

Sentencing Council meeting:
Paper number:

21 October 2022
**SC(22)OCT05 – Reduction in sentence
for assistance to the prosecution**
Ruth Pope
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Lead official:

1 ISSUE

1.1 Under sections 73 and 74 of the Serious Organised Crime and Policing Act 2005 (SOCPA), and under sections 74 and 388 of the Sentencing Act 2020, a reduced sentence can be awarded to an assisting offender (usually called a SOCPA Agreement).

1.2 The Serious Fraud Office (SFO) has written to the Council to ask that consideration be given to the development of new guidelines to provide greater certainty as to the amount of that reduction and thereby encourage offenders to cooperate with law enforcement.

1.3 The letter setting out the request is at Annex A

2 RECOMMENDATION

2.1 The Council is asked to consider the request from the SFO and decide whether to add the development of a Reduction in sentence for assistance to the prosecution guideline to its workplan.

3 CONSIDERATION

Background

3.1 Officials were approached by the SFO in August 2021 for advice on how to make the case to the Council to develop a guideline for reducing sentences for assisting the prosecution. We directed them to the published criteria and invited them to submit a case. We suggested that it would be helpful if they could include an estimate of the number of cases a guideline would relate to. We pointed out that the Council has a full programme of work and even if the Council were persuaded of the need for a guideline it may be some time before work could begin and that the typical guideline development process takes 18 months to two years.

3.2 In July 2022 the SFO submitted the letter attached at Annex A. We have acknowledged receipt of the letter and explained that it would be considered by the Council when there was time on the agenda.

3.3 This is not the first time that the Council has been asked to develop a guideline for SOCPA agreements. In 2015 Siobhain Egan of Lewis Nedas Law Solicitors wrote to the

Council suggesting that a guideline 'would enable defence solicitors to advise their clients with some certainty about the outcome of cooperation with the authorities'. She sought the support of the then Director of the SFO David Green. He responded in a letter copied to the Council:

It seems to me that the sentencing regime and any associated guidance must cater for myriad outcomes. Every case is different and the degree of mitigation afforded by co-operation must necessarily be a matter for the sentencing judge who is uniquely placed to assess the weight it should be given. The case of Dougall [2010] EWCA Crim 1048 is of considerable interest in this regard.

Having regard to the vast range of different circumstances which might come into play around engagement with section 73 of the Act, I therefore do not believe that the Sentencing Council would be able, or likely to give any further guidance to that already given by the Court of Appeal, and therefore I do not feel that I can support your proposal.

The rationale for developing a guideline

3.4 As can be seen from the SFO letter, they argue that the greatest barrier to securing the assistance of an offender is the lack of certainty regarding the sentence reduction. They suggest that a level of certainty similar to that provided by the [Reduction in sentence for a guilty plea](#) guideline would encourage more offenders to enter into arrangements with investigators.

3.5 They say (with reference to the guilty plea guideline): 'It would be interesting to understand whether the number of guilty pleas increased following the production of these guidelines'. The answer to that is that it did not – but it was not the Council's intention that it should. What the guilty plea guideline was designed to do was to encourage offenders who were going to plead anyway to do so earlier in the court process. The evidence does not show that happening – the reasons for this are not clear.

3.6 The SFO set out the positive impact that could be achieved by a guideline:

- a) Impact on law enforcement agency resource: this change could see significant positive impacts on the length of investigations, the number of cases that law enforcement agencies take on, and the outcome of relevant cases.
- b) Public confidence: through the effective use of assisting offenders to secure wins in complex cases, we will see an increase in public confidence in the criminal justice system.
- c) Fairness: guidelines will make the application of SOCPA Agreements more clear, fair and consistent, going further than existing case law.

