

ADVICE TO THE SENTENCING GUIDELINES COUNCIL

Offences Taken Into Consideration



The Panel's Advice to the Court of Appeal

Environmental Offences	March 2000
Offensive Weapons Offences	May 2000
Importation and Possession of Opium	June 2000
Racially Aggravated Offences	August 2000
Handling Stolen Goods	March 2001
Extended Sentences	November 2001
Minimum Terms in Murder Cases	April 2002
Domestic Burglary	May 2002
Rape	May 2002
Offences involving Child Pornography	August 2002
Causing Death by Dangerous Driving	February 2003
Alcohol and Tobacco Smuggling	July 2003

The Panel's published Advice to the Sentencing Guidelines Council

Robbery	May 2004
Reduction in Sentence for a Guilty Plea	September 2004
New Sentences: Criminal Justice Act 2003	September 2004
Manslaughter by Reason of Provocation	May 2005
Allocation Guidelines	February 2006
Custodial Sentences of less than 12 Months	March 2006
Domestic Violence	April 2006
Sexual Offences Act 2003	June 2006
Reduction in Sentence for a Guilty Plea	January 2007
Sentencing for Bail Act Offences	May 2007
Sentencing for Assault and Other Offences Against the Person	June 2007
Revised Magistrates' Court Sentencing Guidelines	December 2007
Driving Offences – Causing Death by Driving	January 2008
Sentencing for Offences of Theft and Dishonesty	March 2008
Sentencing for Theft from a Shop	March 2008
Sentencing for Breach of an Anti-Social Behaviour Order	May 2008
Sentencing for Fraud Offences	February 2009
Sentencing Principles – Youths	June 2009
Sentencing for Corporate Manslaughter and Health and Safety Offences involving death	October 2009
Overarching Principles of Sentencing	March 2010
Sentencing for Drugs Offences	March 2010
Sentencing for Burglary in a Dwelling	March 2010

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FOREWORD BY THE CHAIRMAN

Following a request from the Sentencing Guidelines Council, the Panel has produced advice in relation to offences taken into consideration (TICs).

Asking for other offences to be taken into consideration at the point of sentence is a well-established practice but there is no single source of guidance about the approach the courts should take. The number of offences that a court might be asked to consider can vary enormously and it is important to develop some principles to aid consistency.

The Panel's advice includes proposals about the circumstances in which it is appropriate for other offences to be taken into consideration and the impact that the TICs should have on the sentence imposed for the conviction offence(s).

In general terms, the Panel has concluded that, other than in exceptional circumstances, sentences should be increased to reflect the admission of TICs but that the total sentence should not exceed the maximum that is proportionate for the conviction offence(s).

Professor Andrew Ashworth CBE

Chairman of the Sentencing Advisory Panel

OFFENCES TAKEN INTO CONSIDERATION

THE PANEL'S ADVICE TO THE SENTENCING GUIDELINES COUNCIL

INTRODUCTION

1. Following a request from the Sentencing Guidelines Council, the Sentencing Advisory Panel has produced advice on the impact that offences taken into consideration (TICs) should have on the sentence imposed for the offence(s) of which an offender has been convicted.
2. The Panel considered this request against the backdrop of a number of judgments in which the relevance of TICs to the overall sentence had been considered; in *Sinfeld*,¹ for example, when asked to take no fewer than sixty other offences into account, the Court of Appeal suggested that the time may well have come when more precise principles are required in cases where large numbers of TICs are involved.
3. The request from the Council came at a time when the Office for Criminal Justice Reform (OCJR) had been undertaking a comprehensive review of practices involving TICs,² the aim being to 'maximise the ethical use of offences taken into consideration to contribute to bringing more offenders to justice.'³ The principle being espoused was that encouraging offenders to ask for other offences to be taken into consideration would help to narrow the gap between the number of offences reported to the police and those cleared up. As a result of the OCJR review, the Crown Prosecution Service has produced guidance to assist prosecutors when dealing with TICs.⁴
4. The OCJR review proposed that the Sentencing Guidelines Council should give consideration to the role of TICs in the sentencing process.⁵ There is some similarity between the issues considered by the Panel and Council in relation to the reduction for a timely guilty plea and TICs since both are concerned with the benefits of encouraging defendants to make admissions of guilt.
5. The practical benefit flowing from the acceptance of TICs is that it enables some offences to be brought to justice that might otherwise remain unresolved, either because of insufficient evidence or because they might not be brought to the attention of the police. 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.
6. However, if only a modest additional punishment is likely to be imposed for any TICs then, bearing in mind that an offence taken into consideration cannot subsequently be prosecuted,⁶ an offender may still benefit considerably from admitting TICs and may be inclined to do so. An offender who 'clears the slate' in this way can be free from the fear of future prosecution and will receive an additional penalty for the TICs that is far less than the penalty likely to be imposed following separate conviction for the same offences.

