



## **CBA Response to The Sentencing Guidelines Council**

### **Consultation for Offences of Manslaughter**

**10th October 2017**

#### **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 4,500 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.

#### **The draft guidelines**

##### ***General***

4. The Sentencing Council has proposed a draft comprehensive guideline on sentences for manslaughter (in all of its forms): involuntary manslaughter (by an unlawful act, or gross negligence); and voluntary manslaughter (by a loss of control, or owing to diminished responsibility). The CBA welcomes such a comprehensive guideline because hitherto, guidelines for sentencing in cases of manslaughter by reason of provocation alone, have been available. Comprehensive guidelines will assist the court, advocates and other stake holders in the criminal justice system, as well as providing the public with a greater understanding of disposals in cases of manslaughter.
5. The draft guideline is well thought out and a user-friendly document.

6. In general terms, the tariffs proposed in the draft guideline, are greater in cases of voluntarily manslaughter cases than in cases of involuntary manslaughter. There can be no sensible objection to that approach, and it is consistent with current sentencing practice and authorities.
7. The overview is this:

TYPE OF CASE	Very high culpability	High Culpability	Medium culpability	Low culpability
<i>Involuntary</i>				
Unlawful act	18 (range, 11 - 24)	12 (range, 8 - 16)	6 (range, 3 - 9)	2 (range, 1 - 4)
Gross negligence	12 (range, 10 - 18)	8 (range, 6 - 12)	4 (range, 3 - 7)	2 (range, 1 - 4)
<i>Voluntary</i>				
Loss of control		14 (range, 10 - 20)	8 (range, 5 - 12)	5 (range, 3 - 6)
Diminished responsibility		24 (range, 15 - 40)	15 (range, 10 - 25)	7 (range 3 - 12)

*Comparisons with other existing or older tariffs for the same/ similar offences*

8. In broad terms, the draft guideline could be viewed as increasing the starting point sentences for the most serious or culpable offences of manslaughter, whilst leaving the starting point sentences for less culpable offences relatively unchanged. If this is a fair observation and one which was intended by the Sentencing Council, it is not criticised by the CBA.
9. When comparing the proposed starting point sentences in offences of gross negligence manslaughter (12, 8, 4, and 2), with the starting point sentences in the guidelines for offences of causing death by dangerous driving (8, 5, and 3) – bearing in mind that the maximum sentence in offences of causing death by dangerous driving is just 14 years imprisonment – we see no incongruity. In any case, the proposed guideline helpfully advises sentencers to double check their preliminary view as to the starting point sentence in cases of motor manslaughter (a form of gross negligence manslaughter) with the causing death by dangerous driving guideline:

***In cases of motor manslaughter regard should be had to the *Causing death by dangerous driving* definitive guideline to ensure that the sentence for manslaughter does not fall below what would be imposed under that guideline.***

10. When comparing the proposed starting point sentences in offences of manslaughter by loss of control (14, 8, and 5) with the starting point sentences in the existing guidelines for manslaughter by reason of provocation (12, 8 and 3) we again see no incongruity.

### *'Very high culpability cases'*

11. It can be seen that the draft guidelines propose a new category which is unique in respect of the guidelines generally: 'very high culpability'. This category of culpability would apply (inexplicably) to cases of involuntary manslaughter alone. A very high culpability category does not appear in the sentencing guidelines for attempted murder, corporate manslaughter or causing death by dangerous driving. Sentences for murder are not the subject of a definitive guideline by the Sentencing Council because Parliament has deemed such sentences to require statutory guidance in the form of Schedule 21, Criminal Justice Act 2003. The guidance contained therein, is not set out in the same format as the Sentencing Council guidelines, but nevertheless, there is no also 'very high culpability' category. Instead, Schedule 21 sets out the following categories and starting point minimum terms: 'exceptionally high' (whole life order); 'particularly high' (30 years); and then 2 further categories (25 and 15 years respectively) - the former for cases involving the offender taking a knife to the scene of the crime
12. Therefore, we question the introduction of a new and unique category of culpability for a limited class of manslaughter offences, for these reasons:
  - i. First, it is out of kilter with other guidelines which have the standard three-part high, medium and low culpability (or Level 1, 2 and 3);
  - ii. Secondly, the draft guidelines rightly advise sentencers not to approach the categorisation of culpability in a 'mechanistic way'. The introduction of a new and unique category such as this, could work against that advice;
  - iii. Thirdly, the prospect of a judge being required to sentence an offender in these terms – "*I find that your culpability was high, but not very high*" has the prospect of being misunderstood by the public, which would be particularly unfortunate given the inevitable sensitivity of the sentencing exercise in such cases; and
  - iv. Fourthly, it is not necessary because any feature of culpability that would bring an offender into the 'very high culpability' category could be reflected as an aggravating feature of a 'high culpability' offender enabling a court to reach the same sentence. There are likely to be cases of involuntary manslaughter which are more culpable than 'normal' cases of high culpability, but in those cases (which will be unusual or exceptional) greater discretion should be afforded to the sentencing tribunal, such as in the drugs sentencing guidelines of drugs offences (pg4):

