THE CRIMINAL BAR ASSOCIATION

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CRIMINAL BAR ASSOCIATION RESPONSE TO THE SENTENCING COUNCIL'S CONSULTATION ON THE ASSAULT 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 CBA welcomes to opportunity to respond to the Sentencing Council's Consultation on the Assault Guidelines. The CBA supports the Council's review of the sentencing guidelines in general and specifically the Assault Guidelines which it is agreed have caused difficulties for practitioners and judges alike. In the main the CBA agrees with and support the new recommended guidelines, we particularly welcome premeditation becoming an aggravating feature.

SECTION THREE

Q1. Do you agree that the proposed structure of the draft guideline incorporating an individually tailored sentencing process for each offence is the right approach?

We agree wholeheartedly, most criminal practitioners complain of the difficulty encountered in fitting individuals into the present guideline levels within each offence.

Q2. Do you agree that compensation and ancillary orders should not be included in the new assault guideline or any future offence specific guidelines?

We agree that the introduction of a further step is unnecessary, consideration of compensation/ancillary orders are a waste of time as the vast majority of defendants in assault cases do not have the means to comply with them. However we suggest that in cases of minor violence, the defendant who has made a genuine effort to compensate financially by saving money in anticipation of sentence (as opposed to coming from a wealthy background) should be given credit.

Perhaps it could be incorporated under 'Factors..... reflecting personal mitigation' and 'determination to address offending behaviour'

STEP ONE

Q3. Do you agree with the Council's recommendation that there should be three offence categories for all assault offences? If not, how many would be appropriate?

We agree that 3 categories are sufficient;

i) It avoids the danger of over rigidity in applying step by step procedures and
ii) Any distinction between categories 2 and 3 in Table 2 should be reflected in either the offence charged or by application of the aggravating and mitigating factors.

Q4. Are there any other factors determining harm and culpability that should be taken into account at step 1 of the decision making process?

We have concerns about the use of the expression *"Injury which is serious in the context of the offence (must normally be present)"*. We consider that this wording could be made clearer, by tailoring it to the guideline for each offence. For example, in relation to GBH, the factor might be re-worded as follows:

"Particularly serious harm, beyond that which ordinarily qualifies as grievous bodily harm"

For the ABH guideline, the factor could be worded as follows:

"Serious harm, falling just short of grievous bodily harm"

We have no suggestions to add to Table 3 but would make the observation that 'Intention to commit more serious harm than actually resulted from the offence' might lead to difficulties. Intent is usually governed by the *mens rea* of the offence charged,(e.g. a slash with a knife causing only a nick or a scratch is still wounding with intent) and the introduction of the word 'intention' might lead to double jeopardy.

Q5. Do you agree with the revised approach to premeditation as an aggravating or mitigating factor proposed to be included in the new assault guideline?

Yes. However, the expression *"Degree of premeditation"* without more may not assist the practitioner or sentencing judge. All offences of s.18 contain a degree of premeditation. We consider therefore that it should be prefaced by the word *"Significant"* .

Q6. Do you agree that consideration for mental illness should be included at step 1 of the process and/or do you think that it should be built into the guideline in any other way?

We disagree that consideration of all mental illness should automatically be built into step 1,

We think that there needs to be a clear distinction between:

a) Offenders who are suffering a diagnosed mental illness that contributes to the offence thereby reducing culpability (i.e. paranoia/anxiety/PTSD not amounting to automatism) which we suggest should be a Step one consideration and

b) Mental illness (i.e. Aspergers/ADHD or an inability to cope with custody) that is personal to the individual and does not contribute to the offence, which can be considered as an overall mitigating factor within Step 2.

It is personal to the individual defendant and if premeditation is to be an aggravating/mitigating factor surely mental capacity should be the same. Aspergers Syndrome and ADHD are not 'mental' illnesses per se but the condition may be a mitigating factor.

Second, if one of the purposes of these guidelines is to instil more confidence in the general public we suggest that they would better understand a reduction in sentence taken into account by the Judge as a stage 2 mitigating factor rather than automatically identifying all mental illness as a mitigating factor when determining the offence category.

