Office of the Sentencing Council
Room EB16 East Block
Royal Courts of Justice
Strand
London WC2A 2LL
DX 44450 Strand
T 020 7071 5793
E Steve.Wade@sentencingcouncil.gsi.gov.uk

www.sentencingcouncil.org.uk

22 January 2021

Dear Members

Meeting of the Sentencing Council – 29 January 2021

The next Council meeting will be held via Microsoft Teams, the link to join the meeting is included below. **The meeting is Friday 29 January 2021 from 9:30 to 14:00**. 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)JAN00
▪ Minutes of meeting held on 18 December	SC(20)DEC01
▪ Assault	SC(21)JAN02
▪ Trade mark	SC(21)JAN03
▪ Sex Offences	SC(21)JAN04
▪ What next for the Sentencing Council? – Public confidence	SC(21)JAN05
▪ What next for the Sentencing Council? – Legitimacy	SC(21)JAN06

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

29 January 2021
Virtual Meeting by Microsoft Teams

09:30 – 09:45	Minutes of the last meeting and matters arising (paper 1)
09:45 – 10:45	Assault - presented by Lisa Frost (paper 2)
10:45 – 11:00	Tea break
11:00 – 12:00	Trade mark - presented by Ruth Pope (paper 3)
12:00 – 12:45	Sexual Offences - presented by Ollie Simpson (paper 4)
12:45 – 13:00	Tea break
13:00 – 14:00	What next for the Sentencing Council? – Public Confidence - presented by Phil Hodgson (paper 5) – Legitimacy - presented by Ollie Simpson (paper 6)

Sentencing Council

COUNCIL MEETING AGENDA

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Sentencing Council

MEETING OF THE SENTENCING COUNCIL

18 DECEMBER 2020

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
Representatives:	Hanna van den Berg for the Lord Chief Justice (Legal and Policy Advisor to the Head of Criminal Justice) Phil Douglas for the Lord Chancellor (Head of Custodial Sentencing Policy Naomi Ryan for the Director of Public Prosecutions
Members of Office in attendance:	Steve Wade Mandy Banks Vicky Hunt Emma Marshall Ruth Pope Ollie Simpson

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 20 November 2020 were agreed.

2. MATTERS ARISING

2.1 The Chairman informed the meeting that the Council's new website had successfully launched on 1 December 2020 and at the same time updated versions of the guidelines had been published to reflect the coming into force of the Sentencing Code.

2.2 Eight firearms guidelines had been published on 7 December and were due to come into force on 1 January 2021. There had been good coverage of this launch most of which focussed on the introduction of measures to draw attention to disparity in sentencing based on ethnicity.

2.3 The Council noted the publication on 14 December of the report by Transform Justice entitled 'The Sentencing Council: leading role or bit part player?'. The Council will consider the report alongside the responses to the 'What next for the Sentencing Council?' consultation.

2.4 On 17 December the Council published data covering the factors taken into account when sentencing adult offenders for theft from a shop or stall, and details of the sentence imposed. This data was collected from magistrates' courts before and after the publication of the theft guidelines in 2016.

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

3.1 The Council discussed the drugs guidelines for the final time. It was agreed that within some guidelines additional information would be added to highlight the fact that evidence shows that there is a disparity in sentencing based upon an offender's race. This wording will be placed above the sentencing table within the relevant guidelines.

3.2 The Council also agreed to a new expanded explanation for the mitigating factor 'remorse' and made a further change to the aggravating factors within the supply guideline.

3.3 The Council signed off the guidelines and final resource assessment and agreed to publish the guidelines on 27 January 2021.

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

4.1 The Council discussed a new version of an aggravated burglary guideline and considered the sentence ranges across all three burglary guidelines, domestic, non-domestic and aggravated burglary.

4.2 The Council was broadly content with the new version of an aggravated burglary guideline, save for an issue relating to the use of a weapon/whether present on entry. This issue was remitted to a small working group to be resolved, with the group submitting a proposal to the next Council meeting. The guideline will next be considered at the March Council meeting, with a consultation on the revised guidelines to be launched in the summer.

