

11 December 2020

Dear Members

Meeting of the Sentencing Council – 18 December 2020

The next Council meeting will be held via Microsoft Teams, the link to join the meeting is included below. **The meeting is Friday 18 December 2020 from 9:30 to 14:15.** Members of the office will be logged in shortly before if people wanted to join early to confirm the link is working.

The agenda items for the Council meeting are:

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| ▪ Agenda | SC(20)DEC00 |
| ▪ Minutes of meeting held on 20 November | SC(20)NOV01 |
| ▪ Action log | SC(20)DEC02 |
| ▪ Drugs | SC(20)DEC03 |
| ▪ Burglary | SC(20)DEC04 |
| ▪ Sex Offences | SC(20)DEC05 |
| ▪ What next for the Sentencing Council? | SC(20)DEC06 |

Members can access papers via the members' area of the website.

Also included in the papers are the Sentencing Council meeting dates for 2021 (now including the February meeting) and the 2022 dates.

If you are unable to attend the meeting, we would welcome your comments in advance.

The link to join the meeting is: [Click here to join the meeting](#)

Best wishes



Steve Wade

Head of the Office of the Sentencing Council

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COUNCIL MEETING AGENDA

18 December 2020
Virtual Meeting by Microsoft Teams

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| 09:30 – 09:45 | Minutes of the last meeting and matters arising (papers 1 and 2) |
| 09:45 – 10:45 | Drugs - presented by Vicky Hunt (paper 3) |
| 10:45 – 11:00 | Tea break |
| 11:00 – 12:00 | Burglary - presented by Mandy Banks (paper 4) |
| 12:00 – 13:00 | Sex offences - presented by Ollie Simpson (paper 5) |
| 13:00 – 13:15 | Tea break |
| 13:15 – 14:15 | What next for the Sentencing Council? - presented by Emma Marshall (paper 6) |

Sentencing Council

COUNCIL MEETING AGENDA

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MEETING OF THE SENTENCING COUNCIL

20 NOVEMBER 2020

MINUTES

Members present:

Tim Holroyde (Chairman)
Rebecca Crane
Rosa Dean
Nick Ephgrave
Michael Fanning
Diana Fawcett
Adrian Fulford
Max Hill (for the discussion on Assault)
Jo King
Juliet May
Maura McGowan
Alpa Parmar
Beverley Thompson

Apologies:

Max Hill (for part of the meeting)
Rosina Cottage

Representatives:

Hanna van den Berg for the Lord Chief Justice
(Legal and Policy Advisor to the Head of Criminal
Justice)
Phil Douglas for the Lord Chancellor (Head of
Custodial Sentencing Policy)
Naomi Ryan for the Director of Public Prosecutions

Observer:

Andrew Jonathan, Ministry of Justice, Bail,
Sentencing and Release Policy Unit

Members of Office in
attendance:

Steve Wade
Lisa Frost
Vicky Hunt
Emma Marshall
Ruth Pope

1. MINUTES OF LAST MEETING

- 1.1 The minutes from the meeting of 23 October 2020 were agreed.

2. MATTERS ARISING

- 2.1 The Chairman noted the large amount of work coming up in the next few months and asked members to note that a provisional extra Council meeting had been scheduled for 12 February 2021.

3. DISCUSSION ON ASSAULT – PRESENTED BY LISA FROST, OFFICE OF THE SENTENCING COUNCIL

- 3.1 The Council considered responses to the consultation on the revised guidelines. Consideration was given to a number of culpability factors common across the guidelines, and whether two factors should be amended, and an additional factor included.
- 3.2 The Council also considered responses to the revised Attempted Murder guideline, and research undertaken with experienced sentencers on the practical application of the guideline. It was agreed that prior to finalising the guideline further research should be undertaken on recent sentencing outcomes to inform the final guideline resource assessment.

4. UPDATE ON THE SENTENCING CODE – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

- 4.1 The Council were given a short demonstration of the changes being made to digital sentencing guidelines to reflect the introduction of the Sentencing Code on 1 December. The Council welcomed the introduction of hyperlinks to the relevant sections of the Code, which it was felt would be very helpful to guideline users.

5. DISCUSSION ON WHAT NEXT FOR THE SENTENCING COUNCIL? – PRESENTED BY EMMA MARSHALL, OFFICE OF THE SENTENCING COUNCIL

- 5.1 The Council discussed the first set of responses to the 'What Next for the Sentencing Council?' consultation that closed in September. These covered the area of diversity and equality, particularly in relation to analytical work and associated data issues. It was agreed that a working group would be set up to take forward this area more generally.

6. DISCUSSION ON DRUGS– PRESENTED BY VICKY HUNT, OFFICE OF THE SENTENCING COUNCIL

- 6.1 The Council considered the Psychoactive Substance Act guidelines for the first time since the consultation closed in May. The consultation responses were considered and some changes were agreed to the culpability factors, aggravating factors and mitigating factors. The Council aims to sign off the full set of drugs guidelines at the next meeting in December.

7. DISCUSSION ON FIREARMS – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

- 7.1 The Council agreed to some changes to several of the guidelines to improve clarity.
- 7.2 The Council considered the available evidence on sentence outcomes for different demographic groups and discussed steps that could be taken in the guidelines to address the issue of apparent disparity based on ethnicity. It was noted that the disparity in outcomes varied across different offences and it was decided that a tailored reference to the evidence of disparities and a link to the Equal Treatment Bench Book should be added to those guidelines where there was sufficient evidence of disparity in sentence outcomes.
- 7.3 The Council also agreed to remove one aggravating factor in the strict liability possession offence guidelines and to add a note to another to avoid the risk of double counting or giving too much weight to an offender’s criminal record.
- 7.4 The Council agreed to sign off the definitive versions of the eight guidelines consulted on at the end of 2019, along with the resource assessment. The Council confirmed that the guidelines should be published as soon as possible and come into force on 1 January 2021.
- 7.5 The Council recorded its thanks to Her Honour Judge Sarah Munro for continuing to assist with the development of these guidelines after her term on the Council ended.

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SC(20)DEC02 November Action Log

ACTION AND ACTIVITY LOG – as at 11 December 2020

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 20 November 2020					
1	Firearms	Ruth to circulate the consultation response document and resource assessment on 25/11 for Council members to comment on by 2/12	Ruth and Council members		ACTION CLOSED: Comments received. Published 9/12/20.

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Sentencing Council meeting:
Paper number:
Lead Council member:
Lead official:

18 December 2020
SC(20)DEC03 – Drugs revised guidelines
Rebecca Crane
Vicky Hunt
0207 0715786

1 ISSUE

1.1 This is the final consideration of the revised drugs guidelines with the aim of signing them off at this meeting and publishing them in January. This paper focuses on the disparities in sentencing in this area and what steps the Council might take to ensure the guidelines do not exacerbate or contribute to any disparity. In addition, the paper includes some final proposals for change as a result of some comments from MoJ.

1.2 The consultation version of the guidelines can be seen here:

<https://www.sentencingcouncil.org.uk/publications/item/drug-offences-consultation/>

2 RECOMMENDATION

2.1 That the Council consider the proposals set out below.

3 CONSIDERATION

3.1 At the October Council meeting a number of proposals were discussed and it was agreed that a working group would be set up to finalise the detail of any changes and bring the agreed wording back to the full Council. This working group has now met, and the following proposals are made.

Remorse

3.2 A number of respondents to the consultation indicated that the mitigating factor 'remorse' can be problematic due to the subjective way in which remorse is determined. The Council discussed this in October and agreed to amend the current expanded explanation and agreed with the essence of the proposal put forward:

Remorse can present itself in many different ways. A simple assertion of the fact may be insufficient, and the offender's demeanour in court could be misleading, due to nervousness, a lack of understanding of the system, a belief that they will be discriminated against, peer

pressure to behave in a certain way because of others present, a lack of maturity etc. Remorse may be best demonstrated within a Pre-Sentence Report where a professional has had an opportunity to engage with the offender in a less formal setting.

3.3 However, some members were unsure about the wording in particular the inclusion of the phrase, 'a belief that they will be discriminated against'. That phrase has been used in the Children and Young People overarching guideline, although in a different context. In that guideline we used it as an explanation for why a child or young person may conduct themselves inappropriately in court:

The court should consider the reasons why, on some occasions, a child or young person may conduct themselves inappropriately in court (e.g. due to nervousness, a lack of understanding of the system, a belief that they will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity etc) and take this into account.

3.4 The working group discussed the text and decided upon the following revised wording:

The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction). Lack of remorse should never be treated as an aggravating factor.

Remorse can present itself in many different ways. A simple assertion of the fact may be insufficient, and the offender's demeanour in court could be misleading, due to nervousness, a lack of understanding of the system, a belief that they have been or will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity etc. A PSR may provide valuable assistance to the court in this regard.

Question 1: Does the Council agree to this expanded explanation for the mitigating factor 'remorse'?

3.5 If the Council does agree it is proposed that this expanded explanation would apply to all guidelines with a mitigating factor of 'remorse'. To have a separate and distinct expanded explanation for drugs might cause confusion and would go against the policy we have so far adopted.

Question 2: Does the Council agree that this expanded explanation will apply to all guidelines with a mitigating factor of 'remorse'?

Additional text highlighting the research

3.6 As the Council will be aware, we have very detailed research published at the same time as the consultation, which looks at sentencing for the offences of Supply and PWITs in the Crown Court between the years 2012 to 2015 and shows sentencing disparities based on race and gender. In addition to this work the Analysis and Research team are now producing analysis for the other guideline offences. It should be noted that this further analysis will be different to the detailed published analysis which was able to control for certain factors. This analysis will look at all of the drug guideline offences covering both the Magistrates Court and Crown Court for the year 2019 but will not control for any factors.

3.7 All Sentencing Council guidelines contain the following reference to the Equal Treatment Bench Book (ETBB):

Guideline users should be aware that the [Equal Treatment Bench Book](#) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.

3.8 Respondents have commented that a more specific reference to the relevant sections of the Bench Book would be helpful given that it is so lengthy. We are currently exploring whether this might be possible in the future. It seems that the Judicial College now have a version of the ETBB on the members part of their website where it is possible to link directly to specific sections. Unfortunately, this same version is not available to non-members. However, we will continue to work to see if this can be resolved.

3.9 In addition to this reference at the outset of the guidelines it is proposed that a tailored reference to the evidence of disparities in sentencing should be placed above the sentencing table within each guideline. The Council has already agreed to this approach for Firearms offences.

3.10 This is the proposed wording for the MDA supply guideline:

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black and Asian offenders receive an immediate custodial sentence than White offenders and that for Asian offenders custodial sentence lengths have on average been longer than for White offenders.

There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the [Equal Treatment Bench Book](#).

