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Steve Wade
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Dear Steve,

Creating sentencing guidelines for the reduction of assisting offenders' sentences

I am writing on behalf of a number of law enforcement agencies responsible for investigating and/or prosecuting financial crime to ask you to consider new sentencing guidelines, which would encourage assisting offenders to cooperate with law enforcement in delivering justice to victims. This request meets the fourth criterion for sentencing guideline review, as set out on your website:¹ “issues relating to sentencing that the Council considers could be addressed by the development or revision of one or more guidelines”.

As you know, this Government is committed to tackling economic crime, such as fraud. The ‘Integrated Review’ of our foreign and defence policy cited illicit finance as a high priority, putting it on a par with other national security threats such as hostile state activity. More recently, the Home Office’s ‘Beating Crime Plan’ set out ambitious steps to reduce the incidence of fraud, recognising it as a major threat to citizens’ safety and wellbeing.

Complex economic crimes often require a large amount of resource to investigate, and those investigations can take many years. The average investigation in the Serious Fraud Office, for example, is four years.² The volume of materials that must be interrogated and the forensic accountancy that must be undertaken can pose a challenge to even the most well-equipped law enforcement agencies.

¹ <https://www.sentencingcouncil.org.uk/sentencing-and-the-council/about-the-sentencing-council/our-criteria-for-developing-or-revising-guidelines/>

² This is time taken to ‘first resolution’—either a charge, the commencement of DPA negotiations, or termination of the investigation without charge.

The role of ‘assisting offenders’, i.e. those who were complicit in a crime and subsequently provide intelligence and/or evidence to a law enforcement agency investigating that crime, can change that. The most effective assisting offenders can provide paper trails of a crime that might otherwise remain hidden or prove difficult to identify, significantly reducing investigation times and increasing the likelihood of a successful case outcome. As noted in the judgement for *R v P; R v Blackburn* [2007] EWCA Crim 2290, “like the process which provides for a reduced sentence following a guilty plea, this is a longstanding and entirely pragmatic convention”.

Proposal

Participants in the National Economic Crime Centre³ have recently considered the barriers to the effective use of assisting offenders in economic crime cases, and how those barriers can be overcome to enable the effective use of such offenders.

Anecdotally, the highest barrier to securing the assistance of an offender is the lack of certainty regarding their sentence reduction. Under sections 73 and 74 of the Serious Organised Crime and Policing Act 2005 (SOCPA), and under sections 74 and 388 of the Sentencing Act 2020, a reduced sentence can be awarded to an assisting offender (usually called a SOCPA Agreement). However, until the point of sentencing, an offender cannot be sure to what extent their sentence will be reduced, if it is reduced at all.

The sentence reduction for a guilty plea is set out in law and in guidelines (Reduction in Sentence for a Guilty Plea, issued by the Sentencing Council). It would be interesting to understand whether the number of guilty pleas increased following the production of these guidelines.

Without even the broadest of assurances, many would-be assisting offenders cannot see that the benefits of their assistance outweigh the risks. As the risks to economic offenders are generally less than those to, for example, members of organised crime gangs, it is possible to tip the scales so that the benefits are greater than the risks.

Creating sentencing guidelines would enable investigators to indicate at the earliest stage what level of reduction an offender can expect, if they provide assistance. Investigators may also be able to use the guidance to elicit further assistance—for example, by highlighting the difference in sentence reduction for those that provide intelligence only compared to those that provide evidence.

Impact

We expect the positive impact of greater assurances for assisting offenders to be high:

³ The Serious Fraud Office, the National Crime Agency, the National Police Chiefs Council, the Crown Prosecution Service, HM Revenue & Customs and the Financial Conduct Authority.



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- **Impact on law enforcement agency resource:** this change could see significant positive impacts on the length of investigations, the number of cases that law enforcement agencies take on, and the outcome of relevant cases.
- **Public confidence:** through the effective use of assisting offenders to secure wins in complex cases, we will see an increase in public confidence in the criminal justice system.
- **Fairness:** guidelines will make the application of SOCPA Agreements more clear, fair and consistent, going further than existing case law.
- **International impact:** this will also allow the UK to keep up with other jurisdictions which offer greater support to assisting offenders. The US allows payments to assisting offenders. While we do not propose making payments to assisting offenders, this does make the US a more attractive place to enter into such arrangements. In multi-jurisdictional cases, would-be assisting offenders may prefer to assist foreign law enforcement, reducing the UK's ability to police its own citizens and businesses. By taking steps to encourage offenders to provide intelligence and evidence in their own cases, the UK can better police crimes which took place within its jurisdiction.
- **Prison places:** by increasing the number of assisting offenders in economic crime cases, it can reasonably be expected that a greater number of offenders will have reduced custodial sentences,⁴ therefore reducing the impact on prison places. The Sentencing Council may wish to consider the greater application of non-custodial sentences for assisting offenders in economic crime cases, which would further reduce the pressure on prison places.

