



The Criminal Bar Association response to the Sentencing Advisory Panel's consultation re: overarching principles of sentencing

Introduction

1. The Sentencing Advisory Panel ["SAP"] has been asked by the Sentencing Guidelines Council to review the definitive guidelines *Overarching Principles: Seriousness* and *New Sentences: Criminal Justice Act 2003*. This is the response of the Criminal Bar Association ["CBA"] to a consultation paper issued by the Sentencing Advisory Panel on 8th July 2008, which poses a number of specific questions. The CBA has approximately 3,500 members all of whom are regularly involved in sentencing hearings. The CBA welcomes the opportunity to respond to this Consultation.

Executive Summary

2. It is our view that it is undesirable for the sentencing process to be constrained by rigid guidelines or a structure that is insufficiently flexible.
3. There is, we consider, a real danger of conflict between the useful, existing sentencing guidelines for specific offences, and the proposed general guidelines in the consultation paper relating to categories of sentence. In particular it is proposed that a series of presumptions are built into the sentencing process. It is our view that such rigidity is unwelcome and unlikely to assist in the proper sentencing process. The following responses are given in an effort to help on individual topics but they do not alter our primary position that no such general guidelines should be introduced.

4. The answers to the specific questions posed by the SAP are set out below:

Question 1

Do you consider that any of the statutory purposes of sentencing is more important than another? If so, how should this influence the approach to sentencing?

No. In each case a different emphasis will need to be given to the various statutory purposes of sentencing.

Question 2

Do you agree that culpability should be redefined, in descending order of severity, as:

- (i) intention and/or knowledge; and**
- (ii) recklessness and/or negligence?**

If not, how should the varying levels of offender culpability be categorised?

No. There is a natural sliding scale of culpability; this may extend from a deliberate intention to do a particular wrong, to the accidental commission of an offence predicated on strict liability. At present the state of mind of the defendant in any given scenario is one factor in sentencing; it should remain fluid to take into account the factual variables. A move towards a model which divides culpability into a number of distinct brackets should in our view be avoided. It would seem that "knowledge", as defined in the SAP paper and the 2004 Guideline on Seriousness, equates more with recklessness than intention. However, it is arguable that "knowledge" is merely a stepping stone along the road either to intention or recklessness, and as such it may be more helpful, if any sort of grading is instigated, to abandon "knowledge" as a measure of culpability and simply to refer to intention, recklessness and negligence. Empirically and anecdotally, that tends to be the approach that most Crown Court judges adopt as a matter of practice. In addition, it would be wrong, in our view, to equate recklessness and negligence. One involves the taking of a known risk with foresight of some harm and the other does not require knowledge or foresight at all.

Question 3

Do you agree that the factors identified above are relevant to the assessment of offence seriousness where there is an imbalance between the harm intended and the harm caused by an offence?

Yes. In addition, the degree of any physical, mental or psychological injury suffered by the defendant should be taken into account – this might be particularly relevant, for example, in a case of death by dangerous driving where the deceased was a close friend or relative of the defendant.

Question 4

To what extent and in what circumstances do you consider that the presence of previous convictions should impact on the sentence imposed?

The principles set out in the summary at p26 of the SAP report are sensible. The recognition that a pattern of offending might suggest a sentence with a greater emphasis on rehabilitation is particularly to be welcomed. There are two caveats, however, both of which demonstrate, we would suggest, the difficulty of setting overarching guidelines in the circumstances envisaged:

- firstly, we do not agree that previous convictions will always be relevant to the current offence if they are of the same or a similar type. It may be appropriate to treat an offender as being of good character where, for example, previous convictions are old. Further, whilst shoplifting and serious fraud are offences of the same “type” i.e. dishonesty offences, the fact of a previous conviction for the former may well be disregarded for the purposes of considering the appropriate sentence for the latter. Some previous convictions will be more relevant than others; some may have no bearing on the sentencing exercise whatsoever;
- secondly, where the present offence shows an escalation in offending, that may exacerbate seriousness as far as sentencing is concerned. This does not sit easily with the suggestion that the presence of offences of greater seriousness in the past should ordinarily aggravate the instant offence to a greater degree than historic offences of less seriousness. Recognition that increasing

seriousness of offending may require a different approach to sentencing should not fall outside any guidance given.