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.

### *Secondary party culpability in the light of R v Jogee and Ruddock [2016] UKSC 8*

13. In *Jogee* the Supreme Court restated the principles to be applied in cases where a secondary party joined in a common venture with others to commit crime A, and in the course of the commission of crime A, the principal offender(s) committed crime B. The restatement of the principles included the introduction of the concept of 'conditional intent' [93] and preserved the distinction between 'desire' and 'intention' [91]. At [96] the restated principles include the following:

*'If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results: R v Church [1965] 1 QB 59, approved in Director of Public Prosecutions v Newbury [1977] AC 500 and very recently re-affirmed in R v F (J) & E (N) [2015] EWCA Crim 351; [2015] 2 Cr App R 5. The test is objective. As the Court of Appeal held in Reid, if a person goes out with armed companions to cause harm to another, any reasonable person would recognise that there is not only a risk of harm, but a risk of the violence escalating to the point at which serious harm or death may result. Cases in which D2 intends some harm falling short of grievous bodily harm are a fortiori, but manslaughter is not limited to these.'*

14. Such offences would fall into the 'unlawful act' class of manslaughter. However, the draft guideline for unlawful act manslaughter appears to cater only the culpability of a sole or principal offender as opposed to a secondary party of the type identified above (and draws no distinction between the concepts of intention and desire). The draft guideline as it stands does not adequately cater for an individual (D2) who, in the commission of an unlawful act (crime A) intentionally assisted (conditionally or otherwise) the principal offender (D1) who in fact killed his/ her victim (crime B), yet D2 did not desire the victim to suffer any kind of injury at all. Such cases may be more commonly encountered given the restatement of the principles in *Jogee*, and so the identification of a secondary party (as opposed to a sole or principal offending) as a factor reducing seriousness, is necessary.

### **Harm**

15. We question whether step 6 (totality) and/ or the aggravating factor of '*others put at risk of harm by the offending*' is adequate to deal with cases involving multiple victims. The guidelines for causing death by dangerous driving identify '*more than one person killed as a result of the offence*' as a specific aggravating feature. We would suggest that there should be express recognition in the guideline that the loss of multiple lives is either indicative of greater harm or an aggravating factor in sentencing (even if the indictment contained separate counts for each victim, as would be normal practice).

### **The proposed stepped approach**

16. The stepped approach suggested in the draft guidelines (including the proposed factors increasing and reducing seriousness) are unobjectionable and are in a format which is now very familiar to sentencing tribunals and advocates alike.

### **The specific questions**

Q1.

17. Yes. Save the observation at paragraphs 11 to 14 above.

Q2.

18. Yes. Save the observation at paragraph 15 above.

Q3.

19. Yes. See the observation at paragraph 14 above.

Q4.

20. No.

Q5.

21. No

Q6.

22. No

Q7.

23. No

Q8.

24. No.

Q9.

25. Yes. Save the observation at paragraphs 11 to 12 above.

Q10.

26. No.

Q11.

27. No.

Q12.

28. No.

Q13.

29. No.

Q14.

30. Yes.

Q15.

31. No.

Q16.

32. No.

Q17.

33. No.

Q18.

34. No.

Q19.

35. Yes.

Q20.

36. No

Q21.

37. No.

Q22.

38. No.

Q23.

39. No.

Q24.

40. No.

Q25.

41. No.