Evidence base

While we will endeavour to provide you with sufficient evidence to research and possibly create guidelines, SOCPA Agreements are extremely sensitive, and there are limits to what details can be shared. Initially, you will be able to read the sentencing remarks for the following judgments:⁵

- *R v A* [2006] EWCA Crim 1803
- *R v P; R v Blackburn* [2007] EWCA Crim 2290
- *R v Z* [2007] EWCA Crim 1473
- *R v D* [2010] EWCA Crim 1485

⁴ Assisting offenders that provide intelligence only have, on average, had their sentences reduced by 33%, and those that also provide evidence have had theirs reduced by 66%. While, historically, we have seen low numbers of assisting offenders in economic crime cases, even a small increase, paired with these reductions, will see a reduction in total custodial time.

⁵ In addition, the following judgements which precede SOCPA may be of interest: *R v Sinfield* [1981], *R v King* [1986], *R v Sivan* [1988], *R v Debbag and Izzet* [1990-1], *R v X* [1994], *R v Sehitoglu* [1988]

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Over the past five years,⁶ the Crown Prosecution Service has agreed a total of 56 SOCPA Agreements, of which 31 were under s.73 SOCPA (reduction in sentence).⁷ We expect that by publishing sentencing guidelines—therefore giving greater assurances to potential assisting offenders—the number of SOCPA Agreements will increase.

Guidance

The guidance would need to apply to all offences to which, and in all circumstances in which ss.73 and 74 of SOCPA 2005 and ss.74 and 388 of the Sentencing Act 2020 apply.

In *R v P; R v Blackburn*, The President of the Queen’s Bench Division, Sir Igor Judge, as he then was noted that “No hard and fast rules can be laid down for what, as in so many other aspects of the sentencing decision, is a fact specific decision.” Despite this he went on to set out the factors that might be taken into account (indicating that it is possible to provide a set of guidelines) when agreeing a sentence reduction.

Sir Igor Judge noted that a mathematical approach should not be taken to reducing a sentence, as this is “liable to produce an inappropriate answer”. However, he made these remarks in relation to a gruesome murder, where a long prison sentence is likely to be seen as the only suitable option for punishment. With this in mind, it may be that the sentencing guidelines only apply to a specific set of economic crimes, such as:

- Offences under the Fraud Act 2006,
- Principal money laundering offences in the Proceeds of Crime Act 2002,
- Failure to prevent offence tax evasion in the Criminal Finances Act 2017,
- Offences in the Bribery Act 2010,
- Market abuse offences in the Financial Services Act 2012,
- Insider dealing offence in the Criminal Justice Act 1993, and
- Other financial crime offences in the Financial Services and Markets Act 2000,
- In addition to the relevant common law offences.

This approach may, however, have unintended consequences.

Case law

Some case law exists already for SOCPA Agreements which relates to sentence reductions:

- In *R v P; R v Blackburn*, Sir Igor Judge (President QB) stated that “It is only in the most exceptional case that the appropriate level of reduction would exceed three quarters of the total sentence which would otherwise be passed, and the normal level will continue, as before, to be a reduction

⁶ Between 1 May 2016 and 30 April 2021

⁷ <https://www.cps.gov.uk/socpa-information>



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of somewhere between one half and two thirds of that sentence.” This case remains the leading case for the determination of sentence reduction.

- In *R v D*, Lord Judge LCJ noted that “the extent of any discount must be based on the value to the administration of justice of the performance by the defendant of his statutory agreement, and not on the simple fact that the agreement, so far as it goes, has been performed”. Despite the starting point of 50%-66% in *R v P*; *R v Blackburn*, it was agreed that for an offender who provided intelligence only a reduction of 25% would be appropriate.

Despite this case law, the potential sentence reduction remains a key concern for would-be assisting offenders, and we continue to believe that crystallising the possible reductions in the form of sentencing guidelines would bring about more assisting offenders. In advance of *R v D*, the existing case law proposed a 50%-66% reduction for assisting offenders; *R v D* created new case law which lowered the bar for certain types of assistance. This does not create the level of certainty required to secure potential assisting offenders and realise the benefits set out above.

With this in mind, I would be grateful if you could consider including the creation of sentencing guidelines for assisting offenders in the Sentencing Council’s 2022 work plan.

Kind regards,

Michelle Crotty
Chief Capability Officer

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On behalf of:

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Adrian Foster, Head of Proceeds of Crime Division, Crown Prosecution Service
Andrew Penhale, Head of Specialist Fraud Division, Crown Prosecution Service
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