



**Sentencing Council Fraud, Bribery and Money Laundering Offences Guideline
Consultation
Response of the Criminal Bar Association**

General comments

Section 3: Fraud

Questions 3 - 15

**Section 4: Possessing, making or supplying articles for use in
fraud**

Questions 16 - 21

Section 5: Revenue fraud

Questions 22 - 28

Section 6: Benefit fraud

Questions 29 - 38

Section 7: Money laundering

Questions 39 - 43

Section 8: Bribery

Questions 44 - 47

Section 9: Corporate offenders

Questions 48 - 55

INTRODUCTION

The Criminal Bar Association (“CBA”) represents about 4,500 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.

These guidelines are designed to replace the SGC Fraud guidelines issued in 2009 which were grouped into a number of categories which were possession/making/supplying articles for use of a fraud; Banking and insurance fraud; obtaining credit through fraud; benefit fraud and revenue fraud.

The proposed guidelines are grouped in a similar fashion but there are some differences as confidence fraud is now merged with banking/insurance fraud.

The proposed guidelines expand the offences that are covered. For the first time there are guidelines in relation to bribery and money laundering offences. Within the revenue guidelines the common law offence of cheating the public revenue is now included. Also for the first time each of the guidelines apply to sentencing offenders convicted of conspiracy to commit the substantive offence.

We have had the opportunity to attend one of the consultation meetings chaired by Mr Justice Saunders. We found the information and explanations provided at the meeting of great assistance and are grateful to the Sentencing Council for holding the event.

We welcome the guidelines. We note that the intention of the Council is to set guidelines at the current sentencing rate and not to increase the level of sentencing. We have included what are intended to be a number of discreet constructive suggestions under each Chapter heading.

We welcome the opportunity to respond to this consultation paper.

SECTION 3: FRAUD

QUESTION 1: Do you agree that a single fraud guideline is appropriate for cases of confidence fraud and banking and insurance fraud?

The rationale of the proposal is acknowledged but efforts to consolidate the sentencing approach in respect of these categories of offending risks minimising the culpability of those confidence frauds where the victims are vulnerable and where such cases are likely to be more serious.

QUESTION 2: Do you agree with the proposed approach to the assessment of culpability?

No, category B appears to be rather too vague.

QUESTION 3: Are there culpability factors included that should be considered at step two rather than step one? If so, which factors?

No.

QUESTION 4: Is the proposed two step approach to harm assessment the correct way to assess the harm caused by fraud?

We are concerned that the two stage approach to harm may lead to lower than appropriate sentences for offences of low value, but high impact on a victim (such as confidence fraud).

QUESTION 5: Do you agree with the approach to actual and intended loss and risk loss?

Yes, although we would respectfully suggest that the guidance is made clearer in the guidelines. There is risk that it could be omitted by the sentencer.

QUESTION 6: Are the financial amounts in the five categories set at appropriate levels?

Yes.

QUESTION 7: Do you agree with the approach to the assessment of victim impact?

The factors listed are appropriate.

However, victim impact appears to be considered twice: The vulnerability of the victim is considered at the culpability stage and at the stage when aggravating or mitigating factors are being considered. It would seem like "double accounting" to include victim impact twice in the sentence.

Further, the fraud guidelines appear to be the only guidelines that specifically assess "victim impact" in the body of the sentence. Robbery guidelines, for example, assess the seriousness of the offence or culpability of the offender, they weigh up the mitigating and aggravating factors, including the impact on the victim, and the relevant sentence is passed. The inclusion of moving the sentence up or down according to criteria set in "victim impact" is unnecessary and cumbersome.

QUESTION 8: Are the factors in these three categories the right ones?

Yes. However, as above, this ought to be considered at the culpability stage or at the point of considering aggravating and mitigating features, rather than as a separate exercise.

QUESTION 9: Do you agree with the proposed aggravating factors? If not, please specify which you would add or remove and why?

Yes, agreed.

QUESTION 10: Does the inclusion of "early active co-operation particularly in complex cases" present a risk that the offender may be given double credit for a guilty plea? Is there another formulation that would better reflect the intended application of this factor?

No. This is a very sensible suggestion, particularly in high value and complex cases. It will encourage those involved in complex cases, which will undoubtedly cost the tax payer many millions of pounds to prosecute, to resolve cases efficiently. Guidance will need to be considered as to what sort of case may come into this category. Clearly, a simple theft may not, but a complex missing trader or tax fraud might.

QUESTION 11: Do you agree with the proposed mitigating factors? If not, please specify which you would add or remove and why?