3.11 This is the proposed wording for the MDA possession guideline:

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that for Black and Asian offenders custodial sentence lengths have on average been longer than for White offenders.

There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 123 to 129 of the [Equal Treatment Bench Book](#).

3.12 The wording for the remaining guidelines will be determined by the analysis that is ongoing. For some offences there may be no evidence of disparity in which case the guideline will be silent.

Question 3: Does the Council agree to the inclusion of relevant text above the sentencing table?

Further changes to address sentencing disparities

3.13 In October the Council was asked to consider other changes to the guidelines to address concerns around disparities. These changes included additional mitigating factors reflecting the fact that some offenders offend due to issues such as poor education, lack of employment opportunities, deprivation, lack of positive role models etc. During the working group discussion, the members concluded that such considerations go beyond the drugs guidelines and would be relevant to almost all guidelines we produce. There was also a concern that adding such factors would be quite a significant change from the types of factors we currently include, and that these proposals have not been subject to consultation. For these reasons it was proposed that we reconsider these ideas as part of our wider work on preventing discrimination.

Question 4: Does the Council agree that any further ideas to address the disparities in sentencing should be dealt with as part of a wider project, looking at all guidelines?

Further Proposed Guideline Changes

3.14 We have received some comments from the Prison Safety, Security and Operational Policy Division at MoJ which include some helpful proposals.

3.15 The first, concerns the factor, 'Involving an innocent agent in the commission of the offence'. This is an aggravating factor that we have only included within the importation guidelines (both MDA and PSA), however MoJ propose that this could be just as relevant in supply offences:

... a criminal could secretly stash psychoactive substances into a scheduled delivery of food or materials into a prison – the driver of the van could be the innocent party. Legitimate deliveries into prison are unfortunately subverted for the purposes of drug supply.

Question 5: Does the Council agree that this factor should be included in the supply guidelines?

3.16 The second issue concerns the aggravating factor “Offending took place in prison (unless already taken into consideration at step 1)” which appears within the supply, production and possession guidelines. The MoJ question why it is not also an aggravating factor to be the person who is supplying (or orchestrating the supply) from outside of prison, into prison.

I understand that the fact that the person is a prisoner is important but so is the fact that the criminal activity is undermining safety, security, regime and rehabilitation of prisons – and you don’t have to be a prisoner to cause those harms. We have had cases where people have set up the large-scale manufacture of paper soaked in psychoactive substances to supply drugs into multiple prisons from private residences.

Question 6: Does the Council want to include an additional aggravating factor (within the supply guidelines only), such as ‘offender was supplying or involved in the supply of drugs into prison’.

4 NEXT STEPS

4.1 At Annex A the Council can see all of the guidelines with the changes made. The consultation document will now be completed and will be circulated by email at the start of the new year. The aim is to publish on 27 January and the guidelines will be in force on 1 April.

Question 7: Is the Council content to sign off these guidelines?

5 IMPACT AND RISKS

5.1 The resource assessment is attached to this paper at Annex B. Members of the Analysis and Research team will be present at the meeting to address any questions that Council members may have.

Question 8: Is the Council content to sign off the Resource Assessment?

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Sentencing Council

Sentencing Council meeting: 18 December 2020
Paper number: SC(20)DEC04 – Burglary Revision
Lead Council member: Rebecca Crane
Lead officials: Mandy Banks
0207 071 5785

1 ISSUE

1.1 This is the fourth meeting to discuss the revision of the existing burglary guideline, this meeting will focus on a new draft aggravated burglary guideline and the Council will also be asked to agree sentence ranges across the three guidelines. There is one further scheduled meeting to sign off the guideline in March, at which point a draft resource assessment will also be presented, based on the sentence ranges agreed at this meeting.

2 RECOMMENDATION

2.1 That the Council:

- Considers a new version of an aggravated burglary guideline
- Considers and agrees the sentence levels across the guidelines

3 CONSIDERATION

Aggravated burglary guideline

3.1 A new version of the aggravated burglary guideline has been developed with the input of Rebecca, and is attached at **Annex A**. The existing guideline can be seen [here](#). Council may recall from the meeting in July that the evaluation showed that the guideline contributed to the unanticipated increases seen in sentencing severity for aggravated burglary offences (although this finding should be treated with caution due to low volume of cases, (190 in 2019). The quantitative analysis conducted showed that offenders have been receiving longer sentences since the guideline came into force, and the qualitative work indicated that the harm and

culpability factors in the guideline caused the majority of cases to fall into category 1. In the post CCSS (Crown Court Sentencing Survey) data around 70% were put into category 1.

3.2 It may be helpful to set out that burglary can be committed in two ways:

- *s.9(1)(a)-trespass with intent to steal or intent to do GBH or intent to do criminal damage*
- *s.9(1)(b)-trespass and then steals/attempts to steal, or inflict GBH/attempt to inflict GBH*

It becomes an **aggravated burglary if at the time of committing the burglary he has with him a firearm/weapon of offence/explosive.**

3.3 In thinking about this guideline Rebecca was concerned as to whether all the factors for aggravated burglary are captured, and whether the guideline addresses the different ways the offence can be committed; theft or GBH, also intent re theft or GBH or actually stealing/inflicting GBH.

3.4 The CPS were contacted to ask about charging decisions: whether in aggravated burglary cases, if physical harm/injury is caused, would there always be separate assault charges brought. The response was that a separate assault charge would usually be preferred (at the relevant level for the assault inflicted) if physical harm/injury is caused.

3.5 If the Council wanted to, thought could be given to try and differentiate between the different ways that the offence could be committed. Potentially a high culpability factor '*intent to cause GBH*', could be added as a more serious version of the offence, with '*intent to steal*', added as a medium culpability factor. However, this may complicate things as this wouldn't capture actual GBH or actual theft. It may be simplest not to try and differentiate in this way.

3.6 The existing guideline has '*weapon present on entry*' as a high culpability factor. However this factor has given rise to some concerns, following the issues raised in *Sage*¹ of potential double counting. Considerable thought has been given to these issues by Rebecca, with the conclusion that, given the low volumes of cases it may apply to (only 190 aggravated burglary cases in total in 2019) the most pragmatic solution is to omit the factor. Also, to some extent it may already be covered by the planning factor.

¹ [AG's Ref Sage \[2019\] EWCA Crim 934](#), [2019] 2 Cr App R (S) 50, paras 38 and 45

**Question 1: Does the Council agree not to include ‘weapon present on entry’?
Does the Council agree not to include factors to try and differentiate between
actual/intent to steal and actual/intent to cause GBH?**

3.7 The Council may also like to consider differentiating between different types of weapon within culpability. For example, in high culpability there could be ‘*highly dangerous weapon e.g firearm, blade, axe*’, and in medium culpability there could be ‘*all other weapons*’. This is to differentiate between more dangerous weapons, such as a gun which would fall into high culpability, and weapons such as a screwdriver, which would fall into medium.

3.8 However, developing such factors may not be as straightforward as it might appear- for example, where would an imitation firearm go, and would an unloaded firearm be in A or B? The definition of ‘*weapon of offence*’ is ‘*any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use*’. Again, it may be simplest not to try and differentiate between types of weapons.

**Question 2: Does the Council wish to differentiate between different types of
weapon in the culpability levels?**

3.9 There are some additional differences between this guideline and the domestic and non-domestic ones Council have already considered. In culpability there is no lower culpability factor of ‘*offence committed on impulse, with limited intrusion into property*’ as there is in the other two, as for this offence trespassing and having a weapon are hard to describe as an impulsive act. It is proposed there is no ‘*equipped for burglary*’ factor for this offence as the offender will have a weapon for this offence.

3.10 At the last meeting on the domestic burglary guideline the Council agreed ‘*targeting of vulnerable victim*’ to cover cases where for example, elderly victims are targeted. For this offence targeting could be wider than just vulnerable victims, but the Council have previously discussed concerns that a factor relating generally to targeting could capture too many cases in category one. Therefore, it is recommended that this factor remains fairly tightly worded, to capture only the more serious cases of a vulnerable victim targeted.

3.11 It is also proposed for this offence that there is a variation on the harm factors agreed at the last meeting for domestic burglary of ‘*much greater emotional impact on the victim than would be normally be expected*’ in category one and so on. This is because for this offence arguably the factors need to be more about

physical/psychological injury, so in category 1 harm it is proposed '*substantial physical or psychological injury or other substantial impact on the victim*', '*some psychological injury or other some other impact on the victim*', in category 2 and '*limited psychological injury or other limited impact on the victim*' in category 3.

3.12 This is very similar wording to that in the existing guideline, except the word trauma has been replaced with impact, as Council had previously expressed concern at the word trauma. All cases where there was physical injury would go into category 1, given the factor '*victim at home or on the premises (or returns) while offender present*' is also in category 1, as there can be no physical injury if the victim is not present. There could still be psychological injury and other impact caused to the victim by the offending even if the victim wasn't present during the offence, so there is still reference to this in category 2 and 3 harm. To consider different levels of physical injury the factor relating to the victim being at home/on premises in category 1 would need to be reworded.

3.13 There are no category 3 harm factors covering such features as nothing stolen or limited damage caused to property as there is in the other two. This is because the previous Council wanted to avoid the potential for a case where there was a significant threat to the victim but no theft resulted, because the offender couldn't get into the safe etc, being regarded as lesser harm. Instead there is a mitigating factor of '*nothing stolen/property of low value*'.

Question 3: is the Council content with the proposed harm factors?

3.14 It is proposed that there is an additional aggravating factor of '*use of a disguise*' for situations where offenders have used masks/balaclavas, etc. The offence can be committed either in a dwelling or a non-dwelling but it is not suggested that the guideline draws a distinction between the two. However, if the Council felt a distinction should be drawn, because it is worse if it is in a dwelling as this is someone's home where they expect to feel safe and so on, there could be an aggravating factor of '*offence committed in a dwelling*'.

Question 4: Does the Council wish to include the aggravating factor of 'use of a disguise' and/or 'offence committed in a dwelling'?

3.15 The Council are also asked to consider the proposed draft sentence ranges for this offence, which are based on current sentencing practice, which can be seen on tabs 3.1-3.3 of **Annex B**. This tells us that the majority of offenders, 91%, were

sentenced to immediate custody, 9% were otherwise dealt with². The ACSL in 2019 was 7 years 4 months (post guilty plea) the estimated pre-guilty plea in 2019 was 9 years 2 months. The breakdown of sentence lengths can be seen on tab 3.1.

3.16 When the existing guideline was developed, the Council considered the sentence ranges in relation to robbery, in particular robbery in a dwelling. Since then in 2016 the Council produced a new robbery guideline. The top of the range now for robbery in a dwelling is 16 years' custody (starting point of 13 years, bottom of the range 10 years). However, the Council should note that as part of the 'Cumulative Impacts' project,³ robbery came out as one of the two offences that have been associated with the largest increases in prison places of all the guidelines evaluated to date. As it is estimated that only 19 offenders received a sentence of over 13 years (prior to guilty plea reduction) in 2019⁴, it is proposed that the top of the range is maintained, at 13 years, as in the existing guideline.

