

## Response by the Criminal Cases Review Commission

1. This is the response of the Criminal Cases Review Commission (the CCRC) to the Sentencing Council's Reduction in Sentence for a Guilty Plea Guideline Consultation.
2. The CCRC's response is drawn from our consideration of applications for review of a criminal conviction or sentence in the Magistrates' or Crown Court in England, Wales and Northern Ireland.
3. The CCRC is supportive of the general aims of the draft guidelines to improve consistency in sentencing practice and encourage earlier certainty for victims and witnesses about whether their attendance at court is required. The CCRC also recognises the place of the guidelines as part of an overall programme of reforms within the criminal justice system aimed at improving efficiency in criminal proceedings, and the resulting savings for public time and money.
4. This paper offers views on the key principles underlying the draft guidelines, the definitions of the "first stage of the proceedings" and "initial details of the prosecution case (IDPC)" and the proposed exceptions, in particular F1 and F2.

### **CCRC data and experience**

5. It is the experience of the CCRC that a significant proportion of those who apply to the CCRC for a review of their conviction have entered a guilty plea. A sample of CCRC applications from January 2014, January 2015 and January 2016 indicates that on average 26.7% of applicants pleaded guilty.
6. The CCRC can refer a conviction where there is new evidence or new legal argument which raises a real possibility that the appeal court (the Crown Court in the case of summary convictions and the Court of Appeal for Crown Court convictions) would overturn the conviction. The CCRC has on a number of occasions, referred the convictions of those who pleaded guilty.
7. There are several situations which might result in the CCRC referring a case where a guilty plea has been entered. Examples include:
  - Where there is overwhelming new evidence
  - Where the plea was entered under duress e.g. due to threats between marital partners or threats of death or serious personal injury (particularly if the defendant is unusually vulnerable due to age or mental health)
  - Where there was erroneous legal advice
  - Where there has been an equivocal plea (where the defendant's plea is ambiguous or misinterpreted)
  - Where the guilty plea is as a result of an erroneous ruling on a point of law by the trial judge
  - Where the guilty plea was entered in ignorance of prosecution malpractice e.g. non-disclosure of relevant evidence.

8. Since 2010, the CCRC has referred 128 cases to the Court of Appeal, 49 of which were guilty plea cases, guilty plea cases therefore making up 38% of all referrals in recent years. In 2014, the CCRC referred 27 cases to the appeal courts, 9 of which were guilty pleas. In 2015, 38 cases were referred, 18 of which were guilty pleas and so far in 2016 7 cases have been referred, 5 of which are guilty pleas. Thus in the past 2 years and 3 months a total of 32 guilty plea cases have been referred. 24 of these were Asylum and Immigration cases which are specifically discussed below.

### **CCRC concerns**

9. From its experience of the causes of miscarriages of justice, the CCRC would want to encourage guilty pleas to be entered in circumstances where:
  - defendants have had sufficient time to receive informed legal advice
  - initial details of the prosecution case contain sufficient information to allow legal advisers to offer considered legal advice about plea and to allow the accused to make an informed decision
  - adequate disclosure has taken place in accordance with the requirements of the Criminal Procedure and Investigations Act 1996
  - the public interest in an early guilty plea is balanced with the need for sufficient evidence to be available prior to plea

### **Why?**

10. The work of the CCRC comes at the end of the criminal justice process and an application to the CCRC necessarily extends the duration of a case beyond the appeal courts. CCRC case reviews require public time and money to investigate potential miscarriages of justice. There is a risk that encouraging guilty pleas at an earlier stage of a case than at present might lead to an increase in guilty plea applications to the CCRC once the case has concluded in the courts. In particular the CCRC would want to avoid the risk of unmeritorious guilty plea applications based on concerns amongst potential applicants that "justice has not been done". There is concern that if full credit can only be obtained at an earlier stage (possibly in the absence of full disclosure of the prosecution evidence), if further evidence comes to light (for example during sentence), defendants may feel this is unfair.
11. Policy changes which result in an increased risk of wrongful guilty pleas or which increase the *sense* of injustice or unfairness amongst those who plead guilty may therefore result in an increase in CCRC workload. Whilst this would be an issue the CCRC would have to address, it may make for an *unnecessary* increase in CCRC workload with applicants applying because they system seems unfair to them, rather than because they have been wrongfully convicted.
12. CCRC involvement with criminal cases can prolong the period of uncertainty for victims of crime for months and even years where the CCRC undertakes a full review of a conviction or sentence. In all cases, the CCRC considers whether victims should be notified of an application and victim notification is usually carried out where cases are referred to the appeal court. In other cases, occasionally a victim finds out about a CCRC application from another source such as family or friends or unanticipated media coverage. Encouraging finality in criminal proceedings is in the interests of victims as well as applicants to the CCRC. Thus, an increase in guilty plea applications, particularly where they are unmeritorious, would be detrimental to the interests of victims.

