants who are guilty to plead guilty as early in the court process as possible.

UKELA makes the following comments on the proposals:

PRELIMINARY COMMENTS

A distinction needs to be made between regulatory and general criminal cases.

In general criminal matters, it is often clear to the defendant whether they have committed the act in question but the position is quite different in regulatory matters, regardless as to whether it is a corporate defendant or an individual company director / manager who is charged. These cases can often be complex, highly varied and expert – dominated.

As such, UKELA would like to see a carve out for regulatory matters to acknowledge this clear distinction. Determining whether a party is guilty of the act alleged can be complex and time consuming, involving sometimes substantial expert evidence and thorough legal advice. Whilst we have to be mindful of overriding objective of the Courts and speedy

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justice, we would prefer to see some further acknowledgement that regulatory matters may fall outside of the parameters deemed appropriate for general crime, such that a corporate defendant or an individual company director / manager is dealt with in a fair and proportionate manner by the criminal law.

CONSULTATION QUESTIONS

Question 1:

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

Whilst we agree with the general principal outlined in this section, we make the observation that there is often no identifiable victim in environmental cases. As such, the benefits outlined ((a)-(c)) are weakened.

Do you agree?

(b) With the stated purpose of operating a reduction for a guilty plea scheme

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

(d) That the factors such as admissions in the pre-court process should be taken into account as mitigating factors before the application of reduction for guilty plea?

Please give reasons where you do not agree?

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UKELA agrees. Environmental offences can be very technical and/or complex, this can make it difficult for a defendant to understand whether an offence has been committed or not. As such, the defendant can be reliant on Prosecution disclosure and/or seeking legal advice before it can take a view on appropriate plea.

Question 2

- (a) Do you agree with the approach taken in the draft guideline to overwhelming evidence that the reduction for guilty pleas should not be withheld in cases of overwhelming evidence?**

UKELA agree that certainty in the application of the guideline should be a priority.

If not

- (b) Do you think that the alternative approach of allowing the court discretion to apply lower reductions after the first stage of the proceedings is preferable.**

Please give reasons

UKELA understand the desire to leave a certain amount of discretion in cases where evidence is overwhelming. This is often not the case in environmental matters, indeed, the Defendant may be unaware of the offence charged as noted above. As such, UKELA agree that consistency and certainty are of utmost importance and would support the position at 2a) above rather than this alternative.

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Question 3

- (a) Is the method of approaching a reduction at the first stage of the proceedings set out clearly**

Do you agree?

- (b) With capping the maximum reductions at one third?**

UKELA agrees.

- (c) With restricting the point at which the one third reduction can be made to the first stage of the proceedings**

The majority of the main environmental offences are either way offences. The maximum reduction for pleading guilty for these offences only lasts up to and including the allocation hearing at the Magistrates' Court. There would no longer be a discretion to apply the maximum reduction if the plea is entered afterwards but at the 'first reasonable opportunity'.

Although UKELA note the exceptions at F1 and F2 (discussed below), this does not appear to appropriately cover corporate defendants and corporate governance. It may take some time to go through the necessary decision making process, even if such a process is expedited. We would suggest moving away from an "immediate response" in F1 to one which is "as soon as reasonably practicable".

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In addition, the Guideline is drafted on the assumption the Defendant should know whether the offence has been committed, this is often not the case for environmental matters which (as noted above) can be highly technical or complex in nature. They often they rely on a certain amount of evidence from witnesses or experts. Given that prior to the first appearance, the Criminal Procedure Rules do not require detailed disclosure, this may prove to be an issue for more technical and complex matters. In addition, there is no requirement to address the various issues relevant to the sentencing guidelines (e.g. culpability factor and harm category) and no requirement to serve expert evidence. Absent that material, it may be impossible for the defendant to address the issue of plea.

The exception at F1 is helpful to some degree but this still requires the ability to admit a certain conduct. This may not be possible, as described above. We would suggest an additional exception which allows for the retention of the 1/3 where it is necessary for further disclosure to be provided to properly particularise the offence(s).

(d) With the definition of first stage proceedings for adults and youths for each type of offence at D1

Please refer to our comments above.

Question 4

(a) Is the method of reduction after the first stage proceedings set out clearly?

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Do you agree

(b) With restricting the reduction to one fifth after the first stage proceedings

UKELA does not agree. As discussed above, this gives no consideration to corporate defendants or regulatory matters. Reducing to one fifth at either 14 days after the first hearing or the first hearing at the Crown Court means that the defendant may have as little as 14 days post service of initial details to decide on plea. In addition, this may well be prior to (other than initial details) any prosecution disclosure. UKELA would suggest, at the very least, a similar rule as that shown for indictable only offences should be used for all matters, for example, 28 days following full prosecution disclosure.