Question 5: What is the Council's view of the draft sentence ranges?

Domestic and non- domestic burglary

3.17 Similarly to aggravated burglary, thought has been given as to whether these two guidelines fully capture all the ways the offence can be committed, or if they have been drafted with the focus primarily on stealing. There are a number of ways to commit either a dwelling or non-dwelling burglary:

- a. Enter as a trespasser; and
- b. One of the following:
 - i. Steals
 - ii. Attempts to steal
 - iii. Intends to steal
 - iv. Inflicts GBH [trespass plus either s.20 or s.18 GBH]

² The category 'Otherwise dealt with' usually includes a wide range of other miscellaneous disposals, including (amongst others) hospital orders, restraining orders; confiscation orders; and compensation.. However, on further inspection it appears that for at least some of the offenders in the 'Otherwise dealt with' category in the data (including all offenders in the 'Otherwise dealt with' category in 2019), their disposal may have been incorrectly recorded. It is not possible to determine what sentence was actually imposed in these cases, but the Statistics team will investigate this issue with the MoJ analysts who manage the database.

³ This is one of the projects that the Council has undertaken as part of its 10-year anniversary, and for which initial findings were presented at the January and March 2020 Council meetings. The project seeks to estimate the cumulative impact of its guidelines that have been evaluated to date on sentencing severity and on the need for prison places, as well as comparing findings to the impact expected when the guidelines were published. A paper summarising the findings of this project will be circulated to the Council in due course, prior to publishing in early 2021.

⁴ One additional offender received an indeterminate/life sentence.

- v. Attempts to inflict GBH [trespass plus attempted s.18 GBH]
- vi. Intends to inflict GBH [trespass plus intending to commit s.18 GBH]

3.18 The CPS were asked about charging decisions in these cases if injury was caused. The response was that if there was actual violence or threats of violence in order to effect a theft then cases would probably be charged as a robbery rather than burglary. If it was a burglary with intent to inflict GBH (rather than theft) then assault charges would be an alternative rather than an addition. In conclusion it seems as if there would not be many cases charged as burglary which involved actual physical injury that didn't have additional assault charges.

3.19 If the Council feel that the current drafts do not sufficiently reflect GBH burglaries, one option may be to say that these guidelines are only where there is stealing/attempt to steal/intent to steal and where there is GBH courts should look at the assault guidelines.

Question 6: Does the Council wish to make any changes to the domestic/non domestic guidelines as a result of the issues raised above? And/or should there be a reference to the assault guidelines for the GBH type cases?

Domestic burglary

3.20 The Council are asked to consider and indicate if they are content with the proposed sentence ranges in the guideline. These have been developed based on current sentencing practice, which can be seen on tabs 2.1-2.3 in **Annex B**. The ACSL in 2019 is 28.6 months post guilty plea, 39.4 months is the estimated ACSL for a pre-guilty plea in 2019).

3.21 Currently 88% of offenders receive custody (immediate and suspended sentences combined),⁵ with 9% getting a community order. Of those receiving immediate custody, 12% received one year or less, 20% between one to two years, 16% between two to three years, 25% between three to four years, 14% between four to five years, and 7% between five to six years. 7% received sentences over six years.⁶ Therefore the proposed top of the range is six years custody, the same as in the existing guideline. The bottom of the range stays the same, starting at a low level community order, as the amounts currently receiving a fine or discharge are less than one percent.

⁵ These and some other figures throughout this paper may appear to differ very slightly to those in the data tables. This is because some unrounded figures sum to different totals than if you summed the rounded figures in the tables.

⁶ Sentence lengths are pre-guilty plea

3.22 The evaluation of the original guideline showed that the guideline may have had a slight effect on increasing severity: more offenders are now placed in category one; the custody rate in category one has been increasing; and greater harm/culpability factors are taken into account more often than their counterparts (seen from the 2012-2015 CCSS data).

3.23 The rest of the amendments agreed at the last meeting to the domestic burglary have been agreed, and can be seen in in **Annex C**.

Question 7: Does the Council agree with the draft sentence ranges?

Non-domestic burglary

3.24 The draft guideline is attached at **Annex D**. The sentence ranges again have been based on current sentencing data, which can be seen on tabs 1.1-1.3 of **Annex B**. This tells us that the post guilty plea ACSL in 2019 was 11 months' custody and the estimated pre-guilty plea ACSL was 16 months. 66% of offenders who received an immediate custodial sentence were given a sentence of one year or less, 13% between one to two years, 10% between two to three years, 5% between three to four years, 2% between 4 and 5 years, and 3% over five years. The top of the range at 5 years, is the same as in the existing guideline.

3.25 The Council may recall from the discussion in July that the evaluation of the existing guideline showed that there had been a steep increase in sentencing severity for non- domestic burglary, which had not been anticipated. It seems the increases were primarily driven by an increase in severity in the magistrates' courts, where both the ACSL and custody rate have been increasing. At that meeting the Council said that in revising the guideline it wished to look at sentencing at the lower end for this offence, and to try to encourage more community sentences. Between 2010 and 2019 the proportion of offenders receiving community orders decreased from 41% to 22%.

3.26 Previously the Council rejected a suggestion to include reference to alcohol treatment requirements (ATR's) and Drug Treatment Requirements (DRR's) and said there should just be a link to the Imposition guideline. The current [guideline](#) includes a reference to DRR's. The Council are respectfully asked if it would reconsider this decision. A high proportion of offenders commit these offences due to drug/alcohol addiction, so including specific text on community orders with ATR's and DRR's would encourage sentencers to think about these options, as it does in the shop theft guideline.

3.27 Including the text within the guideline rather than asking sentencers to refer to the Imposition guideline, even if they are familiar with it, will be quicker and give the wording on ATR's/DRR's more prominence. The text that is currently in shop theft is shown below - it is proposed that this text should also be included in non-domestic burglary instead of the link to Imposition. This text also appears in the general theft and criminal damage guidelines.

Where the offender is dependent on or has a propensity to misuse drugs or alcohol and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under [part 10](#), or an alcohol treatment requirement under [part 11](#), of Schedule 9 of the Sentencing Code may be a proper alternative to a short or moderate custodial sentence.

Question 8: Does the Council agree with the proposed sentence ranges?

Question 9: Does the Council agree to include text relating to ATR's and DRR's for non-domestic burglary?

4. EQUALITIES

- 4.1 The additional demographic tables that were requested at the last meeting on ethnicity data broken down by sentence types, ACSLs and sentence length can be seen at **Annex B**. Age and sex were not requested, but as we plan to publish these extra breakdowns in future they have also been included. Ethnicity in these tables is still 'perceived ethnicity' but we will be moving over to self-identified ethnicity when the tables are published. Perceived and self-identified ethnicities were found to be similar but with 'self-identified' there is the extra 'Mixed' ethnicity group.
- 4.2 Below are some of the key features to mention on the additional ethnicity tables (seen at **Annex B**). Overall, the statistics suggest that while Black, Asian and Other ethnicity offenders received more severe sentences for some of the measures⁷, this was not consistently the case, and for some measures, White offenders received the most severe penalties. This suggests that for burglary offences overall, the evidence for disparities in sentencing is not as clear as it appeared to be for firearms or drug offences. Note that all figures quoted below are for adult offenders sentenced in 2019, and ACSLs are for final sentences, after any reduction for a guilty plea:

⁷ 'Measures' refers to the two main statistics that are being compared: the proportion of offenders sentenced to immediate custody, and the average custodial sentence length, and the fact that they are compared for the three burglary offences.

- a. For non-domestic burglary, Black, Asian and 'other ethnicity'⁸ adults had a higher proportion sentenced to immediate custody (58%, 58% and 61% respectively) compared with White adults (54%). The ACSL varied slightly across the different groups: 9 months for Black offenders, 10 months for Asian offenders, 11 months for White offenders and 13 months for other ethnicity offenders.
- b. For domestic burglary offences, the 'other ethnicity' group had the highest proportion being sentenced to immediate custody (81%), followed by White offenders (77%), Asian offenders (76%) and Black offenders (69%). However, the 'other ethnicity' group had the lowest ACSL at 25.2 months, compared with around 28 months for Black and Asian offenders and 29 months for White offenders.
- c. For aggravated burglary offences, 96% of Black offenders were sentenced to immediate custody⁹ whereas this proportion was 92% for White offenders. The remainder of each group were 'otherwise dealt with'. However, due to issues identified with the 'Otherwise dealt with' category for this offence, these differences may not be a true reflection of sentencing outcomes.¹⁰ The ACSL for White offenders was the highest at 8.4 years compared to 7.6 years for Black offenders, 6.0 years for Asian offenders and 5.9 years for other ethnicity offenders.

Question 10: Does the Council have any comments on the new data?

⁸ 'Other ethnicity' includes those who were perceived as having Chinese, Japanese, south east Asian and Middle eastern ethnicities as well as those whose ethnicity could not be perceived by the police officer as White, Black or Asian.

⁹ Care should be taken with these numbers as they were based on 23 black adults sentenced for aggravated burglary in 2019.

¹⁰ See footnote 2 for further details.

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Sentencing Council meeting:
Paper number:
Lead Council member:
Lead official:

18 December 2020
SC(20)DEC05 – Sexual Offences
Adrian Fulford
Ollie Simpson
07900 395719

1 ISSUE

1.1 Seeking Council's agreement to:

- a narrative guideline for offences under section 14 of the Sexual Offences Act 2003 (SOA) (facilitating or arranging the commission of a child sex offence) for situations where no sexual activity has occurred;
- additional text to be inserted into the guideline for section 10 SOA offences (causing or inciting a child to engage in sexual activity) for situations where no sexual activity has occurred, which could also apply to other causing/inciting offences;
- a new guideline for section 15A SOA offences (sexual communication with a child).

2 RECOMMENDATIONS

2.1 That Council agrees the drafts at **Annexes A to C** for consultation.

3 CONSIDERATION

Section 14

3.1 This is the second meeting on the substance of revised guidelines for section 14 and section 10. In October, Council agreed not to overcomplicate a new section 14 guideline and that a narrative guideline would be capable of covering situations where a child sexual offence has been arranged or facilitated, but no offence under ss9-13 has taken place. A working group met last month to consider drafts in detail and I set out a proposed section 14 guideline following that discussion at **Annex A**.

3.2 The highlighted text is proposed in addition to what is there in the existing brief section 14 guideline (as well as some unhighlighted changes to account for the Sentencing Code coming into force).