¹ [2005] EWCA Crim 3638

² OCJR, *Review of TIC practices across Criminal Justice Areas*, July 2005

³ *ibid*, p. 1

⁴ Crown Prosecution Service, *Prosecution Team Guidance: Offences to be taken into consideration*, May 2007

⁵ OCJR, *Review of TIC practices across Criminal Justice Areas*, July 2005, p.11

⁶ There is an accepted convention that TICs will not be prosecuted separately (see para.18). Although technically an offence taken into consideration does not count as a 'conviction' for that offence, the offender's antecedents will specify the number of TICs taken into account on any sentencing occasion.

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7. The advantages for victims, and for the general public, may not appear so obvious. The small additional penalty likely to be imposed for TICs may seem to undervalue their significance, especially to the victims concerned. However, one benefit is that victims will have the closure that follows from an offender having been brought to justice for the crimes committed; this may be of even wider importance where an offender has admitted to a number of offences causing alarm or concern to a local community. Also, in some cases, the fact that an offence that otherwise would not have been prosecuted is offered as a TIC may enable the court to make a compensation order in favour of victims who otherwise would not have been compensated (see further paragraphs 41 to 43 below).
 8. The 'ethical' use of TICs is, in the first place, a matter for the police and for prosecutors but there is a role for the sentencing court in checking, so far as this is possible, that the TICs are fully and freely admitted by the defendant. The practice of allowing offences to be taken into consideration enables enforcement authorities to 'clear up' a number of crimes which might otherwise remain unresolved, or could only be brought to trial through considerable expenditure of resources. As the 'clear-up rate' is one of the criteria by which the efficiency of police forces is measured, such a system could be open to abuse and individuals might be pressured to admit offences that they did not, in fact, commit. There is also a risk that a defendant may claim to have committed offences actually perpetrated by a friend or relative.
 9. The Panel is grateful to the 68 organisations and individuals who responded to its consultation paper; details appear in Annex A. In his foreword to the consultation paper, the then Panel Chairman noted that large numbers of offences are likely to be taken into consideration in connection with low level crimes that are tried in a magistrates' court and a significant number of responses were received from magistrates.⁷ The Panel has given careful consideration to the views expressed by all respondents.

⁷ In addition to the Magistrates' Association, responses were received from over 40 individual magistrates or groups of magistrates.

BACKGROUND

10. The practice of taking offences into consideration has no statutory foundation in England and Wales, but it is recognised and indirectly referred to in statute.⁸ It is a long-standing convention, recognised and approved by appellate courts since the early years of the twentieth century,⁹ and applies both in magistrates' courts and in the Crown Court.
11. Much of the case law on TICs is well established, and is mainly concerned with procedural issues. As the Court of Appeal indicated in *Sinfield*, however, there are some issues of principle involved in sentencing cases with large numbers of TICs, and it is primarily on this topic that the Panel consulted.

Pre-Court Procedures

12. When charging a defendant with a particular offence or offences, the police may invite the defendant to tell them about other offences which they think he or she may have committed.¹⁰ Alternatively, the defendant may make a full and unprompted confession to the police of every offence which he or she has committed.¹¹ Working in conjunction with the Crown Prosecution Service, the police then draw up a list of additional offences.

⁸ Powers of Criminal Courts (Sentencing) Act 2000, ss. 130(1) (compensation orders) and 148(1) (restitution orders).

⁹ *Syres* (1908) 25 TLR 71

¹⁰ This paragraph draws upon *Blackstone's Criminal Practice 2007*, paras. D18.51 to D18.52, and *Archbold Criminal Pleading, Practice and Evidence 2007*, paras. 5-107 to 5-110.

¹¹ In *Sinfield*, for example, the defendant was driven around the streets by the police to point out various houses which he had burgled.

