

CAJ's submission no. S384

CAJ's Submission to the Department of Justice consultation on Encouraging Earlier Guilty Pleas

April 2012

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What is the CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

**CAJ's response to Department of Justice Consultation on
Encouraging Earlier Guilty Pleas, April 2012**

Committee on the Administration of Justice ('CAJ')

The Committee on the Administration of Justice ('CAJ') is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

The Department of Justice (DoJ) has launched this consultation on options to encourage early guilty pleas as part of a broader agenda to reduce delay in the criminal justice system. The Department believes that encouraging earlier guilty pleas has the potential to free up court time, increase public confidence and reduce the burden on victims and witnesses. However, the DoJ states that they do not wish to diminish the presumption of innocence, or encourage more guilty pleas overall. The DoJ is more focused on encouraging those accused that will eventually plead guilty to do so earlier and is not suggesting that there be any new incentives to plead guilty. In this submission, CAJ will provide comment on the proposals put forward, outline relevant human rights standards and provide comment on equality obligations.

Summary:

- The consultation outlines the current scheme for providing credit for an early guilty plea and suggests three options to try and encourage early guilty pleas;
- Whilst CAJ is supportive of the idea of reducing delay in the criminal justice system, we would be concerned that any measures to do so reduce avoidable delay in the system, without affecting due process and the rights of all concerned;
- A number of international human rights standards protect the right to a fair trial, such as the *European Convention on Human Rights*, the *International Covenant on Civil and Political Rights* and the *Universal Declaration of Human Rights*;
- In relation to increasing awareness of the present scheme, CAJ would seek further clarification as to what the appropriate information proposed to be given to suspects or accused persons would be and at what stages it would be provided;
- In relation to making procedural changes to present the case against the accused at an earlier stage, CAJ would suggest that rather than focusing on providing an

accused with a summary of the case against them, that the focus instead should be on ensuring the prosecution service, working in conjunction with the police where necessary, can deliver all the evidence against the accused more quickly;

- In relation to introducing a statutory presumption of credit, any legislation that could interfere with judicial discretion must be carefully considered. If legislation is to be brought forward, CAJ agrees that it should retain an element of discretion for judges, so that sentences can be tailored to meet the particular circumstances of a case;

Background:

The consultation paper outlines how in Northern Ireland, judges have the ability to reduce an offender's sentence where they admit their guilt at an early stage (p. 6). This power is provided under the Criminal Justice (Northern Ireland) Order 1996¹ (p. 14). This requires the court, in determining what sentence to pass in relation to an offender who has pleaded guilty, to take into account the stage in the proceedings at which the offender indicated his intention to plead guilty and the circumstances in which this indication was given. If, as a result of this, the court imposes a punishment on the offender that is less severe than the punishment it would otherwise have imposed, the court is required to state in open court that it has done so. This effectively means that the earlier a defendant pleads guilty, the more their sentence can be reduced. However, the level of reduction is also considered in light of other circumstances, such as the strength of the case against the accused. Generally, the stronger the case against the accused, the less credit they will receive for pleading guilty, compared with cases where there is a greater chance the accused would have been found not guilty after a trial.

The consultation paper states however that there are a significant number of cases where offenders do not admit their guilt until the trial has begun. These late guilty pleas can delay criminal proceedings, waste resources and increase the burden on victims and witnesses (p. 6).

The consultation suggests three options to encourage earlier guilty pleas:

- Increase awareness of the current scheme – this would involve providing the defendant with information advising them that reduction in sentence is possible following an early guilty plea;
- Making procedural changes to present the case against the accused at an earlier stage – this would involve taking elements from approaches in other jurisdictions, such as the idea that there be early engagement between the prosecution and the defence and providing the suspect with an early view of the case against them;
- Introduce a statutory presumption of credit – this would involve introducing a new

¹ Criminal Justice (Northern Ireland) Order 1996, art. 33.

law, meaning a defendant who pleads guilty at an early stage will be entitled to receive a legislatively set level of credit.

