Sentencing Council | 10 years

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8 April 2021

Dear Members

Meeting of the Sentencing Council – 16 April 2021

The next Council meeting will be held via Microsoft Teams, the link to join the meeting is included below. **The meeting is Friday 16 April 2021 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:

▪ Agenda	SC(21)APR00
▪ Minutes of meeting held on 5 March	SC(21)MAR01
▪ Action log	SC(21)APR02
▪ Trade mark	SC(21)APR03
▪ Assault	SC(21)APR04
▪ What next for the Sentencing Council – Miscellaneous	SC(21)APR05
▪ What next for the Sentencing Council – Effectiveness	SC(21)APR06
▪ Firearms	SC(21)APR07

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

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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Sentencing Council

COUNCIL MEETING AGENDA

16 April 2021
Virtual Meeting by Microsoft Teams

09:30 – 09:45	Minutes of the last meeting and matters arising - (papers 1 and 2)
09:45 – 10:45	Trade mark - presented by Ruth Pope (paper 3)
10:45 – 11:00	Break
11:00- 12:00	Assault - presented by Lisa Frost (paper 4)
12:00 – 12:15	Break
12:15 – 12:45	What next for the Sentencing Council – miscellaneous issues - presented by Ruth Pope (paper 5)
12:45 – 13.30	What next for the Sentencing Council – effectiveness - presented by Lisa Frost (paper 6)
13:30 – 14:15	Firearms Importation - presented by Ruth Pope (paper 7)

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COUNCIL MEETING AGENDA

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MEETING OF THE SENTENCING COUNCIL

5 MARCH 2021

MINUTES

Members present:	Tim Holroyde (Chairman) Rosina Cottage Rebecca Crane Rosa Dean Nick Ephgrave Michael Fanning Diana Fawcett Adrian Fulford Max Hill Jo King Juliet May Maura McGowan Alpa Parmar Beverley Thompson
Apologies:	None
Representatives:	Elena Morecroft for the Lord Chief Justice (Legal and Policy Advisor to the Head of Criminal Justice) Amy Randall for the Lord Chancellor (Deputy Director – Sentencing Team) Phil Douglas for the Lord Chancellor (Head of Custodial Sentencing Policy)
Observers:	Hannah Von Dadelszen (Crown Prosecution Service) Samantha White (Criminal Appeal Office)
Members of Office in attendance:	Steve Wade Mandy Banks Lisa Frost Emma Marshall Ollie Simpson

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 12 February 2021 were agreed.

2. MATTERS ARISING

2.1 The Chairman noted that this would be the last Council meeting for Majid Bastan-Hagh who was leaving to take up a role at BEIS. He thanked Majid for his work in the analysis and research team and in particular for setting up the current magistrates' court data collection.

2.2 The Chairman drew attention to a report recently published by the Magistrates' Association, 'Maturity in the magistrates' court' relating to the issue of lack of maturity as a mitigating factor. It was noted that one of the recommendations of the report was that training for magistrates should incorporate the Sentencing Council's expanded explanation on lack of maturity.

2.3 The Chairman reported that Lisa Frost had given a presentation to probation court staff on the Imposition guideline to help them understand the assessment sentencers have to undertake when considering imposing community and custodial sentences and to ensure PSR proposals align with the guideline.

2.4 The Chairman noted that Rosa Dean had given a presentation on the Sentencing offenders with mental disorders, developmental disorders, or neurological impairments guideline to delegates at the Royal College of Psychiatry's Forensic Psychiatry Faculty conference.

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

3.1 The Council considered consultation responses to the draft guideline for common assault and the related offence of assault on emergency workers.

3.2 The Council considered points raised in respect of relativity between sentences for racially and religiously aggravated common assaults and proposed sentences for offences committed against an emergency worker.

3.3 It was noted that currently legislation provides for double the statutory maximum sentence for racially and religiously aggravated offences but the Government intends to increase the statutory maximum sentence for assaults on emergency workers to be equivalent to racially and religiously aggravated offences.

3.4 This raised the question as to whether the approach for sentencing the offences should differ, as each are aggravated versions of the basic common assault offence, and the aggravation is provided for in the same way by legislation.

3.5 The Council considered this point in detail and noted the challenges posed in specifying different approaches to sentencing the offences and potentially appearing to apportion greater weight to one type of aggravation than another when legislation treats them in the same way.

3.6 The Council debated the issue extensively and concluded that different approachs would be undesirable. It was agreed that a consistent approach should be taken to aggravated offences in guidelines.

3.7 Sentences for the basic offence were also considered, and it was agreed that starting points should be increased in the lower seriousness categories. As well as properly reflecting offence seriousness, this would also provide for a greater uplift in comparable sentences against emergency workers.

3.8 The Council also considered responses in respect of culpability and harm factors. A number of revisions to factors were agreed to address issues raised by respondents, including enhanced guidance on factors to consider as part of the harm assessment.

4. DISCUSSION ON SEXUAL OFFENCES – PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL

4.1 The Council considered the consultation stage resource assessment for the revisions to the sex offence guidelines, and agreed additional guidance for sentencers on ancillary orders, and some additions to bring mitigating factors into line with those used elsewhere. The draft revisions and the new guidelines for sexual communication with a child were then signed off for consultation.

5. DISCUSSION ON BURGLARY– PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL

5.1 This was the last meeting to discuss the revision of the guideline ahead of consultation in the summer. The Council considered and agreed the recommendations from the working group regarding the guidelines. This included adding some wording in the domestic burglary guideline regarding cases of particular gravity, and a solution to the issue of potential double counting with the ‘weapon present on entry’ factor.

5.2 The draft resource assessment was also presented and discussed, the Council noted its contents, and made some suggestions for minor changes to wording and some additional detail. The guideline was then signed off ahead of the consultation.

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

6.1 The Council considered consultation responses in relation to analytical work. This included whether there are any technical aspects of the Council's work that could be enhanced, including in the area of data collection, and sources of information to draw upon for resource assessments and evaluations. More in-depth consideration of these areas will be undertaken and then discussed further at a later Council meeting.

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SC(21)APR02 April Action Log

ACTION AND ACTIVITY LOG – as at 8 April 2021

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 12 February 2021					
1	**Firearms importation**	Chairman and guideline lead to discuss membership of working group and meeting to be arranged to refine a draft of the guideline for consideration by the Council at the April meeting,	**Tim Holroyde, Maura McGowan, Adrian Fulford, Rosina Cottage and Ruth Pope**		**ACTION CLOSED**: Working group met on 5 March. Outcomes to be discussed at April meeting.
SENTENCING COUNCIL MEETING 5 March 2021					
2	**Vision consultation: analysis and research**	It was suggested that we link in with the MoJ group that is looking at data in relation to the future of the CJS and recovery from Covid. Nick Ephgrave agreed to facilitate contact between the A&R team and the group.	**Nick Ephgrave and Emma Marshall**		**ACTION CLOSED:** NE has facilitated this contact and EM has had an initial meeting; a further meeting is to be scheduled.

Sentencing Council

Sentencing Council meeting:	**16 April 2021**
Paper number:	**SC(21)APR03 – Trade mark**
Lead Council member:	**Mike Fanning**
Lead official:	**Ruth Pope**

1 ISSUE

1.1 From 7 July to 30 September 2020 the Council consulted on guidelines for the offence of unauthorised use of a trade mark; one for individuals and one for organisations.

1.2 At the January meeting the Council considered the responses to the consultation and the results of research carried out with sentencers, in relation to the guideline for individuals. The Council felt that further detailed consideration should be given to the guideline, particularly to the assessment of culpability and harm to ensure that proportionate sentences would result where the goods were unsafe.

1.3 A working group met on 12 February to consider these issues and two Trading Standards experts attended to provide Council members with an insight into how investigations and prosecutions operate in practice.

1.4 The aim is to sign off both guidelines at the May Council meeting with a view to publication in early July and to come into force on 1 October.

2 RECOMMENDATION

2.1 That the Council agrees whether the trade mark guidelines should increase sentence levels in cases where there are safety risks and, if so, how this should be achieved.

2.2 That the Council agrees any further changes to the guideline for individuals.

3 CONSIDERATION

3.1 This paper concentrates on the guideline for individuals though many of the same points apply to the guideline for organisations. The draft guideline for individuals can he found here: https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/individuals-unauthorised-use-of-a-trade-mark-draft-for-consultation-only/ . A revised version incorporating the changes agreed at the January meeting is at **Annex A**.

Culpability and harm

3.2 In January the Council agreed with suggestions that the wording of culpability factors in the consultation version was too general and so provided limited assistance to sentencers

who are usually unfamiliar with sentencing this offence. The Council also agreed that the guideline should be clear that high culpability could apply to offenders acting alone.

3.3 It was agreed in the first instance that the high culpability factors should be reordered so that the factor 'Sophisticated nature of offence/significant planning' comes first (medium and lesser factors have also been reordered). The Council considered (but no conclusion was reached) amending this factor to give some non-exhaustive examples of what might indicate sophisticated offence/significant planning in the context of this offence. Following suggestions from the experts, further suggested examples have been added see 3.15 below.

3.4 The Council had also considered whether the assessment of culpability and harm adequately captured cases where there are significant safety risks from the counterfeit goods. The 'significant additional harm' relating to risk of injury raises such cases one harm level, but where the equivalent retail value is low but the potential harm is great, the concern was whether the guideline would produce a proportionate sentence.

3.5 What was unclear was what other charges might be brought in such cases. The Trading Standards representative on the working group explained that most offences under safety regulations are summary only and that in his experience 'where cases involve breaches of both the Trade Mark Act (TMA) and safety regulations prosecuting lawyers will generally recommend proceeding with the TMA offences alone. Evidence of breach of safety regulations is then included as an aggravating factor in respect to any charges brought under TMA'.

3.6 He explained the type of evidence likely to be before the court in such cases. 'Either:

- Trading Standards will have submitted items for independent expert testing against specific safety regulations, such evidence may or may not be used to support additional charges in respect to breaches of those regulations or
- Rights owners will submit evidence relating to independent or in-house expert testing on the products in question. Such evidence will generally reference the potential risks for consumers arising from use of such products and may or may not reference specific safety regulations'

3.7 He agreed that it may be easier to provide evidence of wilful blindness to risks rather than evidence that the goods fail to comply with regulations. It was pointed out in consultation responses that counterfeit goods seized are often a mix of different brands and different types of items and it will often only be possible to test a sample.

3.8 A related issue is the extent to which purchasers are aware that they are buying counterfeit goods or are deceived into thinking that the goods are genuine, which may in some cases have a bearing on safety issues. The experts explained that it is not uncommon for purchasers to be aware that they are buying counterfeit goods but there are instances of

purchasers being misled particularly with online sales (an example of such a case was that of Gary Bellchambers). The images shown online may be of a genuine product, and purchasers often think they are getting a genuine bargain. In some cases, the counterfeiters use a clone of the genuine website to deceive purchasers.

3.9 There are various ways that the issue of unsafe goods could be approached. The guideline as consulted on already provides an uplift to the harm level in cases where there is significant additional harm and one example of such harm is 'Purchasers put at risk of significant physical harm from counterfeit items'. The evidence we have of current sentencing practice from transcripts is incomplete as we only have a sample of cases and the transcripts often contain very limited information, but it appears that the version consulted on would already result in an increase in sentences for some cases (particularly those relating to the sale of counterfeit tobacco on a relatively small scale). There were no examples in the transcripts of cases with a safety element that would receive a lower sentence using the consultation version of the guideline.

3.10 If the Council wishes to set effectively a minimum level of sentence for any case involving counterfeit goods with the potential to cause physical harm, this could be achieved by adding a high culpability factor such as 'Offender was reckless as to whether the counterfeit goods complied with safety regulations'. The combined effect of culpability and harm factors would be that any offender involved in the supply of potentially dangerous goods of low equivalent retail value (less than £5,000) would be in category A4 (range of 26 weeks' – 2 years custody) unless there were low culpability factors which balanced out the high, in which case it would be category B4 (range of community order – 26 weeks' custody).

3.11 If a culpability factor relating to recklessness as to safety were introduced, this (combined with the harm uplift) is likely to lead to increases in almost all cases where safety is an issue (compared to current sentencing practice). Cases that would be unaffected by the change to culpability would be those that were already in high culpability. One potential difficulty with this suggestion is that it risks double counting.

3.12 An alternative suggestion would be to say that any case involving unsafe goods should be in at least harm category 3. This would have the effect of putting many low value cases into B3 (range 26 weeks' – 2 years' custody). Sentence levels would be increased only for low value cases (equivalent retail value less than £5000) involving unsafe goods compared to the consultation version.

3.13 A third alternative would be to add an aggravating factor along the lines of 'offender was reckless as to whether the counterfeit goods complied with safety regulations'. This

would have less of an impact on sentence outcomes in some situations but would have the advantage of applying to all levels of harm and culpability.

3.14 The nearest equivalent that we have to a guideline for selling unsafe goods relates to breach of food safety regulations which carry a maximum sentence of two years. In that guideline only the very highest category has a starting point of custody.

3.15 An attempt has been made to incorporate the features discussed at paragraphs 3.3 to 3.8 into culpability factors (changes from the consultation version are highlighted in yellow):

Culpability

The level of culpability is determined by weighing up all the factors of the case to determine the offender's **role** and the extent to which the offending was **planned** and the **sophistication** with which it was carried out.

A – High culpability

- Sophisticated nature of offence/significant planning (examples **may** include but are not limited to: the use of multiple outlets or trading identities for the sale of counterfeit goods, the use of multiple accounts for receiving payment, the use of professional equipment to produce goods, deceiving purchasers that the goods are genuine, offending over a sustained period of time)
- Offender was reckless as to whether the counterfeit goods complied with safety regulations
- A leading role where offending is part of a group activity
- Involvement of others through coercion, intimidation or exploitation

B – Medium culpability

- Some degree of organisation/planning involved
- A significant role where offending is part of a group activity
- Other cases that fall between categories A or C because:
  - Factors are present in A and C which balance each other out **and/or**
  - The offender's culpability falls between the factors as described in A and C

C – Lesser culpability

- Little or no organisation/planning
- Performed limited function under direction
- Involved through coercion, intimidation or exploitation
- Limited awareness or understanding of the offence

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

3.16 The wording of any high culpability factor relating to unsafe goods could be tightened. For example: 'Offender falsely asserted or implied that the counterfeit goods complied with safety regulations' and potentially 'Offender failed to take steps to ensure the counterfeit goods complied with safety regulations' at medium culpability.

3.17 The harm factors proposed below are as discussed at the January meeting with alternative wording as discussed at paragraph 3.12 highlighted in yellow:

Harm

The assessment of harm for this offence involves putting a monetary figure on the offending with reference to the **retail value of equivalent genuine goods** and assessing **any significant additional harm** suffered by the trade mark owner or purchasers/ end users of the counterfeit goods:

1. Where there is evidence of the volume of counterfeit goods sold or possessed, the monetary value should be assessed by taking the **equivalent retail value of legitimate versions** of the counterfeit goods involved in the offending (where this cannot be accurately assessed an estimated equivalent retail value should be assigned);
2. Where there is no evidence of the volume of counterfeit goods sold or possessed:
   a. In the case of labels or packaging, harm should be assessed by taking the **equivalent retail value of legitimate goods** to which the labels or packaging could reasonably be applied, taking an average price of the relevant products.
   b. In the case of equipment or articles for the making of copies of trade marks, the court will have to make an assessment of the scale of the operation and assign an equivalent value from the table below.

Note: the equivalent retail value is likely to be considerably higher than the actual value of the counterfeit items and this is accounted for in the sentence levels, however, in **exceptional** cases where the equivalent retail value is grossly disproportionate to the actual value, an adjustment **may** be made.

The general harm caused to purchasers/ end users (by being provided with counterfeit goods), to legitimate businesses (through loss of business) and to the owners of the trade mark (through loss of revenue and reputational damage) is reflected in the sentence levels at step 2.

Examples of **significant additional harm** may include but are not limited to:

- Substantial damage to the legitimate business of the trade mark owner (taking into account the size of the business)
- Purchasers/ end users put at risk of ~~significant~~ physical harm from counterfeit items.

Where purchasers/ end users are put at risk of significant physical harm from counterfeit items harm category 3 or higher should normally be used.

	Equivalent retail value of legitimate goods	Starting point based on
Category 1	£1million or more **or** category 2 value with significant additional harm	£2 million
Category 2	£300,000 – £1million **or** category 3 value with significant additional harm	£600,000
Category 3	£50,000 – £300,000 **or** category 4 value with significant additional harm	£125,000
Category 4	£5,000 – £50,000 **or** category 5 value with significant additional harm	£30,000
Category 5	Less than £5,000 **and** little or no significant additional harm	£2,500

3.18 The highlighted section could be reworded, for example: ‘Where purchasers/ end users are put at risk of **serious** physical harm from counterfeit items harm category 3 or higher should normally be used**’.**

3.19 Another issue considered by the working group was whether the guideline should take account of the level of profit from the offending. As harm levels are largely based on equivalent retail value, no distinction is made, for example, between two offenders selling handbags that if genuine would retail at £500, one who sells them for £200 and one who sells them for £20. The issue of profitability is more complicated than that, as it will also depend on how much the offender has paid for the goods.

