



Sentencing Council Consultation

Miscellaneous amendments to sentencing guidelines

RESPONSE OF THE CRIMINAL BAR ASSOCIATION

November 2024

Introduction - Questions 1 to 4 – Identity of Respondent

The Criminal Bar Association

1. The Criminal Bar Association (the 'CBA') represents the views and interests of practising members of the criminal Bar in England and Wales. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and promote and represent the professional interests of its members.
2. The CBA is the largest specialist Bar association and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.
3. The email contact details for the CBA are:
aaron.dolan@criminalbar.com.

These written submissions are provided on behalf of the Criminal Bar Association and we are happy for the names of the organisation and contributors to be included in any consultation response document.

Setting a fine for those on a variable income

Question 5: Do you agree with the proposed addition to the fines guidance? If not, please provide any alternative suggestions.

4. The CBA supports this proposal, but suggests a slight amendment to the wording.
5. We agree that additional guidance will help ensure consistency of approach. However care should be taken to ensure that the guidance is not treated as prescriptive, as that would risk causing injustice in individual cases.
6. Many people have significant fluctuations in income across the year. For example, many work in sectors where there are significant seasonal differences in trade, such as hospitality, tourism and agriculture. Some students rely on working in the summer vacation to build up savings to cover living costs in the rest of the year. A fine may be too high or too low if it is based on a snapshot of earnings which is unrepresentative of normal income.
7. We suggest more detailed guidance which highlights the fact that the court may have to adopt a different approach to meet the justice of the case. We suggest the following:

“Where an offender’s income varies, the court should normally take an average of four to six weeks’ income to assess the relevant weekly income. Exceptionally, the court may look at a longer period if it is shown that the offender’s income in the four to six weeks’ period is not representative of their normal income.”

Offence of using or keeping heavy goods vehicle if levy not paid

Question 6: Do you agree to add the proposed guideline for the offence of using or keeping heavy goods vehicle if levy not paid? If not, please provide any alternative suggestions.

8. The CBA supports this proposal. It is consistent with the guidelines for offences of similar seriousness.

Careless driving

Question 7: Do you agree with the proposed changes to the Careless driving guideline? If not, please provide any alternative suggestions.

9. The CBA supports this proposal. The more detailed guidance is to be welcomed.

Question 8: Do you have any views on the likely impact of the proposals on fines or disqualification?

10. This proposal may result in an increase in fines for the most serious cases of this type (Culpability A / Harm 1). However, the increase is modest and we consider it to be appropriate. It is necessary to maintain an adequate distinction between the different categories of case.
11. These changes would mean that the court will only consider discretionary disqualification in cases involving Culpability A. On the face of it, that is a narrower range of cases than under the current guideline. Again, we consider this to be an appropriate change. The exclusion of lower culpability cases from consideration for disqualification is the just result of having more precise and detailed guidance. This will also promote greater consistency between cases.

Driving otherwise than in accordance with a licence

Question 9: Do you agree with the proposed change to the 'Drive otherwise than in accordance with a licence' guideline? If not, please provide any alternative suggestions.

12. Subject to an addition to the proposed text, the CBA supports this proposal.
13. The additional explanatory text is to be welcomed, not least because the statutory provisions themselves are difficult to follow. The example given in the accompanying text in the consultation document (page 13, first paragraph) is a helpful illustration. We suggest that the guideline itself could be improved by its inclusion, so that the additional text would read as follows:

"This applies where the offender's driving would have been in accordance with any licence that could have been granted to them (for example because they have failed to renew it when entitled to do so)."

Allocation Guideline

Question 10: Question 10: Do you have any comments on the accuracy or clarity of the proposed additions to the Allocation guideline? Please provide any alternative suggestions.

14. The CBA supports each of the proposed amendments.

Sentencing children and young people guideline

Question 11: Do you agree with the proposed changes relating to offenders aged under 18? If not, please provide any alternative suggestions.

15. Subject to further explanation being provided within the introductory text to the guideline, the CBA supports these proposed changes.
16. These changes reflect contemporary understanding of child development and maturity. They are consistent with the clear approach of UN Convention on the Rights of the Child,

namely that anyone under the age of 18 years must be treated as a child. However, the difficulty which arises is that this is a departure from the language used by the relevant statutory provisions, including those which the guideline itself is designed to reflect.