13. At some time before the final court appearance, the defendant is served with a list of the other offences and asked to sign it to acknowledge receipt and to provisionally admit the offences. The defendant can accept provisionally some or all of the offences on the list. This list (the TIC schedule) is given to the defence¹² and is included in the prosecutor's brief. The defendant is not charged with the TICs; a full case file is not required for a TIC and 'in most cases a corroborated admission is sufficient'.¹³
14. The TIC procedure applies most naturally to defendants who are pleading guilty to the conviction offence(s), but it also can be used where a defendant is convicted after a trial. In the latter case, the police or Crown Prosecution Service will prepare the list and use an adjournment between conviction and sentence to invite the defendant to admit responsibility for the offences identified.

Procedure in Court

15. At a convenient moment in the sentencing hearing for the conviction offence(s), the prosecutor will inform the court that the offender wishes to have other offences taken into consideration; the court then sees the list. **Before taking any offence into consideration, the sentencing court must make sure that the defendant**

- (i) received the document listing the TICs;
- (ii) admits committing each of the offences listed;

¹² A failure to do this formed the basis of a successful appeal in *Wheeldon* (1988) *The Times*, May 13

¹³ OCJR review, *supra* n.2, p. 13; Home Office Counting Rules for Recorded Crime, April 2007, General Rules, Section H

(iii) wishes each of those offences to be taken into consideration; and

(iv) has signed the list.¹⁴

There is no limit to the number of TICs which may be accepted; there may be only one or two but in some cases there have been hundreds.¹⁵

16. If there is any doubt as to which offences in a list the defendant wishes to have taken into consideration, that doubt should be resolved in open court.¹⁶ If there is any doubt about the admission of a particular offence, it should not be accepted as a TIC.¹⁷ If the court is not satisfied that the defendant has had time to consider the list in detail, it may be necessary to adjourn to allow appropriate time.¹⁸
17. The defendant should be asked to admit the TICs personally and not by a legal representative on his or her behalf.¹⁹ If the defendant confirms the wish to have the matters taken into consideration, the court will decide whether it is appropriate to do so, the prosecutor having given brief details of the offences on the list. The sentencing process continues in the normal way. As mentioned above, the ethical use of the TIC procedure is primarily a matter for the police and

prosecutors, but the court should check, so far as it can, that TICs are accurate, and fully and freely admitted.

Later prosecution for TICs

18. There is a convention (rather than a legal rule)²⁰ that a defendant will not subsequently be prosecuted for an offence which has already been taken into consideration by a court. The Code for Crown Prosecutors makes the general point that, if a defendant has been told that there will not be a prosecution, then that is the end of the matter.²¹ It is likely that subsequent prosecution of a TIC would be regarded as an abuse of the process of the court.²² If, however, an error is made, and a defendant is later prosecuted and convicted of such an offence, the sentencing court should ensure that no additional punishment is imposed for it.²³

Withdrawal of TICs

19. In some circumstances, a defendant might seek to change his or her mind and decide not to admit to an offence that he or she earlier asked to be taken into consideration. This happened in *Davies*,²⁴ where the defendant changed his mind between being committed for sentence from a magistrates' court and being sentenced in the Crown Court. [The Panel](#)

¹⁴ *DPP v Anderson* [1978] AC 964

¹⁵ In *Walsh* (1973) CSP L3-3A01 there were 259 TICs, although it subsequently emerged that the defendant could not have committed some of them because he had been in prison at the time. In *Burfoot* (1990) 12 Cr App R (S) 252 a list of 600 offences was drawn up.

¹⁶ *Urbas* (1963) CSP L3-3B01

¹⁷ In *Burfoot*, the defendant admitted the 600 offences to the police but denied them in court. An appeal against sentence was allowed when it emerged that he had been sentenced on the basis that he had committed the TICs.

¹⁸ *Marquis* (1951) 35 Cr App R 33

¹⁹ *Mortimer* (1970) CSP L3-3C01

²⁰ The defendant is not entitled to rely on *autrefois convict*: *Nicholson* [1947] 2 All ER 535

²¹ Code for Crown Prosecutors, para. 12.1

²² *Archbold Criminal Procedure, Practice and Evidence 2007*, paras. 4-58 and 4-129. It may be different if the conviction offence was quashed on appeal – an associated offence TIC might then justifiably be prosecuted. See *Batchelor* (1952) 36 Cr App R 64, per Lord Goddard CJ.