Delay in the criminal justice system and public confidence

The DoJ emphasise that speeding up the processing of criminal cases is a key objective of it and the criminal justice agencies (p. 7). CAJ agrees with the DoJ that it is in everyone's interests that cases progress as quickly as possible. We also agree that there is no single solution to this problem. The Criminal Justice Inspection Northern Ireland (CJINI) has frequently commented on the problems of delay and has repeatedly recommended the introduction of statutory time limits.² This has also been recommended by the reviews conducted in the last year of the prison system and the youth justice system.³ CAJ notes that the Minister for Justice, in an announcement to the Assembly on 6th February 2012, committed to bringing forward statutory time limits within the lifetime of this Assembly, beginning in the Youth Court.

Whilst CAJ is supportive of the idea of reducing delay in the criminal justice system, we would be concerned that any measures to do so reduce avoidable delay in the system, without affecting due process and the rights of all concerned. We note the commitment within the consultation that nothing within the paper should be taken as seeking to reduce the right of every person to be presumed innocent (p. 7). CAJ welcome this and hope that a similar commitment to respecting due process and protecting rights will be clear in any future proposals to reduce delay.

We also note that the consultation refers to it being vital that people have confidence in the quality of justice delivered in the criminal justice system and that a critical part of this is ensuring that court proceedings are accorded the proper gravity, and that the dignity of those involved is respected (p. 12). CAJ agrees that it is vital that the public have confidence in the criminal justice system. To that end, we also believe that confidence can only grow where the human rights of all those involved in proceedings are upheld and protected.

International human rights standards

The *European Convention on Human Rights*, which has effect in Northern Ireland through the Human Rights Act 1998, provides for the right to a fair trial under Art. 6. Article 6(1) provides that in the determination of any criminal charge, everyone is entitled to a fair and

² Criminal Justice Inspection Northern Ireland, 'Avoidable Delay: Incorporating an inspection of the interface between the Police Service of Northern Ireland and the Public Prosecution Service for Northern Ireland' June 2010, para. 2.42, Criminal Justice Inspection Northern Ireland, 'Avoidable Delay: A Progress Report' p. VIII.

³ 'Review of the Northern Ireland Prison Service: Conditions, management and oversight of all prisons' Prison Review Team, Final Report, October 2011, p. 81, 'A Review of the Youth Justice System in Northern Ireland' September 2011, p. 115.

public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 6(2) provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty. Article 6(3)(a) provides that everyone charged with a criminal offence has the minimum right to be informed promptly, in a language they understand and in detail, of the nature and cause of the accusation against them. Article 6(3)(b) provides the minimum right to have adequate time and facilities for the preparation of a defence.

The European Court of Human Rights has previously stated that the reasonableness of the length of proceedings has to be assessed in each instance according to the particular circumstances of the case. In deciding what constitutes delay the complexity of the case, the conduct of the defendant and the conduct of the relevant authorities must all be taken into account.⁴

In relation to the minimum rights under Art. 6(3)(b), the European Court of Human Rights has previously found that in deciding whether a person has had adequate time for the preparation of their defence, the complexity of the case is relevant.⁵

The *Universal Declaration of Human Rights* states at Art. 10 that everyone is entitled to a fair and public hearing by an independent and impartial tribunal in the determination of any criminal charge. Article 11 provides for the presumption of innocence.

The *International Covenant on Civil and Political Rights* also provides for the right to a fair and public hearing by a competent, independent and impartial tribunal established by law at Art. 14(1). Article 14(2) provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Article 14(3)(a) provides that in the determination of a criminal charge, everyone is entitled to the minimum guarantees of being informed promptly and in detail in a language which they understand of the nature and cause of the charge against them. Article 14(3)(b) provides a minimum guarantee of adequate time and facilities for the preparation of a defence and communication with counsel of your own choosing, whilst Art. 14(3)(c) provides for trial without undue delay.