3.20 A possible way of capturing profitability could be to include ‘high level of profit’ in a list of examples indicating the sophistication of the offence (see 3.15 above). Alternatively, it could be added as an aggravating factor (see below).

Question 1: Should the guideline include additional factors relating to unsafe goods? If so, how should this be achieved?

Question 2: Should any other changes be made to culpability or harm factors (such as the suggested examples of sophisticated offending)?

Aggravating and mitigating factors

3.21 High level of profit is a factor that is mentioned in at least two of the transcripts. A significant level of profit is likely to be present in many if not most cases in high culpability and there is a risk double counting to include it as an aggravating factor. An aggravating factor of ‘high level of profit from the offending’ or ‘expectation of substantial financial gain’ could be added. There is some scope for misunderstanding factors relating to profit or actual gain as it is often the case that those prosecuted for this offence will have their stock forfeited and be subject to confiscation proceedings and so at the point of sentence any prospect of profit or gain will have been removed. Therefore ‘expectation of substantial financial gain’ could be preferable as an aggravating factor.

3.22 This could be balanced with a mitigating factor of ‘little or no actual gain from the offending’ or ‘no expectation of significant financial gain’. There is some overlap with the additional wording already agreed in the harm assessment to cater for situations where the equivalent retail price is very high compared to the price at which the offender was selling the goods:

> Note: the equivalent retail value is likely to be considerably higher than the actual value of the counterfeit items and this is accounted for in the sentence levels, however, in **exceptional** cases where the equivalent retail value is grossly disproportionate to the actual value, an adjustment **may** be made.

Depending on the decisions made relating to increasing harm for low value cases with safety concerns and the inclusion of an aggravating factor, it may be necessary to include a mitigating factor that recognises that the offender may have expected and/or in fact received very little gain from the offending.

Question 3: Does the Council wish to make any changes to aggravating and mitigating factors?

Sentence levels

3.23 The consultation document stated:

> The Council's intention is broadly to maintain current sentencing practice while promoting greater consistency.
>
> In 2018 44 per cent of adult offenders sentenced received a community sentence, 33 per cent received a fine, 11 per cent received a suspended sentence, 5 per cent were sentenced to immediate custody and 3 per cent were given a discharge. In 2018 the average (mean) immediate custodial sentence length (after any reduction for a guilty plea) was ten months and no sentences exceeded 36 months.

3.24 Consultation responses were generally supportive of the proposed sentence levels but with suggestions from some that sentences were too low and from other that they were too high. In road testing several judges felt that sentence levels seemed high compared to other 'serious' criminal offences. The sentence levels were set with reference to the fraud sentence levels (they are pitched slightly lower than the sentences for false accounting which has a statutory maximum of 7 years).

3.25 The changes to harm and culpability discussed above are intended to increase sentence levels for some cases involving unsafe goods. Once decisions are made about those factors an estimate of the impact on overall sentence levels can be made. There will inevitably be a high degree of uncertainty because of the lack of information we have about the detail of most cases, but the likelihood is that sentence levels may increase.

3.26 These offences are prosecuted by local authority trading standards departments and it is possible that if sentencing guidelines increase sentence levels it will encourage more prosecutions particularly of the types of offending that will attract higher sentences under the guideline than previously.

3.27 If sentences are to rise for some cases, it might make sense to increase the top of the offence range from 6 years to 7 years. This would cater for the most serious cases (such as Bellchambers mentioned at 3.8 above). There are no proposals to change any of the other starting points or ranges, as any changes to sentence levels will be the result of changes to factors in the guideline.

Question 4: Does the Council agree to increase the top of the range in A1 to 7 years?

Steps 3 to 8

3.28 There was evidence from consultation responses and from road testing that magistrates often did not understand the difference between confiscation and forfeiture orders at step 6. Respondents variously suggested that the guideline should make it clear that if confiscation is being considered the case must be committed to the Crown Court; that there should be more information about disqualification as a company director and deprivation orders; and that the information on s97 forfeiture order could be re-worded to make it more understandable. The Trading Standards representative at the working group noted:

> In my experience another common area of confusion exists around the valuation assigned to the goods and the purposes for which this is being done i.e. for sentencing purposes the valuation of the goods (as discussed in this document) will be a comparison with the genuine retail price. However, for POCA confiscation purposes the valuation will be the 'street value' of the goods. Perhaps this could also be dealt with in the guidance?

3.29 A suggested amended version is provided below (additions highlighted)

> The court must proceed with a view to making a **confiscation order** if it is asked to do so by the prosecutor or if the court believes it is appropriate for it to do so.
>
> Confiscation orders under the Proceeds of Crime Act 2002 may only be made by the Crown Court. An offender convicted of an offence in a magistrates' court must be committed to the Crown Court where this is requested by the prosecution with a view to a confiscation order being considered (Proceeds of Crime Act 2002, s.70).
>
> (Note: the valuation of counterfeit goods for the purposes of confiscation proceedings will not be the same as the valuation used for the purposes of assessing harm in this sentencing guideline.)
>
> Where the offence has resulted in loss or damage the court must consider whether to make a **compensation order**.
>
> If the court makes both a confiscation order and an order for compensation and the court believes the offender will not have sufficient means to satisfy both orders in full, the court must direct that the compensation be paid out of sums recovered under the confiscation order (section 13 of the Proceeds of Crime Act 2002).
>
> **Forfeiture – s.97 Trade Marks Act 1994**
>
> ~~On the application for forfeiture by a person who has come into possession of goods, materials or articles in connection with the investigation or prosecution of the offence,~~
>
> The prosecution may apply for forfeiture of goods or materials bearing a sign likely to be mistaken for a registered trademark or articles designed for making copies of such a sign. The court shall make an order for ~~the~~ forfeiture ~~of any goods, material or articles~~ only if it is satisfied that a relevant offence has been committed in relation to the goods, material or articles. A court may infer that such an offence has been committed in relation to any goods, material or articles if it is satisfied that such an offence has been committed in relation to goods, material or articles which are representative of them (whether by reason of being of the same design or part of the same consignment or batch or otherwise).

The court may also consider whether to make other ancillary orders. These may include a **deprivation order** and **disqualification from acting as a company director**.

- Ancillary orders – Magistrates' Court
- Ancillary orders – Crown Court Compendium, Part II Sentencing

3.30 In the proposed version above links have been added for 'deprivation order' and 'disqualification from acting as a company director', to the relevant pages of the MCSG explanatory materials. Whilst this information is aimed at magistrates, it would also be applicable in the Crown Court. The information on forfeiture is designed to reflect the legislation in a comprehensible form.

Question 5: Does the Council agree with the proposed amendments to step 6?

4 IMPACT AND RISKS

4.1 As outlined above, the impact of the definitive guidelines will depend on the decisions made at this meeting. Any changes to the Council's stated intention to maintain current sentencing practice will need to be explained in the response to consultation document.

4.2 A revised resource assessment for the definitive guidelines will be provided at the May meeting.

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Sentencing Council

Sentencing Council meeting: 16 April 2021
Paper number: SC(21)APR04 – Assault
Lead Council member: Rosa Dean
Lead officials: Lisa Frost
0207 071 5784

1 ISSUE

1.1 This meeting is the final meeting to consider outstanding issues and sign off the definitive Assault guidelines. It is intended that the guidelines be published in May and come into force in July 2021.

2 RECOMMENDATION

2.1 That the Council:

- considers the summary of changes made to the Assault guidelines based on consultation responses and additional research;
- finalises a number of outstanding issues including consideration of statistical evidence and responses relating to Equality and Diversity issues and;
- sign off the definitive guidelines.

3 CONSIDERATION

3.1 The draft revised Assault guidelines are included at Annex A. Changes made since consideration of consultation responses commenced in October are highlighted for ease of review. This paper summarises the changes agreed by the Council and seeks confirmation of outstanding issues and sign off the definitive guidelines subject to considering the resource assessment, for which a verbal update will be provided at the meeting. The full resource assessment will be finalised and circulated after the meeting.

3.2 There are a number of substantive issues to consider. These include sentences for the offence of assault with intent to resist arrest; finalising factors for the common assault guideline and the aggravated offence of common assault of an emergency worker and; considering equality and diversity issues and how evidence of sentencing disparity for some offences should be highlighted in the definitive guidelines.

Common Assault and related offences

3.3 The Council considered issues raised in respect of the common assault guideline and emergency workers guideline at the last meeting. As well as considering a number of changes to factors, significant discussion regarding the approach to uplifting sentences for assaults on emergency workers were discussed in light of the likelihood that these will shortly share the same statutory maximum sentence with racially and religiously aggravated common assault. The Council considered the difficulty in justifying different approaches to sentencing the offences if there is parity between their same statutory maximum sentences, and legislation provides in the same way for them to be aggravated forms of the basic offence. It was therefore agreed the uplift approach should be adopted for the emergency workers offence, to avoid criticism that racially and religiously aggravated offences are not considered to be as serious by the Council, and to avoid the need to significantly revise the guideline at the point further legislative changes are made. A digital presentation of the revised guideline will be available for review at the meeting.

3.4 Annex A illustrates changes agreed.

Culpability factors

3.5 Amendments made to the consultation version of culpability factors were as follows:

- The vulnerable victim factor wording was aligned with the ABH and GBH guideline wording to remove the ‘targeting’ element. This will provide for any victim vulnerable by circumstances or characteristics to be captured.
- It was agreed that prolonged assault should be rephrased to ‘prolonged/persistent assault’
- the strangulation factor should be expanded to include suffocation and asphyxiation and.

- The working group considered a number of outstanding issues from the last meeting and agreed that 'Excessive self-defence' should be included as a step one culpability factor.

3.6 No other changes to culpability factors were made, although the Council is asked to consider the factors in light of the decision to amend the approach to sentencing assaults on emergency workers. In the draft emergency workers guideline the vulnerable victim factor was not included as it was considered that the increased statutory maximum sentence took the vulnerability of the emergency worker and the greater risk they are exposed to into account. However, if the seriousness assessment will be undertaken with reference to common assault factors it may be inappropriate to qualify the vulnerability factor as not applicable to emergency workers, and to allow for capturing of those who are vulnerable by circumstances, such as medical staff alone in a treatment room. The factor would be applicable to racially and religiously aggravated offences.

Question 1: Does the Council agree the vulnerable victim factor should be applicable to the standard and aggravated offences?

Harm

3.7 It was agreed that the harm model should be amended to include enhanced guidance on factors to be considered in undertaking the harm assessment. These amendments are illustrated at Annex A.

Sentences

3.8 It was agreed that sentences should be increased in the lower seriousness categories, due to concerns raised in respect of fines being too low as a starting point for these offences. These will also provide for increased sentences for emergency worker offences.

Aggravating factors

3.9 The Council did not have sufficient time at the last meeting to consider all questions raised in respect of aggravating factors, so these have been considered by the working group. The working group considered whether 'spitting/coughing' should be qualified as deliberate; if biting should be included as an aggravating factor and; if

the factor ‘presence of children’ should be expanded to ‘presence of children or relatives of the victim’. The working group have decided that;

- The aggravating factor ‘Presence of children’ should not be expanded to include other relatives.

3.10 Views of the working group were split on the other two issues, which the full Council is asked to consider. The first is whether biting should be included as an aggravating factor. It is thought that as the common assault guideline will be used to assess the seriousness of assaults on emergency workers and biting is a common feature of assaults on police officers, that it should be explicitly provided for.

Question 2: Does the Council think that biting should be included as an aggravating factor in the common assault guideline?

3.11 The second issue was whether spitting/coughing should be qualified as ‘deliberate’. One working group member thought that to add ‘deliberate’ would give rise to problems if, for example, the defendant showers his victim with spittle when shouting abuse and threats. It was thought that sentencers will be able to recognise if the defendant coughed because of a medical condition (which was a concern of some consultation respondents) and would not take the factor into account in such circumstances. A different view was that a ‘reckless’ cough or spit is frequently offered as a basis of plea, so it could be useful to clarify.

3.12 A further point made in relation to the spitting factor which was not addressed at the last meeting was that a number of respondents highlighted the risk of double counting where this is the method of the high culpability factor relating to threat of disease transmission. It is proposed that this risk should be highlighted and the standard wording included (where not taken into account at step one) for this factor.

Question 3: Does the Council think that spitting/coughing should be qualified as ‘deliberate’, and should the factor also be qualified with ‘where not taken into account at step one’?

Aggravated common assault – Racially and religiously aggravated and Emergency workers

3.13 The approach to sentencing aggravated offences in guidelines is that the seriousness of the substantive offence is assessed and the aggravation is then considered after the provisional sentence has been determined.

3.14 A visual illustration of the proposed digital guideline will be presented at the meeting. It is proposed that the approach instruct sentencers as follows;

Having determined the category of the basic offence to identify the sentence of a non-aggravated offence, the court should now apply an appropriate uplift to the sentence in accordance with the guidance below. **The sentence uplift may considerably exceed the standard offence category range.**

Question 4: Is the Council content with the instruction that the sentence uplift may considerably exceed the category range?

3.15 The Council will be asked to consider on viewing the guideline at the meeting if assessing the aggravation should be defined as a step in the guideline and constitute step 3. This will give greater prominence to the section when viewed digitally and explanatory text can be included to signpost sentencers of where they will consider the uplift for the aggravated offence. This would require the same approach to be taken in other guidelines with separate racial and religiously aggravated offences, although this will not be a difficult change to effect.

Question 5: Should assessment of aggravation constitute step 3 of the common assault guideline?

3.16 While the factors relevant to determining the level of racially and religiously aggravated offences are already determined and are included in other guidelines, the Council is asked to confirm which element of the offence should be considered in identifying the appropriate uplift for emergency worker offences. At the last meeting it was proposed that the level of aggravation could be assessed with reference to either the harm category, or the full offence category but the Council did not fully consider and is asked to confirm the basis of the aggravation assessment.

Harm Category 1 OR A1	Increase the length of custodial sentence if already considered for the basic offence **or** consider a custodial

	sentence, if not already considered for the basic offence.
Harm Category 2 OR A2/B1	Consider a significantly more onerous penalty of the same type **or** consider a more severe type of sentence than for the basic offence.
Harm Category 3 OR A3/B2/B3	Consider a more onerous penalty of the same type identified for the basic offence.

Question 6: Should the level of aggravation in an assault on an emergency worker offence be determined by the full offence category or the harm category?

Question 7: Does the Council agree to sign off the common assault guideline?

Assault with Intent to Resist Arrest

3.17 Decisions on the assault with intent to resist arrest guideline were subject to the approach to be taken for assaults on emergency workers. The evaluation of the existing guideline did not include assault with intent to resist arrest due to low volumes of offences, but the offence was included in the revised guideline.

3.18 Culpability and harm factors for this offence were the same as for the emergency workers offence. The consultation explained as follows;

Although this offence can be charged where an assault is committed against any individual seeking to apprehend or detain an offender, the most likely victims would be police officers assaulted in the course of their duty. Given the similarity between offences and that the offence is effectively assault on an emergency worker with the additional element of intending to resist arrest, the Council decided that the same culpability and harm factors as agreed for the Assault on emergency workers guideline should be included for this offence.

The Council did consider whether the resisting arrest element of the offence represented broader harm than for common assault in that it may relate to an offender resisting arrest and evading justice. However, the Council decided that the same principle applied as for the emergency workers offence in that this broader harm is

inherent in the higher statutory maximum sentence. The offence will still be common assault as a more serious offence would otherwise be charged; it is the circumstances in which the assault is committed which differs.

3.19 The guideline does not include the vulnerable victim factor for the same reason as it was not included in the emergency workers guideline. The decision in respect of whether that factor should now be qualified in respect of emergency workers will also be relevant here, although this offence could be committed against a non-emergency worker.