Yes, agreed.

QUESTION 12: Please give your views on the proposed sentence levels for these offences.

The sentence levels and ranges are sensible and proportionate.

QUESTION 13: Do you consider that the mechanism to move the next category up in scenario A leads to a proportionate sentence?

The sentence appears fair.

However, the mechanism is unnecessary. Victim impact appears to have been considered.

QUESTION 14: Under the existing SGC guidelines the likely sentence range for scenario A (single fraud transaction confidence fraud involving targeting of a vulnerable victim, loss less than £20,000) would be medium community order to 26 weeks custody. Do you consider the proposed sentence range appropriate?

There was a concern that this sentence may not be sufficient to meet the seriousness of the offence.

QUESTION 15: In scenario B, the risked loss moves the offence down a harm category. Does this lead to a proportionate sentence?

Yes. However, the mechanism is unnecessary and cumbersome.

SECTION 4: POSSESSING, MAKING OR SUPPLYING ARTICLES FOR USE IN FRAUD

QUESTION 16: Do you agree with the proposed approach to the assessment of culpability?

No.

In relation to making articles, there would of necessity always appear to be elements of planning as articles do not make themselves. It seems by integrating the same culpability factors for both 'making' offences and 'possessing' offences, one is automatically going to be stipulating that the greater majority of 'making' offences automatically fall into the high or at the very least, medium culpability. It would be preferable to specify that in relation to making offences, the planning element is removed.

In relation to possessing articles for use in fraud, clarification is needed as to "the sophisticated nature of offence category". Is it envisaged that the sophistication relates to the proposed fraud to which the item is to be used, or the sophisticated nature of the item which the guilty person has in his possession? If, as is anticipated, the culpability attaches to the sophisticated nature of the item itself this should be expressly stated. Otherwise there is a danger of 'double accounting' where the sophisticated nature of the proposed fraud, is dealt with both here, and in the 'harm' stage.

QUESTION 17: Are there culpability factors included that should be considered at step two rather than step one? If so, which factors?

No.

QUESTION 18: Do you agree to the approach to the assessment of harm?

In general terms, yes. However, the use of the word 'potential' is problematic and too open-ended. Although it is accepted that it will be frequently difficult to assess the actual loss or actual number of victims, it is equally hard to envisage circumstances where the potential loss or potential number of victims is not significant. This would have the effect of placing almost every case within the greater harm category. It is submitted that the words "are likely" be substituted for the words "have

potential". This would tie the sentence to the anticipated use of the items in question, as distinct from the theoretical maximum harm which might eventuate.

QUESTION 19: Are the factors in greater harm the right ones?

Subject to redefining as indicated in question 18, yes.

QUESTION 20: Do you agree with the proposed aggravating and mitigating factors? If not, please specify which you would add or remove and why.

'Use of another's identity' should be added as an aggravating factor. This feature is not properly reflected in either the culpability or harm stages but causes massive inconvenience/sense of being wronged and/or distress to those whose identities have been utilised.

QUESTION 21: Please give your views on the proposed sentence levels for these offences.

The sentence levels and ranges seem sensible and proportionate.

SECTION 5: REVENUE FRAUD

QUESTION 22: Do you agree with the approach to the assessment of culpability?

Yes, the separation between high, medium, and lesser culpability is helpful and clear.

The preface to the culpability table at Step one is helpful.

We note that at page 35 of the Consultation it states that "fraudulent activity over sustained period of time" will be added to "high culpability" but this is not represented within the guideline. It is unclear whether this is an omission.

In the event that it is to be included it at Step 1 it is submitted that this type of offence is often committed over a period of time. That in itself does not denote higher culpability. It can be committed in two ways. Firstly, an offence which is committed by an act at the outset and detected after a period of time. Secondly, where an offence is prolonged due to actions of the defendant. It is only the latter that should, if at all, be reflected at step 1 under culpability in the terms such as "Offending takes place over a significant period of time and prolonged through active participation by the defendant".

Alternatively, it is a feature that can be dealt with under different factors under higher culpability such as "sophisticated nature of offending" or at Step 2 as an aggravating feature where the same feature seems to be catered by "length of time over which the offence was committed".

QUESTION 23: Are there culpability factors included that should be considered at step two rather than step one? If so, which factors?

See above under question 22.

Length of time and the offence being a 'one off' should instead be treated as an aggravating or mitigating features at step 2 when such features are likely to be more factually sensitive. Generally, revenue fraud matters are likely to carry on for a number of months due to the length of the tax year but may be relatively unsophisticated. Furthermore, an offender's culpability would not be reduced by the fact that an offence which is particularly sophisticated and involves a large amount of money was completed through the filling in of one form.