13. To this end, the CCRC would want to ensure that the draft guidelines do not undermine the stated key principle that an accused is “entitled not to admit the offence and to put the prosecution to proof of its case” such that the burden of proof still rests properly on the prosecution to prove its case and the presumption of innocence is tangibly intact.

### **Examples of miscarriages of justice in guilty plea cases**

14. The CCRC brings to the attention of the Sentencing Council two examples of guilty plea referral cases. Both examples involve the referral of cases where there were guilty pleas in the Magistrates’ Court.

#### *Asylum and Immigration cases*

15. A high percentage of referrals of guilty plea convictions over the past three years involve passport and deception offences relating to entry and exit from the UK. In these cases, those accused were advised to plead guilty without being made aware of available defences under Article 31 of the 1951 Refugee Convention and Asylum and Immigration (Treatment of Claimants) Act 2004. In some cases, prosecutions should not have been initiated at all because the accused were victims of human trafficking or the prosecution was in breach of their Article 31 Refugee Convention rights (for pre 1999 cases).
16. This illustrates the need for quality legal advice prior to entering a guilty plea. Whilst the example above is restricted to asylum and immigration cases, the CCRC would make the general point that legal advisers need sufficient time and information to offer considered advice on the charges against their client and to investigate the existence of any available defences.

#### *Referral of the common assault conviction of Mr W in 2015*

17. Mr W pleaded guilty in the Magistrates’ Court to a charge of common assault. He was travelling home on the tube following a night out in London when he had consumed alcohol. He became involved in an altercation with another passenger who had told him to take his feet off the seats. The police became involved when the complainant pulled the emergency cord of the tube. He told police that Mr W had hit him twice in the eye. Mr W was charged with common assault.
18. At the police station, Mr W told his solicitor that he was drunk and did not remember anything beyond arguing with the complainant and did not remember hitting him. The police summary was written prior to a statement from the complainant’s doctor and said that the CCTV did not show the assault. Officers also suggested to Mr. W’s solicitor that there would be two independent witnesses who would support the complainant’s case. Mr W said he was advised by his solicitor that the CCTV did not assist him and as a result, no enquiries were made with the prosecution as to the complainant’s credibility. Mr W pleaded guilty at court. He was fined and subject to curfew conditions for 12 weeks.
19. Subsequently, Mr W learned that, in fact, there were no witness statements from any independent witnesses to the incident and having acquired a copy of the CCTV footage for himself, that this footage tended to support the defence case that the complainant was the aggressor. Additionally, a PNC check of the complainant’s previous convictions showed that he had a conviction for a serious benefit fraud six years previously, something which might have undermined the prosecution case at a trial. The CCRC referred the conviction to the Crown Court on the basis of the CCTV

evidence, the guilty plea was set aside and the applicant was acquitted after a hearing which was unopposed by the CPS.

20. It is submitted that this case highlights the importance of ensuring that “sufficient information” both in terms of quantity and accuracy is available to the accused and his/her legal advisers prior to the entering of a guilty plea.