3.3 The draft follows closely the guidance given in *Privett* to work from the harm that was intended by an offender and then applying a discount for the ultimate lack of sexual activity. Whilst not being overly prescriptive in the sort of discount to apply two general scenarios are proposed to represent the ends of a sliding scale:

“In cases where an offender is only prevented by others from conducting the intended sexual activity at a late stage, or where a child victim does not exist and, but for this fact, the offender would have carried out the intended sexual activity, a small reduction within the category range will usually be appropriate.

Where, for instance, an offender voluntarily desisted at an early stage a larger reduction is likely to be appropriate, potentially going outside the category range.”

3.4 Although this leaves some degree of judicial discretion on the level of reduction, the guidance is fairly clear cut when one considers that category 1A offending for sexual activity with a child – the most likely offending intended – means a starting point of 5 years which can only be reduced to 4 within the range. Likewise for 2A offending this could mean 3 years remains the possibility of them using discretion to reduce further than we might intend.

3.5 This means a downward adjustment is made ahead of and separate to any further aggravating and mitigating factors. This disrupts the normal structure of a guideline, although there are already several guidelines that propose adjusting a starting point up or down before moving on to aggravating and mitigating factors. Given the uncertainty that has arisen, and the fact that sting operations account for the vast majority of section 14 cases, I think it is important to flag this reduction upfront to make sure sentencers are fully apprised of the approach to such cases, and then aggravate and mitigate following that.

Question 1: do you have any comments on the proposed draft section 14 guideline?

Section 10 – Causing or inciting a child to engage in sexual activity

3.6 Given the need for a coherent approach between a range of cases where no contact sexual activity ultimately takes place, Council agreed in October we should apply the above approach to the section 10 cases. My proposed additions to the existing guideline are in highlight at **Annex B**.

3.7 The working group concluded that a link to the revised section 14 guideline would be an efficient way of highlighting the approach to take where a judge is using the section 10 guideline to sentence a section 14 case. This avoids unnecessary repetition of the same principles, which in the section 10 guideline I propose putting before the Harm table as the best way to ensure they are not overlooked.

3.8 The draft removes the current mitigating feature *“Sexual activity was incited but no activity took place because the offender voluntarily desisted or intervened to prevent it”*. This is now unnecessary if we are establishing a lower starting point in cases where activity is incited but does not occur, and an even lower starting point where that is because the offender has desisted.

3.9 Incitement cases in undercover police operations will be charged as attempts and the text has been drafted specifically to reflect this. However, we could add further clarificatory text if it was felt necessary to underscore that there should be no further discount because the offending has been charged as an attempt.

Question 2: do you have any comments on the proposed additions to the section 10 guideline?

3.10 These same additions could be made to all the causing/inciting sexual offence guidelines, i.e.:

- Causing or inciting a child under 13 to engage in sexual activity (s8)
- Abuse of position of trust: causing or inciting a child to engage in sexual activity (s17)
- Inciting a child family member to engage in sexual activity (s26)
- Causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity (s31)
- Care workers: causing or inciting sexual activity (s39)
- Causing or inciting sexual exploitation of a child (s48)
- Causing or inciting prostitution for gain (s52)

3.11 Aside from section 8, with 168 offenders sentenced in 2019, these are very low volume offences. There is a question over whether the additional guidance would be relevant in practice for these offences. Nonetheless, even if instances of sting operations, or incitement without activity are rare for these offences, there should be no harm in including the principles to follow in such situations within those guidelines.

Question 3: do you want to make the same amendments to the other causing/inciting guidelines?

3.12 The anti-slavery charity International Justice Mission recently published a report about sentencing in England and Wales for those convicted of online child sex abuse and exploitation (available here: <https://www.ijmuk.org/falling-short>). It makes the argument that sentences for those who direct the abuse of children remotely (usually in the Philippines) are disproportionately low compared to a) the people who facilitate that abuse in-country and are prosecuted and sentenced there; and b) offenders sentenced here for offences committed online against children in this country.

3.13 It is hard to draw robust conclusions from the report's data (the report is based on just 15 case studies, with only four of these being examples of E&W-based offenders

abusing Philippines-based victims). However, there may be merit in ruling out any suggestion that offending against victims in other parts of the world be treated less seriously by E&W courts than offending against victims here.

3.14 Some (but not all) child sex offence guidelines do come with the short preface “This guideline also applies to offences committed remotely/online.” This could be read to suggest an instruction to the court to treat online offending as on a par with contact offending. But it could also be read as a basic technical instruction that the guideline can be applied in both cases.

3.15 I propose we take this opportunity to provide a clearer steer and have included a form of words in step one of the draft section 10 guideline to achieve this:

“Sentencers should draw no distinction between activity caused or incited in person and activity caused or incited remotely, nor between the harm caused to a victim in this jurisdiction and that caused to a victim anywhere else in the world”

Question 4: do you agree with this addition to the section 10 guideline and to any other relevant child sexual offence guidelines?

Section 15A guideline – sexual communication with a child.

3.16 Following discussion in the working group, I present a draft guideline for section 15A offences at **Annex C**.

3.17 The offence is triable either way, with a maximum penalty of two years. It was introduced in the Serious Crime Act 2015 to plug a perceived gap: existing offences relating to malicious communications required the offender to be seeking to cause distress to the victim, and the communications in question often fell short of the requirements for other child sex offences, with no intention to meet or incite further sexual acts.

3.18 There were 284 sentences imposed for s15A offences in 2019, a significant increase from 34 in 2018 and five in 2017. Just over half of sentences imposed in 2019 were custodial (36% were suspended, 15% immediate custody). 42% were community orders and 6% otherwise dealt with.

3.19 Of those that did get immediate custody in 2019, estimated pre-guilty plea sentence lengths appear skewed towards the top half of the range: only 3% of sentences were 6 months or under; 36% were between 6 months and 1 year; nearly half (46%) were between 1 year and 18 months; and 15% were between 18 months and 24 months.

3.20 Based on a selection of 2019 transcripts, the majority of s15A cases involve sting operations, whether conducted by the Police or vigilante groups. The text set out above is

therefore also included here (which could also be bolstered with further clarification to avoid double discounting for the fact these would be charged as attempts).

3.21 The working group concluded that, given the limited variation in facts in these cases there should be two tiers each of harm and culpability, with the upper tiers comprising elements indicating raised harm/culpability, and lower tiers for any other case.

3.22 The raised harm elements as drafted are:

- Discussion of penetrative activity, oral sex, extreme sexual activity, sadism, or masturbation;
- Sexual images sent or received;
- Significant [psychological harm or] distress caused to victim.

3.23 There is a question over whether the first bullet is helpful here. A focus on the content of communications is in line with other sex guidelines with their focus on the activity perpetrated, and may be useful for this offence, where the impact of receiving a sexual communication on victims (in the minority of cases where they are real) may vary, be difficult to measure, or may not manifest itself by the time of sentencing.

3.24 However, with this element it is hard to see any substantial number of s15A cases falling into the lower category of harm. Most involve discussion of penetrative or oral sex or masturbation (although generally not more extreme topics) and we may consider it to be inherent in the offending. The sentencing remarks we have seen do not particularly use the content to determine the seriousness of the offending. Of the cases seen in transcripts, around a third involved some sending or exchange of images.

3.25 Usually, psychological harm is considered separately to distress and considered a higher level of harm. Arguably, significant distress caused to the victim is enough to warrant being placed in the higher category of harm, so we may wish to omit the words in square brackets above.

Question 5: should the higher harm category include descriptions of the nature of the communications, as drafted?

3.26 The working group rejected the usual child sex offence culpability split between standard grooming elements in the higher tier, on the basis again that this was inherent in the offending. In the vast majority of cases, for example, there would be a “significant disparity in age”, putting the offender automatically into higher culpability. These elements remain in the draft:

- Abuse of trust;

- Use of threats (including blackmail);
- Targeting of a particularly vulnerable child;
- Commercial exploitation and/or motivation.

3.27 Based on the transcripts, this reverses the position, making it rare for an offence to be categorised as high culpability. Abuse of trust is most likely to make the difference here, although deliberate targeting of a particularly young child would presumably count as vulnerable.

3.28 Sharing of images is proposed as a harm factor, and soliciting images has been removed from the standard list of raised culpability factors. It could be argued that soliciting of images also indicates raised culpability given the serious problems created by the proliferation of sexual images on the internet, but we have been mindful to avoid any double counting of harm and culpability factors.

3.29 We could add to higher culpability the element of lying about one's age and/or identity (at present it is an aggravating factor in the draft). This is not uncommon in grooming offences generally, although it is only mentioned explicitly in a couple of the cases for which we have transcripts.

3.30 The culpability here would reflect using an alter ego to gain the trust of a victim and also potentially to avoid detection. Lying about one's age is central to that: to go further, we might reinstate "significant disparity in age" to distinguish the case of the young man in his early to mid 20s seeking out a 15 year old, from (say) the man over 30 seeking out a child of any age. Or we can simply leave the issue of age/lying about age as an aggravating factor.

Question 6: do you think that 'Offender lied about age or used a false identity' should be a culpability factor at step one or an aggravating factor at step two?

3.31 The proposed sentencing levels attempt to reflect the outcomes seen in 2019. Each of the four ranges has a custodial starting point. In practice we would expect to see most sentences being either A2 or B1 (with a starting point of 1 year) or B2 (with a starting point of six months). The working group specifically rejected leaving "headroom" in the most serious cases in an offence with a relatively low maximum, so the A1 range extends to up to two years. An early resentencing exercise does not suggest an obvious trend in terms of increased or decreased sentencing severity, although we will return to Council with an analysis of expected impacts in January (incorporating any changes to the guideline made after this meeting).

3.32 The aggravating and mitigating factors are standard for child sex offences, although some of the aggravating factors (location of offence; timing of offence; presence of others,

especially other children; exploiting contact arrangements with a child to commit an offence) are omitted as not being relevant to this offending.

3.33 The working group wanted to reflect somehow duration and persistence of offending here. This is difficult because one-off offending can be incredibly serious, whilst a series of communications over a period of time could be relatively less harmful. We wanted to resist placing a figure on the lengths of time involved. So “sustained and persistent offending” is included as an aggravating factor and “isolated offence” is included as the opposing mitigating factor.

3.34 Finally, there is standard text in the draft about the circumstances where an offence may be taken outside of the category range (aggravation for various reasons, particularly recent relevant convictions). Given the small number of category ranges and the relatively low maximum, this might be unnecessary. On balance, I believe these may still be useful in some circumstances.

Question 7: do you have any further comments on the draft section 15A guideline?

4 EQUALITIES

4.1 By way of reminder, in 2019, generally, a lower proportion of younger offenders received immediate custody; about 40% of 18 to 21 year olds received an immediate custodial sentence, compared to about 60% of offenders over 30 years old.