However, in regulatory matters, expert evidence can be crucial and 28 days to provide such evidence may not prove possible. Indeed, it is clear from our members that such evidence can frequently take months to collate and analyse. As such, we would refer to our earlier comments on the need to carve out a specific exception or provide more flexibility for regulatory offences.

(c) With the definition of the point at which the one fifth reduction can be given at D2

See above comments.

(d) With the sliding scale reduction at D3 thereafter

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Subject to our comments above as to the starting point of the sliding scale, UKELA agree with the general principal.

(e) With treating the trial as having started when pre-recording cross examination has taken place

Please give reasons where you do you not agree

No further comments.

Question 5

(a) Is the paragraph on imposing one type of sentence rather than another clear

Do you agree

(b) That it may be appropriate to reflect a guilty plea by suspending a period of imprisonment

(c) That when a guilty plea reduction is reflected in imposing a different (less severe) type of sentence that no fifth reduction should be made

Please give reasons where you do not agree

No comments.

Question 6

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- (a) Is the guidance at paragraph E2 to E4 clear
- (b) Do you agree with the guidance at E2 that there should be provision for a further reduction in cases where consecutive sentences (after a guilty plea reduction) for some offences to the maximum of 6 months
- (c) Are there any jurisdictional issues that the guideline should add

Please give reasons where you do not agree

UKELA agree with the principles in this section.

Question 7

- (a) Is the guidance at F1 clear

Do you agree

- (b) That the exception is a necessary safeguard
- (c) That the right cases are captured by the exception

Please give reasons where you do not agree

UKELA welcome this exception but please refer to our comments above in relation to suggested changes / additions. In addition, we would suggest that only 1) and 2) or 1) and 3) need apply to make this exception out.

Question 8

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(a) Is the guidance at F2 clear

Do you agree

- (b) That the exception will ensure that the defendant knows what all against them before being required to enter a guilty plea**
- (c) That the exception should only apply to either way and indictable only offences and not to summary offences**
- (d) That 14 days is the appropriate extension**

Please give reasons where you do not agree

UKELA welcome this exception but please refer to our comments above in relation to suggested changes / additions. UKELA do not agree that this exception cannot be applied for summary only offences. It is our member's experience that summary-only environmental offences can be just as reliant on Prosecution disclosure as either-way or indictable offences.

Question 9

- (a) Is the guidance at F3 clear**
- (b) Do you agree with the proposed reduction in cases where an offenders version is rejected at Newton or Special Reasons Hearing**

Please give reasons where you do not agree

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Newton hearings are relatively common in environmental offences as compared to other criminal offences, often on the basis of sentencing factors for the relevant culpability/harm. As noted above, a defendant may be aware that they have failed in some way but the specifics of that failure/offence may be in dispute. UKELA would suggest that to halve the reduction is too severe. The defendant will be subject to costs if they fail in their Newton argument and, as such, they should not be penalised twice.

In the alternative, UKELA would recommend that the Newton hearing should wholly reject the defendant's position prior to imposing the reduction. This would provide some protection for unnecessary hearings, whilst not fettering the defendant's ability to challenge the prosecution evidence.

Question 10

(a) Is the guidance at F4 clear

Do you agree

(b) That it is a necessary exception for the small number of cases to which it applies

(c) That the exception is worded appropriately to capture the right cases

Please give reasons where you do not agree

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UKELA welcome this addition given our comments for very technical and complex matters.

Question 11

(a) Is the guidance at F5 clear

Do you agree

(b) With the proposed treatment of cases where an offender is convicted of a different or lesser offence

Please give reasons where you do not agree

UKELA agree with the principal contained in F5 but note that it may be difficult for a defendant to understand where there may be a lesser regulatory offence that they may be guilty of without the benefit of disclosure. We would suggest therefore the retention of the current move from 1/3 to 1/4 to 1/5.

Question 12

Is the guidance at F6 and F8 accurate and clear?

No comments.

Question 13

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- (a) Is the guidance at section G on reduction for guilty plea in murder cases clear**
- (b) Do you agree with the guidance in such cases**

Please give reasons where you do not agree

No comments.

Question 14

- (a) Do you agree that the guidance in SGC guidelines can be omitted from the new guidelines**

Please give reasons where you do not agree

No comments.

Question 15

- (a) Are the flow charts at appendixes 1-6 clear**
- (b) Do you agree it is helpful to include the flow charts**
- (c) Is there any other explanatory material that it would be useful to include**

UKELA agree that the flow charts are helpful.

Question 16

- (a) Are there any ways in which you think victims can be considered**

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(b) Are any equality or diversity matters that the Council should consider? Please provide evidence of any issues where possible

Please refer to above comments in respect of corporates.

5th May 2016

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Contact: alison.messenger@pinsentmasons.com

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