17. The opening paragraph (Para 1.1) of the existing guideline contains a reminder to the court of its statutory duties when sentencing offenders aged under 18. In its current form, the guideline is consistent with the statutory provisions in that they refer to 'children and young persons'.

18. Para 1.1 of the guideline states:

"1.1 When sentencing children or young people (those aged under 18 at the date of the finding of guilt) a court must have regard to:

- the principal aim of the youth justice system (to prevent offending by children and young people); and*
- the welfare of the child or young person."*

In the consultation document, at page 20, point 2, it is suggested that all references in the guideline will be amended to read 'child' or 'children'. No doubt it is intended that Para 1.1 will be amended accordingly.

19. This gives rise to a risk of confusion, in that both of these duties arise from statutes which use the term 'children and young person'. The first duty arises under Section 37(1) of the Crime and Disorder Act 1998, which states:

"It shall be the principal aim of the youth justice system to prevent offending by children and young persons."

The second duty arises under Section 44(1) of the Children and Young Persons Act 1933, which states:

"Every court in dealing with a child or young person who is brought before it, either as . . . an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings, and for securing that proper provision is made for his education and training."

20. Both of those statutes contain relevant definitions of 'child' and 'young person'. In both, a 'child' is defined as a person under the age of 14 years and a 'young person' is defined as a person who has attained the age of fourteen but is under the age of eighteen years. See: Section 107(1) of the Children and Young Persons Act 1933 and Section 117(1) of the Crime and Disorder Act 1998 respectively.

21. To add to the statutory confusion of terms:

- The Crime and Disorder Act 1998 also compendiously refers to children and young persons as 'youths' (for the purposes of the Youth Offending Teams, Youth Court, the Youth Justice Board and the Youth Justice System).
- The Sentencing Act 2020 refers to persons aged under 18 who appear for sentence as 'young offenders'.

22. We invite the Sentencing Council to consider whether adopting terminology which is different from the relevant legislation may, without explanation, give rise to some confusion. We would therefore suggest the inclusion of an additional paragraph at the very start of the guideline to the following effect:

"For the purposes of this guideline, persons under the age of 18 years are referred to throughout as 'children'. Differing terms are used in legislation, including 'children and young persons', 'youths' and 'young offenders'. This guideline uses the single term 'children' for the sake of consistency and as a reminder that the court's treatment of persons under the age of 18 years is different from its approach to the sentencing of adult offenders."

Assistance to the Prosecution

Question 12: Do you agree with the proposed addition of information on assistance to the prosecution? If not, please provide any alternative suggestions.

23. The CBA supports the proposed amendment, but we suggest that three additional factors should be added.

24. The draft guidance states in the introduction that:

“The following sequence of matters for a sentencing court to consider reflects the judgment R v Royle and others [2023] EWCA Crim 1311.”

However, the summary which follows does not include all of the factors identified in the list at para [33] of the judgment in Royle. In particular, two important factors not included are:

- The seriousness of the offending to which the information relates (Royle, para 33(i)).
- The period of time over which information has been provided (Royle, para 33(ii)).

25. Further, the guideline should also reflect the additional guidance from the Court of Appeal in the subsequent case of R v BFE [2024] EWCA Crim 1198, at para [17]. The Court there identified a gap in the guidance provided at para [33(iii)] in Royle, in that it did not address those cases where at the time of sentence it is too early to say what the results the information may bring. The Court held that in such cases the sentencer should take into account the potential value of the information. Although the judgment in BFE makes no reference to the facts of that case, it is clear that cases of that type may involve information being provided relating to high level activities in relation to the most serious types of offending.

26. We therefore suggest that point 2 in the draft additional guidance should be expanded to read as follows:

“The court should then consider the quality and quantity of the material provided by the offender in the investigation and subsequent prosecution of crime. The court should take into account the period of time over which the information was provided and the seriousness of the offending to which it relates. Particular value should be attached to those cases where the offender provides evidence in the form of a witness statement or is prepared to give evidence at any subsequent trial, especially where the information either produces convictions for the most serious offences, or prevents them, or which leads to disruption of major criminal networks. In cases where it is too early to say what impact the information

will have, the Court should take into account the potential value of the information provided."