²³ *North* [1971] RTR 366

²⁴ (1981) 72 Cr App R 262

considers that, as a general rule, a defendant should not be allowed to change his or her mind after confirming to the court that offences can be taken into consideration. If, where an offender has given good reasons for doing so, a court exceptionally allows agreement to TICs to be withdrawn, the Code for Crown Prosecutors states that the prosecution must then consider whether there is sufficient evidence to support a separate prosecution for those offences. The prosecutor will explain to the defence advocate and to the court that the prosecution of those offences may be subject to further review.²⁵

Offences that may be taken into consideration

20. A sentencing court is not obliged to take offences into consideration. The overwhelming majority of those who responded to the Panel's consultation agreed with the circumstances, outlined below, in which it was suggested that offences should not be accepted as TICs.

The seriousness of the offences

21. TICs should be no more serious, having regard to the likely penalty for the conviction offence, than the conviction offence. An offence should not be taken into consideration if, because of its seriousness, or for some other reason, the public interest requires that it should be the subject of a separate charge.²⁶ Accordingly, as a general rule, indictable only offences should not be treated as TICs.

Recommendation 1

Offences taken into consideration should not be more serious than the conviction offence(s).

22. As a court cannot take into consideration an offence that it is not empowered to try, a magistrates' court cannot take an indictable only offence into consideration. Although there is old authority that states that the Crown Court cannot take a summary offence into consideration,²⁷ there has since been a considerable increase in the circumstances in which a summary offence can be sentenced in the Crown Court. The Panel can see no reason why a summary offence should not be taken into consideration in the Crown Court.²⁸

Recommendation 2

A magistrates' court cannot take an indictable only offence into consideration. However, a summary offence should be capable of being taken into consideration in the Crown Court.

Consequences of conviction

23. In its consultation paper, the Panel suggested that an offence which carries endorsement of a driving record or obligatory or discretionary disqualification from driving should not be taken into consideration if the conviction offence does not carry that sanction, since taking the offence into consideration would prevent the endorsement or disqualification from being imposed. We agree with those respondents who expressed the wider view that an offence should not be taken into consideration if, as a result, the offender

²⁵ *supra*, n. 22, para. 10.4

²⁶ *McLean* (1910-11) 6 Cr App R 26

²⁷ *Simons* (1953) 37 Cr App R 120

²⁸ see also Courts Act 2003, s.66 which provides that circuit judges and recorders have the same powers as magistrates in relation to criminal proceedings

would avoid *any* consequence of conviction for that offence, such as a prohibition from working with vulnerable adults or children, for example, or treating a TIC as evidence of breach of a suspended sentence or community order (see also paragraph 34).

24. However, it should be noted that the wider power to disqualify an offender from driving on conviction for any offence²⁹ could be used in exceptional circumstances where a driving offence has been taken into consideration and the conviction offence is not a driving offence.

Recommendation 3

An offence should not be taken into consideration if, as a result, the offender would avoid a prohibition, ancillary order or similar consequence, which it would have been desirable to impose on conviction.

The nature of the offences

25. There is authority suggesting that matters which are different in kind from the conviction offence should not be taken into consideration. In the old case of *Collins*,³⁰ for example, it was said that road traffic offences should not be taken into consideration when sentencing for offences of dishonesty; that decision may be explicable solely on the basis of the offender avoiding a consequence of conviction, as discussed above. *The Panel takes the view that a difference in kind between the conviction offence and an offence to be taken into consideration is not as important as the fact that the TIC is more serious than the conviction offence or the fact that an offender might avoid a consequence of conviction.*

Recommendation 4

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 of conviction.