### **Specific comments on the guidelines**

#### *First stage of the proceedings and “Initial Details of the Prosecution Case”*

21. The CCRC understands that for summary offences, the first stage of the proceedings will be the first hearing in the Magistrates’ Court. For either way offences, it may also be the first hearing, if the Magistrates are happy to proceed to allocation of the case (i.e. take a decision about the appropriate venue: Magistrates’ Court or Crown Court) at this stage. For indictable only cases the first hearing will be the first hearing at the Crown Court.
22. In the light of the case examples above, the CCRC would have particular concerns about what “initial details of the prosecution case” (IDPC) would be available at such an early stage, particularly for summary and either-way offences.
23. In many cases, because the first stage of the proceedings takes place so early, the IDPC contains minimal information and might be little more than a police summary and a conviction check on the accused. The risk of a wrongful conviction caused by insufficient and inaccurate information in the IDPC has been highlighted above at paragraphs 16 and 20.
24. The CCRC would also comment that separating offenders from victims is not always straightforward, as in the case of multi- handed fights, particularly where alcohol is a factor. Guilty pleas to an overcharge might also be a risk where the IDPC does not give sufficient information (e.g. relevant medical evidence), to allow the police summary to accurately assess the level of an offence (e.g. whether there has been an assault causing actual bodily harm or grievous bodily harm or whether there is evidence of an intentional serious assault or one committed recklessly). Legal advice on this kind of issue needs to be informed, bearing in mind the consequences for the accused in terms of length of sentence and criminal record if a guilty plea is entered to the wrong charge.
25. Some CCRC referrals of guilty plea convictions result from the discovery of a serious abuse of process, often involving non-disclosure of evidence capable of undermining the prosecution case or supporting the defence case. Based on our experience, the CCRC would caution against a criminal justice process where, as a matter of course, evidence is not gathered in the first instance or not passed to the CPS or disclosed to the defence prior to the sentence as a result of guilty pleas being entered at a very early stage in order to receive full credit. The CCRC would also be concerned that this might create an environment in which the general standard of investigatory and prosecutorial procedures is at risk of declining.

#### *The exceptions at F1 and F2*

26. The CCRC welcomes the exceptions outlined in the guidelines which acknowledge that in some circumstances there should be safeguards to prevent undue pressure to plead guilty where it would be unfair to do so. However, it would comment that the

definitions may not be sufficiently widely drawn to provide adequate protection in all cases where it is deserved.

27. For instance, it is not clear whether, in the circumstances of the case of Mr W, the exception at F1 would apply. The example given is where memory of what happened in a car crash may be hazy in the circumstances where the driver is charged with dangerous driving. Would this exception also cover situations where memory of what happened is affected by alcohol, injury, age or mental health?
28. F1 specifically does not apply where an offender has exercised his right not to admit what he knows he has done until he sees the strength of the evidence against him as per *R v Caley and others* [2012] EWCA Crim 2821. Whilst the key principles state that an accused is entitled not to admit the offence and to put the prosecution to proof of its case, the exception at F1 may only add to the pressure a defendant may be feeling to plead guilty.
29. Systemic and personal pressures to plead guilty are capable of extending to the factually innocent as well as the factually guilty. The Sentencing Council should consider whether the draft guidelines provide sufficient safeguards against undue pressure being placed on the factually innocent and vulnerable groups, such as those with mental health problems, where equivocal pleas are more of a risk.
30. The CCRC would also query the justification for the excepting of summary cases from F2. This appears to rest on the assumption that these cases are not serious enough to warrant such a safeguard. As the examples above show, miscarriages of justice are not limited to Crown Court convictions. A conviction for a less serious offence does not intrinsically make for a less serious miscarriage of justice. In the case of a summary offence, the defendant is sentenced by magistrates who may not have the benefit of a full file of papers which includes witness statements. In most cases, there is no right of appeal against guilty pleas in the Magistrates' Courts and a plea may only be altered with the consent of the Magistrates or Judge up to the date of sentence. Consequently, because there is no right of appeal, such cases would have to come to the CCRC.

## Conclusion

31. This paper seeks to encourage the Sentencing Council to take into account the experiences of the CCRC's reviews of convictions and sentences in Crown Courts and Magistrates' Courts before finalising the new guidelines. In particular, the CCRC would ask the Sentencing Council to consider:
  - the possible risk of increased numbers of appeals and applications to the CCRC at the end of the criminal justice process created by making savings of time at the start of the process
  - the impact of appeals and applications to the CCRC on victims
  - the impact of appeals and increased number of applications to the CCRC on public time and money
  - the risk of miscarriages of justice where there is undue pressure to plead guilty when insufficient information is available to inform this decision
  - whether the exceptions provide a sufficiently robust safeguard to allow defendants to receive considered and informed legal advice prior to plea
  - whether the concept of the IDPC allows sufficient information for vulnerable categories of offenders in particular to be properly advised before entering a plea

- whether the increased emphasis on early guilty pleas might lead to declining standards of investigatory and prosecutorial procedures

32. In conclusion, the CCRC would ask the Sentencing Council to weigh the benefit of an early guilty plea as envisaged by the draft guidelines against the potential costs of a reduction in standards of investigation and prosecution and an increase in the number of appeals, and applications to the CCRC.

**Criminal Cases Review Commission**  
**April 2016**