- d) International impact: this will also allow the UK to keep up with other jurisdictions which offer greater support to assisting offenders. The US allows payments to assisting offenders. While we do not propose making payments to assisting offenders, this does make the US a more attractive place to enter into such arrangements. In multi-jurisdictional cases, would-be assisting offenders may prefer to assist foreign law enforcement, reducing the UK's ability to police its own citizens and businesses. By taking steps to encourage offenders to provide intelligence and evidence in their own cases, the UK can better police crimes which took place within its jurisdiction.
- e) Prison places: by increasing the number of assisting offenders in economic crime cases, it can reasonably be expected that a greater number of offenders will have reduced custodial sentences, therefore reducing the impact on prison places. The Sentencing Council may wish to consider the greater application of non-custodial sentences for assisting offenders in economic crime cases, which would further reduce the pressure on prison places.

3.7 Point e) above overlooks the fact that if successful in encouraging more agreements a guideline could lead to more successful prosecutions and therefore more offenders being sentenced resulting in an increased demand for prison places. However, it is to be assumed the numbers involved (in either direction) would be relatively small.

3.8 It should be noted that the letter is sent on behalf of the SFO and the National Economic Crime Centre, the Crown Prosecution Service, the City of London Police, the Financial Conduct Authority and HM Revenue & Customs. The focus of the request is on economic crime. If the Council were to develop such a guideline a decision would have to be made as to whether it should cater for all offence types.

The current position

3.9 Every offence specific guideline includes a step (usually step 3) which says:

Step 3 – Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account [section 74 of the Sentencing Code](#) (reduction in sentence for assistance to prosecution) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

3.10 No further guidance is currently provided. The letter references several Court of Appeal judgments¹ to which courts presumably refer at present in the absence of a guideline. The information given in the SFO letter is that the CPS has agreed 56 SOCPA agreements in the period 1 May 2016 to 30 April 2021.

¹ [R v A \[2006\] EWCA Crim 1803](#), [R v P](#); [R v Blackburn \[2007\] EWCA Crim 2290](#), [R v Z \[2007\] EWCA Crim 1473](#), [R v D \[2010\] EWCA Crim 1485](#)

Next steps

3.11 If the Council is persuaded that the case for developing a guideline is made out, further work will be done to look at the options for the scope of the project and to estimate when it could be accommodated in the Council's work plan.

Question 1: Does the Council wish to develop a guideline for reduction in sentence for assistance to the prosecution?

4 EQUALITIES

4.1 A guideline would improve transparency and consistency which would be relevant to avoiding disparity in the application of the reduction. However, due to the sensitive nature of SOCPA agreements and the low numbers it will be very difficult demonstrate whether any disparity exists and, if so, how a guideline could address it.

5 IMPACT AND RISKS

5.1 There are risks associated with developing this guideline: the limited evidence base may make it difficult to develop an effective guideline and the Council could be criticised for devoting some of its limited resources to such a 'niche' guideline. Equally there are risks associated with not developing it: it is an area of sentencing that is referenced in all guidelines but without any clear guidance and the Council could be criticised for being unresponsive.



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7 July 2022

Dear Steve,

Creating sentencing guidelines for the reduction of assisting offenders' sentences

I am writing on behalf of a number of law enforcement agencies responsible for investigating and/or prosecuting financial crime to ask you to consider new sentencing guidelines, which would encourage assisting offenders to cooperate with law enforcement in delivering justice to victims. This request meets the fourth criterion for sentencing guideline review, as set out on your website:¹ “issues relating to sentencing that the Council considers could be addressed by the development or revision of one or more guidelines”.

As you know, this Government is committed to tackling economic crime, such as fraud. The ‘Integrated Review’ of our foreign and defence policy cited illicit finance as a high priority, putting it on a par with other national security threats such as hostile state activity. More recently, the Home Office’s ‘Beating Crime Plan’ set out ambitious steps to reduce the incidence of fraud, recognising it as a major threat to citizens’ safety and wellbeing.

Complex economic crimes often require a large amount of resource to investigate, and those investigations can take many years. The average investigation in the Serious Fraud Office, for example, is four years.² The volume of materials that must be interrogated and the forensic accountancy that must be undertaken can pose a challenge to even the most well-equipped law enforcement agencies.

