



Expanded Explanations in Sentencing Guidelines Consultation

Response of the Criminal Bar Association

June 2019

Introduction

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 to promote and represent the professional interests of its members.

The CBA is the largest specialist Bar association, with over 3,500 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.

Question 1: What is your name?

Aaron J Dolan

Question 2: What is your email address?

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Question 3: What is your organisation?

The Criminal Bar Association

Question 4: What are your views on the inclusion of the proposed additional material on fines, community orders and custodial sentences within all relevant guidelines?

Question 5: Do you agree that the Imposition guideline should be amended to include a link to forthcoming guidance on when to order a PSR?

The answer to both questions is yes.

Such provisions provide clarity to victims, Defendants, the legal profession and Judges.

Question 6: What are your views on the inclusion of the proposed expanded explanations for these statutory aggravating factors? Do your views relate to any particular offence(s)?

Good idea. They provide clarity to the sentencing process.

Question 7: What are your views on the inclusion of the proposed expanded explanations for aggravating factors A1, A2 and A3? Do your views relate to any particular offence(s)?

They are sensible and well balanced. They should be included across the board.

Question 8: What are your views on the inclusion of the proposed expanded explanations for aggravating factors A4, A5 and A6? Do your views relate to any particular offence(s)?

They are sensible and well balanced. They should be included across the board.

Question 9: What are your views on the inclusion of the proposed expanded explanations for aggravating factors A7, A8 and A9? Do your views relate to any particular offence(s)?

They are sensible and well balanced. They should be included across the board.

Question 10: What are your views on the inclusion of the proposed expanded explanations for aggravating factors A10, A11 and A12? Do your views relate to any particular offence(s)?

They are sensible and well balanced. They should be included across the board.

Question 11: What are your views on the inclusion of the proposed expanded explanations for aggravating factors A13, A14 and A15? Do your views relate to any particular offence(s)?

They are sensible and well balanced. They should be included across the board.

Question 12: What are your views on the inclusion of the proposed expanded explanations for aggravating factors A16, A17 and A18? Do your views relate to any particular offence(s)?

We are content with the proposed inclusions of explanations to address aggravating aspects of offending – specifically: A16 [Offence committed on licence or post sentence supervision or while subject to court order(s)] and A17 [Offence committed in custody] and A18 [Offences taken into consideration].

The purpose for including A16, as stated by the Council, is to secure wording which is consistent across sources of (definitive) offence guidelines. We agree that the explanation (provided at p.17 Annex A) is a further welcome inclusion because of the logic underlying its discrete treatment of the two separate factors. A factor, but not both

factors, may apply in a case. A sentencing court is likely to be assisted by the care taken to specify guidance in respect of both of these factors.

We welcome the rationale governing inclusion of A17. The explanation (set out at p.17 Annex A) provides express reminder of the Totality guideline; this guideline has essential application where a sentence should be consecutive to a term previously passed (and so presently being served). Focused reminder of the principle of totality – fundamental at sentence – is not duplication and serves the valuable purpose of securing against oversight on the part of the sentencing court (and counsels' row).

Similarly, we welcome the same approach and rationale brought to bear in respect of A18, where explanation (given at p.18 Annex A) is extracted and amplified from the Offences Taken Into Consideration Definitive Guideline.

Question 13: What are your views on the inclusion of the proposed expanded explanations for aggravating factors A19, A20, A21 and A22? Do your views relate to any particular offence(s)?

We welcome inclusion of the explanations introduced by A19, A20, A21, and A22. In particular, we commend the consideration, in A22, of what are, in practice, 'limited circumstances', as the Council notes, in which 'the prevalence of a particular type of offending in a locality can be taken into account to increase sentences'. Due caution and sufficient care must be taken by sentencing courts when considering (and, where appropriately raised on the evidence, adjudicating upon) what notionally arises as an issue of, and evidence to demonstrate, prevalence.

Question 14: What are your views on the inclusion of the proposed expanded explanations for mitigating factors M1, M2 and M3? Do your views relate to any particular offence(s)?

The explanations set out at M1, M2 and M3 are familiar in structure and analysis. Consolidation and increased visibility of these specific mitigating factors is appropriate.

Question 15: What are your views on the inclusion of the proposed expanded explanations for mitigating factors M4 and M5? Do your views relate to any particular offence(s)?

The proposed inclusion of M4 and M5 is appropriate. Both accurately and adequately reflect what is the content of certain present offence-specific guidelines (if not the invariable common practice of sentencing courts, in cases where one or both of these issues arise, to take such a structured approach).

