

**Response to the Sentencing Council's
Professional Consultation on Allocation,
Offences Taken Into Consideration and
Totality**

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About the Criminal Justice Alliance

The Criminal Justice Alliance (CJA) is a coalition of 64 organisations - including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions - involved in policy and practice across the criminal justice system.¹ The Criminal Justice Alliance works to establish a fairer and more effective criminal justice system.

Introduction

The CJA is pleased to have the opportunity to participate in the Sentencing Council's consultation on allocation, offences taken into consideration and totality.

We supported the establishment of a new Sentencing Council and believe that the Council can promote stability and consistency in sentencing and improve the availability of data and other information about sentencing, while also playing a role in reviving public confidence in the sentencing process and maintaining judicial confidence.

Response to the consultation questions

We have responded to the consultation questions on which we have a view below.

Allocation

Question 1

Do you think that the structure of the guideline provides sufficient guidance to magistrates to assist them in making consistent, appropriate allocation decisions?

Yes, the CJA agrees with the structure of the guideline and agrees that it provides sufficient information. We believe it will help ensure more consistency in allocation decisions.

Question 2

Do you agree with the approach the guideline takes to assessing the suitability of cases for magistrates' court trial and the emphasis it places on taking a balanced initial view?

Yes. We fully support the clarification in the draft guideline that the court should take into account "all aspects of the case including those advanced by the defence". This will better ensure that the statutory duty on courts to have regard to representations made by the prosecution or the defence is adhered to, and so should help court to make balanced assessment, which is important. The existing guideline is not sufficiently clear on this point, and we believe this new emphasis will ensure consistency of approach.

Question 4

Do you agree to the amendment proposed to the introduction of the MCSG?

It is important that the MCSG reflect accurately the fact that magistrates are able to commit an either way case to the Crown Court for sentence following conviction. As the relevant provisions in the Criminal Justice Act 2003 were never enacted, it would be misleading for the guidelines to remain as currently worded, and so they should be amended.

¹ Although the CJA works closely with its members, this consultation response should not be seen to represent the views or policy positions of each individual member organisation.

It is very welcome that the guideline sets out that the court should remind offenders that all sentencing options remain open, including a later committal to the Crown Court. This is important for clarity and it is important that the offender is made aware of this.

Offences taken into consideration

Question 6

Do you agree with the proposals as to the types of offences that should not be the subject of TICs?

We agree with the proposed exceptions. However, we disagree with the Sentencing Council's view to except offences "where the TIC is not founded on the same facts or evidence or part of a series of offences of the same or similar character". The CJA believes that offences which are less serious than the conviction offence but are not of 'a similar character' should be allowable, in some instances, as TICs. If offences that are less serious, yet 'different in kind' cannot be taken into account, as is proposed, in many cases the important benefits that the Council rightly points out (including bringing offences to justice, saving time and resources, and enabling closure for victims) will not be available.

Seriousness of the offence and the harm caused provide more relevant criteria than the type of offence, and should take precedence. We agree with the Sentencing Advisory Panel recommendation that "When deciding whether it is appropriate for an offence to be taken into consideration, a difference in kind between the conviction offence and the TIC is of less significance than the fact that the TIC is more serious than the offence conviction" (SAP recommendation 4). This maintains the interests of justice and proportionality, whilst ensuring the benefits of TICs are realised.

Finally, we would question the logic of the Council's approach to this issue. Offending behaviour and offenders do not easily fit into coherent or uniform categories. Studies of offending histories show that many offenders will commit several offences across various categories. A Home Office study, for example, found that serious traffic offenders were more likely to have also committed mainstream offences (violence against the person, burglary, robbery, theft and handling, criminal damage, drug offences).²

We also note that young adult male offenders commit the largest amount of crime, and that men engage in a wider range of offending than women.³ We are concerned, therefore, that this distinction may have a disproportionately negative impact on young male offenders in comparison to older offenders. We would recommend that further consideration is given to the impact on different offender groups before this exception is added. It appears to us that the benefits of TICs, including benefits for the victim, outweigh any perceived problem of linking offences of different 'character'.

Question 7

Do you agree with the proposed procedural safeguards?

Yes, we agree with the proposed safeguards.