Sentences

3.20 Volumes of this offence are low with 106 offenders sentences in 2019. Statistics on sentence distribution from 2015 onwards are as follows;

Outcome	**2015**	**2016**	**2017**	**2018**	**2019**
Absolute and conditional discharge	9%	8%	2%	5%	2%
Fine	26%	19%	22%	22%	28%
Community sentence	21%	26%	27%	31%	32%
Suspended sentence	11%	16%	12%	10%	12%
Immediate custody	31%	27%	35%	26%	20%
Otherwise dealt with	1%	4%	1%	6%	6%

3.21 In the draft guideline sentences for this offence were increased considerably from the existing guideline levels purely to achieve relativity with emergency worker sentences, as this offence is effectively the same but with the added element of resisting arrest. The existing sentences are as follows;

Offence Category	**Starting Point** *(Applicable to all offenders)*	**Category Range** *(Applicable to all offenders)*
Category 1	26 weeks' custody	12 weeks' – 51 weeks' custody
Category 2	Medium level community order	Low level community order – High level community order
Category 3	Band B fine	Band A fine – Band C fine

3.22 Given the decision made in respect of the emergency workers offence which removes the need for relativity to be illustrated, the Council is asked to consider if sentences should be revised from consultation proposals as it may now be difficult to justify such significant increases and a number of respondents raised concerns about them. The statutory maximum sentence for this offence is two years' custody. It is possible that these sentences may be looked to as an indication of appropriate sentences for an assault on emergency workers offence if the statutory maximum

sentences are aligned, so relativity remains an important consideration. If the Council thinks that sentences should not now be increased, alternative sentences are included below for consideration;

HARM	CULPABILITY	
	A	B
Harm 1	**Starting point** 26 weeks' custody **Category Range** 12 weeks – 1 year's custody	**Starting point** 12 weeks' custody **Category Range** High level community order - 26 weeks' custody
Harm 2	**Starting point** 12 weeks' custody **Category Range** High level community order - 26 weeks' custody	**Starting point** High level community order **Category Range** Low level community order – 26 weeks custody
Harm 3	**Starting point** High level community order **Category Range** Low level community order – 26 weeks' custody	**Starting point** Medium level community order **Category Range** Band C fine – High level community order

Question 8: Does the Council think that sentences for Assault with intent to resist arrest should be revised?

Question 9: Subject to question 8, does the Council agree to sign off the Assault with intent to resist guideline?

<u>ABH and GBH s20: Culpability factors</u>

3.23 The GBH s20 and ABH revised guideline culpability factors are the same. The Council considered responses relating to a number of cross cutting factors relevant to

these offences in November 2020, and other responses in January 2021. The following amendments were agreed:

- As for common assault, it was agreed that the strangulation factor should be expanded to include suffocation and asphyxiation and prolonged assault should be rephrased as 'prolonged/persistent assault'.
- An additional lesser culpability factor of 'Impulsive/spontaneous and short-lived assault' was included, in response to concerns that culpability for unplanned offences was not provided for in the assessment.
- A very minor amendment was made to the explanatory text regarding highly dangerous weapons to clarify examples of highly dangerous weapon equivalents.

<u>ABH Harm</u>

3.24 At the January meeting the Council considered responses raising concerns regarding the harm model for ABH which included High/Medium/Low factors, and it was agreed that the factors should be revised as follows:

Category 1:	Serious physical injury or serious psychological harm and/or substantial impact upon victim
Category 2:	Cases falling between categories 1 and 3.
Category 3:	Some level of physical injury or psychological harm with limited impact upon victim

3.25 It was agreed that testing of this model would be undertaken to identify if this improved consistency of harm assessment, and importantly if category 3 was used as the previous model wording of 'low' was found to be avoided.

A digital survey was completed by 207 sentencers who were asked to categorise a list of injuries. The injuries and categorisations are included at Annex B. These were actual injuries taken from ABH transcripts. Comments were also sought on whether there were any difficulties with categorising injuries. Responses were broadly positive, although a number did highlight that they would require additional information or to know the full facts of the case to be confident of assessment, particularly in respect of psychological harm;

'It is difficult to categorise injuries when you have not seen an impact statement. Some victims are more badly impacted than others especially psychologically.'

'In determining psychological harm, I would require a victim impact statement as a minimum requirement and would wish if time and resources were available to have a proper psychological report to deal with the extent of the long term harm suffered by the victim.'

'The guideline requires an assessment of victim impact. Most of the questions said nothing about that which rather diminishes any conclusions which may be drawn from the exercise. I always seek a VPS and if the new guideline is thus drafted my practice will be essential.'

Other comments indicated general satisfaction with the categories;

'This was fairly straightforward. We would probably have a few more details if actually working on the case which could help where the decision was borderline.'

'The most severe and least severe group were easier. The middle group was less clear.'

'I found for many of the described injuries that I could possibly have fitted the answers into two categories. However, the injuries alone may well have been expanded on in a real Court situation. With that view in mind I feel that the descriptors were general enough to allow the required flexibility needed for sentencing and would be content should they be promulgated.'

3.26 While the exercise was limited it did identify that Category 3 assessments were made, and while subjectivity remains an issue in assessments, the responses did indicate the model would be preferable to the consultation harm model.

Sentences

3.27 No revisions were proposed to ABH sentences. As the existing guideline included three starting points and ranges and the revised guideline includes nine, starting points were revised to distribute sentences appropriately according to offence seriousness. The starting points were identified according to transcript analysis and the estimated custodial sentence lengths prior to a guilty plea are as follows:

Sentence length band	2015	2016	2017	2018	2019
1 year or less	37%	37%	36%	36%	36%
Between 1 and 2 years	42%	41%	38%	39%	38%
Between 2 and 3 years	16%	16%	18%	19%	19%

Between 3 and 4 years	4%	4%	5%	5%	5%
Between 4 and 5 years	1%	1%	2%	1%	2%

3.28 A number of respondents recognised and approved of the greater range of starting points, while others did not as they thought sentences were being increased. We are unable to publish the relevant statistics on sentence distribution to illustrate the basis of sentences, but it will be further clarified in the consultation response document that these reflect analysis and statistical data on sentences. It is not proposed sentences are revised from the consultation proposals, and the resource assessment anticipates a decrease in sentences overall.

Aggravating and mitigating factors

3.29 In developing the guideline the Council considered whether revenge should be provided for as an aggravating factor. Based on road testing findings it was agreed it should not be included in the definitive guideline as it was taken into account even where not explicitly referenced.

3.30 No other changes were made to aggravating and mitigating factors.

Question 10: Does the Council agree to sign off the ABH guideline?

GBH s20

Culpability factors

3.31 The GBH s20 and ABH revised guideline culpability factors are the same, and revisions to s20 factors were as set out in paragraph 3.22.

Harm

3.32 A very minor revision was made to the GBH harm model, with the word ‘their’ included before ‘day to day activities’ to clarify that the assessment should be based on the victim’s activities rather than generic activities.

Sentences

3.33 As for ABH offences, a number of respondents considered the proposed sentences were an increase on the current guideline as did not seem to have noted

the consultation explanation of the revised sentence distribution. As for ABH, the sentences reflect current sentencing practice and it is not proposed these are revised.

Aggravating and mitigating factors

3.34 No revisions were made to aggravating and mitigating factors.

Question 11: Does the Council agree to sign off the GBH S20 guideline?

GBH S18

3.35 Culpability factors differ slightly for s18 offences with some factors more in line with the attempted murder guideline given that a s18 charge may arise in similar circumstances to attempted murder.

3.36 Other than minor revisions to cross cutting factors, no other changes were made to factors consulted on. The Council considered road testing findings on revenge and whether it should be retained as a culpability factor, and decided that while it should not be included as an aggravating factor for less serious offences, it should be retained in the s18 culpability assessment due to the potential for spontaneous acts of revenge in s18 offences.

Sentences

3.37 The consultation document for s18 sentences explained that sentences increased on the introduction of the existing guideline, which transcript analysis identified was due to the way factors were applied resulting in a high proportion of category 1 assessments. The main issue was that use of any weapon or object results in a higher culpability assessment, and it is difficult to assess any GBH level injury as lesser harm. It was decided that revision to factors would provide for appropriate seriousness assessments and proportionate sentences.

3.38 No revision to sentences were proposed. These have been carefully aligned and calibrated with relative attempted murder and s20 sentences where appropriate and the resource assessment, which is informed by extensive transcript resentencing, confirms that sentences are likely to decrease for this offence as a result of revisions made. This was an objective of revising the guideline as the evaluation highlighted that sentences for this offence increased following the introduction of the existing

guideline, which it was identified was due to factor placement and seriousness categorisations.

Question 12: Does the Council agree to sign off the GBH S18 guideline?

Attempted Murder

Culpability factors

3.39 Extensive testing of the attempted murder guideline was undertaken in development, with testing at the serious crime seminar to achieve a consultation version, and this was tested again post consultation and confirmed that revisions made had assisted in resolving issues identified with the early version. The consultation highlighted broad approval of the more nuanced approach to assessing seriousness and no changes were proposed or made to factors.

3.40 The most prominent issue raised by consultation respondents which the Council was asked to consider in respect of attempted murder was lack of maturity and the potential impact of poor decision making of offenders, such as young people using knives. The Council considered this at length and decided that lack of maturity should not be provided for at step one but retained at step two.

Harm

3.41 The harm model for attempted murder includes the same high harm GBH factor relating to permanent, irreversible injuries, and the minor amendment made to the GBH harm factor was reflected.

Sentences

3.42 During the development of the guideline significant work was undertaken on sentences. The Council wished to increase sentences for some offences and to align sentences for attempted murder more closely with murder offences involving weapons taken to the scene, which are provided for by paragraph 5A of schedule 21 of the Criminal Justice Act 2003 (now paragraph 4 of Schedule 21 of the Sentencing Code).

3.43 Extensive analysis and resentencing of transcripts identified that the revised sentences would achieve the same or higher sentences than currently imposed, and a version including lower sentences would likely decrease sentences from current sentencing practice.

3.44 Post consultation considerations based on consultation responses included whether the revised sentences would have a greater impact upon young people, given that lack of maturity is provided for at step two so will not be as influential on the sentence as it would be if included at step one. It was agreed that further work would be undertaken to consider the impact of revised guideline sentences on this category of offender.

3.45 Analysis of transcripts for offenders aged 25 and under was undertaken after the October meeting to identify if lack of maturity was a feature apparent or taken into account in sentencing. In all cases reviewed the intention of the offender to murder was clear, and lack of maturity was not evident or relevant to the intention formed or assessment of the offence seriousness. In applying the culpability and harm factors in those cases to the existing guideline, sentences would be the same as or lower than currently imposed if starting points were reduced. It is therefore not proposed that sentences should be reconsidered.

Question 13: Does the Council agree to sign off the Attempted Murder guideline?

Equality and Diversity issues

3.46 The consultation highlighted the Public Sector Equality Duty and the intention that the guidelines apply equally to all offenders. Views were sought on whether any factors or their expression could risk interpretation causing discrimination, or if there were any other equality and diversity issues.

3.47 The Birmingham Law Society response thought that alcoholism may be considered an illness and that the factor 'offence committed while under the influence of alcohol' could therefore be discriminatory. This factor is included in nearly all guidelines, and the general guideline includes the following in the expanded explanation of the factor which is linked to relevant guidelines;

In the case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary, but the court should have regard to the extent to which the offender has sought help or engaged with any assistance which has been offered or made available in dealing with the addiction.

This will be highlighted in the consultation response document.

3.48 Dr.Carly Lightowlers, an academic who has published research related to alcohol related violence and sentencing, raised concerns that female offenders may be at risk of higher sentences as are considered 'doubly deviant' for engaging in violent

offences. She highlighted statistics for assaults on against emergency workers, noting that 30% of offenders sentenced for this offence are female. She suggested further work should be undertaken to understand the extent to which such women may be responding to their own trauma and victimisation when coming into contact with emergency workers, or are perhaps attempting to protect their children. She also made the point that female offenders who commit violent offences may be more likely to use a weapon against a physically superior male victim. Guidelines are intended to apply equally to demographics of offenders which reflects the principle that offenders are treated equally. Where a female offender commits an offence in the context of being a victim responding to abuse or in self-defence, the guidelines provide for those circumstances to reduce culpability or to mitigate. It is not thought that it would be appropriate to include mitigating factors relevant to other points made, and the Imposition guideline requires sentencers to consider broader issues in considering the most appropriate sentence to impose on an offender.

3.49 A number of respondents noted the statistical information on sentence outcomes for differing demographics of offenders, noting higher sentences are currently imposed for some offences for ethnic minority offenders.

3.50 Annex C includes a summary of statistical analysis of sentence distribution according to demographic of offenders. Disparity is highlighted across all offences with the exception of common assault and racially and religiously aggravated offences. It is proposed that the wording highlighting evidence of disparity included across other guidelines recently is included where relevant. This has been included in relevant guidelines at Annex A for ease of review.

Question 14: Does the Council agree that evidence of racial disparity should be highlighted for relevant offences?

4 IMPACT /RISKS

4.1 The main objective of revising the Assault guidelines was to address the evaluation findings that the overall impact of the existing guideline was inflationary. Revisions made to the guidelines seek to achieve proportionate and appropriate seriousness categorisations and sentences. Significant work has been undertaken to test their application during development to ensure these objectives are achieved.

4.2 The Council has considered risks associated with approaches throughout the development of the revised guidelines and has considered a number of challenging and complex issues. There is a risk that the approach to sentencing emergency

workers in particular will not be approved of, given that the consultation included a full guideline for the offence which would likely be the preference of the majority of sentencers. However, given proposals to align the statutory maximum sentences with other aggravated offences the alternative risk is that the guidelines do not treat offences in the same way, which will invite criticism regarding equality issues and the Council's commitment to addressing these in its work.

The consultation response document will provide clear and robust rationales for revisions made to the draft version of the guidelines which will be circulated for consideration and approval of the Council prior to publication.

Sentencing Council

Sentencing Council meeting:	**16 April 2021**
Paper number:	**SC(21)APR05 – What next for the Sentencing Council – miscellaneous issues**
Lead official:	**Ruth Pope**

1 ISSUE

1.1 This paper considers the responses to miscellaneous questions in the consultation. Many of the issues that arise have already been covered at previous meetings or are due to be covered under other headings. The purpose of this paper is to 'sweep up' any points not covered elsewhere and to ensure that members have an overall view of the range of points made by respondents.

1.2 Consequently although this paper is rather long, much of the content is for information only.

2 RECOMMENDATION

2.1 That the Council notes the range of responses to the consultation and:

- Considers what other sources of external funding could be explored;
- Agrees that the points raised regarding the extent to which guidelines are meeting the statutory duties relating to consistency, victims and public confidence are covered by existing work streams;
- Considers whether to invite feedback from within the digital guidelines;
- Considers how the importance of consultation responses can be emphasised;
- Agrees to continue to work with the Judicial College to ensure users are prepared for the introduction of new guidelines.

3 CONSIDERATION

Consultation question 5: Are there other sources of funding or funding models that the Council should consider pursuing in order better to fulfil its statutory duties?

3.1 Thirteen respondents made comments or suggestions in response to this question. Several made reference to general issues of underfunding in the criminal justice system. One magistrate suggested that the Council should receive funding from every department it supports through its work. Two respondents suggested that fines or the victim surcharge should be used to fund the Council. One simply stated that additional funding should be secured.

3.2 Others made more detailed comments:

In fulfilling statutory duties, it is important the Council is funded by the government, while retaining the necessary independence from the Ministry of Justice, judiciary and other stakeholders. A commercial model is clearly inappropriate for a body setting sentencing guidelines, so other sources of funding should be approached with caution. **Magistrates Association**

The Council's budget clearly needs to be substantially expanded if it is to undertake fully its statutory duties. Its current budget of £ 1.3 million pounds compares to the HMPPS budget of £4.3 billion. The introduction of the guideline on bladed articles and offensive weapons offences, which came into effect on 1 June 2018, was estimated to result in a need for around 80 additional prison places per year at a net cost of around £2.5 million- almost double the Council's budget. Given that the Council is such a key driver of MoJ spending, it deserves much greater investment and a priority should be to make the case for this in the forthcoming Spending Review. **Transform Justice**

The SC should lobby central government for greater resources to permit it to discharge its duties more fully. In a number of areas, including local sentencing statistics, the Council could be more productive, but only if awarded additional funds. Perhaps the SC could explore the possibility of securing philanthropic and research council funds – either directly, which may be problematic, or indirectly, through partnerships with NGOs and academia? There are precedents, such as the award in 2016 to a consortium of academics from the ESRC and the College of Policing for developing the 'What Works Centre for Reducing Crime'. **Sentencing Academy**

The Council should have the confidence to present its importance to Government to justify more Government funding. (Is Government convinced of its importance?) **Professor Nicola Padfield**

Both these policy imperatives [work needed to engage BAME groups more and to distil findings on the effectiveness of sentences] could form part of the evidence base to make the case for additional funding for the Council. **Professor Andrew Ashworth**

3.3 In response to the question on ways the Council's analytical work could be improved there were responses relating to collaborating on research which could have an impact on this issue:

Transform Justice considers it is important for the Council to obtain [evidence as to reasons for these disparities] so it can take action to remedy any possible discrimination. It may be appropriate for a university or external organisation to undertake the necessary research although ensuring full cooperation from the judiciary will be essential.

T2A is encouraged by SC's statement that it may be possible for it to take some of these areas for research forward through more collaborative work with academics and external organisations. The Alliance would welcome a discussion with the Council about potential collaboration and making available T2A's extensive research and practice material.

3.4 Dr Carly Lightowlers suggested that the importance of research into disparities in sentence outcomes potentially warrants an independent approach (such as commissioning academic researchers) which in turn can assist with public confidence and the Council's openness to scrutiny and commitment to its Public Sector Equality Duty, the Female Offender Strategy and the recommendations of the Lammy review.