The consultation seeks views and comments on the options proposed. It is stated that they are not mutually exclusive and that consideration can be given to how they could work in practice. The consultation emphasizes how the overarching objective of the proposals is to encourage those who know they are guilty to enter a guilty plea at an early stage in proceedings. It is emphasized that the proposals do not aim to coerce anyone to plead guilty when they are not and that those who are innocent should always plead not guilty (p. 20).

⁴ *Corigliano v Italy* (1983) 5 E.H.R.R. 334.

⁵ *Albert and another v Belgium* [1983] ECHR 7299/75.

Increase awareness of the current scheme

This proposal aims to reinforce the current arrangements where offenders receive credit for an early guilty plea by increasing awareness and the transparency of this scheme (p. 21). The defendant would be provided with appropriate information at relevant stages, advising them that a reduction in sentence may be available for an early guilty plea (p. 22).

CAJ would seek further clarification as to what this appropriate information would be and at what stages it would be provided. In relation to what information is provided, CAJ believe that any information should emphasise that if a person is innocent, they should plead not guilty. It should also emphasise that a person is entitled to the presumption of innocence and that the prosecution must prove they committed a criminal offence beyond a reasonable doubt. In relation to when the information is provided, CAJ would request clarification as to whether this information would be offered in the police station, before or during the period when an individual will be questioned over suspected involvement in the commission of offences. If this were the case, CAJ would urge that consideration be given as to whether there is a risk that this could potentially be seen as an inducement to confess to committing a crime, which could ultimately result in that confession evidence being inadmissible if the accused subsequently decides to plead not guilty.⁶ We accept the onus on legal advisers to inform clients of the importance of the attitude taken in the police station, where appropriate (p. 14). However, consideration should also be given to circumstances where a suspect could be interviewed without having first received legal advice, such as under Annex B of PACE Code of Practice C.⁷

The consultation suggests two elements to this proposal. The first is to increase understanding of the existing statutory provisions under the 1996 Order, directed towards accused persons and their representatives. The second is to increase transparency by

⁶ Article 74(2)(b) of the Police and Criminal Evidence (Northern Ireland) Order 1989 provides that if, in any criminal proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid. Article 76(1) of the 1989 Order states that in any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

⁷ Annex B of PACE Code of Practice C allows for access to legal advice to be delayed when a person is in police detention in connection with an indictable offence, where the person has not yet been charged with the offence, and where an officer of superintendent rank or above has reasonable grounds for believing that exercising the right could, for example, lead to alerting other people suspected of having committed an indictable offence but not yet arrested for it.

raising awareness of cases where the court has given credit for a guilty plea. This would require judges to state in open court the credit they would have given if a guilty plea had been entered earlier (p. 21 - 22).

In relation to first of these elements, CAJ would agree with the consultation in that it may be unrealistic to presume that legal representatives are not fully aware of the present legislation and do not already advise accused persons of its existence and implications (p. 28). The second element could have a positive effect in terms of transparency, as it would be clear what sentence would have been passed if the plea of guilty had been entered earlier. However it should be recognised here that sentencing contains a large element of discretion as the circumstances of each case are different. Stating the level of sentence that would have been passed will only form a guide for future cases and will not necessarily provide a firm indication of the sentence that will be passed in a future case.