²⁹ Powers of Criminal Courts (Sentencing) Act 2000, s. 146

³⁰ [1947] KB 560

SENTENCING AND TICS

26. 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. It follows from this that no question arises as to the imposition of concurrent or consecutive sentences for TICS. They are regarded simply as part of the fuller factual context within which sentencing for the conviction offence(s) takes place.
27. Since the court is sentencing only for the conviction offence(s), it is limited to the maximum penalty for that offence.³¹ The maximum penalty available (at least in the Crown Court) is usually high enough to deal with the worst examples of the offence charged, so there is enough leeway to allow the court to increase the sentence to some extent to reflect any TICS.³² In a magistrates' court, the lower maximum penalty available may present a difficulty, but, after hearing of the TICS, a magistrates' court currently can commit an either-way offence to the Crown Court for sentence. Under proposed new allocation procedures, this will only be possible if the defendant indicates an intention to plead guilty. In its Draft Guideline on Allocation, the Sentencing Guidelines Council has emphasised the power of the court to decline to take matters into consideration where that would mean that the sentencing powers of the court were inadequate.³³

The impact of TICS on sentence for the conviction offence(s)

28. When deciding whether a community order or a custodial sentence is justified or when determining the length of a custodial sentence, a court must consider the seriousness of the offence(s) of conviction and any 'associated' offences;³⁴ 'associated' offences include TICS.³⁵ The Panel has concluded from this that the court is expected to pass a heavier sentence for the totality of the offending behaviour than it would have passed had it dealt with the defendant for the conviction offence(s) alone.
29. The Panel's consultation paper sought views on this conclusion in light of the conflicting opinions expressed in cases such as *Batchelor*,³⁶ where the Court said that the sentencing court can give a more severe sentence to reflect the presence of TICS, but did not view it as inevitable, and in *Miles*,³⁷ where the Court indicated that there were some cases where TICS will 'end up by adding nothing or nothing very much to the sentence which the court would otherwise impose ...'. The largest number of respondents took the view that sentences should *always* be more severe to reflect the presence of TICS; slightly fewer suggested that this should be a *general*, rather than an absolute, rule.

³¹ *Hobson* (1942-44) 29 Cr App R 30

³² For example, in *Sinfield* the maximum penalty of 14 years for domestic burglary gave more than enough headroom to deal with the scale of the offending.

³³ Sentencing Guidelines Council, *National Allocation Guidelines 2006 (Draft Guidelines)*, February 2006, para. 3.4.2

³⁴ Criminal Justice Act 2003, ss. 148(1), 152(2) and 153(2)

³⁵ Powers of Criminal Courts (Sentencing) Act 2000, s. 161(1)(b)

³⁶ (1952) 36 Cr App R 64

³⁷ [2006] EWCA Crim 256 at [11]

30. The Panel considers that, in principle, there should be some modest increase in sentence when sentencing a defendant who has also asked for offences to be taken into consideration. However, we accept that there may be exceptions to this general rule (see paragraph 35).

Recommendation 5

Other than in exceptional circumstances, the sentence imposed on an offender should be increased to reflect the fact that other offences have been taken into consideration.

The scale of the increase in sentence

31. The issue that then needs to be addressed is the degree to which a sentence should be increased to reflect the presence of TICs. Under current practice, the total sentence is nowhere near what might have been imposed if the defendant had been sentenced for the TICs as individual offences. The punishment for the conviction offence increases only modestly to reflect the TICs and the impact of each additional TIC on sentence becomes progressively smaller. This is an application of the 'totality principle' which traditionally operates when sentencing multiple offences.³⁸ The totality principle was developed by the Court of Appeal in a series of cases in the last century and is recognised in statute.³⁹ The principle is applicable in relation to custodial sentences, community orders and fines.

³⁸ An example is *Bosanquet*, (1991) 12 Cr App R (S) 646, in which the offender pleaded guilty to eight residential burglaries and three attempted burglaries, with another 59 residential burglaries TIC. The Court of Appeal upheld a total sentence of four years. Assuming that a custodial sentence of two to three years would have been appropriate for one such offence, each further offence has a diminishing (and ultimately negligible) effect on the total sentence.

³⁹ Criminal Justice Act 2003, s. 166(3)

32. The general principle is that 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.⁴⁰ The suggestion that this principle should be applied in relation to TICs met with overwhelming support from those responding to the consultation. Although the admission of TICs may highlight the fact that a defendant is a multiple offender, the overall sentence should still reflect the nature of the offence(s) committed. The aim is to avoid simply multiplying the sentence to reflect the number of TICs and to ensure that the total sentence bears some reasonable proportion to the kind of offending involved.

Recommendation 6

Where offences are taken into consideration, the sentence imposed should not be more severe than the level of sentence commonly imposed for the most serious offence(s) of which the offender has been convicted.

