



Magistrates' Court Sentencing Guidelines Consultation

Response on behalf of the Criminal Bar Association of England and Wales

4th August 2016

INTRODUCTION

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
2. 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 to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 4,000 subscribing members; 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

OBSERVATIONS

Question One: Do you agree that offences generally should be presented in one consistent format.

4. We are encouraged that the Council have decided to adopted a consistent structure and approach in its Guidelines. However, we are concerned that a desire to achieve consistency and thus a need to create categories of offending by listing indicative harm and culpability factors may unintentionally lead to the conclusion that the sentencing exercise has evolved to become an art of “box ticking”.
5. It is important to that end that the Council considers the observation of Lord Justice Hughes in R v Healey and Others 2012 EWCA Crim 2105 namely that: *“it may be that the pictorial boxes which are part of the presentation may lead one to think that adjacent boxes are mutually exclusive, one or the other. They are not. There is an inevitable overlap between the scenarios which are described in adjacent boxes. In real life, offending is found on a sliding scale of gravity with few hard lines”*.
6. The Council should ensure that Sentencers know that the new approach as to consistency is not a lean towards a rigorous application of factors rendering all cases as fitting neatly within a pictorial box.

Question Two: Do you take issue with the fine starting points

7. We have reviewed the suggested starting points and take no issue with the same, not least because a financial penalty is always dependent upon an individual’s means.

Question Three [offence: alcohol sale]: Do you agree that conditional discharge is an appropriate option at the lower end of the range for category 3 cases?

8. Yes, we agree that a conditional discharge should be a welcomed sentence for an offence of this nature where the facts warrant the same.

Question Four [offence: alcohol sale]: Do you agree that 'few entries in refusals/incident book' should remain a higher culpability factor as drafted?

9. We see no merit whatsoever in “few entries in refusal/incident book” being an aggravating feature. The same unfairly presupposes, without foundation, that the absence of entries must mean incompetence and/or neglect. It of course could simply mean that there have been no such matters which have required recording. It is for that reason that we propose that this factor should be deleted.

Question Five [offence: alcohol sale]: Do you have any other comments about any of the factors and/or ranges for this offence?

10. Our only comment in respect of this Offence Guideline is that “drunk person aggressive” and “drunk persons causing distress” are higher harm factors which shall often be at odds, evidentially, with the lower harm factor of “offence committed to avoid confrontation / intimidation / reprisal”. To avoid that obvious conflict, we would suggest that these two higher harm factors are deleted.

Question Six [offence: Animal Cruelty]: Do you agree with the draft guideline, in particular with the culpability and harm factors and with the use of three levels of seriousness?

11. Yes, it is agreed that there should be three levels of seriousness such that the broad range of factual circumstances giving rise to an animal cruelty charge can be reflected by the guidelines and ultimately the sentencing court. We find favour in the main with the particular culpability and harm factors.
12. However, the factor of “commercial context” indicting high culpability should read “ill treatment or neglect in a commercial context” as the Guideline, elsewhere, treat ill treatment and neglect as separate factual bases of guilt.
13. We have concern that there may be an issue when referring to “prolonged” neglect. For example there may be cases where the neglect was prolonged, but

that there was well intended care nonetheless. The fact that the neglect was “prolonged” under the proposed Guidelines means that there is high culpability, but does that trump the low culpability factor of “well intended care”? The period of neglect in such cases is more likely to be relevant to harm, as opposed to culpability. We would suggest that the use of the phrase “prolonged” is limited only to deliberate conduct and deliberate neglect, such that the factor reads “prolonged, deliberate ill treatment or neglect”, as opposed to “prolonged or deliberate ill treatment or neglect”, thus removing the potential for conflict.

14. We note the Guideline is seemingly silent as to the number of animals concerned. There is rarely, if ever, a charge brought in respect of each individual animal. For example one charge may cover 32 Fighting Cocks. There should be a standardise approach encouraged by the Guidelines as to multiple animals (both quantity and variety/breed) and how that is to be reflected in sentence .