Question 16: What are your views on the inclusion of the proposed expanded explanations for mitigating factors M6, M7, M8 and M9? Do your views relate to any particular offence(s)?

M6, M7, M8 and M9 are self-evidently valuable inclusions and, practically, likely to assist courts.

Question 17: What are your views on the inclusion of the proposed expanded explanations for mitigating factors M10, M11 and M12? Do your views relate to any particular offence(s)?

M10, M11 and M12, as immediately above, are valuable inclusions. All concord with the practice specified in certain offence-specific guidelines. Amplifying the same structured approach is welcome.

Question 18: What are your views on the inclusion of the proposed expanded explanations for mitigating factors M13 and M14? Do your views relate to any particular offence(s)?

M13 and M14 are valuable inclusions. In particular, M14 usefully raises the principles and approved approach taken by the Court of Appeal, Criminal Division, in Clarke [2018] EWCA Crim 185.

Question 19: What are your views on the inclusion of the proposed expanded explanations for mitigating factors M15, M16 and M17? Do your views relate to any particular offence(s)?

The CBA endorses the proposal to expand the explanations in relation to health conditions having a significant bearing on the offender (M15), in relation to offenders with mental disorders or learning disabilities (M16) and in relation to demonstration of steps taken by offenders to address addiction or offending behaviour.

In relation to M15 the CBA welcomes clarification of the characteristics that engage this as a mitigating factor. Plainly this mitigating factor has the potential to apply to almost any offence but offences where the physical incapacity of the offender are likely to mitigate any ongoing risk posed by the offender are likely to be particularly significant.

The CBA welcomes the opportunity to respond to the new consultation concerning mentally disordered offenders (M16), in the interim the proposed guidance at Annex A will help ensure that offenders who are susceptible to treatment can be diverted from custody and where risk from the offender can be managed in the community then custody should be deployed as a last resort.

Question 20: What are your views on the proposed change to this medium culpability factor? Do your views relate to any particular offence(s)?

This proposed change although seemingly slight is to be welcomed because it will make plain to sentencers the circumstances when medium culpability should be found. Of the two proposed wordings 'Factors are present in A and C which balance each other out' is the preferred. This change should be implemented for all offences which currently describe medium culpability as being those where 'characteristics for categories A or C are not present'.

Question 21: What are your views on the proposed changes regarding the presentation of maximum sentences in guidelines?

Plainly it is necessary that there be consistency of approach to the expression of maximum sentences across all guidelines and it will be a helpful development that the 'live' version of the guidelines will reflect any change to maximum sentences.

Question 22: What are your views on the proposed changes to the information on life and extended sentences in the Burglary and Assault guidelines? Should changes be made to the wording on this topic in other guidelines?

The CBA endorses the proposal that the assault and burglary guidelines should be updated to reflect the correct approach to dangerousness in force at the moment. It is noted in the consultation that it is contended that the 'guidelines cannot provide comprehensive information on this topic' with an expectation that sentencers will refer to the Crown Court compendium. If that is the case then it would assist if a link to the relevant part of the compendium is embedded in the guideline.

Question 23: What are your views on treating the General guidelines as an overarching guideline?

This requires a balancing exercise and on balance this seems to be a sensible proposal ensuring that sentencers are lent the maximum possible assistance and guidance from the guidelines. The concern about over-complication is not a trivial concern and guidance to sentencers should be as simple as possible, as clear as possible and, as much as possible, in one place.

Provided that sentencers are able to link through to the General guidelines as an overarching guideline then the virtues of designating the guideline as overarching will not be obscured.

Question 24: Which, if any, of the proposed expanded factors or other proposed changes are likely to have an effect on sentencing practice? What do you think that effect would be?

It is envisaged that the clarification of the allocation of cases to Culpability B is likely to lead to more cases being sentenced within Culpability B. This may, of course, mean that some cases are sentenced less severely than they may have been and other more severely.

It does not seem that any of the proposed changes are likely to result in a radically different approach to sentencing.

Question 25: Are there any other equality and diversity issues that the explanations should address?

No.

Question 26: Are there any other comments you wish to make on the approach taken by the proposed changes, or other changes that you wish the Council to consider as part of this project?

Given that in future guidelines will be consulted directly from the Council's website it would assist practitioners if the guidelines were listed on the 'landing page' rather than having to be clicked through to.