QUESTION 24: Do you agree with the approach to the assessment of harm?

Yes.

QUESTION 25: Are the financial ranges set at the appropriate levels?

There is sufficient guidance at both ends of the spectrum and the categories are helpful. There is one discreet point regarding category 6. For the sake of consistency, it should have a starting point of £60,000 instead of £50,000. The starting point would then be set at the middle of the range for that category.

Question 26: Do you agree with the proposed aggravating and mitigating factors? If not, please specify which you would add or remove and why.

Aggravating factors

“Length of time over which the offence was committed” needs to be considered in light of the intention expressed at page 34 to include a similar factor at Step 1. If both factors were included there would be a clear risk of double counting the same activity.

“Dealing with goods with an additional health risk” relates to tobacco and illicit manufacture of alcohol (p38) as an aggravating feature. It is respectfully suggested that this is an inappropriate aggravating feature and can risk an escalation in sentences for tobacco offences. Tobacco relates to a product that is legal –the offence is the evasion of duty/revenue. Whereas “disposing of goods to under age purchasers” is an appropriate aggravating feature.

Mitigating factors

It is submitted that exceptional financial hardship should be included here as a mitigating factor, as in the case with benefit fraud.

QUESTION 27: In Scenario E, three offenders are sentenced. Is the draft revenue fraud guideline workable for offences charged as conspiracies? Are the sentences in scenario E proportionate in relation to the roles of the offenders?

Yes

QUESTION 28: Please give your views on the proposed sentence levels for these offences?

The sentences sufficiently reflect the culpability of the offender and seriousness of the offence.

SECTION 6: BENEFIT FRAUD

QUESTION 29: Do you agree with the proposed approach to the assessment of culpability?

Yes.

We would suggest that “use of false/stolen identity” is included as a factor denoting higher culpability, be it as an addition to “sophisticated nature of offence” or as a separate factor.

QUESTION 30: Are there culpability factors included that should be considered at step two rather than step one? If so, which factors?

No.

QUESTION 31: Do you agree with the approach to the assessment of harm?

Benefit fraud is recognised in the consultation as conduct that can be charged a number of different ways (p43).

We note the recent guidance of the Director of Public Prosecutions as to the changes in charging guidance for offences which fall within this offence. There is a danger in defendants receiving different sentences for the same conduct but differently charged. It is important that this situation is anticipated by the Council to ensure fairness and consistency of sentence. We consider the appropriate guidance for sentencing should come from the Sentencing Council. The serious conduct referred to by the DPP can be catered for in the Benefit guideline as set out in the consultation under harm factors when the amount exceeds category 1 (p.45) i.e. in excess of £100,000. In that situation the sentencer is invited to consider the Revenue guideline.

However we disagree that where the same conduct but charged under section 1 of the Fraud Act or conspiracy to defraud should be sentenced under the revenue guideline at p40. For offending at levels below 100,000, an offender would be at risk at a significantly higher sentence. Alternatively more sophisticated/higher culpability offending could be catered for at higher starting points at Column A at the Benefit guideline table set out at page 48.

QUESTION 32: Are the financial ranges set at the appropriate levels?

Yes.

QUESTION 33: Do you agree with the proposed aggravating factors? If not, please specify which you would add or remove and why.

Yes, save we would suggest including “evidence of a lavish lifestyle”.

QUESTION 34: Do you agree with the proposed mitigating factors? If not, please specify which you would add or remove and why.

Yes.

QUESTION 35: Please provide your views on the inclusion of ‘offender experiencing significant financial hardship or pressure at time fraud was committed due to exceptional circumstances’ as a mitigating factor

We support the inclusion of a mitigating factor which accommodates the exceptional circumstances envisaged in the illustration at page 47 of the consultation. We anticipate the application of this mitigating factor will be relatively rare in practice.

QUESTION 36: Would adjustment for aggravating and mitigating factors in the above scenarios lead to proportionate sentences?

Yes, save the absence of an aggravating feature of “evidence of a lavish lifestyle” this should be recognised as a specific aggravating feature.

QUESTION 37: Is the guidance for sentencing benefit fraud cases involving amounts in excess of £100,000 sufficiently clear?

The guidance is clear, but for the reasons set out at the answer to question 31 we have concerns that there is a risk of unfairness and inconsistency.

QUESTION 38: Please give your views on the proposed sentence levels for these offences?

