Notes on research to explore sentencers' understanding of the draft sentence reduction for a guilty plea guideline

Background and aims

This research feeds into the final stages of development of the draft sentence reduction for a guilty plea guideline. It aimed to examine, in detail, how sentencers construe the guideline, in order to ensure that the final draft is clear, easy to understand and straightforward to apply across courts (where there are different processes and different cultures regarding guilty pleas and the reductions given).

Method

The research consisted of twenty in-depth interviews in total, held with 10 Crown Court judges, 3 recorders, 1 district judge and 6 magistrates. Participants were spread across courts and across the country. The discussion focused exclusively on sentencers' understanding of the text (e.g. 'Is anything unclear or ambiguous in this section?' 'Please can you summarise this section in your own words') and some guilty plea reduction scenarios were also tested.

This summary covers only the more substantive points that sentencers made, so not all the sections of the guideline are referred to.

Findings are preliminary only at this stage; analysis and quality assurance is continuing. The sample size is small and findings should therefore be interpreted with caution, since they are the views of an interested few, which should not be taken as representative of all sentencers. The research exercise also required sentencers' to scrutinise the guideline in a way that probably would not mirror real life. Therefore when we say, for example, that sentencers gave the expected reduction in our scenarios, this serves our current purpose in inferring that the guideline is clear. However, it may not give a very good indication of how the judges and magistrates would act had they not been directed to read parts of the guideline very closely.

Summary of findings

Section B – Key principles

1. Section B was generally clear to sentencers. The only ambiguity was that one judge and one magistrate both said they were not clear what 'greater benefits' are (in bullet point d) over and above bullet points a. to c., so they misconstrued this as meaning *other* benefits not mentioned above, rather than as intended (benefits are greater if the defendant pleads earlier).

2. Almost all of the judges spontaneously spotted the change regarding overwhelming evidence in Section B, although some of the magistrates had to be prompted to notice this. All the sentencers gave the expected 1/3 reduction in a scenario where the defendants were caught red handed or caught on CCTV i.e. they did not reduce the credit because of overwhelming evidence, further suggesting this point was understood.

Section C – The approach

3. Section C was also generally seen as clear. However, a couple of the judges noted that there is no guidance as to where totality fits (they said they would consider this before guilty plea, so the reduction is from the overall sentence). Several also seemed to think that the 'steps' were meant to correspond to those in the offence-specific guidelines, and so they were confused that Step 1 in the guilty plea guideline encompasses multiple steps in, say, the drug offences guideline.

4. Linked to the misunderstanding that Step 1 maps directly onto Step 1 in other guidelines (encompassing culpability, harm and starting points and ranges but *not* aggravating and mitigating factors), a couple of the judges and one magistrate felt that Section C contradicted the key principles, because these state that consideration of mitigation *precedes* reduction for plea, whereas they thought C inferred that aggravation and mitigation are, by default, part of 'Step 5 – follow the remainder of the decision-making process' i.e. to be considered *following* reduction for a guilty plea.

Section D – Determining the level of reduction

5. Judges noticed the changes to the percentage reductions awarded at different stages in the proceedings as outlined in Section D, although for a small minority this was only after prompting. A number of the magistrates did not notice the changes until prompted, but this was perhaps not surprising given that their knowledge of reductions for guilty plea beyond the standard 1/3 at the first hearing, and 1/10 on the day of trial, seemed to be generally low.

6. The judges had no difficulties in understanding Section D, but some judges were resistant to treating either way and indictable only cases differently, given that arrive in the Crown Court through the same mechanism, and, in some courts, very quickly after the allocation hearing, a period in which no additional work has been carried out by the CPS. Fairness was also seen as a consideration in this respect: one judge pointed out that because something is an 'either way' offence it is not necessarily less serious than an indictable only, using the example of a very serious theft compared to a low key robbery, implying he did not think it was necessarily fair that the latter would be given a longer window for full credit than the former.

7. There was also some general resistance to denying the either way cases full credit at their first appearance in the Crown Court, because this tends to focus the defendant's mind on the seriousness of his circumstances and prompts pleas. However, one judge noted that this change supports comments he has heard from district judges to the effect that they warn either way defendants that their credit will diminish if they fail to plead in the lower court, but they feel this is then undermined by the judges giving full credit in the Crown Court. The district judge we spoke to welcomed this change.

8. For indictable only cases, many judges characterised service of the defence statement as a movable feast, which leaves open the question of what happens when the judge extends this time, and made some judges wonder whether there is a perverse incentive to ask for extensions. There was some sense that the meaning (statutory time, or court time?) should be clarified.

9. One judge noticed a possible practical problem with the guideline if the single case management hearing is introduced. He said that he could not imagine how you could have this single hearing without either a plea of guilty or a defence statement. If this were the case, it would mean that the time for a defence statement would expire before the first hearing in the Crown Court, rendering the two key points in indictable only cases problematic.