6(i) Case Study A

15. The facts fall short of “prolonged or deliberate neglect” and equally short of “well intended care”, so we are in agreement this is a medium culpability case. We further agree that this is a lesser harm case. We believe the correct sentence has been arrived at in the case study.

6(ii) Case Study B

16. This case study demonstrate the concern of too greater weight being attached to “prolonged neglect” which unfairly trumps “well intended care”. It is our view that despite the neglect being prolonged, that there was at all material times seemingly “well intended care” as the owner had no knowledge as to the suffering and considered them to be family. We would argue that the more appropriate culpability range would be medium culpability. We agree the harm is high due to death. We disagree with the sentence arrived at in the light of our disagreement as to culpability.

6(iii) Case Study C

17. We are in agreement with the assessment as to capability, harm and sentencing range.

Question 7 [offence: careless driving]: Do you agree with the draft guideline in respect of disqualification?

18. Yes, it is agreed that the circumstances of offences which may lead to disqualification will vary enormously and therefore sentencers should be given the flexibility to order a period of disqualification which is proportionate to all of the circumstances of the case.

19. In terms of other comments about this guideline, it is noted that (in keeping with the format of all other guidelines), the category of the offence is to be determined only with reference to the factors listed in the guideline.

20. We take the view that in respect of careless driving, the factors listed in the draft guideline are inadequate to allow the proper categorisation of offences, as they are too restrictive.

21. Careless driving is an offence in which, by its very definition, culpability is often low. A large number of careless driving offences arise out of a momentary lapse of concentration or misjudgement at low speed. Both of these descriptions are used in the present guideline to cover offences of the lowest culpability, however they have been omitted from the draft guideline.

22. By way of example, if a driver fails to look over his shoulder before pulling into the path of another road user who manages to take evasive action to avoid a collision, the offence could properly be considered to be of low culpability, arising from a momentary lapse of concentration. Similarly, if a driver edges past the 'give way' line at a junction, causing another road user on the main road to take evasive action, the offence could properly be categorised as low culpability arising from a misjudgement at low speed.

23. Using the guideline currently in existence, it would not be at all troublesome for a sentencing court to categorise such offences. The draft guideline however, omits reference to 'momentary lapse of concentration' and 'misjudgement at low speed' and instead lists only three lower culpability factors which the court is permitted to take into consideration, those being: minor risk, inexperience of driver and sudden change in road conditions. We take the view that in addition to those three factors, the court should also be entitled to have regard to the two additional lower culpability factors which exist in the present guideline, namely, momentary lapse of judgement and misjudgement at low speed. This will ensure that the large number of offences which arise out of a momentary lapse can be properly categorised within the new guideline.

Question Eight [offence: telecommunications]: Do you agree with the proposed changes to the category one starting point?

24. In the current Guidelines, the focus is mostly on language (indecent, offensive, threatening, extreme etc.). By contrast, in the Draft Guideline, the factors going to culpability are more concrete and pertain more to the intention and nature of the message (eg. threats (including blackmail and threat to disclose private information) and the targeting of the recipient). We welcome that change in focus, and that change is required, to allow the starting point for Category One to be the same for both offences.

25. We nonetheless have some residual concern in respect of a shift to the culpability and harm model which arises where one guideline is designed to apply to two different offences (section 127(1) and 127(2)) as the offences may catch very different offending. We question therefore why two tables cannot be created, even if the starting point for category one is to be the same.

Question 9 [Offence: Class A, fail to attend/remain as assessment] Do you agree with the treatment of culpability ?

26. We agree that in the light of the wording of section 12 of the Drug Act 2005, that should there should be no material difference between an offender who fails to attend and an offender who fails to remain; save that the latter shows at least an attempt to comply with the assessment.
27. There are however only two version of culpability envisaged by the Guidelines: deliberately failing to attend and attending at the wrong place of time. There is no option for forgetting to attend, failure to understand instructions or the like. Whilst of course these may be covered implicitly by the absence of “a deliberate act”, these inadvertent examples should nonetheless be listed as indicating lower culpability factors. To that end, we are concerned that as currently drafted the Guideline is too restrictive.
28. Further, there used to be consideration, as to “D voluntarily re-arranges” when considering culpability. That is omitted from the new Guidelines. We consider that this should remain listed as indicating lower culpability

Question Ten [Offence: Class A, fail to attend/remain as assessment]: Do you agree with the proposed wording of the harm factor 'aggressive or disruptive during attendance'?