5. DISCUSSION ON SEX OFFENCES– PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL

5.1 The Council considered, and agreed to consult on, amendments to the guidelines for sections 14 and 10 of the Sexual Offences Act 2003 to provide for the situation where no child has been harmed (including where no potential child victim existed). Additional wording was agreed to clarify the position where the offending takes place remotely.

5.2 The Council also agreed to consult on a new guideline for s15A of the 2003 Act, sexual communication with a child.

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

6.1 The Council discussed the responses on guideline development and revision that were submitted as part of the consultation on What Next for the Sentencing Council? This included considering revisions to the criteria on which guidelines are developed or revised, the policy for making changes to guidelines, and suggestions as to which guidelines should be developed in the future.

6.2 The Council agreed that there should be a review of the criteria for developing guidelines and the policy for making changes. It was also agreed that some scoping work would be undertaken to establish the nature and scale of any new areas of guideline work that should be added to the Council's current workplan.

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Sentencing Council

Meeting date:	**29 January 2021**
Paper number:	**SC(21)JAN02 - Assault**
Lead Council member:	**Rosa Dean**
Lead officials:	**Lisa Frost**
	0207 071 5784

1 ISSUE

1.1 This meeting will consider issues raised in relation to the consultation on the Assault guideline revision, specifically in respect of the ABH and GBH guidelines. The Assault working group has considered the issues raised in advance of the meeting, and proposals and options are informed by this consideration. The Council will be asked to consider consultation responses to revised guideline proposals, and the findings of additional road testing undertaken.

2 RECOMMENDATION

2.1 That the Council:

- considers issues and points raised in consultation and road-testing findings relating to factors within the ABH and GBH guidelines and;
- considers and agrees proposed revisions.

3 CONSIDERATION

3.1 The existing GBH guidelines include the same culpability and harm factors for Section 18 and Section 20 offences and the same approach to assessing seriousness as in other Assault guidelines. Based on the evaluation findings for each guideline and issues identified with application of factors, the Council decided the factors should differ in the revised guidelines to reflect the distinction in the intention of the offender in committing the respective offences. A section 18 offence requires proof of intent to cause GBH, while for a section 20 offence there is no need to demonstrate the offender

intended to inflict the harm caused; just that the offender was reckless or intended some harm. The GBH s20 guideline culpability factors are the same as for the revised ABH guideline, while the s18 guideline includes some factors which are in the attempted murder guideline. This reflects the differing statutory maximum sentences and relativity with sentences between ABH and GBH s20 and for GBH s18 and Attempted Murder. The approach to assessing harm is the same in both GBH guidelines. ABH harm is categorised as high, medium and low with information included as to how to measure the level involved in an offence. The draft guidelines are attached at Annex A.

3.2 A number of issues within the guidelines were raised by consultation respondents, and additional road testing has been undertaken on some factors.

Culpability factors – ABH and GBH S20

Weapons

3.3 The majority of respondents approved of the different treatment of weapons in the revised ABH and GBH guidelines, with highly dangerous weapons being provided for at high culpability and other weapons being captured at medium culpability;

We welcome the clarification provided between highly dangerous weapons and other weapons and the reflection of culpability based on this distinction. – CPS

Dissenting responses were received from a small number of magistrates and the Committee of HM Circuit Judges:

'Although we recognise that the distinction between the use of a "highly dangerous weapon or weapon equivalent" and "use of a weapon or weapon equivalent which" is not "highly dangerous" seeks to reflect in sentencing the seriousness of the weapon used as well as echoing the terminology used in the bladed articles guidelines however there is real concern that seeking to over categorise in this way will lead to endless debate in sentencing as to what is, or is not, a "highly dangerous" weapon. We suggest that it is preferable to refer to weapon alone and leave it to sentencer's judgment regarding the exact nature of the weapon – if necessary by treating the type of weapon as an aggravating factor as opposed to one of culpability. – HM Circuit Judges