Question 5

Do you think that any of the suggested approaches to assessing the impact of aggravating factors would be helpful? Do you have any other suggestions?

No. In each case the presence of one or more aggravating factors will carry different weight. While the offence-specific guidelines usefully list those that are relevant to an individual offence, to rank aggravating factors on a general level would wrongly deprive sentencing judges of significant and appropriate flexibility that they currently possess.

Question 6

Are respondents aware of any more recent research into the deterrent effect of sentencing?

No, we are not.

Question 7

Do you agree that there should be a presumption of a custodial sentence where the factors identified above are present? If not, why not?

No. The guidelines issued so far for specific offences are sufficient; further guidelines would lead to unnecessary inflexibility. As it is, the judge is obliged specifically to indicate why he has passed a sentence not in accordance with the guidelines. Our view is that presumptions are generally unhelpful additions to the sentencing exercise. It is of note that, as a result of amendments brought about by the Criminal Justice and Immigration Act 2008, the rebuttable presumption of dangerousness introduced by s.229 of the Criminal Justice Act 2003, has been removed.

Question 8

Do you have any comments on the Panel's assessment of offender mitigation factors and their potential impact on sentence selection?

This list seems fairly comprehensive; it seems to us that if, despite our general stance, there is to be any such Guideline, it may be helpful to include such a (non-exhaustive) list. The way in which the list is expressed ("factors which may be accepted in offender mitigation") suggests that the sentencing tribunal would not be obliged to take any or all of the factors into account in any individual case. We agree and would suggest that this is made explicit in a Guideline.

In relation to the specific factors listed, we would note:

- we cannot see that voluntary reparation should be a distinct factor, as it is part of the evidence that a defendant shows remorse; the concerns expressed in relation to the (possibly random) ability to partake in restorative justice equally suggests that this should not have a separate heading – although it is, again, potentially indicative of remorse;
- as far as employment is concerned, it must be in society's interests for those offenders in work, who have not committed offences that require lengthy custodial sentences, to remain employed, paying taxes and generally integrated in society. The argument that an employed person has an *unfair* "social advantage" over an unemployed offender is not, in our view, strong enough seriously to militate against the broader interest expressed above;
- we consider that youth, as well as being of advanced years, is a mitigating factor – and indeed it is our experience that it is routinely viewed as such by courts in passing sentence;
- the rendering of positive assistance to the authorities ought also to be added to the list - as in the case of a low-level drug dealer who provides information relating to those further up the chain.

Question 9

Do you agree with the Panel's assessment of the factors that are likely to influence the choice of disposal for offences where custody is justified but not essential?

It is our view that to list factors militating in favour of a custodial / community sentence in the way suggested would not be helpful. The art of sentencing is a balancing exercise involving a wide range of factors and competing considerations; what is suggested interferes with the basic and crucial premise that, if custody is not essential, the offender ought not to be imprisoned.

Question 10

In what circumstances, if any, and to what degree, should requests for leniency from the victim (or victim's family) influence the sentence imposed?

It seems to us that the willingness of a victim to encourage the court to pass a lenient sentence tends to suggest that the level of harm (in the sense of long-term psychological damage) caused to the victim was less than would otherwise be the case. Therefore, there is nothing unfair or inconsistent in recognizing its presence as a factor that ought to reduce the level of the sentence. Those who commit offences against victims who are not so inclined are not being treated any more harshly than they should expect. It is not the case that the opinions of victims are only taken into account when they are favourable to the defendant; the court considers evidence from the victim who expresses the view that he has suffered significant long-term psychological damage (for example, in a victim impact statement) when quantifying the harm caused as part of the assessment of seriousness of the offence.

Question 11

Do you agree with the Panel's assessment of the circumstances in which a suspended sentence order should be imposed?