The sentence level is appropriate subject to the submissions made to question 31 and set out below for ease of reference:

We disagree that the conduct that could be charged as benefit fraud is charged under section 1 of the Fraud Act or conspiracy to defraud should be sentenced under the revenue guideline at p40. For offending at levels below 100,000, an offender would be at risk at a significantly higher sentence under those guidelines. Alternatively more sophisticated/higher culpability offending (below £100k) could be catered for at higher starting points at Column A at the Benefit fraud guideline table set out at page 48. Conduct over £100k would be considered under the revenue guideline in any event. This modification would mean only two guidelines are used, rather than three for 'benefit' offending. The Revenue guideline would only be utilised when the relevant figure is in excess of £100,000.

SECTION 7: MONEY LAUNDERING

QUESTION 39: Do you agree with the proposed approach to the assessment of culpability for money laundering offences?

The three types of culpability embrace the existing sentencing position whereby a sentence considers the knowledge /awareness of the defendant of the criminal activity the money laundering stems from.

QUESTION 40: Are there culpability factors included that should be considered at step two rather than step one? If so, which factors?

We consider that “criminal activity conducted over a sustained period of time” be considered as an aggravating feature at step two. Money laundering offending may embrace offending over a period of time but that in itself does not denote higher culpability. Significant planning/sophistication is a factor which would embrace “higher culpability” offending.

QUESTION 41: Is the proposed two stage approach to harm assessment the correct way to assess the harm caused by money laundering?

We disagree with the second part of the two stage approach to harm (p.53).

At present, the likely effect is to elevate all offences up a category, as the sentencer is invited to find “greater harm which is demonstrated from serious criminality including but not limited to drug offences, terrorism, robbery and tax evasion”.

This list of serious criminality in effect covers most money laundering offences. Secondly, the inclusion of tax evasion is in itself is very wide definition and again on one interpretation could cover a great many offences of money laundering.

The effect is that most offences will be elevated a category thus giving disproportionate weight to the index criminal activity at the expense of the awareness/knowledge of the offender of that activity.

It is respectfully submitted that there should be one stage and the financial values have sufficient capacity at column A to allow a defendant with higher culpability i.e. knowledge of the criminal activity to be sentenced. This would provide greater consistency of sentence.

QUESTION 42: In scenario H two offenders are sentenced. Are these sentences proportionate in relation to their roles?

The scenario is not exactly clear. Firstly, in relation to K the range at category 3 would be 18months to 4 years (not three as set out at the consultation at p57). It is submitted that an upper range of 4 years on these facts would be too high for lower culpability.

Furthermore, applying the two stage harm test, this offence would be liable to fall within the definition of greater harm (drug offences) and thus move up a category to category 2.

QUESTION 43: Please give your views on the proposed sentence levels for money laundering offences

A small observation is that the starting point for category 5 should be £60,000 rather than £50,000, in order to be at the half way point within the range.

For the reasons set out above, there is a danger that the actual sentences for money laundering may increase in practice. The removal of the two stage harm test should be considered.

SECTION 8: BRIBERY

QUESTIONS 44 and 45:

44. Do the factors outlined above clearly reflect the levels of culpability involved in this type of offending? Please say what you would change and why.

45. Do you agree with the approach to assessing harm as outlined above? Are the harm factors identified sufficiently clear whilst providing courts with the flexibility to reflect the widely different types of harm that could result from this type of offending? Please say what you would change and why

We have grouped these questions because our response affects each.

Although the SFO has two live investigations into allegations of bribery committed by companies, there has been no prosecution of a company under the Act. The only prosecution to date is of two directors and an outside adviser in connection with the promotion and sale of biofuel investments to UK investors.

In our view the current proposals do not give a sufficient “culpability” or “harm” steer when a court has to deal with a corporate defendant or an offence committed by a director; particularly in the case of a plc.

SCENARIO

A UK plc quoted on the UK and NY stock exchanges secures lucrative contracts by the Board or (unknown to the Board) by a rogue director/s by bribing a Minister of an overseas government.

The contracts are worth millions of pounds and increase profits resulting in a marked increase in share value. New investors are attracted and existing investors increase their holdings.

Acting on the evidence of an employee “whistleblower” the SFO fearing that evidence will be destroyed raid the plc and seize documents. The financial press reports the raid.

Possible consequences.

1. The company may have to self-report as its receipts may directly or indirectly represent the proceeds of crime.
2. The company’s auditors may have to Note the public accounts to reflect the above.