Q7. Do you agree with the level of guidance and the extent of discretion that it proposed in step1 for determining the offence category?

Yes. To prescribe, for example, that two specified aggravating factors would be required to indicate a higher level of culpability would trespass too far upon judicial discretion

STEP 2

Q8. Do you agree that the starting point and category ranges should be applicable to all offenders, not just first time offenders, and regardless of plea entered?

Yes. We suggest that the guidelines should specifically state at this stage that the starting point and category ranges are applicable to all offenders. Then credit for plea, if appropriate, is given at Step 4. This would avoid the danger of mistaken double credit.

Q9. Do you agree that starting points should be set out in the assault guideline?

Yes.

Q10.

Are there additional aggravating and mitigating factors that should be included in step 2 of the decision making process?

Yes

i) See Q2 above – genuine savings to compensate financially
ii) See Q6 above – mental illness
iii) Other aggravating feature: *"Recording the offence on a telephone or other media"* and *"distribution of a recording of the offence"*

Q11. Do you agree that the court should take account of an assault offence covered by s.29 having been racially or religiously aggravated, and increase the severity of the sentence accordingly, only after having reached an initial view on the sentence for the offence.

Yes. We agree that it should be left to the discretion of the Judge to apply a common sense view and distinguish between the wholly racially motivated assault and the throwaway racial insult in the course of a disagreement or fight.

Q12. Do you agree with the Council's proposed change to include lack of maturity and/or is there any further role for the guideline to play in addressing the specific issue of offenders aged 18-24?

No. Whilst youth should remain an important mitigating factor, there is a risk that adding a consideration of maturity will confuse the sentencing exercise. Most obviously, an offender who is proved to have behaved in an immature (and violent) way may perversely be entitled to seek credit for the manner of his actions.

In addition, the use of the cut-off age of 24 is no less arbitrary. There may be many intelligent 20-year old undergraduates, for example, who do not deserve to invoke immaturity as a mitigating factor; conversely there may be less gifted 25-year olds for whom such a consideration may be more fitting.

In our view, 18 is a seminal age at which young people assume adulthood, with its attendant rights and privileges. It is more coherent, we would suggest, to reflect in the Guideline a corresponding responsibility not to behave in an mature and non-violent way.

If however there is some evidence of low IQ or that the defendant has learning difficulties such that their lack of maturity has some clear pathology then clearly that it something that should be taken into account when sentencing as it likely to have been an important factor in the commission of the offence itself but also may be important when assessing appropriate sentencing options. That can be addressed by the sentencing judge without the need for specific mention in the Guideline.

Q13. Do you agree with the 8 step proposed decision making process?

Yes.

We would like to take this opportunity to seek further guidance be considered on step 8 as an inconsistency has emerged relating to the granting of bail with a condition of curfew and tag.

Some judges offer a tag knowing that part of the sentence will already have been served on bail – others refuse a tag for the very same reason. This is unsatisfactory as there is no uniformity and guidance should be given as to when a tag is appropriate and when it is not.

Q14. Do you think the range for category 3 GBH cases should include custody at it upper limit or recommend only non – custodial disposals?

We agree that the range should include custody; this offence often merits and is best dealt with by a 'short, sharp shock' because of the injury inflicted (albeit unintentional), if the offence doesn't warrant custody it shouldn't be charged as GBH. To remove the scope for custody altogether would unduly fetter the sentencers discretion.

Q15. Do you agree that the starting point for common assault should be a community order?

Yes.

Q16. Do you agree with the proposed offence ranges, category ranges and starting points for all of the offences in the draft guidelines?

Yes.

Q17. Do you agree with removing the distinction between a high, medium and low community order from the offence ranges?

Yes, it is too restrictive.

Q18. Are there other ways in which other victims could be considered?

We do not consider that this is a matter that the CBA can helpfully or appropriately comment on.

Q19. Are there any other ways in which the proposed guideline could increase public understanding and confidence?

We agree that the decision making process as framed by the proposed guideline has the potential to increase transparency and public confidence in the sentencing process. Beyond that we make no comment.

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