33. Notwithstanding this principle, there will be cases in which the presence of TICs is likely to make a significant difference to the overall severity of sentence. This was recognised in *Miles*, where the Court of Appeal said that TICs may aggravate sentence and could lead to a substantial increase. The Court observed that TICs may reveal a pattern of criminal activity which suggests careful planning, or deliberate rather than casual involvement in crime. It may be that the dates of the offences taken into consideration show that the defendant has offended on bail or on licence,

⁴⁰ Ashworth, *Sentencing and Criminal Justice*, 4th edition, 2005, p. 251

or demonstrate a return to offending shortly after an earlier sentence. Information which can be gleaned from the pattern of offending is always relevant to sentencing, irrespective of whether the information relates to TICs or conviction offence(s).

Other sentencing provisions

34. A further issue is the relevance of TICs in terms of triggering various sentencing provisions. Since taking an offence into consideration does not amount to a conviction for that offence it is clear that a TIC could not amount to a breach of, say, a conditional discharge or a suspended sentence order. Nor could it count towards provisions such as the prescribed minimum custodial sentence of three years imprisonment for the third residential burglary.⁴¹ However, when considering a defendant's eligibility for one of the sentences for dangerous offenders, there is no reason why the sentencing court should not take account of TICs when determining whether the offender poses a 'significant risk to members of the public of serious harm occasioned by the commission by him [or her] of further [specified] offences',⁴² since the court may take into account any information which is before it about any pattern of behaviour of which the offence forms part, as well as any information about the offender.⁴³

35. There may also be circumstances in which the defendant's admission of TICs will inform the court's *choice* of sentence rather than its severity. When TICs are admitted the defendant may be revealed to be a multiple or prolific offender and this may affect, for example, the selection of requirements within a community order. In addition, where a prolific offender has demonstrated a genuine desire for rehabilitation, the court may take the view that a community order involving intense supervision requirements might be the most appropriate disposal, where a custodial sentence might otherwise have been imposed. Prolific and priority offenders (PPOs) are subject to schemes involving local criminal justice agencies overseen by the appropriate Crime and Disorder Reduction Partnership. PPOs are prioritised for interventions which aim to reduce their offending.⁴⁴

Early and/or unprompted admission of offences taken into consideration

36. The Sentencing Guidelines Council Guideline *Reduction in Sentence for a Guilty Plea* states that TICs should be weighed in the balance to determine the seriousness of a case *before* making an appropriate reduction for a guilty plea.⁴⁵ As explained above, the Panel's view is that the presence of TICs will require some increase in the sentence above that which would have been imposed for the conviction offence alone.

⁴¹ Powers of Criminal Courts (Sentencing) Act 2000, s. 111. However, the TIC should not be accepted in any of these circumstances as the offender would be avoiding a consequence of conviction: see paras 23-24

⁴² Criminal Justice Act 2003, s. 229(1)(b)

⁴³ *ibid*, s. 229(2)

⁴⁴ National Probation Service, *Probation Bench Handbook*, 2005, p. 30

⁴⁵ Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea*, Definitive Guideline, revised 2007, para. 3.1

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37. However, the OCJR review suggested that, sometimes, the defendant's admission of TICs can be treated as a mitigating factor. Similar comments may be found in some Court of Appeal judgments, where the admission of TICs has been set alongside the admission of guilt for the conviction offence as deserving of credit, especially if the police otherwise would have had no way of linking the defendant to the TICs.⁴⁶
38. Provided there is objective evidence to prove that the offences actually took place, the Panel accepts that there is more credit in bringing TICs to the attention of the police voluntarily than in admitting them under interview. This does not deflect us from the view that the sentence imposed on an offender generally should be increased to reflect the fact that TICs are present. It follows that a defendant's unprompted or early admission of TICs should result only in a marginal reduction in sentence, since it affects only the (relatively small) additional element of the penalty that is designed to reflect the presence of the TICs. The overall sentence should still be more onerous given the presence of the TICs, no matter how early the TICs were admitted.

Recommendation 7

Any credit for an early or unprompted admission of TICs should affect only the additional element of the penalty which reflects the presence of the TICs; it should not reduce the sentence for the conviction offence(s).

⁴⁶ See for example, *Millington* [2003] EWCA Crim 2510 and *Coady* [2002] EWCA Crim 1974

Ancillary orders

39. Although the incremental increase in the overall penalty to reflect each TIC may be small, the court does have the power to make ancillary orders, particularly restitution and compensation orders, specifically in relation to any or all of the TIC offences.