4.2 Males account for the majority of offenders in every offence, accounting for 98% of offenders sentenced in total for the sexual offences in question. Given the low number of female offenders, it is difficult to accurately determine if there are differences between sentencing outcomes for males and females but generally the proportion of offenders receiving each sentencing outcome is similar.

4.3 90% of the offenders sentenced for these sexual offences in 2019 were White. In general, the distribution of sentencing outcomes was similar across the ethnicities for each offence, with the most common outcome being immediate custody. However, again, due to the small number of Black, Asian and Other ethnicity offenders, it is difficult to determine trends or disparities within the immediate custodial sentence lengths.

Question 8: Are there any particular issues relating to equality and diversity that should be addressed in the consultation?

5 IMPACT AND RISKS

5.1 An impact and risk assessment will be conducted prior to consultation and we will come back to Council with a resource assessment in January. In principle we are simply codifying the approach that the courts should be taking currently. Following *Privett*, we would expect section 14 “sting” operations to start resulting in longer custodial sentences. If that approach is extended to all cases where there is not a real child victim, then we should expect more severe sentences in these cases.

5.2 There may be some continued confusion or concern about the concept of moving away from the position that any sexual activity which is incited but does not take place should automatically be considered less harmful than any activity which does take place. The rationale for this, though, is set out in the *Privett* judgment and is inherent in the fact that the assessment of harm under section 63(b) of the Sentencing Code includes “any harm which the offence [not only] caused, [but also] was intended to cause, or might foreseeably have caused”.

5.3 As set out above, there is no clear assessment yet of whether the new section 15A guideline as drafted would increase sentencing severity, decrease it, or leave it broadly the same. We will provide further detail in January.

Sentencing Council meeting:	18 December 2020
Paper number:	SC(20)DEC06 – “What next for the Sentencing Council?” consultation
Lead officials:	OSC Vision group

ISSUE

1.1 The key issues to have emerged from the “What Next for The Sentencing Council?” consultation responses in the area of guideline development and revision.

RECOMMENDATION

2.1 That the Council considers the issues raised and provides indicative responses to the questions posed; we will then review responses to all questions at the end of the process in order to balance priorities against resources.

CONSIDERATION

3.1 As outlined in the November meeting, 36 responses were received from a range of individuals and organisations. The consultation asked 23 questions across six broad areas, one of which related to developing and revising sentencing guidelines.

3.2 Although in some areas it is more straightforward to feedback responses in relation to general themes, for this area, respondees did tend to answer direct questions. This paper therefore largely sets out responses question by question.

3.3 As also outlined at the previous Council meeting, final decisions can be made only once the Council has discussed all consultation responses, across all areas. As noted in the consultation document, the Council’s overall resources are small and so a decision to take forward one area may impact on progress in another. It is also important that any future workplan does not make any concrete public commitments in such a way as to limit our flexibility to respond to any wider or more urgent issues (for example any legislative changes that impact on guidelines and the Council’s work, such as changes necessitated by the Sentencing White Paper).

3.4 Therefore, whilst it would be helpful to have indicative views on questions as we progress through the different areas, we will need to consider these in the round, along with the Council's views on the other topics on which we consulted, at the final stage (currently scheduled for our March and April meetings).

Consultation responses

The criteria for prioritising development of guidelines and the policy for making changes to guidelines

3.5 Two questions were asked in this section. The first related to respondents' views on suggested criteria for prioritising development or review of guidelines.

What are your views on the suggested criteria for prioritising the development or review of guidelines? Please suggest any additional criteria that you think should be considered or criteria you think should be removed.

3.6 The suggested criteria were as follows:

1. The Lord Chancellor or the Court of Appeal formally requests the review of sentencing for a particular offence, category of offence or category of offender, and the production or revision of a guideline.
2. A substantial body of interested parties request a guideline to be issued or revised for a particular area of sentencing and there is evidence to suggest that a guideline would have a significant impact on sentencing.
3. Existing guideline(s) have become significantly out of date, or new guidelines may be required because of new legislation, amendments to legislation or other external factors.
4. Evidence indicates that existing guideline(s) have had a problematic, unintended impact on sentencing severity.
5. Evidence indicates that there is currently inconsistency in the sentencing of an offence or group of offences

3.7 Fifteen respondents provided comments in relation to this question. Around half of those who responded felt the criteria overall were generally acceptable and appropriate.

However, there were also various comments (including from those who were generally in support of the criteria) about how they could be refined or changed.

3.8 Regarding the first 3 criteria, there were comments about the basis on which calls for new guidelines might be made, as well as what constituted a “substantial body of interested parties”.

*The inclusion of the attorney general [sic] or appeal court as a source of information ignores the limited number of cases they will actually consider and the tendency to be the most serious and which will affect the least proportion of the general public. Similarly, the second criteria then uses ‘substantial body of interested parties’ as a defining point, but what does that mean? Who will decide what constitutes substantial? As the criteria stands, it could be the case that one case from the appeal court attracts more attention than a number of lower but reoccurring cases that affects considerably more people. I would remove the first two criteria and add to the remaining three criteria ‘where concerns are raised by interested parties’ - **Greater Manchester Magistrates***

*[Some] criteria suggested...should not be used because they are open to bias or are open to subjective interpretation...(i.e. The Lord Chancellor or the Court of Appeal formally requests the review of sentencing for a particular offence, category of offence or category of offender, and the production or revision of a guideline; a substantial body of interested parties request a guideline to be issued or revised for a particular area of sentencing and there is evidence to suggest that a guideline would have a significant impact on sentencing; existing guideline(s) have become significantly out of date, or new guidelines may be required because of new legislation, amendments to legislation or other external factors) - **Mandeep Dhani, academic***

*The second point could be rephrased for clarity, as it is not clear whether it references a body that represents a substantial group of interested parties or a substantial number of different groups. It is important not to set this criteria as an unnecessarily high bar. For example, if a significant number of magistrates raise concerns about a particular guideline, this would be a clear indication that the Council should consider reviewing that guideline - **Magistrates Association***

What does a "substantial body" in this context mean? This needs clarification. Could it be one or a small group of organisations that for example represent many thousands, tens or hundreds of thousands or millions of members? - **Member of the public**

3.9 The Insolvency Service, whilst agreeing with the criteria, suggested adding the wording '*a body with particular expertise in or a remit to address the specific category of offending requests the development or review of guidelines, supported by evidence of inconsistency, or on the basis of other good reason to develop or review the guidelines*'. Professor Ashworth also pointed out that if the Council engages more with BAME groups, this may result in more requests from 'interested parties' for the revision of a guideline.

3.10 The Prison Reform Trust went further, suggesting that criterion 2 was altogether insufficient and could have unintended consequences: "*The inclusion of this criteria as it stands, for instance, could risk the Council's workplan being hijacked by populist interests, if a tabloid newspaper got behind a campaign to change sentencing guidelines in a particular area*".

3.11 They recommended a more wholesale revision/ expansion of this criterion to: *A substantial body of interested parties request a guideline to be issued or revised for a particular area of sentencing, and there is evidence to suggest that this would lead to a significant improvement in sentencing in this area, which:*

- *helps to deliver on the statutory purposes of sentencing, while retaining an appropriate balance between those purposes; and/or*
- *helps to improve outcomes, including addressing any disproportionate outcomes, for people with protected characteristics.*

3.12 An expansion along the line of their last bullet point above would align with the wider work the Council is committed to undertaking in the area of equality and diversity and that was discussed at the November Council meeting.

3.13 On the fourth criterion - evidence indicates that existing guideline(s) have had a problematic, unintended impact on sentencing severity – several people addressed this. Diverse Cymru said it was important that impacts on sentence severity and consistency specifically included identifying and addressing existing and potential inequalities.

3.14 The Prison Reform Trust (PRT) stated that they welcomed this criterion, citing assault and burglary as a good example of revising guidelines when unintended impacts

have been found. However, they felt that the criterion needed to be refined in order for it to be a more effective inclusion in considerations. This would include reconsidering the definition of a “problematic, unintended impact on sentence severity” - in their opinion:

- increases in severity may be problematic even if intended;
- the definition of “problematic” should include concerns about proportionality and impact on available resources and be broadened to include the wording “problematic and/or unintended”; and,
- there should be clarification around what is meant by “unintended”.

3.15 This links for PRT around what we regard as a measure of “success” and the way in which we interpret our evaluation findings. Citing the burglary evaluation, they flag that this found an upward trend in sentence severity prior to introduction of the guideline and consequently concluded that the continuing increase after introduction of the guidance was in line with anticipated results.

3.16 However, in support of a point made by Professor Sir Anthony Bottoms in his review of the Council¹, they feel that any pre-guideline increases in sentencing severity that continue after implementation of a guideline should be regarded as an unanticipated outcome. Transform Justice raised a similar point: that guidelines should be urgently reviewed if there is an indication that they have led to an unanticipated increase in the severity of sentences – including where they have failed to stabilise a preceding upward trend.

3.17 Transform Justice also commented that guidelines should be adjusted in response to various changes that may occur (the sense being that some changes may lead to a more adverse experience of custody than originally anticipated when the sentence was handed down). They cited amongst these as changes in the law which increase the proportion of a sentence served in custody, when the overall punitive weight of a sentence increases (e.g. when mandatory post release supervision was introduced for sentences under 12 months), and when issues such as Covid-19 may lead to more overcrowding in prisons.

¹ The Prison Reform Trust: “As Anthony Bottoms highlights, however, “This judgement is open to question. It can be argued, to the contrary, that the purpose of a guideline is to set sentencing levels, and if there is a pre-existing upward trend for the particular offence, and the guideline recommends (broadly) the existing sentencing levels, then the intention of the guideline is to stabilise the upward trend. Accordingly, it is recommended that when conducting impact assessments, if there is a pre-existing upward trend and sentence severity continues to rise after the implementation of a guideline, the Council should in future treat this as an unanticipated, and not an anticipated, increase in the sentence level.”

3.18 More generally, Mandeep Dhimi from Middlesex University felt that the main criteria on which the Council chooses to develop or revise a guideline should be empirical evidence – not only in relation to the criteria already included, but also in relation to the reasons for departures from guidelines, evidence on the most effective format for guidelines, and ‘what works’ in terms of achieving the aims of sentencing. Another academic – Professor Nicky Padfield – felt that guidelines for more common and more serious offences should probably be prioritised over others.

3.19 Some of these issues link to other areas that the Council is considering more broadly. For example, at the February meeting we plan to discuss the way in which our evaluation of impacts may be enhanced and the responses in relation to comments on effectiveness of sentencing issues (which may include what the Council “intends” to achieve with its guidelines) will be covered in January. These further discussions will need to consider the types of issues raised by PRT and Transform Justice. The Council has already discussed the need to develop our work in the area of groups with protected characteristics, something raised by Diverse Cymru.

