



## THE CRIMINAL BAR ASSOCIATION

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### **THE CRIMINAL BAR ASSOCIATION RESPONSE TO THE SENTENCING COUNCIL CONSULTATION ON BURGLARY OFFENCES GUIDELINE**

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 Sentencing Council ('The Council') is consulting on a draft guideline for burglary offences [the Consultation paper] to bring the three burglary offences into a single guideline under a single approach. The Council states as its aim a desire to promote "a clear, fair and consistent approach to sentencing to ensure that sentences are proportionate to the offence committed and in relation to other offences." [pg 5]

The Council recognises the significant effect that burglary offences can have on victims and has drafted the guideline with this in mind. The Council proposes to maintain the current level of sentencing for all three burglary offences and to reinforce a consistent approach for sentencing these offences.

The CBA welcomes the opportunity to respond to this consultation paper. The CBA endorses the aims to be achieved and recognises the need for a consistent approach. In the main, the CBA agrees with and supports the new recommended guidelines.

In answering questions 2 and 3, we respectfully suggest a few modifications to both the proposed harm/culpability and aggravating/mitigating factors.

#### **Question 1:**

#### **Do you agree there should be three offence categories?**

We agree with the approach taken by the Council. We are inclined to the view that it is far more appropriate to determine the category into which any case will fall based on harm and culpability rather than on value alone. We also agree that the three proposed categories provide a clear structure for assessment of the level of seriousness of an individual offence. The categories appear to strike an appropriate balance between providing sufficient distinction between each other without unnecessarily constraining the application of judicial discretion

**Question 2:**

**Do you agree with the harm and culpability factors proposed at step one? If not, please specify which you would add or remove and why.**

Subject to the observations below, we agree with the Council's proposals.

i) We have some concerns about the inclusion of "racial or religious motivation, motivation or hostility based on sexual orientation, motivation or hostility based on disability and motivation or hostility based on age, sex or gender" as factors indicating higher culpability. It is beyond argument that where an offence is motivated by such factors the sentence imposed for that offence should reflect that fact. However, it is not our experience that such features are sufficiently common in burglary offences to warrant specific inclusion in the list of factors indicating higher culpability. Judges would, in applying general sentencing principles be able to ensure that the sentence properly reflected such factors when they were present. We note that the approach taken by the Council in this regard mirrors the approach taken in its Assault Guideline. Whilst such factors are, in our experience, not infrequently encountered in offences of violence the converse is true in respect of burglary offences. Whilst consistency across the Guidelines is a sensible aim this is not, in our view, a sufficient justification of itself to warrant inclusion in every Guideline.

ii) We respectfully invite the Council to reconsider the inclusion of "*use of a vehicle*" as a factor indicating higher culpability. In our view the use of a vehicle does not necessarily indicate a higher degree of premeditation in the commission of the offence. We cannot see, with respect, why any greater planning is involved in travelling to and from the scene of the crime in a vehicle rather than using public transport. We also see the potential for anomalies arising. By way of example, the burglary of a neighbour's house (where no transport is required to get to and from the scene) may be treated as less culpable than the burglary of a house two miles away where the offender has driven to and from the scene. We do, however, entirely agree with the Council's proposal that the carrying of equipment for burglary should be regarded as an indicator of higher culpability.

**Question 3:**

**Do you agree with the aggravating and mitigating factors proposed at step two? If not, please specify which you would add or remove and why.**

We broadly agree with the Council's proposals. We do, however, make the following observations:

Aggravating features

i) We note the inclusion of "*abuse of power and/or position of trust*" within the section dealing with aggravated burglary offences and "*abuse of position of trust*" within the section dealing with non-domestic burglaries. We were not able to discern any reason for using different terminology within those respective sections and respectfully suggest that it would be preferable to use one consistent phrase throughout. It also struck us as odd that the feature does not appear within the section dealing with domestic burglary. We could not discern a logical reason why this should be so and wonder whether this is simply an oversight in drafting.

ii) We consider that any degradation of a victim should be regarded as an aggravating feature and that the requirement (in the Guideline's current form) that the degradation be "*gratuitous*" seems to be unnecessarily restrictive.

iii) Whilst we recognise offences of burglary will not infrequently have an impact upon the local community in general, we foresee that the inclusion of this factor within the aggravating features may give rise to some practical difficulties. We were not clear as to who it is envisaged would provide such evidence to the court. How is the court to be satisfied that the deponent making the statement about community impact is properly in a position to speak to those matters on behalf of the community? We can also foresee practical difficulties arising where there is a dispute as to the nature and/or extent of the impact on the local community. Presumably the sentencing court would be required to hold a "Newton" style hearing to resolve the issue in such circumstances.

iv) Some members of our working party had concerns over the inclusion of offences to be taken into consideration in the list of factors increasing seriousness. The rationale that underpins taking other offences into consideration is generally understood to be that the courts should encourage those who have been regularly committing offences of this nature to admit to further offending in order that the offender can make a fresh start at the end of any sentence. This process also reduces the burden on police to continue to investigate offences where they have little or no evidence. It also provides a degree of finality to victims of crime when they learn that the person who has burgled their premises has been detected and will be punished. Some concern was expressed in our discussions that to include TIC's in the list of aggravating factors may act as a disincentive to offenders who might otherwise ask for offences to be taken into consideration. We accept of course that it is difficult to assess whether and to what extent such a consequence will flow in practice.