Restitution orders

40. Under section 148 of the Powers of Criminal Courts (Sentencing) Act 2000 the court has power, in any case where goods have been stolen and the offender has been convicted of the offence or has asked to have the offence taken into consideration, to order that the goods⁴⁷ should be recovered from the offender and returned to the victim.

Compensation orders

41. Under section 130 of the same Act, where a person is convicted of an offence the court may, in addition to imposing the appropriate punishment, make an order requiring the defendant to pay compensation to the victim for 'any personal injury, loss or damage resulting from his [or her] offence or any offence taken into consideration on sentence.'⁴⁸

⁴⁷ Or a sum of money, not exceeding the value of the goods, taken from the offender at the time of his arrest.

⁴⁸ In a case prosecuted by way of 'sample counts' the court has no power to order compensation in respect of the wider admitted offences; compensation can only be ordered in respect of the sample counts and any offences TIC: *Crutchley and Tonks* (1990) 15 Cr App R (S) 627. The Domestic Violence, Crime and Victims Act 2004, s. 17, which came into force on 9 January 2007, allows for sample counts to be tried by a jury, but for further counts to be tried by judge alone; the court can make a compensation order in respect of any conviction under this procedure.

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42. In a magistrates' court, the total sum which can be ordered is limited by the offence(s) of conviction, and TICs do not attract their own separate compensation allowances. Thus, if the defendant is convicted of one offence and has five TICs, the total sum which could be ordered in compensation is £5,000, but that may need to cover all six offences. If the defendant is convicted of two offences and has five TICs, the total sum is £10,000, which could be divided over all seven offences. The financial limit on compensation orders does not apply in the Crown Court and a magistrates' court may need to consider committing the case to the Crown Court for sentence in an appropriate case.
43. There is clearly value in a process whereby an offender who has admitted to a TIC is required to restore stolen property or pay compensation to the victim of that offence. A court is required to explain its reasons if it decides against making a compensation order;⁴⁹ it is, therefore, essential that the court has all the evidence it needs at the point of sentence to enable appropriate compensation orders to be made.

Confiscation orders

44. As a separate matter, the prosecution may ask⁵⁰ the Crown Court to make a determination of the extent of the offender's benefit from criminal conduct, for the purposes of making a confiscation order under the Proceeds of Crime Act 2002. If an offender does not have a criminal lifestyle (as defined in the Act) the court must determine the benefit of 'his [or her] criminal conduct'. This inquiry

is restricted to offences proved or admitted in the current proceedings but, by virtue of section 76(3), includes TICs. If the offender does have a criminal lifestyle, the court must determine the offender's benefit from 'general criminal conduct', which means all of the criminal conduct (including TICs) regardless of when it occurred.

45. If a confiscation order is made, there are provisions in the Proceeds of Crime Act 2002 which enable the offender's victim(s) to be compensated using money derived from the confiscated sum. If it is clear that otherwise there would be insufficient means to compensate the victim(s), the court must order the shortfall to be paid from the confiscated sum. *Victims of offences taken into consideration may properly benefit from the proceeds of a confiscation order in the same way as victims of offences of which the offender has been convicted or to which he or she has pleaded guilty.*

⁴⁹ Criminal Justice Act 2003, s. 130(3)

⁵⁰ Or the court may proceed of its own motion.

SUMMARY OF THE PANEL'S RECOMMENDATIONS

Recommendation 1

Offences taken into consideration should not be more serious than the conviction offence(s).

Recommendation 2

A magistrates' court cannot take an indictable only offence into consideration. However, a summary offence should be capable of being taken into consideration in the Crown Court.

Recommendation 3

An offence should not be taken into consideration if, as a result, the offender would avoid a prohibition, ancillary order or similar consequence which it would have been desirable to impose on conviction.

Recommendation 4

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 of conviction.

Recommendation 5

Other than in exceptional circumstances, the sentence imposed on an offender should be increased to reflect the fact that other offences have been taken into consideration.

Recommendation 6

Where offences are taken into consideration, the sentence imposed should not be more severe than the level of sentence commonly imposed for the most serious offence(s) of which the offender has been convicted.

Recommendation 7

Any credit for an early or unprompted admission of TICs should affect only the additional element of the penalty which reflects the presence of the TICs; it should not reduce the sentence for the conviction offence(s).

