

The Early Guilty Plea Scheme and the Rising Wave of Managerialism

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From 1st June 2017, a new scheme dealing with early guilty pleas will come into force. The scheme falls in line with a managerialist mantra which has existed since Lord Justice Auld's *Review of the Criminal Courts* in 2001. Since that point, an implicit agenda to transform the adversarial criminal justice system of England and Wales has emerged. In the wake of the Auld Review, the courts of England and Wales were quick to focus on prioritising both "efficiency and economy" (See *R v Chaaban* [2003] EWCA Crim 1012 and *R v Jisl and Others* [2004] EWCA Crim 696). These cases, alongside others, were soon followed by the implementation of the Criminal Procedure Rules (hereafter, CrimPR), including explicit goals of cost effective and swift criminal proceedings (see the Overriding Objective of 'dealing with cases justly' (Rule 1.1(1) CrimPR)).

Despite the inbuilt efficiency drivers, the managerialist approach was not working as effectively as anticipated. Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings* in 2015 (a decade after the introduction of the CrimPR) found that all parties needed to work to 'identify the issues so as to ensure that court time is deployed to maximum effectiveness and efficiency.' Since then, the goals of efficiency and effectiveness have been further consolidated with the genesis of the Better Case Management Initiative (BCM). The initiative links several differing concepts which are designed to improve the way that cases are processed through the criminal justice system. The overarching aims of BCM are as follows:

- Robust case management;
- Reduced number of hearings;
- Maximum participation and engagement of every participant within the system and;
- Efficient compliance with the CrimPR, Practice and Court Directions.

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To assist in fulfilling these goals BCM introduced a new case management initiative - the Early Guilty Plea (EGP) Scheme. The Crown Prosecution Service (CPS) have argued that a plea at the earliest opportunity has 'huge advantages', which include efficiency savings. From June 2017, the definitive guideline on reduction for a guilty plea (available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-plea-Definitive-Guide_FINAL_WEB.pdf) comes into force. This guideline explicitly states that, in order to be entitled to the maximum 1/3 discount, a defendant must indicate a guilty plea at the first court hearing. Those who enter a guilty plea after the first hearing can be given a maximum reduction of ¼ which reduces to 1/10 on the day of the trial. Previously, the court would consider the stage in proceedings which the offender indicated his intention to plead guilty (s.144(1)(a) Criminal Justice Act 2003) and the circumstances in which this was given (s.144(1)(b) CJA 2003). By requiring a plea at the first hearing to obtain full credit, EGP removes judicial discretion concerning any reduction.

It is clear that EGP is designed to support the Auld Review's goals of cost saving and efficiency. The rationale behind the scheme is clear and well established: acceptance of guilt at an early stage reduces the impact of crime upon complainants, saves complainants and witnesses from having to testify, and is in the public interest as it saves both time and money. As such, the sentence discount is an 'incentive' for those who are in fact guilty to indicate this 'as soon as possible'. However, it is this incentive that continues to threaten the adversarial criminal justice process in England and Wales. The guidelines stress that '[the scheme] is directed only at defendants wishing to enter a guilty plea and nothing in the guideline should create pressure on defendants to plead guilty'. Yet, this is surely naïve and idealistic in practice, especially considering the discount may be the difference between a custodial and non-custodial sentence. The temptation to avoid custody at any cost – even a false admission – may be overwhelmingly powerful for some defendants. The rationale posited by the guidelines implies the rather unlikely reality that the only defendants who will be affected are those who have every intention of pleading guilty, but will do so as late as possible. There is no evidence to suggest large numbers of defendants think this way – and it is doubtful that any competent lawyer would advise their client to do so. One is therefore left wondering – who is this scheme aimed at?

It is almost a truism to say that prosecution disclosure to the defence prior to hearings has significant problems; this is particularly acute at the pre-trial stage, when time is limited. For example, the period between arrest, charge and attendance at a Magistrates' Court may be a matter of hours. This is important in considering the impact of the EGP regime. Since the first hearing is the only point at which the maximum 1/3 discount is available this presents an obvious dilemma for the defence – if they lack information about the case against them, how do they proceed? There is clear evidence that pre-trial disclosure by the CPS is often inadequate (See J. Plotnikoff and R. Woolfson, *'A Fair Balance? Evaluation of the Operation of Disclosure Law*, RDS Occasional Paper No 76). The prosecution is only required to disclose Initial Details of the Prosecution Case (IDPC) if the defence requests it (Rule 8.2(2)) and the scope of this disclosure is narrow - it is merely a brief summary of what the case may be against the defendant, which has been prepared by a police officer. At present, this not only appears to be limited considering the weight of the decisions for the defence, but arguably falls short of EU Law requirements on information (see Cape and Smith, *Pre-trial Detention Practice in England and Wales' (2016)*). Despite this, the defendant is still expected to enter a plea at the first stage of proceedings. The failure to plead guilty at this stage is, under EGP, tantamount to an automatic increase in sentence in the event of a guilty verdict. The suggestion that this does not create pressure on at least some cross-section of the defendant population is unconvincing.