3.20 For this reason, we suggest that the Council commits to reviewing the criteria on which guidelines are selected for development and revision, but to do this once all areas of its work have been considered as part of vision discussions.

Question 1: Does the Council agree that the criteria on which guidelines should be developed and/or revised should be reconsidered? Does the Council agree to consider this separately after all vision discussions have concluded?

The policy for making minor changes to guidelines

3.21 Question 9 of the consultation asked about the process of making more minor changes to guidelines.

<p>Should the Council expand the policy for making changes to existing guidelines (short of a full revision)? Please suggest what situations should be covered by such a policy</p>
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3.22 The Council's [policy](#) for making limited modifications to guidelines is published on the website and covers:

- clarifications or corrections to substantive errors or omissions;
- amendments made to reflect changes in legislation; and,
- updates to information or terminology in a guideline.

3.23 Depending on the scale and nature of the changes, the policy sets out whether the Council will consult on these changes. Examples of more substantive changes in the past include the addition of references to the Equal Treatment Bench Book in all guidelines (consulted on as part of the expanded explanations), updates to reflect the introduction of the Sentencing Code (not consulted on), and miscellaneous changes to the MCSG (consulted on).

3.24 The consultation asked whether the current policy could be extended further, in particular to cover situations where interested parties make a case to improve an existing guideline short of a full revision. Only a small number of respondents submitted an answer to this question. Of those that did, there was a mixed reaction to the idea of expanding the policy for making changes to existing guidelines.

3.25 Those in support felt this could be an efficient way of making changes: for example, Diverse Cymru felt that such an approach could address identified inequalities more quickly and Avon and Somerset Bench said that such changes would be useful in circumstances where sentencers put forward ideas to help improve the usability of a guideline.

3.26 The Sentencing Academy also strongly supported the proposal as amendments could be easily and efficiently incorporated into online guidance and highlighted for sentencers. However, they said it would be important that such rapid review is limited to matters on which the Council has concluded there is unlikely to be a wide array of views.

3.27 Others had wider concerns about expansion of the policy. The Magistrates Association, whilst welcoming the flexibility of the current situation, expressed concern about an expansion of this beyond “small non-substantive changes”. They said the full public consultation process is an important part of the way the Council works: it links to public confidence in the legitimacy of the guidelines and ensures all stakeholder views can be considered.

3.28 The PRT were also concerned about any loosening of the criteria and the risk that substantive changes to guidelines could be made based on the views of a particular interested party without going through the formal development process (that includes assessment of resource implications and consultation). If the Council did choose to loosen the criteria, it was felt that there would need to be *“clear criteria to judge the merits of each case, including criteria for what types of changes would and wouldn’t be permitted as part of a more limited review....any form of limited review should still include a [resource] assessment and a process of consultation”*.

3.29 This was also a concern from Greater Manchester Magistrates who reiterated its point made in relation to the earlier question around the difference between acting on an issue raised by Ministers or the Court of Appeal versus those raised via magistrates with experience of *“a more repetitive problem”*. They felt that it *“is not necessarily the case that the policy should be expanded in scope, but more about what level of concern will trigger the response and at what point will that be deemed ‘substantial?’”*.

3.30 The Justices’ Clerks’ Society gave qualified support to the idea, saying that they agreed there should be a policy for making changes to existing guidelines which fall short of a full revision. However, they believed that this should be restricted to where there has been an acknowledged difficulty with an aspect of a guideline and an interested party makes a case to improve an existing guideline.

3.31 Finally, two respondents (one magistrate and one academic) made the point that the issue did not warrant further attention.

3.32 Given that it is already implicit in the current policy that changes could be made on the basis of information that is raised by external parties (for example if an error or omission was flagged), a more explicit reference may not in practice change matters. However, it would need to be clear that the policy is limited to more minor changes and that any changes made may be subject to consultation; this may necessitate a small review of the current wording of the policy to ensure this messaging is as clear and explicit as possible.

3.33 Anything more substantive – even if short of revision of a full guideline/ suite of guidelines – might be better considered as part of the criteria for developing/revising guidelines discussed above (the digitisation of the guidelines making it much easier now to make such changes). These criteria already contain references to including calls from interested parties (albeit this part may be amended).

3.34 This means that the changes envisaged by Diverse Cymru (updates as a result of identified inequalities) may need to be considered as part of the wider criteria. It would, however, mean that the concerns of bodies such as the PRT would be unfounded: by dealing with more substantive changes through the alternative route, this would ensure that these were accompanied with a resource assessment and consultation.

Question 2: Does the Council agree to include more explicit reference to calls from interested parties in the policy for making more minor changes to guidelines and to review the current wording of the policy to ensure that it is clear that these may be subject to public consultation?

Guideline areas to prioritise

3.35 The consultation asked two questions about which offence specific and overarching guidelines the Council should develop or revise. This supplements previous suggestions raised in meetings with Council members and several stakeholders prior to issuing the consultation.²

Is there a guideline for a particular offence or set of offences that the Council should develop or revise as a priority? Please give reasons.

Is there a guideline for a particular overarching issue that the Council should prioritise? Please give reasons and explain how best you think this could be addressed.

Suggestions for new offence specific guidelines

3.36 The table below shows the responses on this and indicates that there was no real consensus regarding which new offence specific guidelines the Council should develop. The rationale for suggestions also varied: some people felt a guideline was needed because an offence was common, others because an offence was uncommon (and thus unfamiliar to sentencers), whilst others were clearly making suggestions specific to their particular area of interest/ expertise.

3.37 The table indicates that several respondents flagged areas for development that the Council has already issued – either definitively or in consultation form – including rape and

² We conducted discussions with individual Council members, as well as with several stakeholders in 2019.

sexual assault, assault on emergency workers and modern slavery. Guidelines on causing death by dangerous driving and drug driving are due to start early in 2021. See Annex A for information on the Council's current guideline workplan.

3.38 The remaining areas have previously been discussed by the Council and in 2018 were included on a long list of areas for future consideration. Some areas (e.g. blackmail and wildlife offences had also been raised in the early vision discussions prior to the consultation exercise). See Annex B for those areas flagged for potential future consideration in 2018.

	Offence- specific guideline suggestions	Respondent/s
Guidelines already underway/ issued	Assaults on emergency workers ³	Three magistrates and one member of the public
	Modern slavery ⁴	Dr Carly Lightowlers
	Rape and sexual assault	Not stated
	Disclosing private sexual images	Magistrates Association
Guidelines due to start imminently	Causing death by dangerous driving	Professor Andrew Ashworth
	Drug driving	HMCTS
Guidelines discussed and listed for future consideration	Kidnapping/ false imprisonment	Member of the public
	Blackmail	Member of the public
	Forgery/ counterfeiting	Member of the public
	Prison offences	Member of the public
	Wildlife offences	Member of the public
	Data protection offences	Information Commissioners Office
	Hacking of information	Magistrates Association

3.39 The next set of suggestions cover those areas that have not previously been considered by the Council. As can be seen, all suggestions were raised by one person/ organisation only.

Further offence specific guideline suggestions	Respondent
Determining the minimum sentence for murder	Sentencing Academy
Failing to keep/preserve books and misconduct in the course of winding up; restrictions on re-use of company name	Insolvency Service

³ One respondent also felt there was an overlap between assaults and emergency workers and possession of a bladed articles/ offensive weapon which can cause confusion. No further information was given however to clarify precisely what this was referring to.

⁴ A magistrate also raised a very specific aspect that could potentially be covered in guidelines: "*immigrant workers working as slaves can often be involved in criminality as part of the control being exercised yet there is no reference to either of these in any guideline and the guidelines should highlight and promote thought on these issues*".

Offences relating to failing to provide services for guide dog users	Magistrate
New sexual offences (e.g. 'sexting' and 'upskirting')	Magistrates Association

3.40 The Sentencing Academy felt that a guideline for the minimum sentence for murder was consistent with the guideline that has already been issued on manslaughter and that the structure of Schedule 21 (containing categories based on seriousness and aggravating and mitigating factors) could easily be adapted to a Council guideline. The need for such a guideline was also raised by a previous Council member who regarded Schedule 21 as not 'workable'. The Academy did acknowledge that difficulties would exist with the creating of this type of guideline, but felt that it was still within the Council's remit to produce one:

*Whilst we appreciate that this perhaps presents some difficulty given the extent of Parliament's intervention into this area of sentencing, there are a large number of steps that sentencing judges must go through when determining the minimum term for murder once the appropriate Schedule 21 starting point has been identified and it is with these subsequent steps that further guidance might assist. It is to be noted that Schedule 21 itself states that 'Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order' and therefore significant discretion is left to sentencing judges to weigh the non-starting point aggravating and mitigating factors. Ensuring a consistent approach to these subsequent steps falls within the SC's remit – **Sentencing Academy***

3.41 The Insolvency Service's suggestion was flagging a specific area where they felt more help was needed: whilst acknowledging the value of the Fraud guideline and General guideline, they felt that there were offences for which more help could be provided.

*The first set of offences...is failing to keep or preserve the books and records of a company...These offences are not analogous to any other offences for which there is a guideline and can properly be described as "niche" for the purposes of sentencing. It is our experience that sentencers ask to be directed to any guidelines that may exist, and that there is very little either in the way of guidance or case law to help them. It would be of great assistance for sentencing guidelines to be published in relation to these offences - **Insolvency Service***

3.42 For similar reasons they called for a guideline on restriction on the re-use of company names. The Magistrates' Association also felt the Fraud guideline should be updated more

in the area of online fraud (although they did not specify in what way the Fraud guidelines were inadequate for dealing with sentencing online fraud).

3.43 A magistrate also commented on offences relating to failing to provide services for guide dog users. It is not clear what, if any, criminal offences are relevant to this issue.

*Offences against guide dogs. Magistrates are making appalling decisions in relation to how taxi drivers and others behave towards guide dogs and owners to such an extent that many local authorities fail to take cases to court as it is a foregone conclusion that nothing will happen to the accused and no true punishment will be given because the concept of how a blind person is treated is so alien to the magistrates they cannot comprehend the fear, distress and alarm caused to such a blind person. Having little or no understanding of disability and equality they make bad decision - **Magistrate***

3.44 Finally, the Magistrates Association suggested guidelines for new sexual offences, for example 'sexting' and 'upskirting'. 'Sexting' is not an offence as such, but the Council is currently developing a guideline for sexual communication with a child.

Overarching guidelines

3.45 In terms of overarching guidelines, there was much more consensus around this and a relatively large amount of comments⁵. As already discussed at the November Council meeting, the most frequently called for guideline/ guidance (highlighted in five submissions) related to **sentencing female offenders**, something that had also been raised several times in the early meetings on the vision. Those who raised it as part of the consultation noted the evidence on sentencing outcomes for this group and some of the specific issues they may face during periods of imprisonment (which linked for some to effectiveness of sentencing, to be discussed at a later meeting). Several felt strongly enough to outline these issues in some detail.