¹ <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-the-sentencing-council/our-criteria-for-developing-or-revising-guidelines/>

² This is time taken to ‘first resolution’—either a charge, the commencement of DPA negotiations, or termination of the investigation without charge.



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The role of ‘assisting offenders’, i.e. those who were complicit in a crime and subsequently provide intelligence and/or evidence to a law enforcement agency investigating that crime, can change that. The most effective assisting offenders can provide paper trails of a crime that might otherwise remain hidden or prove difficult to identify, significantly reducing investigation times and increasing the likelihood of a successful case outcome. As noted in the judgement for *R v P; R v Blackburn* [2007] EWCA Crim 2290, “like the process which provides for a reduced sentence following a guilty plea, this is a longstanding and entirely pragmatic convention”.

Proposal

Participants in the National Economic Crime Centre³ have recently considered the barriers to the effective use of assisting offenders in economic crime cases, and how those barriers can be overcome to enable the effective use of such offenders.

Anecdotally, the highest barrier to securing the assistance of an offender is the lack of certainty regarding their sentence reduction. Under sections 73 and 74 of the Serious Organised Crime and Policing Act 2005 (SOCPA), and under sections 74 and 388 of the Sentencing Act 2020, a reduced sentence can be awarded to an assisting offender (usually called a SOCPA Agreement). However, until the point of sentencing, an offender cannot be sure to what extent their sentence will be reduced, if it is reduced at all.

The sentence reduction for a guilty plea is set out in law and in guidelines (Reduction in Sentence for a Guilty Plea, issued by the Sentencing Council). It would be interesting to understand whether the number of guilty pleas increased following the production of these guidelines.

Without even the broadest of assurances, many would-be assisting offenders cannot see that the benefits of their assistance outweigh the risks. As the risks to economic offenders are generally less than those to, for example, members of organised crime gangs, it is possible to tip the scales so that the benefits are greater than the risks.

Creating sentencing guidelines would enable investigators to indicate at the earliest stage what level of reduction an offender can expect, if they provide assistance. Investigators may also be able to use the guidance to elicit further assistance—for example, by highlighting the difference in sentence reduction for those that provide intelligence only compared to those that provide evidence.

Impact

We expect the positive impact of greater assurances for assisting offenders to be high:

³ The Serious Fraud Office, the National Crime Agency, the National Police Chiefs Council, the Crown Prosecution Service, HM Revenue & Customs and the Financial Conduct Authority.

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- **Impact on law enforcement agency resource:** this change could see significant positive impacts on the length of investigations, the number of cases that law enforcement agencies take on, and the outcome of relevant cases.
- **Public confidence:** through the effective use of assisting offenders to secure wins in complex cases, we will see an increase in public confidence in the criminal justice system.
- **Fairness:** guidelines will make the application of SOCPA Agreements more clear, fair and consistent, going further than existing case law.
- **International impact:** this will also allow the UK to keep up with other jurisdictions which offer greater support to assisting offenders. The US allows payments to assisting offenders. While we do not propose making payments to assisting offenders, this does make the US a more attractive place to enter into such arrangements. In multi-jurisdictional cases, would-be assisting offenders may prefer to assist foreign law enforcement, reducing the UK's ability to police its own citizens and businesses. By taking steps to encourage offenders to provide intelligence and evidence in their own cases, the UK can better police crimes which took place within its jurisdiction.
- **Prison places:** by increasing the number of assisting offenders in economic crime cases, it can reasonably be expected that a greater number of offenders will have reduced custodial sentences,⁴ therefore reducing the impact on prison places. The Sentencing Council may wish to consider the greater application of non-custodial sentences for assisting offenders in economic crime cases, which would further reduce the pressure on prison places.

