Our vision:
A world where every person’s right to a fair trial is respected.

Submission: Reduction in Sentence for a Guilty Plea Guideline Consultation
About Fair Trials

Fair Trials is a non-governmental organisation, based in London and Brussels, which works for fair trials according to internationally recognised standards of justice. Our vision is a world where every person’s right to a fair trial is respected. Fair Trials pursues its mission by helping people to understand and defend their fair trial rights; by addressing the root causes of injustice through our legal and policy work; and through targeted training and network activities to equip lawyers to defend their clients’ fair trial rights.

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Background

1. Fair Trials is currently engaged in a campaign of research into the protection of procedural rights in global guilty plea practices. Working in pro bono partnership with law firm Freshfields, Bruckhaus Deringer, LLP, we are collecting and analysing data on guilty plea practices in 90 global jurisdictions. We plan to use this research as the basis of a report on the spread and form of plea bargaining and related practices, which will include recommendations for procedural protections to ensure that justice is not undermined when guilty pleas are entered in exchange for a benefit from the state. The report will be published in the autumn of this year.

2. In addition to the global research, Fair Trials also hosted a roundtable in Washington, D.C. in November 2015 convening experts on criminal justice in the USA to discuss the implications of the massive reliance on plea bargaining in the US, where upwards of 97% at the federal level, and only slightly less on average (around 95%) on the state level, are resolved through plea bargaining. Participants at the roundtable identified a number of challenges to procedural fairness arising out of US plea bargaining, including *inter alia*: a) distorted incentives for prosecutors and defence lawyers who are incentivised by resource limitations to encourage defendants to plead guilty, with impact on the quality of policing and prosecution; b) waivers of core fair trial rights with minimal investigation, disclosure, or legal advice, often accepted in order to obtain release from pre-trial detention; and c) the coercive effect of an enormous differential between sentences obtained following guilty pleas and those obtained following convictions at trial resulting in innocent people pleading guilty. Participants identified structural effects of the overwhelming reliance on plea bargaining in the US that included an increase in prosecutorial power to engage in overcharging, which drives mass incarceration and reduces systemic incentives to filter out unworthy cases.

3. In relation to this Consultation, Ruth Pope of the Office of the Sentencing Council hosted a meeting at Fair Trials’ offices in London for interested NGOs to discuss the proposed Guideline on April 14th 2016. Representatives from the Prison Reform Trust, the Howard League, and Fair Trials as well as our pro bono partner Freshfields Bruckhaus Deringer attended.

4. Though Fair Trials does have a demonstrated interest and expertise in the use of guilty pleas worldwide, it is not a specialist in British law or criminal policy. Therefore we cannot comment with specificity as to the potential impact of the proposed Guideline on current British criminal practice, and cannot answer all of the questions posed in the Consultation. Instead, with this submission Fair Trials will identify more general areas of concern for procedural rights posed by the proposed Guideline, as informed by our research into similar practices globally. Where relevant, the specific questions from the Consultation will be referenced.

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Areas of Concern

5. As an initial and general point, the Guideline and Consultation, notably, fail to identify any risk of injustice resulting from the proposed changes to the guilty plea system, nor do they mention any procedural rights or safeguards for defendants considering entering guilty pleas. A guilty plea must be understood broadly as a waiver of key fair trial rights protected by Article 6 of the European Convention on Human Rights (ECHR), including *inter alia* the right to a trial, to view and contest the prosecution’s evidence, to silence, and to appeal. The European Court of Human Rights (ECtHR) has repeatedly held that any waiver of Convention rights “must be established in an unequivocal manner and must be attended by minimum safeguards commensurate with the waiver’s importance.” Furthermore, Courts must examine waivers of fair trial rights to see whether the circumstances surrounding the waiver were compatible with the requirements of the Convention, which should include an analysis of whether the waiver was given “knowingly and intelligently”. Unfortunately, the minimum safeguards required by the ECtHR do not feature in the Guideline. In this submission, Fair Trials will highlight some of the minimum procedural rights that should be better protected in order to avoid injustice in the administration of guilty pleas.

The presumption of innocence

6. Question 1.C. of the Consultation asks whether it is agreed “that the guideline does not erode the principle that it is for the prosecution to prove its case.” While it is true that the sentence reduction offered for an early guilty plea is a benefit rather than a right, and the burden of proof will still lie with the prosecution if a defendant chooses not to enter a guilty plea and to proceed to a full trial, there are ways in which the Guideline does erode the presumption of innocence and the related burden of the prosecution to prove the guilt of the accused beyond a reasonable doubt.