We agree with a and b; as for c, we do not consider it is necessary for there to be guidance on the equation between the operational period and the period of suspension. There are many variables in the circumstances where a suspended term of imprisonment may properly be imposed. To give even "an approximate guide" would undermine the appropriate flexibility of the sentencing tribunal; d – we do not agree that the requirements should necessarily be less onerous than

for a community penalty. In order for a Suspended Sentence Order ["SSO"] to be imposed, the offence(s) must have crossed the custody threshold. It may be that a SSO is a lenient course. Any suggested weakening of the impact of the sentence should not find itself into guidelines. Where a SSO is a direct alternative to an immediate custodial sentence it may well be appropriate for there to be stringent conditions attached. On the other hand, the sentencing tribunal should ensure that it only imposes a custodial sentence where the threshold has been crossed and he should be careful not to impose a SSO where he should be passing a community sentence.

Question 12

Other than the issues already discussed, have any problems arisen in practice of which the Panel needs to be aware?

None spring to mind.

Question 13

Do you agree with the Panel's assessment of the circumstances in which a community order is likely to be the most appropriate starting point for sentence?

We do not believe this is in keeping with other, offence-specific guidelines, e.g. that relating to robbery. If the offence is so serious that the custody threshold has been passed, then, subject to mitigation, the sentence ought to be a custodial one. Further, as noted above, we do not view the introduction of presumptions as being of benefit to the sentencing exercise.

Question 14

Do consultees have anything to add to the discussion about the use of fines and discharges?

Where an offender is sentenced to a discharge, whether conditional or absolute, the offence in respect of which he has been discharged is not deemed to have resulted in a conviction save for specified purposes (s.14 PCC(S)A 2000). This is potentially very significant for first-time offenders, especially young offenders awaiting a first job. There are obvious potential benefits to society in taking such a course, as the offender is not alienated or handicapped as he might be by the

imposition of a different type of sentence. We do not understand how a discharge can be appropriate with an ASBO and consider that such a combination should be discouraged.

Question 15

Do you have any comments about the way in which deferred sentences are currently being used and whether they could be used in a wider range of circumstances?

Deferred sentences are rare because of the principle that there ought to be finality and certainty in sentencing, but they have an important place in the sentencing lexicon, where there is a particular objective which is set to be achieved before the level of sentence can finally be established. The last bullet point implies that custody is an inevitable consequence of failure. However, this must surely depend on what the threshold for the offence is. Although rare, we cannot see why it cannot apply to a community penalty. It is our view that deferred sentences are likely to be of benefit, for instance, in cases in which there is a possibility of engaging the offender in a programme of restorative justice.

Question 16

Do you have reason to believe that any of the Panel's proposals is likely to impact disproportionately on certain offenders by reason of their gender, age, disability, race or ethnic group or any combination of those factors?

No.

Question 17

Do you agree with the principles relating to the sentencing of women offenders identified by the Panel? If not, why not? Are there any other factors that should be taken into account?

The four principles seem sensible. In relation to the second principle, however, it is our view that, whilst a custodial sentence ought not generally to be imposed without obtaining a PSR, there should be no absolute bar to sentencing without a report. One example of a situation in which it would be appropriate to proceed immediately to sentence would be in a case involving the possession of a false passport, in respect of which there are a number of authorities

providing a somewhat rigid sentencing framework and where offender mitigation will have little effect on the appropriate type of sentence. The same considerations might also apply to drugs couriers.

Question 18

Do you agree that a court should be able to give a non-binding indication of its assessment of offence seriousness when requesting a pre-sentence report?

Yes. This will assist the author of the PSR in focusing on the areas that matter (e.g. likely response to custodial sentence or availability of community-based programmes). However, the court ought not to be obliged in every case to indicate the level of seriousness.

Question 19

Do you have any suggestions for a formula that might assist the courts when considering whether a sentence is proportionate to the totality of the offending behaviour?

No. The variety of sentencing situations is so great that any formula would be likely to impair rather than advance the cause of justice.

Question 20

Are you content with the current guidance on calculating a reduction for time spent on remand when sentencing or re-sentencing an offender?

Yes.

Question 21

In what circumstances (other than those provided in Rules) is it just to refuse to give credit for time spent on remand in custody or on bail subject to curfew with electronic monitoring?

The general rule ought in our view to remain that time on remand counts towards any sentence imposed. It is somewhat anomalous that time on remand under a curfew is rewarded in this way, whereas time spent in a bail hostel is not, but this is a matter that can only be remedied by legislation. It is helpful to know when days in custody

have played a part in deciding to pass a community disposal or a suspended sentence, where immediate custody would ordinarily have been imposed.

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