Making procedural changes to present the case against the accused at an earlier stage

This proposal suggests reforming the way the criminal justice system operates to address the question of guilt or innocence at an earlier stage. This would involve taking elements from approaches used in Liverpool and Scotland and tailoring them for Northern Ireland (p. 22). The consultation discusses the key components of this as being:

- Early engagement between the prosecution and the defence – here prosecutors would identify cases within a fixed period of charge which are likely to result in a plea of guilty. They would approach the defence with a summary of the case, highlighting the strength of the case against the accused. The defence would then advise the accused of the evidence against them on that basis (p. 23);
- Providing the suspect with an early view of the case against them – this would be linked to the above component and would involve the provision of a clear and concise summary of the evidence the prosecution intends to rely on. The service of this information would be subject to deadlines (p. 24);
- A recognised ‘earliest opportunity’ to plead guilty and avail of maximum credit – this would be linked to the deadline for service of the prosecution papers and the date of the first hearing (p. 24);
- Transparency in sentencing arrangements – this could involve the court stating the level of credit that would have been available at an early stage, as set out above, or fixing the level of credit available at various stages in statute (p. 25).

In relation to the notion of early engagement between prosecution and defence and providing the suspect with an early view of the case against them, CAJ would have some concerns in this regard. Firstly, we would be concerned that the summary of the case under these proposals would only appear to highlight the strength of the case against the accused. The Criminal Procedure and Investigations Act 1996 places an initial obligation on prosecutors to disclose to the accused any prosecution material which might reasonably be

considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.⁸ The 1996 Act also provides that the prosecutor must keep under review the question of whether at any given time before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned, (and, in particular, following the giving of a defence statement) there is prosecution material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, and that has not been disclosed to the accused.⁹ CAJ thinks that consideration should be given to how these obligations will interact with these proposals, particularly in relation to Crown Court proceedings, where these duties appear to apply once a person is committed for trial.¹⁰ We appreciate that the consultation does acknowledge that further work may be required to ensure compatibility with existing disclosure arrangements (p. 29).

It may be difficult for legal representatives to fully advise clients if they do not feel that they have all the information they need to do so. This may hinder their willingness to engage with the prosecution, an issue that is identified in the consultation (p. 31). This proposal also has to be viewed in light of the right contained under Art. 6(3)(a) of the *European Convention on Human Rights*, which contains the requirement that the accused be presented with the nature and cause of the accusation against them in detail.

CAJ has also noted recent media reports in relation to measures designed to streamline Magistrates Court trials in England and Wales under the Stop Delaying Justice Policy, which aims to complete trials within six weeks. Defence lawyers in that jurisdiction have raised concerns that defendants have been asked to enter pleas of guilty or not guilty before they have seen all the evidence against them and that this has the potential to lead to miscarriages of justice.¹¹ CAJ thinks that these warnings should always be borne in mind.

CAJ would suggest therefore that rather than focusing on providing an accused with a summary of the case against them, the focus should instead be on ensuring the prosecution service, working in conjunction with the police where necessary, can deliver all the evidence against the accused more quickly. This would allow the accused to make a fully informed decision as to their plea. The right under Art. 6(3)(a) referred to above also contains a requirement that the accused is informed of the nature and cause of the accusation against them promptly.

In relation to providing a recognised earliest opportunity to plead, CAJ agrees that a provision like this would create clarity about the point an accused person can receive maximum credit (p. 31). However, we also think that it is important to recognize that an

⁸ Criminal Procedure and Investigations Act 1996, s. 3(1)(a).

⁹ As above, s. 7A(1) and (2).

¹⁰ As above, s. 1(2)(a).

¹¹ BBC News website, <http://www.bbc.co.uk/news/uk-17690404>, 'Lawyers claim new policy causes miscarriages of justice', 14th April 2012.

overly prescriptive rule in relation to this could be unfair, as an accused person could miss this earliest opportunity through no fault of their own. We also think the rights contained in Art. 6(3)(b) of the *European Convention on Human Rights* and under Art. 14(b) of the *International Covenant on Civil and Political Rights*, that provides the minimum right to have adequate time and facilities for the preparation of a defence must be considered here. This period can vary depending upon the complexity of the case.

CAJ thinks that this earliest opportunity would have to be linked to the deadline for service of the prosecution papers, as is suggested in the consultation paper in order to be fair and effective. However we think that the present system, whereby the judge decides what the earliest opportunity is on a case-by-case basis, is more flexible and is fairer.