7. The language used throughout the Guideline is not always consistent with the presumption of innocence. It must be borne in mind that the proposed Guideline is proposing changes that would impact on individuals who are legally innocent, and to whom the presumption of innocence must be afforded. Nonetheless, defendants are described as “offenders” throughout the document, a term which is common in the sentencing context but is obviously inappropriate in relation to defendants who have not been convicted. The choice in terminology may be a result of the Sentencing Council’s usual focus on post-conviction matters, and may not be strictly inaccurate in most instances in which it is used throughout the Consultation in relation to defendants who have already pled guilty. However, in general the treatment of defendants as “offenders” at the moment when they are considering whether or not it is in their interests to plead guilty has the effect of undermining the presumption of innocence to which they are due.

8. There are also references in the Consultation Paper to situations in which defendants may “play the system” by refraining from entering guilty pleas until additional evidence is adduced. In

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2 *Zachar and Čierny v Slovakia*, Apps Nos 29376/12 and 29384/12, 21 July 2015, para 56.
3 Ibid, para 68.
5 See, e.g. pages 15, 24 of the Guideline.
order for the Consultation to more scrupulously respect the principle that it is for the prosecution to prove its case, the Guideline and any related communications should avoid suggesting that the exercise of the right to view the prosecution’s evidence is in any way untoward.

9. Finally, the Consultation paper does not acknowledge the possibility that innocent people may be incentivised or coerced to plead guilty. The phenomenon of innocent people pleading guilty is well recognised in the US context. The US system has particular features which tend to increase the coercive effect of the guilty plea regime, where incentives to plead guilty are particularly intense due to high and inconsistently applied sentencing discounts and prosecutors operate without regulation or transparency. To its credit, the Guideline protects against this kind of coercion by limiting the sentence discount to 1/3 and applying it equally and transparently to nearly all cases regardless of the strength of the evidence. However, any time a benefit is offered in exchange for a guilty plea there is a risk that an innocent person will judge it in his interests to plead guilty. Sadly, the Guideline provides no safeguard against this happening.

Access to a lawyer

10. Fair Trials has serious concerns that the situation promoted by the Guideline will encourage defendants to plead guilty before they have had effective legal advice and representation. There are two scenarios in which this risk arises: a) when defendants must decide whether or not to plead guilty without the assistance of a lawyer, and b) when practical restrictions exist on the time and facilities available to lawyers and defendants to consult on the decision of whether or not to plead guilty.

11. Comprehensive, reliable data about the numbers of unrepresented criminal defendants is not available, but there is strong indication that those numbers are rising, particularly in magistrates’ courts, due to constraints on the availability and extent of legal aid. The ECtHR has emphasized

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7 Various safeguards designed to prevent innocent people from pleading guilty exist in other jurisdictions. In For instance, the Western Australian Guidelines stipulate that a plea will not be accepted if “the accused person intimates that he or she is not guilty of any offense.” In the USA, a rule requires the court to address the defendant personally in open court to make sure the defendant understands exactly what it means to plead guilty and what the defendant is giving up by pleading guilty. The court must explain to all defendants that, if they plead guilty, they will be giving up the constitutional rights associated with a trial. The Rule also requires the Court to satisfy itself that there is a sufficient factual basis on which the defendant will be convicted, often by asking the defendant to describe the conduct that he admits to or by reading the allegations aloud and asking the defendant whether or not he agrees with them.

8 See, e.g. “Justice denied? The experience of unrepresented defendants in the criminal courts,” Transform Justice, April 2016, pg 5, available at [http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf](http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf). This report highlights a number of observed cases in which unrepresented defendants plead guilty without having had the opportunity to consult a lawyer, sometimes in cases in which a reasonable defence existed. Equally the report discusses unrepresented defendants who fail to appreciate the lack of defences available to them and fail to plead guilty despite there being no reasonable defence. The report
that the right to counsel is so fundamental to the notion of a fair trial that it is a “prime example of those rights which require the special protection of the knowing and intelligent waiver standard.”9 Where a defendant is unrepresented due to limitations on legal aid that leave him unable to financially obtain a lawyer, or due to practical problems in the administration of legal aid, it may not be possible to establish that his “waiver” of a lawyer is knowingly and intelligently made.