² Gerry Rose (2000) *Home Office Research Study 206: The criminal histories of serious traffic offenders* <http://library.npia.police.uk/docs/hors/hors206.pdf>

³ Tracey Budd, Clare Sharp and Pat Mayhew, (2005) *Home Office Research Study 275: Offending in England and Wales: First results from the 2003 Crime and Justice Survey* <http://webarchive.nationalarchives.gov.uk/20110220105210/rds.homeoffice.gov.uk/rds/pdfs/05/hors275.pdf>

We would also recommend that a further safeguard be inserted to strengthen these proposals. Immediately following the section stating that “If there is any doubt about the admission of a particular offence, it should not be accepted as a TIC”, we advocate the inclusion of a further procedural provision stating that “If the court is not satisfied that the defendant has had time to consider the list in detail, it should adjourn to allow for appropriate time”. This is set out by the Sentencing Advisory Panel in their advice to the Sentencing Guidelines Council as part of the procedure that should be followed in court.

The CJA believes this is extremely important given the possibility for abuse of the system. As the SAP notes, there is a risk that defendants may feel pressured to admit to offences they did not commit, and also to admit to offences actually perpetrated by a friend or relative. Given the prevalence of those who may be considered vulnerable within the criminal justice system, including those with mental health problems and learning disabilities or difficulties, this is of real importance. By including this additional procedural provision, the Council would ensure a robust range of safeguarding measures is in place to ensure that the court is fulfilling this role.

The Transition to Adulthood Alliance has also highlighted the degree to which many young adult offenders are still lacking in maturity.⁴ Those with developing emotional and psychological maturity would benefit from this additional safeguard.

Question 8

Do you agree with the proposed approach to the application of TICs?

The CJA agrees with the overall approach outlined in the consultation to the application of TICs. We endorse that TICs are an aggravating factor taken into account at Step 2, rather than at Step 1. This is very important given the fact that the ‘core’ of the sentence should be the offence for which the offender has been tried and convicted, and that considering TICs at step 1, as the Council identifies, would “place an undue emphasis on them”.

However, we disagree with the Council’s approach that suggests it is appropriate for sentencers to move outside the *category range* if there are a large number of TICs. We are more convinced by the arguments put forward by the SAP that where there are offences taken into consideration, “the overall sentence should be kept approximately within the level of sentence normally imposed for the conviction offence(s) and below the level imposed for more serious types of the offence”(p.8). The SAP advice, in fact, does allow for courts to move outside the category range, but makes it very clear that this would only be appropriate in exceptional cases, which is the right approach. We believe the wording should be changed to ensure a presumption in favour of remaining within the category range.

There are several reasons why this should be the case. Firstly, as the SAP point out, “it is important to note that the sentence passed by the court is for the conviction offence only and not for the matters taken into consideration; as there is no conviction in respect of the TICs, there can be no sentence imposed for them” (p.7). As such, the sentence imposed should be one that is appropriate given the particular circumstances and characteristics of the conviction offence, and it should remain within the level normally passed for this type of offence.

Secondly, the category ranges proposed in sentencing guidelines are sufficiently broad for even a large number of TICs to be counted, and still for the sentence passed to remain within the category range for that particular type of offence. For example, for a category 1 domestic burglary according to the recently published definitive guideline, the category

⁴ The CJA endorses the T2A response to this consultation which covers issues regarding maturity in more detail.

range is two to six years' custody. This ensures a sufficient range from which to sentence. It should be noted in their advice to the SGC that the approach they proposed "met with overwhelming support from those responding to the consultation" (p.8).

Finally, as the SAP also noted, "too great an increase in sentence to reflect the admission of TICs could discourage offenders from asking for other offences to be taken into consideration, which would not be in the best interests of justice" (p.1). If there is too great a level of uncertainty about what sentence could be handed down, this could defeat the object of providing an incentive to admit offences. The very fact that TICs can even be considered as a mitigating, rather than aggravating, factor (albeit in exceptional circumstances) indicates that there should be caution regarding their level of influence on the sentence outcome overall.

In summary, whilst TICs should be treated as an aggravating factor at Step 2, the Council should include guidance to sentencers that it will rarely be appropriate for TICs to result in a move outside the category range for the conviction offence, and that TICs should result in a move outside the category range only in exceptional cases.

Totality

Question 10

Do you agree with the proposed general principles of totality?

The CJA agrees with the general principles of totality stated by the Council.

Question 11

Do you agree with the circumstances in which concurrent and consecutive sentences are likely to be passed, recognising there is no inflexible rule?

Yes, the circumstances set out by the Council are helpful, and the guidance makes clear there is flexibility for sentencers.

Question 12& 13

Do you agree with the guidance provided on ensuring the sentence is just and appropriate? Should the guideline provide further detail on how sentences are adjusted in relation to totality, and if so how might this be done?

The CJA generally welcomes the guidance provided to ensure the sentence is just and appropriate. We agree that it would not be appropriate to take a mathematical approach to the reduction that should be applied to the sentence, which could lead to arbitrary injustices in sentencing.