Sentencing very large organisations

Question 13: Do you agree with the proposed addition of wording relating to sentencing very large organisations? If not, please provide any alternative suggestions.

27. Subject to one proposal, the CBA supports this proposal.
28. The CBA also invites the Council to consider whether the additional wording should also be added to the sentencing guideline for Corporate Manslaughter.
29. The proposed amendments are consistent with the guidance of the Court of Appeal in R v Thames Water Utilities Ltd [2019] EWCA Crim 1344 and R v Places for People Homes [2021] EWCA Crim 410. We agree that it is not appropriate to identify very large organisations by reference to a fixed threshold of turnover, which is not always the best measure in any event. There are always going to be cases which exceed the upper limit. For example, if a threshold of (say) £300 million was set, the Council would then have to decide what guidance to give about organisations with a turnover substantially in excess of the new upper threshold.
30. Although Para 3 of the draft echoes some of what was said by Popplewell LJ at paras [34] and [35] of Places for People, we suggest that for clarity it would be helpful also to include the qualification which he added. We suggest para 3 should read as follows:

"In the case of very large organisations the appropriate sentence cannot be reached by merely applying a mathematical formula to the starting points and ranges for large organisations. The extent to which any increase is required will depend upon the particular circumstances of each individual case."

31. The proposed additional wording makes no reference to the specified aggravating and mitigating features within the existing guidelines. For the avoidance of doubt, it might be preferable to make it clear that it is a relevant consideration. The fourth paragraph would therefore read as follows:

“In setting the level of fine for a very large organisation the court must consider the seriousness of the offence, any aggravating or mitigating factors (as identified below), the purposes of sentencing (including punishment and deterrence) and the financial circumstances of the offending organisation. Regard should be had to the principles set out under “General principles in setting a fine” above and at steps 5 to 7 below.”

32. The consultation document suggests that the additional guidance on very large companies should be included in the guidelines on Environmental Offences, Health and Safety, Food Safety and Sale of Knives. We suggest that it should also be included in the guideline on Corporate Manslaughter.

Revenue fraud

Question 14: Do you agree with the proposed new sentence table in the Revenue fraud guideline? If not, please provide any alternative suggestions.

33. The CBA supports this proposal.

34. We agree that these changes achieve the aim of increasing sentences for ‘the most egregious examples of tax fraud’. There is no reason to alter the sentence for offences with a value below £2 million, which are the majority of cases which come before the Court.

Standard language in guidelines

Question 15: Do you agree with the proposed standard wording in guidelines? If not, please provide any alternative suggestions

35. Subject to a slight difference in wording, the CBA supports this proposal.
36. We agree that the existing offence guidelines are inconsistent in their wording at Step 2. It would be helpful to adopt standard wording to ensure consistency.
37. At the risk of disagreeing over a mere preposition, we suggest that the guideline should not refer to “An adjustment *of* the starting point...”. A starting point is fixed and immutable. Section 121(5) and 121(10) of the Coroners’ and Justice Act 2009 defines the meaning of starting point: it is the sentence specified in a guideline by the Sentencing Council as the starting point within each category of that offence. The sentencer can depart from the starting point, but they cannot change it. Existing guidelines therefore refer to adjustments “*from*” the starting point.
38. The second paragraph under Step 2 should therefore read:

“An adjustment from the starting point, upwards or downwards, may then be necessary to reflect particular features of culpability and/or harm ...”

Totality

Question 16: Do you agree with the proposed addition to the Totality guideline? If not, please provide any alternative suggestions

39. The CBA supports this proposal.

Shop theft and Benefit fraud guidelines

Question 17: Do you agree with the proposed additions relating to financial hardship? If not, please provide any alternative suggestions

40. The CBA supports this proposal.

Wording relating to community orders in guidelines

Question 18: Do you agree with the proposed changes relating to community orders? If not, please provide any alternative suggestions

41. The CBA supports this proposal.

Wording relating on mandatory minimum sentences

Question 19: Do you agree with the proposed changes relating to community orders? If not, please provide any alternative suggestions

42. The CBA supports this proposal.

Domestic abuse

Question 20: Do you agree to add the domestic abuse aggravating factor to the listed guidelines? If not, please provide any alternative suggestions

43. The CBA supports this proposal.

Equalities and impact

Questions 21 to 23

44. No comments to add.