12. The impact of not having legal advice prior to deciding to plead guilty can have knock-on effects on the validity of a defendant’s waivers of fair trial rights that are implicit in the decision to plead guilty. In relation to such implicit waivers, the ECtHR requires that courts establish that the defendant “could reasonably have foreseen what the consequences of his conduct would be.”10 Given the technical and complex subject matter of criminal law and sentencing, there is a real risk that defendants who are unrepresented will not be able to reasonably foresee the consequences of proceeding to trial versus pleading guilty. Despite this risk, the Guideline is silent on the issue of the court’s duty to ensure that defendants, particularly unrepresented defendants, fully appreciate the nature of the case and the consequences of pleading guilty or proceeding to trial before making such a decision.

13. Even where a defendant has counsel, practical limitations on the time available to consult prior to having to take a decision on whether or not to plead guilty can mean that the defendant is still not in receipt of effective legal representation sufficient to understand the charges against him, defences and mitigation available to him, and the potential impacts of pleading guilty or proceeding to trial. As the details of the case are usually provided on the morning of the hearing at which the defendant must decide whether to plead guilty, defence lawyers may have only minutes to consult with defendants prior to pleading. This consultation may take place informally, i.e. in the courtroom corridor, in only semi-private conditions that are not suited to the kind of deliberation a defendant must give to waive effectively and knowingly key fair trial rights.

14. The exception described in F.1 of the Consultation paper, extending the time given to defendants within which the maximum 1/3 reduction could be given in situations where the defendant has insufficient information, advice or evidence in order for him to decide whether he should plead guilty, has the potential to address some of the concerns around insufficient pre-plea access to legal advice. However, it is drafted narrowly and it is not clear that it would sufficiently protect defendants who have not had effective access to legal counsel. Nor is it clear how unrepresented defendants would be informed of the existence of the exception in order to invoke it. The exception also operates only when the defendant “has identified to the court and/or the prosecutor the conduct which he admits,” which is itself an implicit waiver of the

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9 Pischalnikov, para 78.
10 Ibid, para 77.
right to silence that requires its own safeguards to be effective. The decision to admit any conduct to authorities in the absence of effective legal counsel could be a perilous one for many defendants, particularly where the theory of criminal liability is complex and conduct that may carry liability is not immediately obvious to the lay defendant, for example in allegations of joint enterprise.

15. The limitations on effective access to legal assistance are especially acute for vulnerable suspects, including people with mental and physical disabilities that may make a timely decision on guilty pleas very difficult. In the limited time many defence lawyers have to counsel defendants prior to the first available opportunity to enter a guilty plea, lawyers may not have been able to accurately assess whether such vulnerabilities exist. Even where they are, the Guideline does not set out any provision for the assessment or identification of vulnerable suspects, nor for an exception that would provide these individuals with sufficient time and facilities to fully understand the case against them and the potential impact of pleading guilty. This omission should be remedied.

Access to evidence

16. The Consultation paper makes clear that defendants waive their right to access the prosecution’s full evidence in order to obtain the maximum 1/3 discount. Rather, defendants receive only the initial details of the prosecution case (IDPC) prior to deciding whether or not to plead guilty in time to receive the maximum discount. As with insufficient access to legal advice, insufficient access to evidence necessary to take a decision on whether to plead guilty at the first available opportunity can arise in two ways: a) where the evidence provided is insufficient and b) where the evidence is not provided with enough time for the defendant to effectively review it.

17. Fair Trials has coordinated recent research that sheds light on the issue of adequate and timely disclosure of evidence in the UK. As part of a research project that gathered data about pre-trial detention decision-making in ten EU Member States, researchers from the University of Western England attended first instance pre-trial detention hearings, which often coincide with the first available opportunity for defendants to plead guilty in order to receive the maximum sentencing benefit. Researchers also surveyed defence practitioners regarding (among other issues) the sufficiency of the prosecution evidence provided to them at the first hearing.¹¹

18. The data collected through the hearing monitoring and defence lawyer surveys indicated that the information provided by prosecutors was “patchy,”¹² often minimal and very brief, and was viewed as sometimes factually unreliable by both defence lawyers and prosecutors who relied on it. Information pertinent to considering an early guilty plea, including the charge sheet, was often missing. Lawyers surveyed for the research also reported that disclosure was often served too late, often only 30 minutes to one hour before the hearing and in some cases not until after the defendant arrived in court.

¹¹ The full report, The Practice of Pre-Trial Detention in England and Wales, Ed Lloyd-Cape and Thomas Smith, University of Western England (2016), is available at http://eprints.uwe.ac.uk/28291/.