THE CONSULTATION

In accordance with the duty imposed by section 171(3) of the Criminal Justice Act 2003, the Panel issued a consultation paper on 8 February 2007. The Panel's provisional views on the effect of TICs on sentencing were set out.

Copies of the consultation paper were sent to 649 individuals and organisations including the Panel's 33 regular consultees, Bench Chairmen and Resident Judges at each Crown Court Centre in England and Wales. It was published on the Panel's website and in the Justice of the Peace journal.

Responses were received from the following:

Association of Chief Police Officers
Council of District Judges (Magistrates' Courts) for England and Wales
Council of Her Majesty's Circuit Judges
Criminal Bar Association
Crown Prosecution Service
Justices' Clerks' Society
Magistrates' Association
Nacro
National Offender Management Service and Office for Criminal Justice Reform
Police Federation of England and Wales
Police Superintendents' Association
Prison Governors' Association

Responses were also received from:

John Abram MBE TD, Magistrate
Ian Andrews, Magistrate
Christopher Armstrong, Justices' Clerk, Cumbria
HH Judge Michael Baker QC
Berkshire Benches
Jill Berliand, Magistrate
Bourne and Stamford Bench
Brent Bench
City of London Magistrates' Court
Peter Clark, Magistrate
Conwy Bench
Peter Cox, Magistrate
Department for Work and Pensions, Office of the Solicitor, Prosecution Division
Derbyshire Benches
Devon Branch of the Magistrates' Association
East and West Cornwall Benches

East and West Dorset Local Justice Area
East Hertfordshire Bench
Anthony Edwards, solicitor and member of the Sentencing Guidelines Council
Flintshire Bench
Harrogate Bench
Harrow Gore Bench
Hartlepool Bench
David Haywood, Magistrate
Health and Safety Executive, Legal Adviser's Office
Graham Hooper, Justices' Clerk, Nottinghamshire
Judge Roger House
Julian Mahy, Deputy Justices' Clerk
Susan Manners Wood, Magistrate
Metropolitan Police Service
Neath Port Talbot Bench
Northamptonshire Branch of the Magistrates' Association, Executive Committee
North Lincolnshire Bench
North Staffordshire Bench
North West Wiltshire Bench
Oxfordshire Bench Chairs
Hazel Poad, Magistrate
Quaker Peace and Social Witness
HH Judge Russell QC, The Honorary Recorder of Preston
Alec Samuels, Magistrate
Robert Scrase, Magistrate
Sedgemoor Bench
South Hampshire Bench
Sussex Western Local Justice Area
Taunton Deane and West Somerset Bench
George Tranter, solicitor and former Justices' Clerk
Rita Twiss, Magistrate
Mike Voyce, private individual
Walsall and Aldridge Bench Chair and Deputy Chair
Michael Wernicke, Magistrate
West and Central Hertfordshire Benches
West Yorkshire Bench Chairmen
West Yorkshire Legal Forum
Wycombe and Beaconsfield Bench

In addition, two anonymous responses were received.

The Sentencing Advisory Panel is an independent advisory and consultative body originally constituted under sections 80 and 81 of the Crime and Disorder Act 1998 (which came into force on 1 July 1999) and now constituted under section 169 of the Criminal Justice Act 2003. Its function, prior to implementation of the relevant provisions in the Criminal Justice Act 2003, was to provide fully researched, objective advice to the Court of Appeal to assist the Court when it framed or revised sentencing guidelines.

The Criminal Justice Act 2003 established a Sentencing Guidelines Council with responsibility for issuing sentencing guidelines. With effect from 27 February 2004, the Sentencing Advisory Panel submits its advice to the Council rather than to the Court of Appeal.

The following were members of the Panel at the time this advice was delivered to the Sentencing Guidelines Council:

Professor Andrew Ashworth CBE (Chairman)

His Honour Judge Anthony Ansell

His Honour Judge Philip Clegg

John Crawford

Amritlal Devani

Mrs Anne Fuller OBE JP

Professor Frances Heidensohn

David Mallen CBE

Michael Morgan

Judge Howard Riddle

John Staples

Ms Joanna Wallace

Ms Joan Webster QPM

Christopher Woolley

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Head of Sentencing Guidelines Secretariat: Kevin McCormac OBE
Secretary to the Panel: Mrs Lesley Dix