In relation to providing transparency in sentencing arrangements, CAJ has no objection in principle to the courts stating the level of credit that would have been available at an early stage. This could increase transparency and awareness immediately. In terms of fixing the level of credit available at various stages in statute, CAJ will go on to address these issues below.

Introduce a statutory presumption of credit

This proposal relates to introducing a new law that means a defendant who pleads guilty at an early stage will be entitled to receive a legislatively defined level of credit (p. 25). The consultation states that this presumption of credit would not be automatic and that judges would have the power to withhold credit in some circumstances, such as where the case against an accused was overwhelmingly strong. Judges would still have discretion to decide on the level of credit they apply, depending on the facts of the case, but within a fixed range. The DoJ thinks that an accused person will be aided in their decision-making as to their plea if they are clear about the amount of credit available (p. 35). They also think it would make the application of credit clearer for legal representatives and the public. The application of credit would be consistent and predictable. CAJ agrees that sentencing should be clear, transparent and consistent.

The DoJ also notes that legislation can be a blunt instrument when applied to sentencing and that judicial discretion in sentencing is important, as it allows judges to take account of all the facts of the case in passing sentence (p. 37). CAJ has previously noted, in our response to the consultation on a sentencing guidelines mechanism, that judicial independence is a cornerstone of the criminal justice system, as outlined in the *United Nations Basic Principles of the Independence of the Judiciary*.¹² We have also previously highlighted the need for judges to be able to tailor a sentence for an individual offender for a particular crime, against a particular victim, as being crucial.¹³

¹² CAJ's submission no. 277 'CAJ'S Response to the Consultation on Sentencing Guidelines Mechanism' January 2011.

¹³ CAJ's submission no. S275 'Response to the Lord Chief Justice's Office on Sentencing Guidelines Priority

Therefore it is clear that any legislation that could interfere with judicial discretion must be carefully considered. If legislation is to be brought forward, CAJ agrees that it should retain an element of discretion for judges, so that sentences can be tailored to meet the particular circumstances of a case.

We would question whether the levels of credit available, if this scheme is brought forward, should mirror those set out by the Sentencing Council (p. 36). We think that it should be remembered that these guidelines are not currently binding in Northern Ireland and that local case law may already provide different guidance for certain offences. For sentencing to be clear and consistent in all cases these factors would have to be considered.

Equality

The consultation notes that an initial pre-policy screening did not identify any s. 75 impacts and that no equality issues have been identified through an Equality Impact Screening (p. 42). CAJ would presume that the DOJ has considered that there may be a need to translate the summary of the case referred to in the consultation, or the appropriate information on the current scheme. If this has not been considered, there is the potential for an adverse impact here on different racial groups, who may not have English as their first language.

The provision of information in relation to the nature and cause of the accusation against the accused in a language they understand is also a part of the right contained in Art. 6(3)(a) of the *European Convention on Human Rights*.¹⁴ The format of materials provided in relation to information on the current scheme should also be considered in light of the age of an accused person. Young people and older people may require distinct versions of this information to make this information accessible to them. There is also a potential for an adverse impact on the disabled, as information will have to be provided in a way that makes it accessible for them.

Committee on the Administration of Justice
April 2012

Areas' December 2010.

¹⁴ The European Court of Human Rights has previously held that a failure to provide the information stipulated in Art. 6(3)(a) in a language understood by the accused breaches the Convention in *Brozicek v Italy* (1989) 12 EHRR 371. It has also held in *Hermi v Italy* [2006] ECHR 18114/02 that the minimum right under Art. 6(3)(e) to have the free assistance of an interpreter if a person cannot understand or speak the language used in court applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. This means that an accused person who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings which it is necessary for them to understand in order to have the benefit of a fair trial. However, the court has accepted that Art. 6 (3)(e) does not go so far as to require a written translation of all items of written evidence or official documents

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