3.5 Consideration is already being given to working collaboratively with academics and to exploring the potential for external funding for public confidence work, such as the Legal Education Fund. We have successfully made a case to the Ministry of Justice for additional funding for 2021/2022 of £150,000 in real terms in addition to funding to cover You be the Judge (although some of this will be swallowed up by the need to accommodate inflationary pressures on our core budget). We have flagged that we may come back with additional business cases in year for more funding for specific projects depending on the priorities that the Council agrees to pursue as part of our 'vision' work.

Question 1: Is the Council happy to explore sources of non-government funding (in addition to any further funds from MoJ that might be made available)? If so, are there any sources of funding (other than those covered in paragraph 3.5 above) that should be investigated?

Consultation question 6: Are there any other broad matters that you would like to raise, or comments you wish to make on the Council, that are not covered by your answers to any other questions?

3.6 Eleven respondents made comments in response to this question. Some of the responses have already been discussed by the Council at previous meetings and others are covered under different headings in this paper.

3.7 The remaining suggestions appear to be outside the Council's remit:

- The Council should issue guidance on the appraisal system for magistrates;
- There should be better explanations and communication from the police when investigating cases particularly in relation to victims being required to hand over their phones etc.;
- The Sentencing Council should be watching the changing nature of workplace hazards particularly in the construction industry.

Consultation question 7: What are your views on the extent to which the Council, through the development of sentencing guidelines, meets the duties to have regard to: • the need to promote consistency in sentencing; • the impact of sentencing decisions on victims; and • the need to promote public confidence in the criminal justice system? Please suggest any ways in which you think this could be improved.

3.8 There were a total of 23 responses to this question. Some responses simply expressed satisfaction with the way that guidelines fulfil these criteria. The Justices Clerks Society commented:

> Developing sentencing guidelines fulfil the primary purpose of promoting a consistent approach to sentencing. They also improve transparency, thus contributing to promoting public confidence in the criminal justice system.

3.9 In contrast Professor Nicola Padfield stated:

> I believe that public confidence is not ‘promoted’ simply by creating guidelines which ‘promote consistency’.

3.10 Where there were more detailed comments they are considered below under each sub-heading.

Meeting the duty to promote consistency through the development of guidelines

3.11 A magistrate felt that generally guidelines do promote consistency in sentencing, but that some magistrates take a ‘generalised approach based on previous experiences, particularly when dealing with common offences (e.g. theft or traffic offence)’ with little consideration of aggravating and mitigating factors. ‘I think more emphasis in each offence is needed rather than overarching approaches as it is not clear why some offences have an overarching approach and others have a specific approach’.

3.12 An individual commented: ‘The consistency in sentencing is actually based on the judge's discretion in the end, which unfortunately can be biased and in some cases need to be put in media for actual justice to occur.’

3.13 Diverse Cymru made suggestions for the greater involvement of people with one or more protected characteristics in the work of the Council, in order to ensure consistency in sentencing. This was raised in the November paper on diversity and is one of the matters being considered by the equality and diversity working group.

3.14 The Magistrates Association (MA) were supportive of the way the Council consults in the development of guidelines and works with them in other ways such as attending MA events and contributing to MA publications. They suggest that this could be further developed to ensure all their members are aware of new sentencing guidelines as they are published and understand the rationale and intention behind them (see further paragraph 3.57 below). They suggest the Council should do more work to assess the impact of sentencing guidelines in magistrates courts, as this is crucial in ensuring that guidelines are being implemented consistently and having the intended effects. They recognise that such work would require the provision of the necessary resources.

3.15 The Council has enhanced data collection in magistrates’ courts over the last few years and we are now exploring ways in which data collection more generally can be enhanced, including opportunities through the common platform.

3.16 Transform Justice made a link between consistency and effectiveness (effectiveness is being dealt with in a separate paper).

> The most important goal of sentencing should be effectiveness and that guidelines should promote a consistently effective approach by courts. There is a case for guidelines prescribing sentencing ranges which provide appropriate levels of punishment

and in particular requiring courts to respect the upper limits of those ranges. However, courts should be permitted and indeed encouraged to sentence below the range if it is in the interests of the reform and rehabilitation of those who have committed crimes or the making of reparation to victims. These are two of the statutory purposes of sentencing which have received inadequate attention from the Council in its work to date. **Transform Justice**

3.17 The Prison Reform Trust points out the difficulty with assessing consistency.

The guidelines rightly prioritise consistency of approach over outcome, since there may be justifiable differences in outcome for similar cases, depending on the circumstances and needs of the individual defendant. Inevitably this makes the task of assessing whether the Council is fulfilling its statutory remit to promote consistency difficult, since it relies on being able to measure justifiable differences in outcome between case. Nonetheless, it is important that the guidelines retain this focus on consistency of approach, and not aim to produce an aggregate level of consistency between cases. Furthermore, it is important to recognise that consistency is a “slippery concept” which may work against other important principles such as equity and proportionality. **Prison Reform Trust (PRT)**

3.18 PRT go on to discuss the findings in the assault and burglary guideline evaluations that sentences for some offences had increased unexpectedly and argues 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’. This something that relates to the issue of how we measure success which in turn relates to what the Council defines as effective (effectiveness is being dealt with in a separate paper).

3.19 There was a call for more evidence on the link between guidelines and consistency.

The SC has yet to adequately document the contribution of its guidelines to promoting a more consistent approach to sentencing. To date, the principal source of insight into the effects of the guidelines has been the academic literature. A small number of academic studies have suggested positive impacts on consistency, but a more comprehensive evaluation involving multiple guidelines is necessary. Of the three duties identified in Q7, this one is the most important. Promoting consistency is a key statutory duty of the Council, one we believe is being promoted by the offence-specific and overarching guidelines. But the informed public might reasonably ask whether the guidelines regime has achieved this goal, and to what extent. Research should also explore variation in the degree to which consistency has been promoted; some sources of guidance may have been more useful in this regard than others. One way of exploring the impact of the guidelines would be to compare, for a limited number of offences, sentencing in England and Wales and Scotland. No offence-specific guidelines have been issued to date in Scotland, and so it can serve as a useful comparator for the SC guidelines. **Sentencing Academy**

3.20 As was discussed at the March meeting, a report on consistency will be published later this year and there is more work to be done on developing a methodology to measure consistency (as flagged above by the Prison Reform Trust, the chosen measure –

consistency of approach rather than outcome – is difficult to measure and so further work is needed before an assessment of consistency can become as standard part of our analytical work).

Meeting the duty to have regard to the impact of sentencing decisions on victims through the development of guidelines

3.21 A magistrate commented that victims are often not present in court to hear the reasons for sentences and guidelines do not necessarily reassure victims as they often will not be aware of the mitigation taken into account. As a consequence victims often feel that the criminal justice system is 'soft'. Another magistrate made a similar point: 'I think the guidelines help us to fulfil these criteria well but we need to be better at communicating the reasons for our sentences to victims, especially if they are not in court when sentence is passed.'

3.22 One respondent commented on guilty plea reductions, noting that although it speeds up the process where it is clear that the offender is guilty 'it leaves a bad taste for those victims'. They suggest that there should be better protection for vulnerable victims 'if the sentencing decision was light'.

3.23 The point made earlier by Diverse Cymru about engaging with a wider range of people also applies to the impact on victims.

3.24 The MA were supportive of the work already done to consider the views of victims but suggested that more research was needed. As discussed in previous papers, we will consider the need to undertake such research on a case-by-case basis.

3.25 Transform Justice felt that more could be done by referring to restorative justice in guidelines (this again relates to the issue of effectiveness which is being dealt with in a separate paper):

> As for the impact of sentencing decisions on victims, there is a need for the Council to recognise that greater levels of punishment are far from the only way to satisfy victims. There is good evidence that problem solving and restorative justice (RJ) approaches can be effective for victims and offenders. Victims' satisfaction with the handling of their cases is consistently higher among those who attend restorative justice conferences, compared to those dealt with solely by standard criminal justice processes, usually the courts. In December 2012, the Council discussed a request from the Restorative Justice Council for guidelines to be issued in respect of a provision in the Crime and Courts Bill on deferring sentence for convicted defendants who fulfilled a restorative justice programme. The Council agreed that guidance on the appropriate approach can be included in individual guidelines as necessary. There has however been very little mention of RJ in guidelines since then.

3.26 The Prison Reform Trust agreed that the Council should take account of the impact of sentencing decisions on victims in the development of guidelines. They note that studies show that victims' views are shaped by the way their case is handled, and that many victims express a strong interest in ensuring that, if possible, the offender does not commit further offences. They go on to say:

> Evidence suggests that there is some overlap between what victims and defendants value in terms of their experience of the criminal justice system. [ ] From the perspective of both victims and offenders, therefore, there is scope for guidelines to both promote fairness and consistency and support the process of desistance to reduce the risk of future offending.
>
> It is unclear why there is not a corresponding duty on the Council to consult with defendants. Doing so would help both to uncover areas of the guidance that were perceived by defendants to be unclear or unfair. It would also assist the Council in developing its remit to consider the effectiveness of sentencing. We endorse Anthony Bottoms recommendation that the defence 'voice' on the Council, along with expertise on mental health and addictions, should be strengthened through either membership or advice. Arguably, however, the Council should go further. People with lived experience of the criminal justice system should be routinely consulted as part of the process of developing guidance. The risks to defendants experiencing sentencing as a fair process are currently very severe, given difficulties in accessing competent legal advice, and the absence of any intermediary assistance for defendants with learning difficulties or disabilities. A stronger voice for defendants and a greater concern for their perception of fairness is wholly complementary to the Council's proper concern for victims – an unfair process does a disservice to all concerned.

3.27 The issue of engaging more with those with lived experience of the criminal justice system is considered below at para 3.49

3.28 The Sentencing Academy agreed that the Council is meeting this duty in relation to victim impact as guidelines contain many victim-related factors, but felt that it could possibly do more by developing overarching guidance on Victim Personal Statements. This suggestion was mentioned at the December Council meeting and will be further explored when we evaluate the expanded explanations.

Meeting the duty to have regard to the need to promote public confidence in the criminal justice system through the development of guidelines

3.29 A magistrate cautioned that public confidence should be distinguished from pandering to populism. A magistrate who is a former police officer commented that there is a low level of public awareness of sentencing guidelines and suggested more should be done with social media to highlight what they aim to achieve. Another magistrate felt that 'speed and creation of guidelines is much too slow. The lack of understanding of numerous issues

by magistrates when there are no guidelines is often appalling and leads to a lack of support from the public'.

3.30 The point made earlier by Diverse Cymru about engaging with a wider range of people also applies to public confidence. Transform Justice again made a link with effectiveness (covered in a separate paper) and PRT made a link to consistency.

> As for public confidence, if the Council gives greater weight to effectiveness in the development of its guidelines, this will provide a sound basis for promoting public confidence. When the Council launched its breach guideline in 2018, its press notice stated, "New guidelines introduce robust approach to sentencing of breaches of court orders." Transform Justice considers such an approach unhelpful given the term "robust" is generally associated with increased punitiveness. An effective approach is surely what the Council should be encouraging and promoting, not simply a tough one.
>
> The Council should also revise its perverse position that when considering the appropriate length for a sentence of imprisonment a court must not consider any licence or post sentence supervision requirements which may subsequently be imposed upon the offender's release. The Council should be looking to promote effective sentencing by courts, which means that all of the components of a sentence whether served in prison or the community should be taken into account. **Transform Justice**
>
> The development of sentencing guidelines has undoubtedly bought a greater degree of consistency and transparency to the sentencing process. By extension they may have contributed to public confidence in the criminal justice system. However, evidence from public confidence research commissioned by the Council suggests that the impact of the development of guidelines on public confidence in general has been limited. **Prison Reform Trust**

3.31 The issue of public confidence more generally has already been discussed at the January Council meeting and actions are being taken forward.

Question 2: Is the Council content that issues raised above are covered by existing work streams?

Consultation question 10:
Can you suggest practical ways in which the flexibility afforded by delivering guidelines in a digital format could be used by the Council to improve guidelines?

3.32 There were comments from magistrates suggesting that the format of the digital guidelines could be improved, particularly with reference to the tools (such as fine calculator, pronouncements etc). One magistrate suggested that guidelines could be more automated whereby the sentencer selects the relevant factors and the guideline then calculates the suggested sentence. Another suggested something similar, an 'interactive program to take you through the guidelines would be great to come to your starting point and range. If this was available on court iPads it could then be linked into the fines calculator too'. By contrast

another magistrate was clear that any improvement to digital guidelines should not sacrifice the need for judgement and discretion.

3.33 There was a suggestion that examples of how a guideline could be applied to a fictitious case would be helpful to magistrates. There were comments that some magistrates are not very computer literate and that the use of hyperlinks or drop down menus can be difficult for them. This is in contrast to many of the comments below which recommended the greater use of links.

3.34 There was a recognition that digital guidelines make updates much easier and while some respondents said that it was easier to find digital guidelines, others criticised the search function. Professor Nicola Padfield said 'I think there is a real danger (as was pointed out by the Triennial Review) that this flexibility makes the website difficult to navigate: for me, this is a significant problem'.

3.35 One magistrate said that the digital guidelines should be made available in visual and audible formats to take account of diversity on the bench. This is an issue that was briefly discussed at the January meeting and the practicalities of doing this will be given further consideration.

3.36 Diverse Cymru suggested links between different guidelines and guidance relating to equality issues. This is something that we are already doing to some extent and the Equality and Diversity Group may make further recommendations. The 'preventing discrimination project' which we are still hoping to procure will pick up on this issue as it will involve reviewing the language and wording in the guidelines.

3.37 The MA made a number of suggestions:

> The Council should consider how it can improve the way that its guidelines are formatted for use on court tablets. The vast majority of the time, magistrates need to use the guidelines on their tablets but our members report that it is not as easy to do so with the available app as it could be. The sentencing guidelines app should therefore be developed to make it as intuitive and straightforward to use as possible. There would be benefits, in achieving this, in involving magistrates in its development.
>
> Also important is establishing how magistrates search for offence guidelines, to ensure the appropriate guideline can be quickly found. Currently the search functionality is not optimised.
>
> The Council should consider using hyperlinks more effectively, especially in relation to signposting to additional guidance or case law.
>
> Another important aspect is ensuring there is consistency across all guidelines, including explanatory material and overarching guidelines. Electronic guidelines makes it easier to update language or terminology, so there are no gaps or inconsistencies.

> Again, hyperlinks can be used to signpost sentencers, without having to duplicate text unnecessarily, so it is clear what they should be referring to in relation to a particular issue. An example would be to make it clear when sentencers should be referring to overarching guidelines on offences in a domestic setting or the new mental health guideline

3.38 On a similar point PRT said:

> One benefit of delivering guidelines in a digital format has been the ability to cross refer to other useful areas of guidance such as the Equal Treatment Bench book. One concern raised by Anthony Bottoms in his review of research is that overarching guidance tends to be underused by sentencers compared to offence-specific guidance. One way to remedy this would be to improve signposting between offence specific guidelines and overarching guidelines. For instance, any reference to mental health in relation to culpability or mitigating factors should include a link to the overarching guidance in this area.

3.39 Transform Justice welcomed the introduction of expanded explanations and suggested that more detailed material should be provided through drop down boxes in guidelines in a similar way. 'For example, the Council has made clear [in the note that was issued about sentencing during the Covid-19 emergency] that "in accordance with well-established principles, the court ..should take into account the likely impact of a custodial sentence upon the offender". More detail could be provided about those principles, what kind of impact the court should be looking at and how it should identify it e.g. through a pre-sentence report'.

3.40 The Justices Clerks Society suggested any changes made to guidelines could be highlighted in a different colour, to draw attention to the fact a revision has been made since the full guideline was introduced. This is an interesting suggestion but it would be difficult to administer and could cause confusion. We do publish a log of minor revisions to guidelines which gives an audit trail of any changes.

3.41 On a related issue the MA made this suggestion:

> There should be a mechanism for sentencers/legal advisers to feed back to the Sentencing Council on an ongoing basis when in particular cases they are surprised by where the guidelines are taking them or there is a lack of an adequate guideline. This could be an interactive process that does not interfere with the independence of the judiciary. It might also be useful if the Sentencing Council considered indicating on each guideline when it was last reviewed, including a note highlighting if sentencers should be aware that the law may have changed in respect of the guideline and it has yet to be updated.

3.42 There are a number of themes in these responses and it is clear that some respondents are more comfortable with the use of digital guidelines than others. One development worth noting is that the iPads issued to magistrates are being replaced by

laptops and so we are working with HMCTS to provide some guidance to magistrates on how to access and use guidelines on the new devices.

3.43 It will be impossible to provide the additional links that some are suggesting without making others feel that the guidelines are more difficult to use. The Council has gradually increased the number and types of links included in guidelines and it will be instructive to see the responses to the upcoming consultation on the revisions to the sex offences guidelines which proposes some additional expanded explanations at step one of those guidelines. It remains the strategy for the website that guidelines should be easy to use.