29. We are of the view that this harm factor is intended to capture disruptive behaviour towards vulnerable service users. It would be helpful to make it plain that there must actually be service users present and that they be affected, lest this be used too generally to capture conduct which is below threatening or abusive but still affects only staff. We would suggest that the harm factor should read “aggressive or disruptive during attendance affecting other service users”

Question Eleven [Offence: drunk and disorderly]: Do you have any comments about this draft guidelines?

30. Considering that this is a fine only matter (with that fine being means tested) we question how “a serious medical condition requiring urgent, intensive or long-term treatment” or being a “sole or primary carer for dependent relatives” can impact upon a courts determination of a fine band. The inclusion of these two features suggests an over formulaic approach by the Council and diminishes the weight of the Guidelines.

Question Twelve [Offence: failing to stop/failing to report]: Do you agree with the proposed wording of this mitigating factor?- “significant attempt made to comply with duty”.

31. The rationale for the same is that section 170(4) Road Traffic Act 1988 creates very precise requirements to comply with, so there are frequent cases where offenders have made efforts to report which do not comply with the law. We welcome this proposed mitigating feature. We have no further comments on the Guidelines.

Question Thirteen [Offence: Football Related] Do you agree with the proposed culpability and harm factors and the inclusion of both generic and specific factors?

32. Considering the multitude of offending covered by this Guideline, we would welcome “duration” of incident featuring within the culpability factors. Also, we must acknowledge, that often football related offences are committed by large groups of individuals, thus there ought to be the same properly listed as an aggravating feature.

Question Fourteen [Offence: Railway Fare Evasion] Do you agree that the factor “aggressive towards staff” captures both verbal and non-verbal behaviour, including offensive language?

33. We agree that “aggressive towards staff” is a proper aggravating feature; the same would cover both verbal and non-verbal behaviour. We have no other comments to make in respect of this Guideline.

Question Fifteen [Offence: school non-attendance]: Do you agree with the proposed aggravating and mitigating factors?

34. We are unclear what is meant by “adverse influence on children of the family”; does the inference pertain to a child, other than the non-attending child, that is affected or encouraged to behave or attend school poorly as a result. We would welcome clearer wording in that regard.

Question Sixteen [Offence: school non-attendance]: Do you agree with the proposed approach regarding fine bands?

35. We agree that the Guideline should only refer to Category A to C fines and adopt the two-fold rationale for the same articulated by the Council.

Question Seventeen [Offence: Speeding]: Do you agree with the proposed structure for this guideline?

36. The draft Guideline follows a slightly compressed format, not providing additional culpability and harm factors save the speed; the same is plainly appropriate and sensible.

Question Eighteen [Offence: sexual activity in a public toilet]: Do you agree with the proposed sentencing ranges?

37. We note that unlike other offences which carry a community penalty, being a “sole or primary carer for dependent relatives” is omitted as a mitigating factor. In the absence of justification for the same, this factor should remain.

Question Nineteen [Offence: Taxi Touting] Do you agree with the proposed step one and step two factors?

38. Yes. We have no observations to make.

Question Twenty [Offence: TV Licences] Do you agree with the proposed step one and step two factors?

39. We question why it is an aggravating feature to have “had additional subscription television services”. We form the view that the same adds little if anything to one’s culpability.

40. Considering that this is a fine only matter (with that fine being means tested) we question how “a serious medical condition requiring urgent, intensive or long-term treatment” or being a “sole or primary carer for dependent relatives” can impact upon a courts determination of a fine band. The inclusion of these two features suggests an over formulaic approach by the Council and diminishes the weight of the Guidelines.

Question Twenty One [Offence: Vehicle interference] Do you agree with the proposed culpability and harm factors?