3.46 Some also suggested there would be value in producing a guideline on **sentencing young adults** and/ or further guidance on the issue of age and maturity.

⁵ Two respondents did, however, criticise overarching principles guidelines. One member of the public felt this work should not be prioritised as she had never seen them referenced in court. A magistrate said that they are the weakest of all the guidelines and in his experience, rarely used.

*Proactively explore improvements to sentencing of women offenders. It is already well established that prison has especially poor outcomes for women....as they are often the primary carers of children, their imprisonment has an exceptionally harmful impact on families...It must surely be timely for the Sentencing Council to undertake further analysis of options such as the greater use of women's centres, to tackle complex needs and support rehabilitation - **Catholic Church***

*As part of the wholesale review to prevent disparity and alongside addressing issues of racial disparity, the Sentencing Council should prioritise how it can ensure a distinct approach is taken at sentence to young adults and to women. Whilst the Howard League welcomes the expanded explanation of 'age and/or maturity' it does not go far enough to ensure young adults are not discriminated against at sentence. The arguments for a distinct approach to women at sentence are overwhelming - **Howard League***

*The Council should produce guidelines on the distinctive approach to the sentencing of women, young adults, and older offenders. In respect of women, Lord Phillips (who chaired the Sentencing Guidelines Council) has made it clear that he wished it had prepared a comprehensive set of gender specific guidelines. The current chair has said that "our guidelines are drafted in a way which is intended to be neutral as to the sex and ethnicity of an offender". This seems at odds with the position taken by the Council in 2010 when it considered its equalities obligations and agreed that cultural factors need to be considered in the development of guidelines. Transform Justice agrees with the Council's 2010 position – **Transform Justice***

*PRT is a member of the Transition to Adulthood (T2A) Alliance and shares its view that there should be a separate overarching guideline for sentencing young adults up to age of 25. Evidence suggests that the 20 to 25-year-old age group are most likely to desist from offending. Therefore, developing a guideline in this area would go some way to meeting Anthony Bottoms recommendation to more closely match guidelines to the process of desistance - **Prison Reform Trust***

3.47 The need for a guideline for female offenders (and/or sole or primary carers) and young adults has already been noted by the Council and were included as longer-term considerations in a paper presented to the Council in November 2018. Information on age and/or lack of maturity has now been provided as part of the expanded explanations (these have yet to be evaluated). The Council discussed the need to develop guidelines on

sentencing female offenders and young adults at the November meeting and agreed in principle that these should be future considerations, subject to other commitments that emerge from the consultation.

3.48 Two respondents – Transform Justice and the Prison Reform Trust –felt there should be **guidance on the purposes of sentencing**. Transform Justice pointed to the General guideline which says that courts need to consider which of the five statutory purposes of sentencing it is seeking to achieve through sentence. They flag that in the case of more than one being relevant, there is no guidance about how courts should go about selecting the purpose for a particular case.

3.49 These comments reflect one of the recommendations made as part of the Council’s independent review conducted by Professor Sir Anthony Bottoms - that the Council should consider whether a guideline or less formal guidance should be developed on s142(1) of the Criminal Justice Act 2003 (this also links to issues of effectiveness in sentencing, to be discussed in a later Council meeting).

3.50 Two respondents also felt that the **totality guideline** should be revisited. The Sentencing Academy cited the fact that a number of academics have criticised this guideline for providing insufficient/ minimal guidance for courts and Professor Andrew Ashworth stated that:

it is arguable that simply to state that the total sentence should be ‘just and proportionate’ does not amount to a guideline on totality, since it gives no clue as to the process by which the court should find its way to a total sentence that meets this test. Many cases (in the Crown Court, probably the majority) involve multiple offences, thus requiring the court to deal with the question of totality. This, in turn, has a considerable effect on the overall sentence – notably, in the Crown Court, the length of prison sentences. Assessing the total sentence is a vital issue, both for the offender and for the use of imprisonment, and the Council ought to return to this topic

3.51 Other suggestions for overarching guidelines/ guidance were raised by just one respondent each:

- **Sole and primary carers:** The Prison Reform Trust felt there was a need for clear guidance to the court at the outset regarding its duty to investigate caring responsibilities of defendants and to take these into account in sentencing decisions.

- Sentencing procedure and the standard of proof for relevant sentencing factors:** The Sentencing Academy cited an article in the Criminal Law Review by Martin Wasik and Andrew Ashworth that highlighted the need for a guideline on sentencing procedure and practice: *“When referring to an offence specific guideline, a sentencing judge will be making a number of decisions at every step of the sentencing process that will ultimately determine the final sentence. It is conceivable that in some cases these decisions may have as much influence over the sentence as a decision by a jury to convict a defendant of a lesser or more serious offence. The case law on this area is vast and includes decisions dating back many decades. This is an area which would benefit from SC guidance”*.
- Guidance on Victim Personal Statements:** The Sentencing Academy raised this as an area where more guidance was needed for sentencers who are less experienced in sentencing: *“there may be occasions when the VPS suggests that a particular disposal such as immediate imprisonment would inflict undue hardship for the victim. If this occurs, the VPS provides insight into the impact of the potential sentence as well as the offence. How much weight should this information carry? At present, sentencing guidance takes the form of a judgment from the Court of Appeal, and a practice direction which is relatively brief.... guidance from the Court of Appeal is now rather dated, and produced at a time when VPSs were used less frequently than at present”*.
- Assessing dangerousness:** The Sentencing Academy flagged this as an area where there are some important and complex areas to tackle⁶. Whilst acknowledging that release arrangements are not entirely determined by the sentencing exercise, it commented that the sentence that flows from a finding of dangerousness will have a significant impact on the sentence served and thus the degree of public protection; it linked this to public confidence in this area: *“it is essential that these decisions are made in a consistent and transparent manner and a guideline along the lines of the Imposition guideline may assist sentencers in this exercise”*.

⁶ This had also been suggested in early discussions with the MoJ.

- **Guidance on the use of location monitoring:** The Magistrates Association called for this given that it is a new option available to sentencers.
- **Sentencing older defendants:** Transform Justice raised this, but offered no information on their rationale for suggesting it.
- **Protective/ preventative orders:** the member of the public calling for this felt that guidance is generally lacking in this area, particularly in terms of the drafting of the orders. In their view, this could lead to difficulties at a later stage when “*almost unenforceable*” orders are breached; they called for a simplification of the regime and a joint project between the Council and the Law Commission.
- **Substance laws and sentencing:** the magistrate who raised this said: *‘All the substance laws and sentences need review. There’s no substance worse than alcohol and it’s legal. We can’t go on like this.’* There is already an aggravating factor and expanded explanation relating to intoxication.
- **The custody threshold:** Transform Justice stated that the Council argues that the vast variation in offence types/ factors affecting seriousness means it is not possible to provide one general definition of this. However, it feels that courts should be given further guidance to discourage them from imposing unnecessary custodial sentences.
- **Aggravating and mitigating factors:** Transform Justice suggested that there is a need for more guidance on the weight given to various factors. It also cites that fact that there are more aggravating than mitigating factors and some overlap between (something also raised in the Bottoms’ report).
- **Intoxication:** Dr Carly Lightowlers suggested that the Council should consider clarifying how the guidance in relation to intoxication ought to be applied in practice and include a clear explanation as to why alcohol or drug intoxication constitutes an aggravating factor.
- **Guidance on “totting up”:** The Council will recall that this guidance has recently been updated and is now in force.

3.52 Some of these areas have already been considered by the Council as a potential longer-term consideration (see Annex B). There are also already expanded explanations in various areas – for example, for the mitigating factor of ‘sole or primary carer for dependent relatives’ and to a limited extent on the use of victim personal statements in court. In addition, whilst older offenders are not specially cited, the mitigating factor ‘Physical disability or serious medical condition requiring urgent, intensive or long-term treatment’ and the associated expanded explanation may be relevant to older offenders. A later step in guidelines covers dangerousness, but does not give guidance on how the statutory test should be applied.

3.53 The Council could, however, consider enhancing the current guidance in this area – either separately or as part work that may emerge from a future evaluation of the expanded explanations.

Summary

3.54 The above indicates that there were many varied calls for the Council to produce new or revised guidelines/ guidance. Some of these have already been completed, and some are due to start.

3.55 Setting these aside, as well as any suggestions that are unconnected with sentencing, this leaves the following areas for consideration:

Guideline area	Guideline area
Kidnapping/ false imprisonment	Female offenders
Blackmail	Young adults
Forgery/counterfeiting	Older offenders
Prison offences	Sole and primary carers
Wildlife offences	Totality
Data protection offences	Victim Personal Statements
Determining the minimum sentence for murder	Assessing dangerousness
New sexual offences (e.g. ‘sexting’ and ‘upskirting’)	Aggravating and mitigating factors
Failing to keep/preserve books and misconduct in the course of winding up; restrictions on re-use of company name	Intoxication
The approach to the custody threshold	Substance laws and sentencing
Sentencing procedure and the standard of proof	Protective/preventative orders
The purposes of sentencing	The use of location monitoring

3.56 It will not be possible to prioritise this entire list in the meeting. The more medium and longer term priorities for guideline development and revision will also be influenced by the overall resources of the Council which will be affected by other work that may emerge as a result of the vision consultation.

3.57 It should also be noted that guidelines take an average of around two years to develop and additional areas of work may arise as a result of evaluation evidence. Given that the Council already has a full workplan for the foreseeable future, it will only be possible at this stage to add on a small number of additional areas.

3.58 As outlined earlier, we will also need to retain flexibility within the Council's workplan to respond to any wider or more urgent issues (for example any legislative changes that impact on guidelines and the Council's work).

3.59 We would therefore recommend that at this stage we select three areas to explore for further consideration. If the Council agrees to this, we could undertake some preliminary scoping work over the next few months to ascertain what would be possible in the relevant area and to provide some options. The Council would then be able to consider these areas more fully and in relation to other commitments it wishes to make.

3.60 Undertaking to explore these areas further would not mean committing to developing or revising any individual guideline. It would, however, demonstrate the Council's commitment to considering these areas in more detail and if work was not eventually taken forward, it would provide a full justification for this decision.

3.61 The areas we would recommend exploring at this stage are:

- An overarching guideline on sentencing female offenders;
- An evaluation of the General guideline and the expanded explanations; and,
- An evaluation and potential revision of the Totality guideline.

An overarching guideline on sentencing female offenders

3.62 An overarching guideline on sentencing female offenders has been raised consistently over recent years. As outlined earlier, this was discussed by the Council in November 2018 and included in a list of potential areas for future development. At that point it had been noted that the issue of sentencing female offenders was topical and that Council member Sarah Munroe had given evidence to the All-Party Parliamentary Group for women

in the penal system. It was also raised as part of discussions with Council members and stakeholders prior to launching the consultation and was the most commonly called for guideline from consultation respondents.