3.44 The idea from the MA of providing a mechanism for feedback is something we could take forward. There is already information on the website about how users can contact us to report problems or ask questions and we regularly get a small number of such enquiries. These often result in small changes being made (for example to search terms) to improve the digital guidelines. The Council has already agreed that it would be a good idea to have an annual consultation on miscellaneous changes to guidelines and so there could be merit in proactively seeking suggestions from users for minor amendments to existing guidelines. If this is felt to be a good idea we could explore ways of inviting feedback from within guidelines. This is something that will be easier to do once magistrates are accessing the guidelines via laptops rather than off-line iPads. There would, of course, be resource implications if we increase the amount of feedback we get from users. This could be mitigated by using an auto-response function to acknowledge receipt and indicate that the comments will be considered.

3.45 Our proposed work on user testing will investigate whether digitisation of guidelines has had any impact on the way in which the guidelines are used and may propose changes to the provision of digital sentencing guidelines to ensure they are used in line with the intentions of the Council. An Invitation to Tender for this project was issued in late 2020, but unfortunately we received no bidders. The tender will be re-issued once it is confirmed that the necessary funds are available from next year's budget.

Question 3: Would it be useful to encourage feedback on guidelines from within the digital guidelines?

Consultation question 25: Do you have views about how the Council how can improve the consultation process for regular respondents?

3.46 There were several comments from magistrates:

> To make life easy for busy people, put the relevant issues and the questions about them together, briefly, so people don't how to keep referring back to another document. If you don't already, give feedback (at east in general terms) on the feedback you've received and, most importantly, what you're doing about it.

Have far simpler questionnaires. I have almost lost the will to live in completing this survey. Far too many questions and most are about much the same thing.

A question to ask here is, 'What audience are you trying to reach?' Publishing long winded technically written documents may appeal to CJS users and practitioners who work full time but to the general public and a lot of Magistrates, this viewing of material may be sporadic at best and not very interesting at worst. Sadly, my opinion of consultation documents are that they are written and presented like most legal texts, mind numbingly boring. By jazzing them up, more colour, text boxes and appealing backgrounds then the sometimes tedious subject can be made more interesting. In doing so this could be more acceptable on social media sites and a suggestion would be to do some work with universities to understand what appeals psychologically to the human mind and consult accordingly. An example I heard many years ago was during the 2nd world war, many GI's recruited from poorly educated groups in the USA were having difficulty learning rifle drills with the obvious dangers escalating in a war zone. A user pamphlet was designed as a comic book with a talking rifle with text boxes, arms and legs and pictorial explanation rather than boring text. It was a huge success and showed that understanding your audience is the starting point to designing what will appeal to them.

Reports can be more concisely written than this document. Avoid overlap of questions. The sharper it is the easier it is to engage and respond.

3.47 An anonymous respondent suggested:

More awareness of consultations to the public and more information on how it's used and the results at the end provided. More awareness and advertising of these consultations are important for the public to know and so can contribute towards it and gather as many views and thoughts as possible that truly represent what the UK population feel about the council and these issues. However, obviously criminals will want better guidelines for themselves and may take advantage of these consultations, so it's a factor to be aware of and should be ensured no favouritism occurs to benefit criminals more than victims.

3.48 Other respondents comments and suggestions were:

Working with community groups and third sector organisations that represent one or more protected characteristics is vital to ensuring that all diverse people are involved and to identifying and addressing inequalities.

Additionally it is vital that consultation documents are available in plain language and Easy Read and that people can submit their experiences and views to be considered without responding directly to the written consultation document. This is vital to engaging all diverse people across the protected characteristics. **Diverse Cymru**

There should be more liaison about the planned programme – especially in relation to what existing guidelines need amending, or where there is a clear lack of guidance. They should consult with stakeholders annually, setting out what guidelines are in place (a surprising number) and what their programme ahead is, so key stakeholders can influence the workplan. **Magistrates Association**

While the Council has made commendable efforts to engage a variety of organisations, Transform Justice considers that their consultations should reach a

broader audience -particularly organisations that deal with people who have been convicted. Consideration should be given to undertaking more surveys and research studies to understand the complexity of attitudes to particular offences and to draft consultation questions in a less legalistic way. **Transform Justice**

I think it would be extremely useful to have a mailing list of interested parties to which such consultations are circulated and to which people can sign up. I have to date relied on people alerting these to me out of good will and encountering them on Twitter – yet I am a sporadic user thereof and worry I may not have seen relevant notifications of such consultations. For example, my colleague Rose Broad and I would very much like to pre-register an interest in future consultations or bespoke consultations such as the Modern Slavery guideline consultation in due course and know that I will be alerted of these once they are 'live'. I believe this approach will also assist with question 26 as organisations can proactively pre-register an interest with the Sentencing Council too. **Dr Carly Lightowlers**

The SC should be encouraged to hold more consultation events. A number of such events have been held in the past targeting the academic community but a more consistent approach to such events might be helpful. These events should be opened up to as wide a group of participants as possible as this will also help inform the individual responses from attendees. **The Sentencing Academy**

Many people are deeply sceptical as to whether those who consult also listen. Publishing responses, and your response to consultations in more detail might help. **Professor Nicola Padfield**

I would be interested in exploring with the Council what mechanisms could be used to further strengthen the relationship with Parliament and the public to ensure the Council receives representations from a wide range of stakeholders, including MPs, charities and academics. I would also encourage the Council to consider what more it could do to proactively target and seek the views of specific demographic groups and victim groups affected by particular crime types during consultations on guidelines. There is strong interest amongst some parliamentarians in the sentencing guidelines and I would welcome consideration of whether the Council could host roundtables with interested parliamentarians on draft sentencing guidelines during consultation. **Lord Chancellor**

Consultation question 26: Do you have views about whether there are people or organisations we should be reaching with our consultations but are not? If so, please suggest what we can do to reach them.

3.49 There were various suggestions for greater links with:

- BAME groups
- Groups active in the area of mental health and substance abuse
- More generally with the public – perhaps through blogs, have a panel of registered members of the public
- The disabled community
- Organisations and charities supporting victims
- Trade organisations (relating to health and safety issues)
- Groups representing those with protected characteristics
- Former offenders, people with lived experience of the criminal justice system
- Defendants

3.50 Professor Nicola Padfield commented:

> It is a difficult question: only a small percentage of the population is likely to engage with these sorts of written consultations, which assume so much prior knowledge. I would encourage you to hold more focus groups in prisons, and to reach out to hostels and community centres, for example. It is so important to hear the voices of those who do not have easy access to the internet.

3.51 There are several themes in the responses to questions 25 and 26, most of which have already been discussed at the January meeting. One is that our consultations are too technical. The Council has agreed that consultations cannot be simplified without sacrificing important detail, but it has been agreed that we should include an executive summary in consultations to assist users.

3.52 Another theme is that we should ensure that we are reaching all interested parties with our consultations and should make particular efforts to reach certain groups perhaps through consultation events. The Council has agreed to do this and proposals for taking this forward will be put to the Equality and Diversity sub group in May. It might be useful to include consideration of the target audience for a consultation in the Council paper at the consultation sign off stage.

3.53 The Council has already agreed to consider bringing in external expertise at the scoping stage of each guideline and we regularly engage with stakeholders at an early stage of guideline development; we could consider engaging with a wider range of stakeholders at an early stage (again this could be considered by the Equality and Diversity sub group).

3.54 The suggestion from the MA about liaising more about our workplan was mentioned at the January meeting. The workplan has a large degree of flexibility built in, as the amount of time needed for each guideline or other project varies, staffing levels within the office can change and external factors (legislation, pandemics, general elections etc.) can disrupt the plan. There will be a paper on the Council's priorities at a future meeting and the criteria for deciding which guidelines should be developed will be discussed then.

3.55 It is apparent from some of the responses that it is not always clear how we have taken respondents' views into account. We do, of course, publish a response to every consultation where we set out the range of views and suggestions in responses and the Council's reasons for adopting them or not. These documents are necessarily detailed and technical and it is not always possible to come up with simple to understand examples of how and why the guideline has changed as a result of consultation. Perhaps though, we could do more to highlight the fact that we consider consultation responses seriously and in detail and that they are an integral part of the guideline development process. One way of doing this could be through a blog post setting out how we take views into account.

Question 4: Should the Council seek to give more prominence to the importance of consultation responses?

Question 27: Do you have views on how the Council should time the publication and coming into force of the guidelines?

3.56 There were only a few responses to this question. One magistrate questioned the policy of quarterly publication, suggesting that this could lead to delays. Another said that there should be time for sentencers to be able to look at the new guidelines before they come into force. A third felt that one month between publication and coming into force was adequate. The MA welcomed a gap between publication and coming into force and the Justices Clerks Society welcomed the predictability of when guidelines come into force for training purposes. Professor Padfield suggested that annual changes might be preferable.

Question 28: Is it the role of the Council to provide more assistance on the use and interpretation of guidelines? If so, please explain how you think this could best be achieved.

3.57 Fourteen respondents gave answers to this question. The MA said it was important for the Council to be responsive to any difficulties or challenges identified by users of the guidelines and one magistrate said that the thinking and objectives should be set out at the consultation stage and revised if necessary in a separate document to the guidelines. Professor Padfield felt that there was a need, noting that there are significant numbers of magistrates and judges who struggle with following multiple guidelines simultaneously, especially on an iPad.

3.58 Some felt that the Council could do more to help with the interpretation of guidelines. A magistrate felt that there should be more assistance with the use of the guidelines, stating that if they were more user friendly there would be fewer issues of interpretation. Another magistrate repeated his suggestion that guidelines could be more automated whereby the sentencer selects the relevant factors and the guideline then calculates the suggested sentence. This magistrate also felt that step by step examples of how a guideline should be applied to a scenario would be helpful.

3.59 Some went further suggesting that the Council should provide training. An anonymous respondent said that the Council should offer workshops or lessons on the guidelines, provide advice on the use of guidelines and ‘be contacted when needed and respond promptly’.

3.60 Mandeep Dhami stated:

> The Council ought to be involved in assisting on the use and interpretation of the guidelines, because it is best placed to do so, given its role in developing and monitoring the guidelines. This could be achieved by organising and delivering meaningful training for sentencers and court clerks that includes individual-level

feedback on performance (e.g., on issues such as consistency, compliance, use of extra-legal factors etc). The Council would need additional resources in order expand its role in this regard.

3.61 In contrast two respondents simply answered 'no' to this question and the Sentencing Academy stated:

> We do not believe that the role of the Council is to provide more assistance on the use of its guidelines. This is a matter for individual magistrates' courts' legal advisors, individual members of the judiciary, the Court of Appeal and the Judicial College.

3.62 There was no clear theme to these responses. There clearly is a need for some gap between publication and coming into force, but no clear consensus on how long that should be. In the past we have produced examples of how a new guideline could be applied in a fictitious scenario and published these on the web site as well as sharing them with the Judicial College. More recently we have liaised with the training committee of the JCS who provide training in magistrates' courts and have worked with the Judicial College to provide training and to conduct a research exercise at the Serious Crime Seminar. As we understand it training is delivered in various ways – through face to face (or virtual) courses, on-line training modules and, particularly in magistrates' courts, much of it is devised and delivered locally. Our contact with the Judicial College is on a somewhat ad hoc basis – although the impression we have gained lately is that Covid has been very disruptive to any training programmes. We are currently in discussions with the course director for sentencing at the College regarding input into the continuation course for circuit judges and recorders.

Question 5: Should we continue to liaise with the Judicial College to determine the best way to ensure that users are prepared for the introduction of new guidelines?

Sentencing Council

Sentencing Council meeting:	**16 April 2021**
Paper number:	**SC(21)APR06 – What next for the Sentencing Council – Effectiveness**
Lead official:	**Lisa Frost/Emma Marshall**

1 ISSUE

1.1 This paper considers the responses to questions in the consultation regarding how the Council currently discharges its duties to consider the cost and effectiveness of different sentences.

2 RECOMMENDATION

2.1 That the Council notes the range of responses to the consultation and:

- Considers views on the Council's current approach to assessing effectiveness and;
- considers suggestions as to further work and agrees action which could be undertake to discharge this duty more fully.

3 CONSIDERATION

3.1 S120(11)(e) of The Coroners and Justice Act 2009 provides that in developing guidelines the Council must have regard to the cost of different sentences and their relative effectiveness in preventing re-offending.

3.2 The relevant section of the consultation which discussed effectiveness is included at Annex A. Views were sought on how the Council has approached this duty to date, and what more could be done in this area. The consultation explained the narrow approach taken to considering costs to date in that the Council has generally chosen not to address costs or cost-effectiveness in resource assessments explicitly beyond the inclusion of the costs of correctional resources. While views regarding this were sought and are included in this paper, the focus of the consultation and subsequently this paper predominantly relates to the effectiveness element of the duty.

The Council's current approach to discharging the statutory duty relating to effectiveness

3.3 The approach currently taken to discharging this duty was determined in 2017 when the Council agreed that the Analysis and Research team should undertake a piece of work to assess what evidence was available on the effectiveness of sentencing in reducing reoffending and take a view as to the quality, consistency and comprehensiveness of this work. The A&R sub group, at the time led by Julian Roberts, subsequently considered what the Council could do in respect of fulfilling the statutory duty. It was recommended that a proportionate approach for the Council to fulfil its statutory responsibility to 'have regard to' the cost and effectiveness of sentencing would be to maintain an awareness and knowledge of current research in this area. It was agreed that an annual digest of current research and evidence in this area would be provided to all council members, together with any significant additional research or evidence that may become available during the year. It was agreed that the aim would not be that this information necessarily directly influenced deliberations on any individual guideline; rather, it would supplement council members' significant existing expertise and experience in sentencing matters and brought to bear in Council discussions when considering the development of guidelines. This approach was felt to be a proportionate response to the fulfilment of the Council's statutory responsibility in this area, given the current state of the evidence.

3.4 The consultation document explained the following in respect of how the Council currently considers effectiveness;

"The legislation itself does not specify how the Council must have regard to this factor, nor provide for how to weigh up this factor alongside the other matters to which the Council is required to have regard, some of which may be in conflict.

The Council's approach to this in recent years has been to produce an annual internal document outlining the latest research evidence in this area regarding reoffending. The evidence review is not intended directly to influence the Council's deliberations on any individual guideline but to supplement Council members' significant existing expertise and experience in sentencing matters, which is brought to bear in discussions when considering the development of guidelines."

The consultation explained the limitations of undertaking further work in this area. It highlighted that "*further work would require the Council to take a view on how it defines 'effective' within this context. Ministry of Justice (MoJ) studies have a reasonably tight definition: proven reoffending within a year of release from custody, or the point of sentence for a community order. However, the Council is aware that there are arguments for alternative definitions within the academic community and, while there may be practical*

benefits for adopting a similar approach to the MoJ studies, the Council does not consider that there is a clear objective rationale for choosing that measure over another."

As well as the resource burden, the consultation document explained that the cost of sentences should not be a consideration in determining an appropriate sentence, and that "*it would be extremely difficult to isolate the effect of guidelines specifically on any reduction in reoffending or to identify, in a meaningful way, what the total cost of any guideline-related reoffending might be*. Finally, it was explained that; *it is not obvious to what practical purpose carrying out further work in this area could be put. Our existing approach of bringing current research in this area to Council members' attention, and for them to have this in mind during their deliberations on individual guidelines, seems to work. This is, after all, just one of the matters to which the Council must have regard: current sentences, consistency, impact on victims, and the need to promote public confidence are all other matters that the Council must consider and weigh up when producing guidelines."*

3.5 In January 2021 the Sentencing Academy published a review of key research findings, titled The Effectiveness of Sentencing Options, which has been included at Annex B. This also highlighted the complexities of measuring and defining effectiveness;

"A common research strategy involves comparing the re-offending rates of different disposals. Drawing causal inferences from this research is challenging. Studies that compare re-offending rates by type of sentence can only show a correlation between the type of sentence and the outcome (desistance or re-offending). Many factors other than sentence type may explain offending. For example, people may have particular characteristics that make them more likely to re-offend regardless of the type of sentence imposed and certain crime categories have long been associated with high re-offending rates – again independent of the sentence imposed.

Effectiveness can also have alternate meanings. Policy-makers may wish sentences to be effective in the more complete sense of desistance. Desistance refers to a long-term cessation in criminality for those who had a pattern of offending (Sapouna et al. 2015). Yet studies on re-offending tend to follow ex-offenders for relatively short periods of time (one to three years is common). The absence of offending during those follow-up periods does not necessarily mean that these individuals have achieved desistance. Indeed, the studies tend only to count offences that are known to police and their perpetrators identified as ex-offenders. This means that ex-offenders who commit offences yet who evaded prosecution and punishment may be mistakenly counted as successes. As well, the limited follow-up periods do not necessarily detect desistence where the ex-offenders may have committed new offences outside the short time frame studied. Effectiveness could also be measured by

the extent to which the sentence addressed the individual's criminogenic needs. The term 'needs' here refers to those characteristics and problems that are amenable to treatment and, if addressed, will reduce the individual's likelihood of re-offending. For men, common criminogenic needs include drug/alcohol problems, underemployment and a lack of stable housing. For female offenders, needs may include a history of trauma, fractured family ties and sexual victimisation. Thus, a broader approach to effectiveness would consider how sentences foster improvements for offenders in such life areas as health, employment and family and social networks (Villettaz et al. 2015). Another definition of effectiveness would consider how well different sentences compensate victims or society in general (Mann and Bermingham 2020). Unfortunately, studies provide little information on this version of effectiveness. The emphasis in the effectiveness literature has long been upon re-offending rates over relatively short periods of time, rather than these other, broader conceptions."