41. In terms of culpability and the defendant’s role within a group, we take the view that the higher culpability factor should be described as ‘leading role within a group’, rather than ‘significant role’ as this is in keeping with the terminology used in other definitive guidelines (such as the theft, fraud and

assault guidelines). The sentencing council may also wish to consider as additional higher culpability factors: going equipped and use of a weapon.

42. In relation to factors indicating lower culpability, the Council may wish to consider including 'mental disorder or learning disability, where linked to the commission of the offence' (as per other definitive guidelines, such as burglary).

43. Finally, in relation to the factors increasing seriousness, the Council may wish to consider including two additional factors, namely that the offence was committed at night and the offence was committed against a disabled person's vehicle.

Question Twenty Two [Offence; TWOC] Do you agree with the proposed lengths of disqualification

44. No. It appears that there is a drafting error in the proposed Guideline as it is suggested that category one offences should have the lowest starting point of 4 months and category 3 offences should have the highest starting point of 9-12 months.

45. Assuming that this is a drafting error (and should read in reverse), we nevertheless do not agree with the proposed lengths of disqualification. Given that a sentencing Court is only permitted to determine the category of the offence by reference to the harm and culpability factors listed in the guideline, we take the view that an offence of lesser harm and lower culpability should not attract a disqualification from driving at all. Examples of such offences (with reference to the factors listed in the guidelines) would be where an individual exceeds the hire period of a rental vehicle and voluntarily returns the vehicle or where a teenager exceeds the permitted usage of his/her parents' car. It seems to us that such offences should not attract a period of disqualification. Whilst it is accepted that the guideline only asks the court to consider disqualification, it is felt that a suggested starting point of 4 months is likely to lead to a large increase in offenders who are disqualified.

46. In our view, this Guideline ought to be drafted in a similar fashion to the careless driving guideline, in which the words 'consider disqualification' appear in the guideline, without any proposed disqualification lengths. The draft TWOC guideline could therefore simply mimic the careless driving Guideline, albeit the words 'consider disqualification' could appear in both category one and category two cases, to provide the Court with greater flexibility.
47. In terms of other observations, in our view, this Guideline is highly likely to affect sentencing outcomes. By way of example, if an offender who was operating on his own entered private premises and took a vehicle without the owner's consent; under the present guideline, his offence would be placed into the highest category of the guidelines, attracting a starting point of a high level community order and a sentencing range of up to 26 weeks' imprisonment. Under the draft guideline, the same offender is likely to fall within category 2, as entering private premises is only one factor indicating greater harm, and there would be no factors indicating higher culpability. The starting point for this offender under the present guideline is therefore likely to be a medium level community order, with a sentencing range up to a high level community order.
48. As the draft guideline will almost inevitably make it more difficult for a sentencing court to place an offender within category one (as greater harm and higher culpability factors will both need to be present), the Council may wish to mark this with a change in the starting points in the draft guideline. It may for example be appropriate in cases where both greater harm and higher culpability are present, to have a starting point of a custodial sentence.
49. Another potential remedy to address this anomaly may be to list 'vehicle taken from private premises' as a higher culpability factor, rather than a greater harm factor. This may enable a greater number of cases to be captured by category one.
50. Finally, we take the view that a further lower culpability factor should be included in the guideline, namely that an offence was unplanned or

opportunistic (as per the theft and fraud guidelines). Similarly, the sentencing council may wish to include a further higher culpability factor, namely deliberate targeting of a victim based on vulnerability.

Question Twenty Three [multiple offences]: Please provide any additional comments or suggestions that you have about these proposals. Please indicate which specific guideline you are referring to if appropriate. Please state if you agree with the proposed culpability, harm and or additional factors. Please give your reasons if you do not agree and /or highlight anything additional you believe should be included.

51. We are grateful to the Pupils of Church Court Chambers [Estelle Thornber, Sam Stockwell and Alex Tinsley] who have “stress tested” the new Guidelines against their respective predecessors and, together with a subcommittee of the CBA, have envisaged hypothetical cases to consider whether or not there is to be any material differences occasioned by the new Guidelines such that representations need to be made either on behalf of potential defendants or victims of crime.

52. Save where else addressed herein, we have no representations to make.

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