Evidence base

While we will endeavour to provide you with sufficient evidence to research and possibly create guidelines, SOCPA Agreements are extremely sensitive, and there are limits to what details can be shared. Initially, you will be able to read the sentencing remarks for the following judgments:⁵

- *R v A* [2006] EWCA Crim 1803
- *R v P; R v Blackburn* [2007] EWCA Crim 2290
- *R v Z* [2007] EWCA Crim 1473
- *R v D* [2010] EWCA Crim 1485

⁴ Assisting offenders that provide intelligence only have, on average, had their sentences reduced by 33%, and those that also provide evidence have had theirs reduced by 66%. While, historically, we have seen low numbers of assisting offenders in economic crime cases, even a small increase, paired with these reductions, will see a reduction in total custodial time.

⁵ In addition, the following judgements which precede SOCPA may be of interest: *R v Sinfield* [1981], *R v King* [1986], *R v Sivan* [1988], *R v Debbag and Izzet* [1990-1], *R v X* [1994], *R v Sehitoglu* [1988]

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Over the past five years,⁶ the Crown Prosecution Service has agreed a total of 56 SOCPA Agreements, of which 31 were under s.73 SOCPA (reduction in sentence).⁷ We expect that by publishing sentencing guidelines—therefore giving greater assurances to potential assisting offenders—the number of SOCPA Agreements will increase.

Guidance

The guidance would need to apply to all offences to which, and in all circumstances in which ss.73 and 74 of SOCPA 2005 and ss.74 and 388 of the Sentencing Act 2020 apply.

In *R v P; R v Blackburn*, The President of the Queen’s Bench Division, Sir Igor Judge, as he then was noted that “No hard and fast rules can be laid down for what, as in so many other aspects of the sentencing decision, is a fact specific decision.” Despite this he went on to set out the factors that might be taken into account (indicating that it is possible to provide a set of guidelines) when agreeing a sentence reduction.

Sir Igor Judge noted that a mathematical approach should not be taken to reducing a sentence, as this is “liable to produce an inappropriate answer”. However, he made these remarks in relation to a gruesome murder, where a long prison sentence is likely to be seen as the only suitable option for punishment. With this in mind, it may be that the sentencing guidelines only apply to a specific set of economic crimes, such as:

- Offences under the Fraud Act 2006,
- Principal money laundering offences in the Proceeds of Crime Act 2002,
- Failure to prevent offence tax evasion in the Criminal Finances Act 2017,
- Offences in the Bribery Act 2010,
- Market abuse offences in the Financial Services Act 2012,
- Insider dealing offence in the Criminal Justice Act 1993, and
- Other financial crime offences in the Financial Services and Markets Act 2000,
- In addition to the relevant common law offences.

This approach may, however, have unintended consequences.

Case law

Some case law exists already for SOCPA Agreements which relates to sentence reductions:

- In *R v P; R v Blackburn*, Sir Igor Judge (President QB) stated that “It is only in the most exceptional case that the appropriate level of reduction would exceed three quarters of the total sentence which would otherwise be passed, and the normal level will continue, as before, to be a reduction

⁶ Between 1 May 2016 and 30 April 2021

⁷ <https://www.cps.gov.uk/socpa-information>



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of somewhere between one half and two thirds of that sentence.” This case remains the leading case for the determination of sentence reduction.

- In *R v D*, Lord Judge LCJ noted that “the extent of any discount must be based on the value to the administration of justice of the performance by the defendant of his statutory agreement, and not on the simple fact that the agreement, so far as it goes, has been performed”. Despite the starting point of 50%-66% in *R v P*; *R v Blackburn*, it was agreed that for an offender who provided intelligence only a reduction of 25% would be appropriate.

Despite this case law, the potential sentence reduction remains a key concern for would-be assisting offenders, and we continue to believe that crystallising the possible reductions in the form of sentencing guidelines would bring about more assisting offenders. In advance of *R v D*, the existing case law proposed a 50%-66% reduction for assisting offenders; *R v D* created new case law which lowered the bar for certain types of assistance. This does not create the level of certainty required to secure potential assisting offenders and realise the benefits set out above.

With this in mind, I would be grateful if you could consider including the creation of sentencing guidelines for assisting offenders in the Sentencing Council’s 2022 work plan.

Kind regards,

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Chief Capability Officer

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On behalf of:

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