3.6 In relation to how the Council currently addresses the statutory duty on effectiveness the consultation asked; 'Do you have any views on the way the Council has addressed the duty to have regard to the costs of sentencing and and their relative effectiveness in preventing re-offending?'. Respondents did not necessarily agree that the Council could not go further to fulfil the duty or that the current approach works as set out in the consultation paper, and responses received were as follows;

You say that "on costs, the Council has generally chosen not to address costs or cost-effectiveness in resource assessments explicitly beyond the inclusion of the costs of correctional resources. This is because in any individual case, the cost of a sentence should not be considered when deciding upon the most appropriate disposal". Who says? I disagree strongly. If your ambition is to reduce re-offending in an economically sensible, or cost efficient way, you must consider costs. It is irresponsible not to do so. Not considering costs is not neutral in a number of ways. It also backs away from educating the public about the direct financial costs of imprisonment, as compared to other sentences.

You should not give up because "further work would require the Council to take a view on how it defines 'effective' within this context or what constitutes 'reoffending'". That is really basic – and crucial to any public confidence. If the SC can't say what it means by 'effective', who can the public rely on? You know well that relying on proven reoffending within a year of release from custody, or from the point of sentence for a community order is a pretty crazy measure, but what 'risks' would you like to encourage sentencers to take? The SC may have lost its way in failing to advocate adequately for individualised sentences.

You can't just put this in the "too difficult" box! You say in a footnote that "In the field of criminology, desistance is generally defined as the cessation of offending or other antisocial

behaviour". As part of your public engagement brief, you should expand this: we know that desistance is slow and difficult, and beset with traps and hurdles. There is a vast literature which you could bring to public attention in an engaging format (and I include the judiciary in the 'public' in this context).

- **Nicky Padfield**

3.7 While some respondents would like the Council to take the lead in defining what effectiveness is, others agreed that the issue is complex, multi-faceted and involves issues which are broader than the Council's remit of sentencing;

An issue we come across repeatedly is the personal circumstances of the offender including background and social status. Sadly, these factors if negative can have a debilitating effect throughout a person's life and often leading to criminality. Focussing purely on repeat offending fails to take into account social issues for an individual i.e. one size punishment fits all, and that is what we judge success or failure on. The reality is that courts see offenders with 40, 50, 60 convictions for petty theft, public order, drugs, assaults etc with a sprinkling of prison, rehab' and probation work yet are still offending. To task yourselves with assessing the success of sentencing without consideration of community intervention resources such as housing, health support and even education etc. is in my view naive. There are factors beyond mere sentencing that influence reoffending rates and this requirement should be monitored but not measured. It is the social factors considered during sentencing that are not captured in court results etc and it is those factors that need more work. - **Magistrate**

I think this is an almost impossible task. I have little confidence in the statistics on the effectiveness of community sentences in reducing reoffending and in times of austerity we don't spend nearly enough on rehabilitating offenders in prison or in the community. – **Individual respondent**

Lowered sentences for admitting guilty does not prevent reoffending. Prison encourages more crime activity due to all the criminals, gangs and violence in prison as well as drugs and corrupt officers there. Improvement in the prison system is needed, they should work for their keep inside the prison and learn discipline rather than obedience. However the public needs to be kept safe, so longer sentences means safer society to an extent. The causes of crime should be dealt with to prevent the reoffending such as mental problems or unemployment etc. - **Anonymous respondent**

3.8 The following responses directly addressed the current approach;

We have a number of concerns about this (the current) approach:

1. Lack of transparency. There is no clear justification for withholding from the public domain the information on reoffending that is being circulated to Council members to inform their deliberations on the development of guidelines

2. Because of this lack of transparency, it is not clear where the evidence is being bought to bear in the formulation of a particular guideline and where it is not. It is perfectly reasonable for the Council to prioritise issues other than reoffending in relation to the development of particular guidelines. The CJA 2003 states that the process of sentencing involves a balance of five purposes, only two of which (the reduction of crime (including its reduction by deterrence) and the reform and rehabilitation of offenders) are relevant to reoffending. However, the Council should be transparent about what purposes it chooses to prioritise and the evidence, including on reoffending, that goes into informing its deliberations.

3. There are a number of guidelines, in particular on the imposition of community and custodial sentences, where much of the evidence on reoffending is in favour of community over custodial disposals. For these guidelines, it is particularly important that the evidence is made clear and the Council is transparent about how it is taken into account in the development of the guideline.

4. Publishing the evidence would contribute to the Council fulfilling its statutory duty to promote public awareness of the realities of sentencing and its related duty to promote public confidence in the criminal justice system. Therefore, we would favour a change to the current approach, prioritising transparency and the explicit consideration of evidence on reoffending relevant to each guideline. This could include:

1. The publication of the document outlining the latest research on reoffending

2. The publication of any relevant evidence on reoffending as part of the impact assessment of each guideline. - **Prison Reform Trust**

In the year to March 2020 the average length of a prison sentence stood at its highest level for a decade - 19.6 months (MoJ 2020). In 2020 forty-eight per cent of determinate prison sentences were over four years – in 2010 only thirty-three per cent of sentences were of that length (House of Commons 2020). In relation to 'effectiveness', it is difficult to accept, in light of the developments outlined above and Ministry of Justice statistical data, the Council's assertion in the consultation paper that their current approach in this area 'seems to work'. It is equally hard to agree with the suggestion that practical difficulties and resource

constraints overwhelm the Council's capacity to give due regard to this statutory duty - **Howard League**

The SC's response to its statutory duty in this regard is to publish an 'annual internal report' summarising the latest research evidence regarding re-offending. This seems a rather modest step towards discharging the statutory duty. In its consultation document the Council concludes that this approach 'seems to work', but how do we know this, and who has determined what works? Is there any evidence or are there any examples of this information having influenced the guidelines' sentence recommendations? We recommend the Council produce and publish a document on this subject -- possibly every other year -- and in conjunction with the Ministry of Justice. This would inform the wider community about the research findings, and also help external users understand the information which feeds into the Council's guideline construction. **Sentencing Academy**

Why do you produce "an annual internal document outlining the latest research evidence in this area regarding reoffending". Not making it public might imply a nervousness about effective independent scrutiny. And why on earth is it not intended directly to influence the Council's deliberations? That is weird!..... "Our existing approach of bringing current research in this area to Council members' attention, and for them to have this in mind during their deliberations on individual guidelines, seems to work". Surely not? If your guidelines were 'effective' in reducing re-offending, we wouldn't have the extraordinarily high levels of reconviction, about which you and the public should be very troubled. - **Nicky Padfield**

In paragraph 125, reference is made to the production of an annual internal document focused on latest research evidence regarding reoffending. The YJB understands the arguments defining 'success in reoffending', and appreciates that this can be a challenging area to navigate. However, we believe there would be merit in publishing the internal document that is referenced here to provide transparency around the way in which sentencing guidelines are in fact effecting reoffending rates. Of particular interest for the YJB, would also include information in relation to children, and the way in which the application of sentencing guidelines effect this (and to what extent). – **Youth Justice Board**

I note from the consultation paper that the Council acknowledges that it has not fully explored the relative cost and effectiveness of various sentencing approaches to date. Were the Council able to provide greater insight in this area, it would support policy development and improve our understanding of the impacts of our policies. However, I do also understand

that a greater focus on this must be considered in the context of the delivery of other priorities such as production of the guidelines and so may not be feasible. - **MOJ (Lord Chancellor)**

We would agree with the way the Council has addressed effectiveness in sentencing and in particular the issue of costs. We agree that the cost of a sentence should not be considered when deciding upon the most appropriate disposal. We also believe that further work in this area would not add significant value. It would not only prove difficult but divert resources away from other areas of the Councils activities - **Justices' Clerks Society**

3.9 While views differ on how and the extent to which the Council should consider evidence on effectiveness, responses illustrate a strong appetite for the Council to share evidence it does consider. While the consultation response stated that the Council considers an internal publication on effectiveness research, for various reasons this has not been consistent and the last report considered was in 2018. As suggested by a number of respondents, if the research were considered and published annually or bi-annually this could promote transparency and understanding of how the Council has had regard to effectiveness, and would allow for the limitations of any evidence to be highlighted. As responses illustrate, a number of respondents – even whilst accepting the resource constraints the Council are under – commented on the apparent lack of transparency of not publishing what it has and how it may appear as if evidence is 'hidden'.

3.10 Publication would require a commitment to the task and have resource implications. If the work was conducted internally, it would require time to source the relevant studies, assess them for relevance and robustness and then synthesise them into a publishable document. The report would need to be peer reviewed and go through the standard approval processes; overall this would constitute a full project for a social researcher and would need to be built into our work plans. If we were to externally commission the work, the internal resource implications would be less (although some input would still be required), but we would need to set aside funds for the work (likely to be in the region of at least £10,000). It would also likely be necessary to publish an accompanying narrative explaining how the evidence has been considered in the context of the Council's work. Undertaking this on a bi-annual basis would help manage the resources required for this in context of other work the A&R team need to undertake. It would also seem sensible, given that analytical work in this area takes time to conduct and so new evidence is not available on a frequent basis. The Council is therefore asked to consider if more should be done to ensure that current research on effectiveness is regularly and consistently considered, and if the

evidence should be published. It is also asked to consider how frequently it should publish new updates: on an annual or bi-annual basis.

Question 1: Does the Council agree a digest of evidence on effectiveness should be produced and considered regularly and published on the Council's website? If so, how frequently should this be published?

Could the Council do more to have regard to effectiveness?

3.11 Resources and a lack of clarity as to how to measure and define effectiveness are significant barriers in themselves to ensuring effectiveness of sentences are a key consideration of the Council, but perhaps the most compelling argument for the current scope of the Council's work in this area is the point made in the consultation document as to what purpose it would serve in respect of its core functions. As offence seriousness is the predominant driver of the sentence and the Council must also have regard to consistency, impact on victims, and the need to promote public confidence, consideration must be given to how much weight could, or should, reasonably and realistically be given to effectiveness in balancing these other objectives.

3.12 The second question sought views on this and asked respondents; 'Do you have any views on other aspects more broadly in terms of the 'effectiveness' of sentencing that the Council might want to consider and if so, how we would go about doing this? To what extent should any further work be prioritised above other areas of the Council's activities?'. The following suggestions and points were made;

The SA believes that the Council could do more to promote more cost-effective sentencing. We agree with the Council that 'in any individual case, the cost of a sentence should not be considered'. Encouraging individual sentencers or panels of magistrates to undertake their own cost-effective analysis prior to choosing the appropriate disposal is likely to provoke greater inconsistency, as sentencers' views on this issue will diverge. In addition, proportionality will be undermined if disposal costs, a factor unrelated to harm or culpability, plays a pivotal role in determining sentencing outcomes. That said, the costs of different disposals vary greatly, and are a matter of public record. In addition, research by the Ministry of Justice has clearly demonstrated that short prison terms are associated with higher rates of re-offending than other, cheaper sanctions such as community orders or suspended sentence orders. The SC could consider simply making these trends (costs; effectiveness) more widely known to sentencers by publishing them on their website. The Council notes that 'resources are scarce' but Council should surely work with the Ministry of Justice to do more work in this area. There is a consensus among scholars at least that sentencing in

England and Wales could deploy its more expensive sanctions more effectively than at present. All sentencers should be aware of the relative effectiveness of different sanctions at their disposal. – **Sentencing Academy**

3.13 While publishing or linking to MOJ data on sentencing costs may be a fairly simple objective to achieve, it is necessary to consider what the purpose of this would be. Publishing the information without context would likely raise questions as to what the Council intends the information is used for, and the Council have already agreed that the cost of a disposal should not be a relevant factor in determination of the appropriate sentence. As there is no clear evidence available which illustrates a link between cost of sentences and their relative effectiveness and this is unlikely to be available while there are diverging views on how effectiveness can be measured, it is difficult to see how the Sentencing Academy's final point can be achieved. However, a commitment to keep evidence of relative effectiveness of sentences under review and be transparent as to how the Council takes this into account is probably a reasonable expectation.

3.14 The Council are asked to consider, bearing in mind the points above, if evidence of sentencing costs should be published or linked on its website for information and transparency purposes?

Question 2: Does the Council think information on sentencing costs should be published on its website?

3.15 Other respondents shared views on how the Council could broaden its consideration of effectiveness, and what steps and measures it could take;

I think this is basic to your role? The SC is made up of extraordinarily influential and knowledgeable people. I remain surprised that you haven't prioritised much more work on the 'effects' as well as the 'effectiveness' of sentencing. Discrimination is an obvious area: the impact of imprisonment on the lives of already disadvantaged people. I am surprised that you make no reference to the Lammy Review (2017), and was disappointed that you refer to the Public Sector Equality Duty merely in an Annex. This does not seem to have led you to take equality issues to the very heart of your agenda and your self-evaluation (when you might have chosen to go rather further than required by the minimalist Equality Act 2010 – intersectional disadvantage in the penal system is of huge concern). A small example: has the SC done all that it can to highlight the additional disadvantages faced by many women in the community stages of sentences (including the lack of Approved Premises)? Another example: should the SC encourage sentencers to explore the reality of support (including mental health treatments) available under different penal 'pathways' – **Nicky Padfield**

A framework document providing more detailed analysis of how each (sentencing) principle is achieved, and how they interrelate, could be beneficial. This could be cross-referenced in respect of certain sentences – for example, looking at what options imprisonment offers to rehabilitation. In order to assess effectiveness of sentencing, the Council should consider coordinating with other stakeholders (including those bodies with a statutory responsibility to inspect probation and prison services) to look at the impact of recommendations on probation on sentencing, and linking that to reoffending rates.- **Magistrates Association**

The goals of sentencing are multi-fold and often competing i.e., to give offenders their just deserts, incapacitate or deter them from committing crimes in the future, rehabilitate them, or enable them to make reparations. Therefore, the Council could examine the extent to which these goals are met, perhaps with reference to different subgroups of offences and/or offenders. - **Mandeep Dhami**

We need statistical analysis of outcomes following different types of sentencing over periods of time. This is to review the effectiveness of each types of sentences. – **Individual respondent**

Since 04 the Catholic Church has proposed that the SC "should be given the brief not simply of rationalising and systematising sentencing so that it becomes proportionate, consistent and effective. It should also be given the brief of gearing the system so that fewer people are sent to prison." England and Wales now have the highest imprisonment rate in Western Europe. Despite a noticeable fall in recorded crime, the prison population has risen by almost 70% over the last 30 years. Giving appropriate levels of care to such a high prison population is a demand that is not being met effectively, with serious consequences not only for the human dignity of those in prison, but also their opportunities for effective rehabilitation. One of the main reasons for this trend is a significant and persistent increase in the average custodial sentence length over the past decade. Therefore, we strongly believe that the Sentencing Council should adopt a stated aim to curb sentence inflation and undertake a periodic review of sentencing trends in relation to specific offences. This would greatly assist with determining the causes of sentence inflation and improve the effectiveness of sentencing guidelines in addressing it. The process may also help to identify areas where existing guidelines or legislation require amendment. - **Catholic Bishops' Conference**

3.16 A number of responses considered that rehabilitation directly links to effectiveness and suggested the Council should give more prominence to rehabilitation as a purpose of sentencing, and highlighted practical steps which could be taken in this regard;

> The principle of proportionality in sentencing and the statutory requirement to assess the cost and effectiveness of sentencing must be at the heart of the Council's future work. The development of any new guidelines should pay sufficient regard to the 'cost of different sentences and their relative effectiveness in preventing re-offending' (Coroners and Justice Act 2009 (s120(11)(e)). Without proper focus on the cost and effectiveness of different sentences there is little prospect of sentencing guidance enabling sentencers to take a proportionate and effective response to offending. Without this focus the worrying trajectory of the last ten years is likely to be replicated, with increasingly severe sentences and prisons remaining overcrowded, unsafe and ineffective. There are several avenues that the Sentencing Council might fruitfully explore in giving greater regard to the cost and relative effectiveness of different sentences. In the first instance these factors should inform the levels at which category ranges are set. The Howard League suggests that a review of the category ranges, and the thresholds for the imposition of custody, particularly those for less serious and non-violent offending, is necessary to give effect to this statutory duty. Secondly, having appropriate regard to effectiveness and the wider 'cost' or impact of sentencing options ought reasonably to result in building these factors into the process by which sentencers themselves arrive at an appropriate sanction. To achieve this the Council should consider a review of the structured approach to sentencing set out in the offence-specific guidance. The Howard League suggests that the Council review whether to include a step in the process requiring the sentencer to consider the effectiveness of the proposed sentence and its likely impact, not only on the victim(s) and individual defendant, but also on the defendant's family/dependents and the community at large. These considerations are at present neglected in the structured approach a sentencer is required to follow. The assessment of effectiveness could be structured by reference to the five purposes of sentencing to which sentencers must have regard: punishment, the reduction of crime (including by deterrence), the reform and rehabilitation of offenders, the protection of the public and the making of reparation to victims (s142 Criminal Justice Act 2003). – **Howard League**

> In respect of the purpose of sentencing, the Council appears to prioritise punishment and public protection, emphasising the former as the primary means of deterring and preventing crime. From its website: "While punishing the offender for the crime committed is one of the purposes, there are other important aims, like preventing crime happening in the future so

more people don't become victims of the same offender." Sentencing aims to protecting the public "…from the offender and from the risk of more crimes being committed by them. This could be by putting them in prison, restricting their activities or supervision by probation." Rehabilitation is portrayed by this narrowly unimaginative example: "by requiring an offender to have treatment for drug addiction or alcohol abuse". It is thus marginalised to the public mind, reflecting presumably its marginalisation within the Council's mind. It would not be sufficient for the Council to respond by saying that its potential work is limited by the s.142 CJA 2003. However confused, the Act's five purposes give plentiful scope for development. In the face of strong evidence of the ineffectiveness of prison for reducing recidivism (and hence longer term for protecting the public), it is urgently necessary for the Sentencing Council to put its weight behind determined exploration of rehabilitative policies. Given the costs of imprisonment and recidivism, this relates directly to cost-effectiveness. Given a media appetite for effectively equating justice with revenge, this is not an easy argument. Public "confidence" may more easily be achieved by conforming to Pavlovian simplicities. However, one essential "overarching issue" is surely the Council's leadership role in encouraging more nuanced understandings of what counts as "effective" as well as "fair". – **Individual respondent**

We hope in particular that the Council will take forward the Bottoms' proposals on effectiveness, to more closely match guidelines to support the process of desistance and to reflect consequentialist approaches to sentencing. We share Anthony Bottoms' view that the Council's consideration of 'effectiveness' in relation to sentencing has been too limited. In particular, we endorse his recommendations that:

• Offence-specific guidelines might usefully include some reference to the 2003 legislative provision relating to the purposes of sentencing (paragraph 38).