¹² Ibid, pg 114.
19. The persistence of insufficient disclosure prior to the initial hearing has raised concern that the UK practice in this area is not consistent with EU law. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (the Right to Information Directive) lays down rules concerning the right to information of suspects and accused persons in relation to their rights in criminal proceedings and to the accusation against them. It includes the right of access to the materials of the case in order to safeguard the fairness of the proceedings. Provisions of the Right to Information Directive have not been adequately transposed into the Criminal Procedure Code. As this is an area of ongoing reform that could impact on the timing of disclosure available to defendants at the initial hearing, it may be wise to await the outcome of any rule amendment process before putting further pressure to plead guilty on defendants who have received minimal disclosure and legal counsel.

20. The available exceptions for situations in which defendants lack sufficient information to plead are not broad enough to address widespread deficiencies in pre-plea disclosure. The exception at F2 providing a 14-day extension of time to plead where the IDPC is not provided at or before the first hearing properly recognises the need for defendants to receive enough information about the allegations in order to decide whether to plead guilty and time to discuss it with a lawyer. However the exception does not apply to summary cases (even where the defendant is detained), on the rather weak justification that in summary cases these issues “are likely to be more easily resolved on the day.”

21. Disallowing the application of the exception to summary offences ignores the serious long-term impact of convictions for these minor crimes, which can affect defendants’ ability to obtain employment and benefits, and which are likely to negatively impact any sentences the defendant may receive for future convictions. In the US roundtable, participants highlighted the massive reliance on plea-bargaining for resolving prosecutions for minor crimes in the USA as a major driver of over-criminalisation. US experts indicated that many defendants faced with prosecution for minor offences for which they may not face a custodial sentence may be easily incentivised to plead guilty in order to obtain release from pre-trial detention and to minimise the time and expense of a lengthy trial, even if they were innocent or unlikely to be convicted if they proceeded to trial. Procedural rights and the exceptions designed to guarantee them should apply to all offences, not exclusively to either-way or indictable offences.

Motivation for the proposed changes:

22. Question one of the Consultation asks whether the stated purposes for the proposed changes were clear and acceptable. Many of the stated purposes are laudable: clarity, transparency and consistency of application of the sentence discount should benefit all actors in the justice system, including both defendants and victims. However, the rigidity of the application of the “first available opportunity” at which the maximum sentence reduction can be granted strongly encourages vulnerable defendants, many of whom may lack effective access to legal advice or basic information about the case against them, to waive core fair trial rights with minimal procedural protection. The primary goal of the Guideline, to save victims the emotional trauma of giving evidence, may be served by reducing the uncertainty of the process. However, it is not clear that victims’ emotional trauma would not be sufficiently reduced by a timeline that
allowed time to ensure that defendants have the opportunity to meaningfully understand the content of the charges and to consult with counsel. There is also a risk of a loss in public faith in the justice system when convictions are perceived to have been won through unjust processes. The perceived legitimacy of the criminal justice system and its truth-finding role can also impact on victims’ emotional well-being.

23. The risk of injustice this situation poses may not be worth the potentially small impact on the ultimate timing of guilty pleas. The Consultation paper states that 72% of the 90% of convictions that are obtained through guilty pleas are already given at the first available opportunity, leaving a potential for moving 18% of guilty pleas to earlier in the system. As recognised in the resource assessment, the tightening of the timeline in which guilty pleas are encouraged to be given may in fact result in some defendants who would plead guilty at some point in the process, deciding to proceed to trial instead. Others will fall into one of the enumerated exceptions. Of the remainder, a large proportion are likely to consist of defendants accused of victimless crimes. The potential benefit in earlier pleas and reduced victim distress may not, therefore, be substantial enough to justify the risk of injustice posed by the rigid timescale proposed by the Guideline. In any case, further data collection, including from Magistrate’s Court (from which little if any data is available but which would presumably be the source of a large proportion of guilty pleas) is warranted to ensure that the proposed Guideline will indeed have the desired effect.

Conclusion:

24. The Sentencing Council should consider ways to reduce the risk that the strong incentive to plead guilty too early in the process for defendants to make knowing, intelligent, and unequivocal waivers of their rights in exchange for a reduced sentence, while retaining the benefits of the improved clarity and consistency the Guideline offers. One suggestion is to retain some discretion in the interpretation of the “first available opportunity” to plead guilty. Another option is to introduce a specific exception for situations in which judges have concerns that a person is pleading guilty without sufficient legal advice or evidence.

25. Fair Trials would be happy to collaborate further with the Sentencing Council to examine in more detail the kind of comparative safeguards operating in guilty plea systems globally if it would be helpful. We are pleased to be able to contribute to this consultation, and commend the Sentencing Council for its open and transparent approach and for the many positive aspects of the proposed Guideline.

Fair Trials
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