10. The flowcharts were generally welcomed as a good innovation. A recorder and relatively newly appointed judge both said that they could imagine solicitors using these to explain guilty plea reduction in its simplest terms to defendants. Because of this, one felt that the guilty and not guilty pathways should be reversed in the chart, to facilitate explaining the process to someone on the other side of a desk. One judge suggested that the flowcharts should be ordered in levels of seriousness, and some judges noted the need for consistent terminology across the guideline and the chart (e.g. the term 'allocation hearing' does not appear on the 'either way' flowchart). A couple of magistrates said they could envisage using the flowcharts in the retiring room, or in a training context.

Section E1 – imposing one type of sentence rather than another

11. The phrasing of Section E1 was seen as unambiguous, but with specific reference to suspended sentences, a number of judges noted that in practice they often reduce *and* suspend the sentence in response to the guilty plea, which would seem to contradict the guideline's instruction that the reduction can only be the transformation of the sentence, implying that otherwise this is double-counting.

12. One judge in particular felt that this stipulation in the guideline contravened all *'existing principles'* in suspending a sentence. He and another judge noted that if the reduction could only be used *either* to transform the sentence *or* reduce its length, the suspended sentence would be longer than the immediate custodial term (e.g. a 12 month immediate custodial sentence would reduce to 8 months for an early guilty plea, but the suspended sentence would remain at 12). If the sentence was breached and subsequently invoked, the time served would then be longer than if an immediate custodial sentence had been imposed in the first instance. Additional consideration might therefore be given to how the transformation from an immediate custodial to a suspended sentence should work.

Section E2 – more than one summary offence

13. Magistrates understood Section E2 about giving a small additional discount in cases of more than one summary offence, and they all gave the expected third reduction in a scenario which tested this. However, it jarred with several who felt this was a double discount, or reward for committing more offences. The district judge, however, said that this was something he often did, to make sure the guilty plea is really incentivised in a situation where the maximum total sentence is 26 weeks.

<u>Section E3 – keeping an either way case in the magistrates' court to reflect a guilty plea</u>

14. For Section E3, there was some sense from less experienced magistrates that they would only retain jurisdiction if the likely or maximum sentence was 9 months' (rather than, for example, if the MSCG says 'Crown Court'). However, more experienced magistrates and the district judge said they did retain jurisdiction in these cases, basing the decision on a general sense of the severity of an offence, rather than the predicted outcome if it was sent to the Crown Court. In this context, for a couple of the magistrates, the phrase *'may enable'* seemed to have overtones of manipulating the sentence in order to retain jurisdiction.

<u>Section F1 – further information or advice needed</u>

15. In Section F1, although a few judges and magistrates liked the phrase 'what he knows he has done', some found it very hard to envisage, in practice, how the defendant would state this, i.e. through what mechanism? How formal does this have to be? There was also sense that expecting the defendant to state what he knows he was done was a little unrealistic, particularly from the more advocacy-minded judges, who noted that a solicitor will have advised a client not to make admissions, and that if the defendant makes some admissions and then chooses to plead not guilty this could damage his case. Those judges who found the phrase imprecise or were concerned about its implementation suggested alternative wordings e.g. '*he has admitted an element of the offence*' or '*the offender has by himself or through his representative made it clear to the court or the prosecution that there are matters in the case with which he takes no issue.'*

16. Some of the sentencers also failed to read the three bullet points in F1 as conditions that all need to be met.

17. Despite these issues, almost all of the judges gave the expected 1/5 reduction in a scenario which necessitated a judgement call as to whether or not the defendant needed more advice. One judge who gave 1/4 seemingly invoked the current sliding scale, rather than the new one, when he sentenced this case.

<u>Other exceptions in F</u>

18. The remaining Sections in F did not present any problems in terms of clarity. In particular, judges were given a scenario with a Newton hearing (<u>Section F3</u>) and all gave the expected reduction. Asked about what length of trial they thought would think worthy of qualifying under exception <u>Section F2</u>, many judges said a trial lasting more than 4 weeks, but there was no consensus around a 'rule of thumb' for a substantial number of witnesses. A couple of judges noted that large amounts of material to read can also constitute complexity. A couple of judges also suggested that some sex offence trials could also be included under exceptions, because of the particular value of the plea in saving very vulnerable witnesses from having to give evidence, and in having the victim's version of events accepted by the defendant.

General comments

19. There were indications in this research that judges felt it would be challenging to change the status quo in guilty plea reduction. In particular one or two judges referred to holistic sentencing and back calculating the sentence, and their own or their colleagues' cultural resistance to, for example, no longer giving a ¼ reduction for a plea at PCMH. One or two judges also inferred that they did not think defendant behaviour would change easily – for example, several said that a 1/5 reduction may be so low that defendants will decide to 'take their chance' and go to trial, and one judge noted the importance of other factors in determining when defendants plead e.g. retention of privileges such as visiting rights whilst on remand.

20. However, when asked about the draft guideline compared to the current, sentencers almost universally said the draft is clearer, albeit more prescriptive.

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