3. The stock exchanges may either unilaterally or at the request of the company suspend trading in its shares.
4. The share value may drop incurring significant loss to investors.
5. Legitimate contracts in the process of being negotiated with UK companies may be abandoned after considerable investment in negotiations and presentations.
6. The SFO might restrain the company's assets or on a worst-case scenario appoint a management receiver which may spell the end of the plc.

Each of the above is foreseeable.

CULPABILITY/HARM FACTORS

The current proposals appear to concentrate on *individuals* who offend and the only reference to "business" is in the Category 2 Harm guideline which speaks of "**Significant undermining of the proper function of local or national government, business or public service**". Our reading of this guideline is that the "business" is in fact one conducted by or on behalf of government and public services and the "function" test will relate to the impact that the bribery will or might have on confidence in the processes adopted e.g. corrupt tendering procedures may seriously undermine a government department's reputation in the market place and cast serious doubt as to the future reliability and transparency of its procedures.

We have little doubt that a court faced with a corporate or rogue director in the private sector would be able to "shoe-horn" the case into the guidelines but the guidelines should in our view be clear; not least so that proper sentencing advice can be given to clients.

PROPOSAL

1. That in determining the offence category (Step 1) there should be inserted at **A- High culpability** a guideline specifically orientated towards corporate offending that causes asset or capital loss or the risk of such loss.
2. That in identifying harm factors there should (a) be inserted at **Category 1** a guideline dealing with serious detrimental effect on investors and (b) in **Category 2** serious detrimental effect on market confidence (this would cover a case where publicity had driven potential investors away from a company resulting in prospective as opposed to actual loss or detriment)

QUESTION 46: Do you agree with the aggravating and mitigating factors for bribery proposed at step two? If not, please specify what you would change and why.

In the context of the above scenario, there might be evidence of an attempt to trace and identify the “whistleblower” (who is not a victim of the offending) eg through the process of the interviewing of employees as part of an internal investigation and thereafter to place pressure on him/her not to cooperate with a public investigation and/or to discriminate against that individual within the workplace.

PROPOSAL

That in the list of **Other aggravating factors** guidance should include steps taken against any person to prevent proper investigation of the offence or in the case of an employee who reports offending to discriminate against that employee within the workplace.

QUESTION 47: Please give your views on the proposed sentencing levels for Bribery Act offences. Please specify what you would change and why.

We agree with the proposed sentencing levels. In our experience, particularly after a lengthy trial, sight is lost of the powers available to the court to disqualify under the Company Directors Disqualification Act 1986. We have had experience of cases where a custodial sentence has been imposed and only then has the prosecution “woken up” to the powers under the Act. An order can of itself be a significant punishment and out-run any prison sentence and ought in our view to be taken into account before identifying the appropriate sentence rather than added as an afterthought when it may be too late to adjust any prison sentence to give effect to this significant additional punishment.

We would suggest that in cases of director offenders, the guidance should steer the court towards the exercise of its discretionary powers to disqualify under the Act before identifying the appropriate sentence.

SECTION 9: CORPORATE OFFENDERS

QUESTION 48: Do you agree that consideration of compensation should be at step one? If not, please give you reason.

Yes, agreed.

QUESTION 49: Do you agree with the culpability factors for these offences and do you agree that the list of factors should be non-exhaustive? If not, please specify what you would change and why?

Yes. Both agreed, this is sensible.

QUESTION 50: Do you agree with the approach to assessing harm as outlined above? Does the approach strike the right balance between flexibility and certainty? Please say what you would change and why?

Yes.

QUESTION 51: Do you agree with the approach to calculating the financial penalty by applying a multiplier to the harm figure? Do you think that the multipliers are set at the right level? Please say what you would change and why?

Yes the multipliers are sensible.

QUESTION 52: Do you agree with the aggravating and mitigating factors for corporate offenders proposed at step three? If not, please specify what you would change and why?

Yes.

QUESTION 53: Please give you views on the proposed steps four. Do you think that it achieves the objectives of punishment, deterrence and removal of gain in a fair way? Please specify what you would change and why?

Yes. This caveat allows a degree of judicial discretion to adjust the sentence in a fair and proportionate way.

QUESTION 54: Do you think that any further guidance should be offered at steps 5 - 9? Are there any particular ancillary orders that are relevant to corporate offenders that should be mentioned at stage seven?

No.

QUESTION 55: Overall do you consider that the draft corporate guidelines provide the sentencer and the parties will sufficient guidance and flexibility? Please specify what you would change and why?

Yes

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