



THE CRIMINAL BAR ASSOCIATION

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THE CRIMINAL BAR ASSOCIATION RESPONSE TO THE SENTENCING COUNCIL PROFESSIONAL CONSULTATION ON ALLOCATION, OFFENCES TAKEN INTO CONSIDERATION AND TOTALITY GUIDELINES

The Criminal Bar Association (“CBA”) represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high 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 guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

The Sentencing Council ('The Council') is consulting on a draft guideline on allocation, offences taken into consideration (TICs) and totality [the Consultation paper] with the aim of improving consistency of approach to the range of issues covered (p5).

The Council’s principle objective with regard to the allocation procedure is to ensure, insofar as it is possible, that all cases are heard in the most suitable court. The volume of cases that are heard at the Crown Court has increased in recent years, including a significant proportion of cases where the sentences imposed fall within magistrates’ court sentencing powers. The Council has sought to offer clear and practical guidance to magistrates in the draft guideline in order to ensure greater consistency of approach and transparency in the decision making.

Although there is well-established practice on the matter of offences taken into consideration there is no single source of guidance about the approach the courts should take. The Council wishes to promote a clear, fair and consistent approach to sentencing. The number and nature of offences that a court might be asked to take into consideration can vary enormously. The Council feels it is important to set out the general principles, procedure and approach that should be taken to TICs in order to support clarity and consistency. It is not seeking to bring about any change to sentencing practice other than where the application of the guideline might lead to greater consistency of approach.

The Council is particularly aware that the wealth of statutory provisions and case law surrounding the sentencing of multiple offences can lead to a degree of complexity. Therefore in respect of totality the Council has sought to reflect current law and sentencing practice in the guideline in order to set out the general principles and therefore bring greater clarity and transparency to the

sentencing process where there are multiple offences. It is not seeking to bring about any change to sentencing practice other than where the application of the guideline might lead to greater consistency of approach.

The CBA welcomes the opportunity to respond to this consultation paper. The CBA endorses the aims to be achieved and recognises the need for a consistent approach. In the main, the CBA agrees with and supports the new recommended guidelines.

In answering questions 1, 2 and 3, we respectfully suggest a few modifications to the proposed factors to be considered when deciding the appropriate allocation of cases.

ALLOCATION

Question 1:

Do you think that the structure of the guideline provides sufficient guidance to magistrates to assist them in making consistent, appropriate allocation decisions?

We agree with the approach taken by the Council that in general, either way offences should be tried summarily unless it is likely that the court's sentencing powers will be insufficient. We respectfully propose that there may be other important factors why a case is more suitable to be tried in the Crown Court notwithstanding that the Magistrates sentencing powers would be sufficient.

Question 2:

Do you agree with the approach the guideline takes to assessing the suitability of cases for magistrates' court trial and the emphasis it places on taking a balanced initial view?

We agree with the emphasis on the need to take a balanced view. We respectfully invite the Council to consider the inclusion of further factors for cases which, whilst falling within the magistrates sentencing powers, are more suitable for trial in the Crown Court. By way of example where there is likely to be significant or complex issues of admissibility or where the case is likely to be long and logistically more suited to trial in the crown court or where the case is likely to be of public interest.

Question 3:

Are there further matters that the guideline might usefully cover?

We respectfully suggest that the Guideline might usefully cover other important factors which might militate in favour of trial in the Crown Court, examples of which are referred to above in answer to question 2.

Question 4:

Do you agree to the amendment proposed to the introduction of the MCSG?

We agree.

OFFENCES TAKEN INTO CONSIDERATION

Question 5:

Do you agree with the proposed general principles?

We agree. The general principles proposed seem to restate existing law and practice.

Question 6:

Do you agree with the proposals as to the types of offences that should not be the subject of TICs?

We agree. Once again this seems to reflect current practice.

However, we suggest that “where it is in the public interest that the TIC should be the subject of a separate charge” is amended to say “where it would be in the interests of justice that the TIC be the subject of a separate charge.” The interests of justice encompass all elements of the decision to prosecute including the public interest.

Question 7:

Do you agree with the proposed procedural safeguards?

We agree. The safeguards should promote clarity and certainty. The proposals appear to meet those objectives by ensuring that the defendant and all other parties are clear about what offences the court is being asked to take into consideration. To this end, we suggest that there is a further safeguard: a copy of the TIC schedule must be provided to the defendants and his representative at least 7 days before the sentencing hearing. This will ensure that a defendant has had adequate time to consider the often numerous allegations contained therein ensuring that he accepts all and only those offences he has committed.

Question 8:

Do you agree with the proposed approach to the application of TICs?

We agree. Considering TICs at stage 2 of the sentencing process seems to be the most appropriate stage to ensure that proper weight is given to TICs and this will also encourage the sentencer to pass a sentence within the category range for the index offence. There are obvious parallels that can be drawn between the relevance of previous convictions and TICs to the sentencing process. Both can properly inform the sentencer’s view as to the overall criminality of the offender. There is good reason therefore to treat TICs as a generally aggravating factor in a similar way to previous convictions. As such, the importance of advance notice of TICs should be emphasised to prosecutors as stated above.

TOTALITY

Question 9:

Do you agree with this definition of totality?

We agree with the wider construction of totality. All three principles identified are part of the process by which the sentencing court arrives at a sentence which is just and proportionate.

Question 10:

Do you agree with the proposed general principles of totality?

We agree with the proposed general principles.

Question 11:

Do you agree with the circumstances in which concurrent and consecutive sentences are likely to be passed, recognising there is no inflexible rule?

We are of the view that the draft guideline provides a useful summary of the relevant principles illuminated by examples. We would respectfully suggest an amendment to the wording at the bottom of page 33 "Where concurrent sentences are to be passed the sentence should reflect the overall criminality involved. The sentence should be appropriately aggravated by the presence of the associated offences" to "*The sentence should appropriately reflect the presence of the associated offences*".

Question 12:

Do you agree with the guidance provided on ensuring the sentence is just and appropriate?

We agree that the guidance appears to identify all of the relevant considerations. We are unable to suggest any improvement on the guidance.

Question 13:

Should the guideline provide further detail on how sentences are adjusted in relation to totality, and if so how might this be done?

We do not believe that the guideline should provide further detail on how sentences are adjusted. We are of the view that the guideline is appropriately balanced with sufficient detail to be helpful whilst avoiding being overly prescriptive. The proposed approach appears to reflect current sentencing practice.

Question 14:

Are there further specific considerations that the guideline could usefully cover relating to the sentencing of multiple offences?

The tabular presentation of the specific application of the principles makes the information readily accessible. We would respectfully suggest an amendment to the wording at the bottom of page 35, paragraph 4 to "*Ensure that the structure of the sentence is such as will be best understood by all concerned with it, and that the language used in passing sentence clearly explains how the makeup of the sentence is just and proportionate in the circumstances*".

We consider that frequently the makeup of the sentence is confusing and apparently unjust. This is an opportunity for the problem to be addressed.

GENERAL CONSIDERATIONS

Question 15:

Are there further ways in which you think victims can or should be considered, in relation to:
(a) allocation?
(b) offences taken into consideration?
(c) totality?

There are none that occur to us but we readily accept that there may be other respondents who are better placed to speak to this issue.

Question 16:

Are there any equality or diversity matters that the Council should consider, in relation to:
(a) allocation?
(b) offences taken into consideration?
(c) totality?
(please provide evidence where possible)

There are none that occur to us but we readily accept that there may be other respondents who are better placed to speak to this issue.

Question 17:

Are there any further comments you wish to make?

There are no further comments that we wish to make.

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On behalf of the Criminal Bar Association