Furthermore, defence representatives have to consider their professional obligations to the client, not least because the Law Society has suggested they could potentially be liable in negligence if the advice they give regarding plea is inadequate. (The Law Society, *Response of the Law Society of England and Wales to the Sentencing Council consultation on the Reduction in Sentence for an Early Guilty Plea*, May 2016, 5). This therefore pushes the decision-making of the defence lawyer from the purely professional into the personal. This is perhaps comparable with the threat of wasted costs orders. If a lawyer is deemed to be wasting the court's time in promoting a client's case, they may be personally financially penalised. In this situation the lawyer must balance delivering for the client – which may well irritate the court – or protecting their own financial interests. In both situations, it would be unrealistic to think that lawyers – when faced with professional and personal conflict – will unerringly choose the client. As such, the temptation for the lawyer may be to

advise the safe option, rather than the right option. Therefore, where there is a lack of information and material on a case – in addition to the potential ethical hazard discussed above - a very serious question arises: how are defence lawyers expected to give sound and impartial legal advice as to plea?

There is undoubtedly an agenda, for better or worse, to encourage defendants to enter early guilty pleas. Moreover, it seems that, should a defendant regret doing so, a remedy will rarely be offered by the courts. In *R v on the application of the DPP) v Leicester Magistrates' Court* (Unreported, 9th February 2016) the claimant sought to re-open his conviction for common assault. The offence had allegedly been committed against a 14-year-old boy, who was in the care of the defendant as an agency worker in a care home at the time of the alleged offence. At his first appearance in court, he intended to enter a plea of not guilty on the basis of self-defence. However, he changed this on the first day of his trial. He asserted that his solicitor had pressured him into entering an early guilty plea; he was convicted, and, as a result, was no longer able to find work in the social care sector. Whilst the magistrates' court can make an order to re-open a conviction when it is in the interests of justice (under s.142 Magistrates' Courts Act 1980) it can only be exercised where there has been a mistake or a situation akin to a mistake. A subsequent change of heart or regret at entering a guilty plea will not suffice as a mistake and as such the defendant's conviction stood. It is particularly troubling that this resulted from the advice of a solicitor, against the initial wishes of the defendant. It should be questioned why the solicitor applied such pressure and whether this is truly serving the best interests of the client, or some other master.

In such cases, there is a risk that the overriding objective of the CrimPR is undermined – that is, to deal with cases justly, which includes acquitting the innocent and convicting the guilty. Whilst it is important to consider the effects of lengthy criminal proceedings on complainants and witnesses, it is often the defendant who is left behind by reform. The emergence of the CrimPR as the guiding hand of criminal justice and its implicit goals of managerialism have arguably diluted the adversarial nature of the criminal justice process, emphasising the importance of co-operation between the prosecution and defence throughout proceedings. Whilst this is not without merit, to push it too far is to change the

nature of adversarial justice. Piecemeal changes to the criminal justice system over the last fifteen years, including but not limited to EGP, represent a criminal justice system that has arguably departed from its adversarial foundations and is moving towards a more managerial process. The ramifications for fair trial rights have been largely ignored.

It is therefore imperative to ensure that any decision to enter a guilty plea is based on full and accurate evidence from the police and prosecution, made available at an early stage. If co-operation is to be encouraged, it should be done so on an equal basis and the defence should be in receipt of a greater amount of prosecution disclosure prior to entering a plea. This would ensure the defence lawyer can adequately advise the client as to plea. Moreover, it would re-assert the adversarial tradition of English and Welsh criminal justice by moving towards a system which requires the prosecution to discharge the burden of proof by revealing the totality of their case from the beginning of the process. This seems, for purposes of equality, the least that should be done considering defence disclosure requirements (see Criminal Procedure and Investigations Act 1996; and CrimPR). This would re-assert core values and stem the tide of the rising wave of managerialism, which is arguably killing adversarial criminal justice by a thousand cuts.