#### Mitigating features

v) Very often the best evidence of remorse on the part of an offender comes from an early acknowledgement of guilt. Determining the proper credit due for a guilty plea is always an important consideration in every sentencing exercise and the extent to which the offender's plea evidences remorse on his or her part will inevitably inform the sentencer's judgment on that issue. We, therefore, question whether it is necessary to include remorse as a separate and distinct mitigating feature since this would on one view mean that it would be taken into account in the offenders favour twice – once at stage two when considering mitigating factors and again at stage four as part of the reduction for a guilty plea. An alternative approach would be to exclude remorse from the list and leave it to the sentencer to apply general sentencing principles to reduce the sentence where there appears to be genuine remorse over and above that normally assumed to accompany a guilty plea.

vi) We are conscious of the fact that the list of factors increasing and reducing seriousness are non-exhaustive and intended to reflect important factors which will commonly fall to be considered by the sentencing tribunal. In those circumstances we are inclined to the view that "*serious medical conditions requiring urgent, intensive or long-term treatment*" is not a sufficiently common occurring factor as to require specific inclusion in the list. We suggest that such matters can be left to be taken into account, as and when they arise, through the application of general sentencing principles.

#### **Question 4:**

**Are there any further ways in which you think victims can and/or should be considered?**

There are none that occur to us but we readily accept that there may be other respondents who are better placed to speak to this issue.

**Question 5:**

**Do you agree with the proposed approach to previous convictions?**

We agree with the proposed approach.

**Question 6:**

**What further guidance might be usefully included in relation to the sentencing of dependent offenders?**

We respectfully suggest that a formula of words similar to the guidance provided by the Lord Chief Justice in **Saw** could usefully be included in the introductory section that accompany the guidelines.

“There will therefore be some cases where, depending on the circumstances of the burglary, and the impact on the victim, the right sentence will be non-custodial..... Another example is the defendant who has reached a critical stage in his life with a real prospect of turning his back on crime, or breaking away from addiction to the drugs which led him into crime. If he is indeed making a genuine attempt to break the cycle, or to address its causes, then that is plainly a factor to be taken into account in his favour, and put into the balance against the aggravating features of the specific case. Successful and early rehabilitation often represents the best long term advantage to the public, and a sentence which has a reasonable prospect of achieving that the offender will be deterred, or discouraged, or taught to avoid crime may well be appropriate where the burglary lacks significant attendant aggravating features. In the context of a young life which is presently being wasted away, a constructive, rehabilitative sentence, which includes a punitive element, may provide a better long term solution for the public, and particularly for other householders, generally than an unconstructive custodial sentence. The judge is not the prisoner of the sentencing tariff, but rather has the difficult task of arriving at the right sentence in the individual case”.

**Question 7:**

**Are there any equality and diversity matters that the Council should specifically consider (please provide evidence where possible)?**

There are none that we have been able to identify.

**Question 8:**

**Do you agree with the proposed offence range, category ranges and starting points for aggravated burglary?**

We agree that there should be a proportionate approach between sentences for robbery and aggravated burglary and endorse the view that the features of trespass and possession of a weapon that are present in aggravated burglary mean that it should be

regarded as a relatively more serious offence. In the circumstances we regard the proposed starting points and category ranges as entirely appropriate.

**Question 9:**

**Do you agree with the proposed offence range, category ranges and starting points for domestic burglary?**

We agree with the proposal that the starting point and offence range for category 1 offences should be higher than that proposed by the SAP. In our view the Council's proposals more accurately reflect current sentencing practice

We also agree with the Council's proposals for category 3 offences. We share the Council's view that a high-level community order is an appropriate starting point and that the category range provides appropriate flexibility to the sentencing judge where there are a number of step two factors present which would dictate that a custodial sentence should be imposed.

**Question 10:**

**Do you agree with the proposed offence range, category range and starting points for non-domestic burglary?**

We agree with the proposed offence range, category ranges and starting points for non-domestic burglary. These, as was intended, appear to reflect current sentencing practice and are broadly in line with the existing guideline..

**Question 11:**

**Are there any further comments you wish to make?**

There are no further comments that we wish to make.

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on behalf of the Criminal Bar Association