• It is appropriate for those responsible for sentencing (including the Sentencing Council) to structure sentencing practices so that, where possible, they contribute to the desistance process – without, of course, compromising the other purposes of sentencing (paragraph 48).

• Since s. 142(1) of the Criminal Justice Act 2003 includes consequentialist aims among the purposes of sentencing, when constructing guidelines the Council should consider research evidence on consequences (paragraph 91). The first recommendation would require the Council to update existing and new guidelines, or to produce separate guidance which could then be cross referenced from each offence specific guideline. This is something which the migration of guidelines online should make relatively straightforward. A comprehensive response to the second and third recommendations would require a review of the 'step'

framework the Council has adopted for offence specific guidelines. We do not doubt the significant amount of work this might involve. Nonetheless, the consultation should be an opportunity for the Council to reflect on whether the way in has chosen to structure its guidelines to date adequately reflects: 1) “the rapid recent development of desistance research, which has produced clear evidence that most offenders wish to desist” (Bottoms, para 48); and 2) whether it has done enough to take account of the consequentialist purposes of sentencing. We could, for instance, imagine a framework which was significantly different to the one currently adopted, structured to fully take account of the desistance process. This might involve:

Step 1: identify the background to this offence (what led to this offence)

Step 2: identify the factors which might lead to this offender not re-offending

Step 3: having put the offence in context (step 1) identify aggravating and mitigating factors in order to evaluate culpability

Step 4: identify offence serious in the light of 1-3.

Even if the Council chose not to embark on such a comprehensive revision of the framework, there are still practical steps it could take to ensure that its guidance better supports the process of desistance and consideration of consequences. Perhaps the most significant would be to consult on an overarching guideline on the sentencing of young adults (aged 18-25), since it is the age-range 20- 25 when there is the fastest deceleration of offending among persistent offenders.

The Council may also choose to take forward some of the recommendations put forward by Anthony Bottoms to amend the step framework, which would work to support the process of desistence: From the point of view of an offender reading the Council’s guidelines, there would be merit in separating out personal mitigation factors as a separate Step in the guideline, so that offenders are more aware that their personal circumstances, and their steps towards desistance, are explicitly recognised by the Council as relevant to sentencing. This change is accordingly recommended (paragraph 47).

• The Council should consider whether it would be helpful to add the question ‘Is Custody Unavoidable?’ as a standard additional Step in guidelines for all imprisonable offences (paragraph 84).

• The possible new ‘Is Custody Unavoidable?’ Step in offence-specific guidelines might usefully contain a reminder that the court can request an adjournment to ensure that a more considered and reliable pre-sentence report (PSR) is obtained in the interests of better decision-making (paragraph 85). – **Prison Reform Trust**

3.17 The latter suggestions made by the Prison Reform Trust have already been effected since the digitisation of guidelines, with all guidelines including a drop down section on custodial sentences which include the key questions from the Imposition guideline. The same approach is taken for Community Orders with each offence specific guideline including the relevant principles and criteria relevant to imposing such an order. Some guidelines, such as burglary, also include specific references to rehabilitation and highlight community orders with a rehabilitation requirement may be a proper alternative to short or moderate custodial sentences.

3.18 While it is not thought that the model of guidelines should be revised as radically as suggested, there is perhaps merit in the suggestion by the PRT and a number of respondents that the aims of sentencing could be highlighted more clearly in guidelines as a step rather than being limited to the general guideline and referenced and reflected in the Imposition guideline. As suggested by the PRT a practical way to do this could be to include a separate step in guidelines so that an overall assessment of these is made in finalising the sentence. This could take the form of a 'step back' assessment, similar to the approach taken in the Health and Safety guideline where the sentencer is required to consider the overall impact of a financial penalty on an individual or an organisation. At a later stage this may also provide for links to be included to relevant and current evidence of effectiveness, as the Council have recently started to do in respect of evidence of racial disparity.

3.19 A recommendation made by Professor Anthony Bottoms on the review of the Council was that '*The Council might wish to consider whether a guideline, or less formal guidance, on s.142(1) of the Criminal Justice Act 2003 should be developed, in the course of which comments would be made on relevant empirical research findings'.* At that time the Council did not wish to reference empirical data in guidelines, but if it is decided that effectiveness evidence considered should be published then a natural progression could be to link this to any steps included which may relate to the aims of sentencing, and rehabilitation and deterrent effects of sentencing which are the most relevant to reducing reoffending. Such a suggestion was made by Andrew Ashworth, who submitted the following response which cut across a number of the consultation questions;

> In relation to effectiveness, the Council argues at [132-136] that it lacks the resources to undertake research on this, that there are difficult questions of definition of 'effective' and of 're-offending', and that it is best to continue with its current approach of producing an annual internal document summarising the latest research. I have not seen a copy of any annual review, but it sounds as if this charts recent research findings without placing them in the context of effectiveness research generally (for example, Bottoms and von Hirsch, 'The Crime-Preventive Impact of Penal Sanctions', in P. Cane and H. Kritzer, Oxford Handbook of

Empirical Legal Research,2010). In what is one of the weakest paragraphs in the consultation document, the Council states that its current approach of bringing recent research to the attention of Council members 'seems to work'. The Council gives no evidence of whether or how it 'works.' For example, Council documents frequently refer to the need for deterrence, without any reference to the research findings on deterrence. If the Council has an internal document summarising those research findings, should it not be brought to the attention of consultees at the stage of consulting on a draft guideline. What is the sentencer to do when s. 142 of the 2003 Act sets out 5 purposes of sentencing to which regard must be had, when the country's leading criminologist states that 'the bulk of the evidence suggests that increases in sentence severity have zero or very weak effects' (Bottoms Review, [88]), and when the distinguished former chief magistrate highlights the findings of one study of sentences after the 2011 London riots which claims that the tougher sentences had a 'general deterrence effect' (H. Riddle [2020] Crim.L.R. 194, at pp. 209-210)? Surely the sentencer should be given some guidance about the robustness of research findings when reliance is placed on any of the five 'purposes of sentencing.' -
Andrew Ashworth

3.20 The practical challenges of this would be that sentencers are unlikely to have time to review such evidence during a sentencing exercise, which may limit its impact. However, if the evidence were published and widely communicated, adding a 'step back' step may serve as a 'nudge' or reminder to sentencers that it is available and encourage an evidence based approach if any is available for consideration. This approach may also be a step towards helping focus sentencers on potential factors that may have disadvantaged certain offenders, and could indirectly link to addressing racial disparities on outcomes.

3.21 Should the Council consider this idea worth exploring, the additional step could be at step three immediately after the consideration of adjustment to the sentence for aggravating and mitigating factors and look something like as follows;

Step Three

The sentence arrived at should be considered with reference to the aims of sentencing as provided for by s142 of the Criminal Justice Act 2003, which are as follows;

the punishment of offenders,

the reduction of crime (including its reduction by deterrence),

the reform and rehabilitation of offenders,

the protection of the public, and

the making of reparation by offenders to persons affected by their offences.

The court should consider which of the five purposes of sentencing it is seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence.

(nb. The final paragraph is already included in the general guideline)

This is a very basic example for illustrative purposes only. Further work could be undertaken on this subject to the Council's views on the merit of the suggestion.

Question 3: Does the Council think further consideration to include an additional step in guidelines should be undertaken, to remind sentencers to consider their sentence in the round in terms of potential relative effectiveness?

Additional research

3.22 The final question in relation to effectiveness asked 'Should the Council carry out additional research in the area of effectiveness of reducing reoffending? What should the additional research priorities be?'.

3.23 There was broad agreement that more research into effectiveness was needed, although views varied on whether this should be undertaken by the Council.

The SC is the primary statutory authority with respect to guidance for sentencers. This confers on the Council a unique authority to provide, for courts and the community, authoritative advice about the most effective ways of reducing re-offending through the sentencing process. The Council does not appear to have the resources at present to carry out original research in this area. But the Council could work with the Ministry of Justice to publish brief research summaries with respect to various questions relating to sentencing options and re-offending. We note that there is a 'What Works' Centre involving the College of Policing. There is a clear need for some form of 'What Works' Centre focusing on the effectiveness of different disposals and the Council should play a key role in establishing and guiding such a centre. A good example of collaborative research with the Ministry of Justice (and possibly academics) involves the most effective requirements of community orders in terms of preventing re-offending. When imposing a community order, courts in England and Wales may choose to impose one or more of 15 requirements such as a curfew, a residence requirement or an unpaid work requirement. When crafting the sentence, courts should individualise the restrictions imposed, with a view to determining the most effective and most appropriate combination. This determination is assisted by counsel and by advice from probation services. Ultimately, however, the conditions imposed are likely to reflect the

court's experience and intuitions about which specific requirements are most useful or effective. The SC is encouraged to work with the Ministry of Justice to develop a research programme which would compare the effectiveness of different conditions. Furthermore, consideration must be given to the availability of specific requirements in each area and the SC must advocate for the universality of provision to both help reduce re-offending and ensure consistency. – **Sentencing Academy**

I do not think this is the remit of the Sentencing Council but is a piece of work desperately needed as long as it takes a holistic view. - **Individual respondent**

I think you can put too many resources into this. Really affectively rehabilitated people probably don't appear in your statistics. - **Individual respondent**

Indeed, this should be a key focus. - **Sentencer**

Someone should carry out more research. It would be good if it was an independent body without any financial, political or management pressures - such as the Council. - **Individual respondent**

The Howard League do not consider that it is necessary or practicable for the Council itself to conduct its own research in this area (CQ24). There are broad areas of agreement in sentencing research to which the Council can, and must properly, have regard. - **Howard League**

There is already a substantive body of research on the effectiveness of sentencing options such as community orders and restorative justice. Yet despite the proven benefits when it comes to rehabilitating offenders and supporting victims, they remain underutilised. We would welcome further analysis by the Sentencing Council in this area, specifically focussed on developing recommendations regarding the wider use of non-custodial alternatives in the criminal justice system. This clearly needs to be accompanied by the political will in government and parliament to implement such changes. - **Catholic Bishops' Conference**

It is important for sentencers to have a detailed understanding of the effectiveness of sentencing options on reducing reoffending, but in order to ensure there is no doubling up of

work, the Council must liaise with other stakeholders, including Inspectorate bodies and independent researchers. **– Magistrates Association**

Yes. I think much more will be learnt by qualitative research than quantitative. We all know how unreliable reconviction data is as a measure of re-offending! And the life stories of those attempting to live law-abiding lives have to be so much better understood (by judges, policy makers and the public).

The SC should consider whether it would be more effective either to publish summaries of other people's research in this area or to carry out its own. Probably the most cost-effective step forward would be to do both?

It is worth revisiting Professor Ralph Henham's suggestion in his Sentencing Policy and Social Justice (2018) that regional Sentencing Councils should be established, not least for training purposes and to keep sentencers abreast of "social cost factors" (p. 208). - **Nicky Padfield**

Yes, if you have the time and funding. Perhaps student/ university staff can help with this. - **Individual respondent**

3.24 Other respondents suggested areas of research which would be useful;

We would be supportive of any research which looked at the concept of desistance, especially in relation to children. It will be noted that one of the tenets of the YJB's Guiding Principle focuses on how the YJB can work with other partners to ensure that children can develop a pro-social identity and in turn, sustainable desistance. We understand that there are constraints on the Council's resource but do consider that conducting further analysis on desistance would help the Council in the execution of its statutory functions, by enhancing the understanding of how reoffending can be reduced and sustained. – **Youth Justice Board**

Taking short custodial sentences as an example, there is clear, uncontroversial evidence that they are ineffective, indeed that they are generally counter-productive (see for discussion Corston 2007, British Academy 2016). There is broad, cross-party consensus that the movement away from such sentences is an urgent necessity. The Ministry of Justice's own research (MoJ 2018b, see also Mews et al 2015) has identified that for individuals with significant previous offending a short-term sentence raises the odds of that person reoffending by around a third in comparison to the same individual being given a

community order. Far from protecting the public, short sentences are more likely to make more victims. The Council's guidance should warn against imposing counter-productive short sentences. Indeed giving proper regard to the relative effectiveness (or ineffectiveness) of short sentences the Council ought properly to be calling for their abolition. Instead, following sentencing guidance, 34,900 adult defendants were given immediate prison sentences of less than 6 months in the year to March 2019 (MoJ 2020a). – **Howard League**

Looking at ways to assess what was the intervention that gave the positive benefit, was it simply the shock of a sentence, was it providing a home, was it drugs intervention, was it financial advice on managing personal finances etc. We need to know more about what works in different situations if we are to avoid having no option but to send people to prison. I agree that short sentences do not work for most people, sadly though some people already are beyond what the system can offer and if we are to stop sending people to prison then we need to know what will work and that requires not just looking at reoffending rates but looking at the positive outcomes and what that was. - **Individual respondent**

Please Investigate the Police and Volunteers Scheme in Scotland to stop Re-Offending by means of convincing offenders that unemployment, drugs, alcohol, gangs and continued unemployment leads to recidivism and a life of prison in, out, in, out etc. It also screws-up the life of the next generation, who all too often then follow in the very same footsteps of the parent or parents. And so on and so on, for years and years. - **Individual respondent**

Understanding the effectiveness of various community order options would be valuable, also any regional differences. I do not understand why 'reducing offending' is considered to be different from the first step to 'desistance' **- Magistrate**

Transform Justice also thinks that when producing guidelines, the Council should interview those who have been convicted, as they did in relation to drug mules. This would help ensure that the human consequences of sentencing decisions are fully considered.

Areas for further research could include: Sentencing and desistance, the role of pre-sentence reports and restorative justice. - **Penelope Gibb, Transform Justice**

3.25 Clearly there is a demand for more research, although the majority of respondents recognise that there are resource constraints which limit the extent to which further research could be undertaken by the Council. Some suggestions, such as the Council being involved

in establishing a ‘What Works’ centre as suggested by the Sentencing Academy, are ambitious although potentially something that could be explored with MOJ if resources were available.

3.26 Other suggestions may be possible to integrate into the Council’s existing work. The biggest area for which there seems to be a demand is qualitative research with offenders to understand which elements of a sentence may have influenced their rehabilitation, and to which degree. While there are many non-sentencing factors which influence offending such as addiction, lifestyle and other socio-economic factors, it could be valuable to understand how sentences could intervene and the extent to which they may be able to influence desistance. As noted by the Transform Justice response, the Council did carry out research with drug mules to provide for proportionate sentences for this category of offender, and understanding broader offender motivations and needs may assist in considering how guidelines could provide for addressing these more specifically. However, to some degree the Council have done this already as noted earlier in this paper, by highlighting where consideration should be given to imposing sentences focused on rehabilitating offenders convicted of particular offences rather than imposing short or moderate custodial sentences. This has not been as a result of research as such, but more by an understanding that some offences are more likely to be related to addiction. However, research may provide valuable evidence to support and influence wider government and agency initiatives into sentences and programmes which reduce re-offending, and is an area there is strong support for the Council to explore further in having regard to effectiveness.