An evaluation of the General guideline and expanded explanations

3.63 Several areas raised in the consultation are already covered through the General guideline and expanded explanations. For these, an evaluation would help to examine how they are being used and interpreted and whether any changes or enhancements are needed. Whilst we plan to include the expanded explanations as an area to review as part of the Preventing Discrimination project, a more general evaluation is yet to be scheduled. We could therefore put some thought into how we might go about a more general evaluation and what information/ methodologies we could draw upon.

An evaluation and potential revision of the Totality guideline

3.64 Whilst the totality guideline was only raised twice in the consultation, it is an area that is regularly flagged by academics, in particular Professor Andrew Ashworth. A revision of the guideline was also recommended in the Bottoms' Review.

3.65 Totality was one of the first guidelines produced by the Council and is one of the guidelines that the Council must produce as part its statutory duties. It is now quite outdated which recently made it problematic to update in response to the Sentencing Code. The Bottoms' Review stated that:

By contrast with previous convictions, there is a complete lack of empirical data on the court's use of the totality principle: no research has ever been conducted on this topic in England and Wales. There is even some uncertainty about the frequency with which 'multiple offence sentencing' (MOS) occurs...the Consultation document issued in preparation for the Council's 2012 totality guideline stated that about 24 per cent of cases (presumably including summary cases) came into this category, but an earlier statistical study of Crown Court sentencing found that 62 per cent of persons sentenced in that Court were convicted of two or more offences. This older Crown Court figure is roughly comparable with the proportion of MOS cases in studies of higher criminal courts in other jurisdictions; if it also reflects the contemporary situation in the Crown Court in England and Wales, then the issues around totality are not a minor matter.

Given the Council's statutory duty in this area and concerns that have been raised since the guideline's implementation, then some consideration of how we might evaluate or revise the guideline would be beneficial.

Question 3: Does the Council agree that in the first instance officials should investigate 1) scoping an overarching guideline on sentencing women, 2) evaluating the General guideline and expanded explanations, and 3) evaluating the Totality guideline?

RISKS AND IMPACT

4.1 It will not be possible to take on board all suggestions put forward as part of this section of the consultation – either because the justification for them is not strong enough or because resources do not permit this. It will be important to prioritise further guideline work on the basis of robust criteria and to provide a full justification for choices in the consultation response document.

Sentencing Council Guideline Work Plan – 2020 to 2021*

Guideline	Next Council Meeting	Consultation period	Publish definitive guideline	Definitive guideline in force¹
Revision of SC assault and SGC attempted murder guidelines	January 2021	16 April 2020 – 15 September 2020	May/ Jun 2021	TBC
Drug Offences: revision of SC guideline	December 2020	15 January 2020 – 7 May 2020	January 2021	1 April 2021
Firearms offences	N/A	9 Oct 2019 – 9 January 2020	December 2020	1 January 2021
Firearms importation offence	February 2021	TBC	TBC	TBC
What next for the Sentencing Council (Vision)	December 2020	10 March 2020 – 9 September 2020	TBC	TBC
Modern Slavery	March 2021	October 2020 – December 2021	June 2021	1 July 2021
Sexual Offences (partial revision)	December 2020	April 2021 – June 2021	TBC	TBC
Terrorism: revision of SC guideline	March 2021	22 October 2019 – 3 December 2019	TBC	TBC
Trademark offences	January 2021	July – October 2020	April 2021	1 July 2021

Guideline	Next Council Meeting	Consultation period	Publish definitive guideline	Definitive guideline in force¹
Burglary: revision of SC guideline	December 2020	May 2021 to July 2021	December 2021	January 2022
Perverting the course of justice etc	TBC	TBC	TBC	TBC
Motoring offences ²	TBC	TBC	TBC	TBC
Immigration	TBC	TBC	TBC	TBC
Cybercrime	TBC	TBC	TBC	TBC

¹ In most instances we aim to bring definitive guidelines into force quarterly, on 1 January, 1 April, 1 July and 1 October

² Timetable provisional dependent on legislative change following Government review of offences

Guidelines for consideration on future work plans (last updated 19/11/2018)

Title	Size of project	Existing guideline	Active external lobbying?	Brief reason for doing	Priority Order	Required to meet 2020 ambition?
MEDIUM TERM						
Vehicle licence/ registration fraud, Vehicle Excise and Registration Act 1994, s.44	small			40 cases in 2016. This was previously a much higher volume offence (859 cases in 2006). Possibly rarely prosecuted now 'tax discs' are not issued. Do as standalone or possibly not at all?	6	
Aggravated vehicle-taking (damage to property or vehicle) Aggravated vehicle-taking (dangerous driving or accident causing injury)	Standalone – small or part of larger g/l			1070 adult cases in 2016 (311 youth). Volumes for adults fairly stable. 666 adult cases in 2016 (161 youth). Volumes have been dropping (1789 adult and 1173 youth in 2006) Links to dangerous driving	10	

Title	Size of project	Existing guideline	Active external lobbying?	Brief reason for doing	Priority Order	Required to meet 2020 ambition?
				Should we do these two as standalone or wait for driving offences guideline?		
Dangerous Driving	Standalone –small or part of larger g/l			3361 cases in 2015 Do as part of death and injury by driving?	10	
Causing death & injury by driving	large	SGC	Yes	Required to meet ambition to replace all SGC guidelines. Awaiting changes to legislation. Will need to evaluate post-election. Best guess is that a future Government may still announce an intention to legislate but timescales highly unpredictable. Possibly incorporate other e/w driving offences	10 or as soon as settled	YES
LONG TERM						
SC guidelines for possible revision	Medium	Yes	No	Possible guidelines would be Sex, Theft, Fraud – though no issues have been found with these as yet.		
Cyber Crime - hacking	medium	NONE	No	Council has identified this as area where guidance would be useful. 37 adult cases in 2015 + 3 youths 53 adult cases in 2016 + 4 youths HHJ Deborah Taylor at Southwark says that guidance would be useful, but she highlights the youth and mental health/ learning disabilities of offenders as area courts need help with. Still awaiting response from HHJ Topolski. (now received) Police data suggests that ‘cyber’ is factor in many different types of crime from blackmail to obscene publications.		NO
Fire regulation offences	small	None	Yes repeated requests from	Was considered as part of H&S and we have told stakeholders that we will do it at some stage.		

Title	Size of project	Existing guideline	Active external lobbying?	Brief reason for doing	Priority Order	Required to meet 2020 ambition?
			London Fire brigade	London Fire Brigade estimates that there have been 500 prosecutions in the period 2009-2016. They are keen to work with us on this		
Wildlife	medium	NONE	Yes – WWF provided detailed report.	Low volumes. Possibility of legislative changes? Would provide help & improve consistency in area that courts do not see often. http://www.lawcom.gov.uk/wp-content/uploads/2015/11/lc362_wildlife_vol-1.pdf		NO
Planning Offences	Medium?	NONE	Yes	Analogous to environmental or H&S; difficult regulatory offences 624 cases in 2016		NO
Landlord, HMO offences	Medium?	NONE	Yes	As above – serious issue in some large cities. 160 cases in 2016		NO
Data Protection offences	Small?	NONE	Yes in 2010 from MoJ	To improve consistency 26 cases in 2015		NO
'Old age' (<i>overarching principles</i>)	Small?	NONE	No	Increasingly an issue with aging prison population especially as a result of historic sex offences - CACD has given guidance in this area		NO
Prisoner offences (<i>overarching principles</i>)	Large if includes offence specific	NONE	Yes	There are offences specific to serving prisoners, but the requests we have had centre more on ensuring that consecutive sentences are passed to deter offending by serving offenders.		NO
Sentencing women and/or sentencing sole or primary carers (<i>o/p</i>)	Small?	NONE	Yes – including PRT but maybe not a stand-alone guideline	Topical issue – Sarah gave evidence to the all party parliamentary group for women in the penal system. Ties in with imposition. Ashworth suggests this is a gap. Potentially could be covered as part of seriousness?		NO
Offences against	Small-medium	NONE	No	Analogous to some child cruelty offences.		NO

Title	Size of project	Existing guideline	Active external lobbying?	Brief reason for doing	Priority Order	Required to meet 2020 ambition?
vulnerable adults						
Totality / TIC	medium	YES - SC	No	The Bottoms report suggests that there is inconsistent application of the current guideline and more research is needed		NO (current guideline is in force)
FGM	medium	NONE	No	Expectations raised by including FGM in child cruelty.		NO
Child abduction	small	None But there is CACD guidance	No but Ashworth mentions it in CLR article	CACD felt it necessary to give some guidance to sentencers – so should the Council produce a guideline?		No
Sentencing young adults	small	None – some case law	No – Ashworth mentions it in his article	All guidelines currently have ‘age or lack of maturity’ as a mitigating factor. Perhaps we could amplify this guidance?		No
Blackmail	small	None	No	Serious offence with links to other types of offending (fraud, cyber, intimidatory)		No
Kidnap and false imprisonment	small	None	NO	Serious offences 136 cases in 2016– could also include child abduction (about 100 cases per year). See R v RH and LA [2016] EWCA Crim 1754 re child abduction		NO

Sentencing Council Meeting Dates 2021

The meetings will start at 9:45 and end at 16:30, these times may change depending on workload etc.

Friday 29 January 2021 – Microsoft Teams

Friday 12 February 2021 – Microsoft Teams

Friday 5 March 2021 – Microsoft Teams

Friday 16 April 2021 – Microsoft Teams

Friday 21 May 2021 – RCJ Queen's Conference Room

Friday 25 June 2021 – RCJ Queen's Conference Room

Friday 30 July 2021 – RCJ Queen's Conference Room

Friday 24 September 2021 – RCJ Queen's Conference Room

Friday 22 October 2021 – RCJ Queen's Conference Room

Friday 19 November 2021 – RCJ Queen's Conference Room

Friday 17 December 2021 – RCJ Queen's Conference Room

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Sentencing Council Meeting Dates 2022

The meetings will start at 9:45 and end at 16:30, these times may change depending on workload etc.

Friday 28 January 2022 – RCJ Queen's Conference Room

Friday 4 March 2022 – RCJ Queen's Conference Room

Friday 8 April 2022 – RCJ Queen's Conference Room

Friday 13 May 2022 – RCJ Queen's Conference Room

Friday 17 June 2022 – RCJ Queen's Conference Room

Friday 22 July 2022 – RCJ Queen's Conference Room

Friday 23 September 2022 – RCJ Queen's Conference Room

Friday 21 October 2022 – RCJ Queen's Conference Room

Friday 18 November 2022 – RCJ Queen's Conference Room

Friday 16 December 2022 – RCJ Queen's Conference Room

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