3.27 As with many other issues considered, such research would be subject to resources. Potential options could be for offender engagement to be undertaken as part of the research of guideline development or evaluation, which could be facilitated through links with Probation or partner agencies, or as suggested by a respondent, for work to be outsourced to Universities. The key point to consider is whether this should become an integral part of guideline development and evaluation.

Question 4: Does the Council think consideration should be given to undertaking research in guideline related work related to how effectiveness of sentences may be influenced or enhanced?

3.28 The responses included many suggestions which it would not be possible to discuss in the course of one meeting. The Council are asked if there are any issues raised by respondents and not covered by the questions posed which the Council consider are worthy

of further consideration, either by the A&R sub group or by the full Council at a future meeting?

Question 5: Are there any other points made by respondents, or that arise from this paper, that the Council thinks should be explored for fuller consideration?

Sentencing Council

Sentencing Council meeting: **16 April 2021**
Paper number: **SC(21)APR07 – Firearms importation**
Lead Council member: **Maura McGowan**
Lead official: **Ruth Pope**

1 ISSUE

1.1 At the February meeting the Council considered the scope and format of a firearms importation guideline. It was agreed that the scope of the guideline should be limited to the importation of firearms contrary to sections 50 and 170 of the Customs and Excise Management Act 1979.

1.2 The Council agreed that the format of the guideline should be loosely based on the possession of a prohibited weapon guideline, but with elements taken from the transfer and manufacture guideline.

1.3 It was agreed that the working group should consider the guideline in more detail and make recommendations the full Council to enable the guideline to be signed off for consultation at the April or May Council meeting. The working group met on 5 March to consider two versions of a draft guideline and the recommendations in this paper reflect the discussions at that meeting.

2 RECOMMENDATION

2.1 That the Council considers the proposed draft at **Annex A** and agrees a version of the importation guideline for consultation.

2.2 That the Council agrees a timetable for the consultation which would allow for the definitive guideline to come into force on 1 January 2022.

3 CONSIDERATION

Assessing culpability

3.1 Taking into account the suggestions made at the February Council meeting, several culpability models have been explored and tested against cases. A model that first considers the type of weapon and then considers the offender's role appears to work best for a wide range of cases.

3.2 In summary there are three types of weapon:

- Type 1: Weapon designed to be capable of killing two or more people at the same time or in rapid succession.
- Type 2: Weapons falling between 1 and 3 and most ammunition

- Type 3: Weapon that is not designed to be lethal and very small amounts of ammunition

3.3 Consideration was given to providing just that summary in the guideline, but on reflection it seemed preferable to be consistent with the other guidelines and give more detail. The difficulties of defining exactly which firearms and ammunition are covered by the offence means that the lists are not exhaustive but the wording used 'would **normally** include' should prevent the lists being treated as inflexible.

Culpability – Type of weapon Use the table below to identify an initial culpability category based on the **type of weapon** only. This assessment focuses on the nature of the weapon itself only, not whether the weapon was loaded or in working order. Courts should take care to ensure the categorisation is appropriate for the specific weapon. Where the weapon or ammunition does not fall squarely in one category, the court may need to adjust the starting point in step 2. References to weapon below include a component part of such a weapon.
Type 1 Weapon that is designed to be capable of killing two or more people at the same time or in rapid succession • This would **normally** include a weapon prohibited under the following sections of the Firearms Act 1968: o section 5(1)(a) o section 5(1)(ab) o section 5(1)(aba) o section 5(1)(ac) o section 5(1)(ad) o section 5(1)(ae) o section 5(1A)(c)
Type 2 All other weapons falling between Type 1 and Type 3 • This would **normally** include a weapon requiring certification or prohibited under the following sections of the Firearms Act 1968: o section 1 o section 5(1)(af) Ammunition (where not at Type 3) • This would **normally** include ammunition under requiring certification or prohibited under the following sections of the Firearms Act 1968: o section 1, o section 5(1)(c), o 5(1A)(b) and (d)-(g)
Type 3 Weapon that is not designed to be lethal • This would **normally** include a weapon under section 5(1)(b) or a stun gun under section 5(1A)(a) Very small quantity of ammunition

3.4 The ‘other’ culpability factors relate to role, planning and expectation of financial or other advantage. They are based on the culpability factors in the Transfer and manufacture guideline.

Culpability – other culpability factors The court should weigh all the factors set out below in determining the offender’s culpability
High culpability: • Leading role where offending is part of a group activity • Significant planning, including but not limited to significant steps to evade detection • Abuse of position of trust or responsibility, for example registered firearms dealer, customs official • Expectation of substantial financial or other advantage • Involves others through coercion, intimidation or exploitation

Medium culpability:
• Significant role where offending is part of a group activity
• Some degree of planning, including but not limited to some steps to evade detection
• Expectation of significant financial or other advantage
• Other cases falling between culpability A and C because:
  ○ Factors are present in A and C which balance each other out and/or
  ○ The offender’s culpability falls between the factors as described in A and C

Lower culpability: • Lesser role where offending is part of a group activity, including but not limited to performing a limited function under direction • Involved through coercion, intimidation or exploitation • Little or no planning • Expectation of limited, if any, financial or other advantage

3.5 One concern raised by the NCA in response to the firearms consultation in 2020 was an impression that those who imported firearms by post had been dealt with less severely compared to accompanied importations. The evidence we have from transcripts does not indicate that this is an issue (for examples of importation by post receiving significant sentences see numbers 5 and 9 in Annex B). Although it is possible that importations by post may involve less planning than accompanied importations, there are other high culpability factors that would apply in appropriate cases.

3.6 These two elements of culpability have been combined to make one of four overall culpability levels:

	Type of weapon		
Other culpability factors	**1**	**2**	**3**
High	Culpability category A	Culpability category B	Culpability category C
Medium	Culpability category B	Culpability category C	Culpability category C
Lower	Culpability category C	Culpability category D	Culpability category D

3.7 This is a departure from other firearms guidelines where there are only three culpability levels. It has been done to cater for the very wide range of offending covered by this guideline.

Question 1: Does the Council agree with the proposed culpability model? Are the factors the right ones?

Harm assessment

3.8 The proposed harm model is based on the Transfer and manufacture guideline in that it refers to the scale and nature of the importation (regardless of the offender's role).

Harm Harm is assessed by reference to the **scale** and **nature of the importation** regardless of the offender's role and regardless of whether the importation was intercepted.
Category 1 • Large-scale commercial enterprise – indicators may include: ○ Large number of firearms/ ammunition involved ○ Operation over significant time period ○ Close connection to organised criminal group(s)
Category 2 • Medium-scale enterprise and/or some degree of sophistication, including cases falling between category 1 and category 3 because: ○ Factors in both 1 and 3 are present which balance each other out; and/or ○ The harm falls between the factors as described in 1 and 3
Category 3 • Smaller-scale and/or unsophisticated enterprise – indicators may include: ○ Limited number of firearms/ ammunition involved ○ Minimal/no connection to organised criminal group(s)

3.9 One potential issue with this harm model is that quite a wide range of offending could be encompassed by each category. In particular category 3 does not distinguish between the importation of one or two weapons where there is a real danger that they may be used and cases where there is a very low risk of the weapon causing any harm. Looking at the cases for which we have transcripts, the distinction between such cases is generally achieved by the difference in culpability. Aggravating and mitigating factors may provide for further distinction between such cases (see discussion below).

Question 2: Does the Council agree with the proposed harm model? Are the factors the right ones?

Sentence tables

3.10 The offence range is a fine to 28 years' custody. There are two sentence tables (one for offences carrying life and one for those with a seven year statutory maximum). Culpability

A and B have been combined in Table 2 because culpability A will never apply and culpability B will rarely apply.

Table 1 should be used if the offence is subject to a maximum life sentence
Table 2 should be used if the offence is subject to a maximum 7 year sentence

TABLE 1: Offences subject to the statutory maximum of a life sentence (offence relates to weapon or ammunition that is of a kind mentioned in Section 5(1)(a), (ab), (aba), (ac), (ad), (ae), (af), (c), section 5(1A)(a) Firearms Act 1968)

Harm	Culpability			
	A	B	C	D
Cat 1	**Starting point** 20 years' custody **Category range** 16 – 28 years' custody	**Starting point** 14 years' custody **Category range** 10 – 17 years' custody	**Starting point** 10 years' custody **Category range** 8 – 12 years' custody	**Starting point** 6 years' custody **Category range** 4 – 8 years' custody
Cat 2	**Starting point** 14 years' custody **Category range** 10 – 17 years' custody	**Starting point** 10 years' custody **Category range** 8 – 12 years' custody	**Starting point** 6 years' custody **Category range** 4 – 8 years' custody	**Starting point** 3 years' custody **Category range** 2 – 5 years' custody
Cat 3	**Starting point** 10 years' custody **Category range** 8 – 12 years' custody	**Starting point** 5 years' custody **Category range** 3 – 8 years' custody	**Starting point** 3 years' custody **Category range** 2 – 5 years' custody	**Starting point** 2 years' custody **Category range** 1 – 3 years' custody

TABLE 2: Offences subject to the statutory maximum sentence of 7 years

Harm	Culpability		
	A / B	C	D
Category 1	**Starting point** 5 years' custody **Category range** 4 – 7 years' custody	**Starting point** 3 years' custody **Category range** 2 – 5 years' custody	**Starting point** 2 years' custody **Category range** 1 – 3 years' custody
Category 2	**Starting point** 3 years' custody **Category range** 2 – 5 years' custody	**Starting point** 2 years' custody **Category range** 1 – 3 years' custody	**Starting point** 1 year's custody **Category range** High level community order – 2 years' custody
Category 3	**Starting point** 2 years' custody **Category range** 1 – 3 years' custody	**Starting point** 1 year's custody **Category range** High level community order – 2 years' custody	**Starting point** Low level community order **Category range** Band A fine – High level community order

3.11 The boxes shaded orange in the sentence tables above are those that have been used in the resentencing exercise described at 3.15 below.

3.12 The working group also considered a version of the guideline with an extra low level of harm and only one sentence table. This carried the risk of the guideline leading to a sentence in excess of the statutory maximum and also involved having some boxes in the table that could never be used.

3.13 A key difference between having one or two tables, is that two tables could mark a clear distinction between very similar cases where one involves stun guns and the other involves disguised stun guns; whereas with one table they would be treated the same. A similar issue was encountered with the possession of a prohibited weapon guideline where there are two tables: one for offences subject to the minimum five year term (such as possession of a disguised firearm) and one for those that are not (such as possession of a stun gun). For that guideline, however, similar cases are likely to be treated the same because the CPS charging policy is that that possession of a disguised stun gun (absent aggravating features) will be charged under s5(1)(b) – to which the minimum term does not apply.

3.14 To take an example: D buys a low powered stun gun over the internet from a seemingly reputable on-line retailer which is shipped to him from outside the UK. Assuming that D is of good character, cooperates fully and it is accepted that he had no intention to use it: if charged with **possession**, the sentence is likely to be a fine or community order; if charged with **importation** the sentence would be similar. In the same scenario if the stun gun was disguised as a torch, there would be no change to the sentence for **possession** and if charged as **importation** the sentence using Table 2 would be unchanged but the sentence using Table 1 would be custody.

3.15 For the CEMA offences, the CPS is in the process of updating its charging policy so that in future the charge will specify the type of weapon with reference to the Firearms Act. The intention is that where a disguised stun gun is involved, the CPS will specify it as a weapon under s5(1)(b) Firearms Act to which the 7 year maximum applies unless there are aggravating features. So Table 2 would be used to sentence in our example above.

3.16 Annex B contains a summary of 26 sample cases that have been 'resentenced' using the proposed guideline and assuming that the change to CPS charging policy has been made. The final column in Annex B shows the comparable sentence using either the possession of a prohibited weapon guideline or the transfer and manufacture guideline. It is acknowledged that this 'resentencing' exercise is inexact and it is based on scant details in many cases but it gives an indication of how the guideline might operate.

3.17 In Annex B, blue highlighting in either of the last two columns indicates that the relevant guideline would produce a sentence lower than that actually passed and yellow

highlighting indicates a sentence higher than was actually passed (if the actual sentence is within the range of the category it has not been highlighted).

3.18 The sentence levels in the guideline have been set with current sentencing practice in mind. Most s170 offences are dealt with in the Crown Court (88% of all offenders sentenced since 2009). Whereas s50 offences have been predominately dealt with in magistrates' courts (78% since 2014).

3.19 Sentences passed in 2019 were as follows:

Offence	Discharge	Fine	Community order	Suspended sentence	Immediate custody	Range
s50 CEMA	2	7	1	5	2	Discharge – 3 years' custody
s170 CEMA		1	1	2	4	Fine - 14 years' custody

3.20 Both versions of the guideline appear 'top heavy' when compared to 2019 sentencing data but it seems likely this is because a high proportion of prosecutions (particularly under s50) are cases of relatively low seriousness. We don't have any information about the cases sentenced in magistrates' courts but it is assumed that those cases receiving fines and discharges are similar to the example described at 3.13 above. Discharges have not been included in the sentence table as it is difficult to envisage a situation where it would be 'inexpedient to inflict punishment' (section 80 Sentencing Code) but in an exceptional case a court could go outside the guideline.

3.21 It is apparent from the 2019 figures that suspended sentence orders (SSOs) are relatively frequently imposed for these offences. Using the proposed guideline, it seems likely that in a number of cases these would be replaced with community orders (there are eight examples of this at Annex B). In practical terms from the offender's point of view the effect of the sentence might not be very different. The effect on prison and probation resources of the change from a short SSO to a community order might also be minimal. One difference that might be relevant is that a custodial sentence (including one that is suspended) of three months or longer means that the offender is prohibited from possession any firearm or ammunition for a minimum of 5 years (section 21 Firearms Act 1968).

Question 3: Does the Council agree with having two sentence tables? Are the sentence levels appropriate?

Aggravating and mitigating factors

3.22 These are similar to those in the transfer and manufacture guideline.

3.23 An additional mitigating factor (M4) has been added to cater for very low harm cases:

- Very small scale importation **and** very low risk of harm to others

3.24 Consideration of the cases at Annex B suggests that there may be a requirement for a balancing aggravating factor to take account of situations where there is recklessness as to harm from the weapon. The suggested factor (A6) is:

- Offender intends firearm/ammunition to be used or is reckless as to whether it would be used (where not taken into account at step 1)

Question 4: Does the Council have any comments on the proposed aggravating and mitigating factors?

Other steps

3.25 The remaining steps of the draft guideline are fairly standard. Step 6 – Ancillary is the only one which contains information specific to this guideline. Other firearms guidelines contain a reference to forfeiture orders under section 52 of the Firearms Act 1968 but this does not apply to these offences. For s170 offences there is a power to order forfeiture under s170(6) CEMA. Otherwise, there is a general power to order deprivation of property under section 153 of the Sentencing Code. Reference is also made to a Serious Crime Prevention Order which is available for s170 offences.

Step 6 – Ancillary orders

In all cases the court should consider whether to make ancillary orders.

- Ancillary orders – Magistrates' Court
- Ancillary orders – Crown Court Compendium

Forfeiture of firearms

Where the offender is convicted of an offence contrary to section 170 of the Customs and Excise Management Act 1979 the court may consider making an order for forfeiture under section 170(6).

For any offence, the court may consider making an order for deprivation under section 153 of the Sentencing Code of any property used in the commission of the offence.

Serious Crime Prevention Order

Where the offender is convicted of an offence contrary to section 170 Customs and Excise Management Act 1979, the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

Question 5: Does the Council have any comments on the ancillary orders step?

Timetable

3.26 If the guideline is signed off for consultation at this meeting, the plan is to launch the consultation on 23 June to run for 12 weeks until 8 September. The previous consultation on firearms guidelines received only 21 responses and a similar number is expected for this guideline. The consultation responses could then be discussed at the September and October Council meetings and the definitive guideline published in November to come into force on 1 January 2022.

4 EQUALITY AND DIVERSITY

4.1 The volumes for these offences are too low to draw any conclusions about whether there are any issues of disparity in sentencing based on membership of one or more demographic group.

4.2 The factors in the guideline have been drawn up with fairness and proportionality in mind and the consultation will ask for views on whether there are any equality issues that should be addressed.

5 IMPACT AND RISKS

5.1 A draft resource assessment is attached at Annex C. As has been noted above, these are low volume offences and the sentence levels in the draft guideline broadly reflect current sentencing practice and so any impact is likely to be small.

Question 6: Does the Council agree to sign off the guideline for consultation and, if so, is the proposed timetable suitable?

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