The distinction was to address the issue that weapons ranging from knives to household objects (such as chairs) achieved the same culpability assessment with the

existing guideline, often resulting in disproportionate sentences. It is not proposed that the distinction be removed or provided for at Step 2 as this may undermine the objective of achieving proportionate sentences. There was broad approval and acknowledgment of the approach from other respondents;

'We are pleased to see a distinction introduced between "highly dangerous weapons and weapon equivalents" (which includes knives, firearms and corrosive substances) and other weapons. We support this development to reflect the increased concern and harm to the community from the prevalence of these weapons and the risk of death or very serious injury whenever these weapons are used as part of a violence incident. For more serious violent offences, such as this, when the chance of a custodial sentence is higher, it is right that there should be three levels of culpability, by introducing a medium level and avoid a big disparity between offences that would, under the previous guidelines, either be deemed high or low. Allowing seriousness and so sentencing to be more responsive to issues such as the type of weapon used and the role of offender within the group should allow the guidelines to more accurately reflect these types of offences than span the custody threshold and allow careful consideration of whether the use of custody is justified.' – MOPAC (Mayor of London Office for Police and Crime).

The West London Bench also approved;

We agree that the assessment of seriousness should provide for a distinction between highly dangerous weapons and other weapons or weapon equivalents. So we agree with the inclusion of a high culpability factor of 'use of a highly dangerous weapon or weapon equivalent', as long as there is guidance as to what is intended by a "highly dangerous weapon". We note there is a table note to that effect. - West London Bench

3.4 While CPS approved of the distinction in weapons in the revised guideline, they suggested that acid or corrosive substances should be specifically referenced as a highly dangerous weapon. While the Council intended that it be considered as such, the current wording in the explanatory section of culpability in the relevant guidelines may not be clear.

3.5 The working group considered and agreed a proposal that, for clarity, this wording should be amended by inserting the words 'highly dangerous' at the beginning of the second sentence of the explanatory text, so this reads 'highly dangerous weapon equivalents can include corrosive substances…' The working group also decided the word 'includes' in the first sentence should be amended to 'can include' to avoid limiting the assessment to the weapons specified. The amended wording would be illustrated as follows (revised wording underlined);

* A highly dangerous weapon ~~includes~~ <u>can include</u> weapons such as knives and firearms. <u>Highly dangerous</u> weapon equivalents can include corrosive substances (such as acid), whose dangerous nature must be substantially above and beyond the legislative definition of an offensive weapon which is; *'any article made or adapted for use for causing injury, or is intended by the person having it with him for such use'*. The court must determine whether the weapon or weapon equivalent is highly dangerous on the facts and circumstances of the case.

Question 1: Is the Council content with the amended explanatory text relating to highly dangerous weapons?

<u>Premeditation</u>

3.6 In the existing Assault guidelines 'lack of premeditation' is included as a factor indicating lower culpability, while 'significant degree of premeditation' is a higher culpability factor. In the revised guideline significant planning was retained at higher culpability, but the Council did not include 'lack of premeditation' as it was felt that offences involving a lack of planning could be as serious as planned attacks. The CLSA disagreed with this and thought that 'lack of premeditation' should be retained at lesser culpability for both ABH and GBH;

Impulsive/spontaneous and short lived assault should lessen culpability. If Medium culpability includes a balancing of A and C then there should be counterpoints to A in C to avoid an escalation in prison sentences. – CLSA

However, the Sentencing Academy agreed with the removal of 'lack of premeditation': '*Lack of premeditation' has been removed. We agree. If the absence of premeditation mitigates, and premeditation aggravates, wherein lies the base offence?*' Sentencing Academy.

3.7 There is some merit in each point, but arguably the point by the CLSA is stronger. The Attempted Murder guideline also provides for both planned and spontaneous offences, with spontaneous offences captured in a lower category of culpability. While the harm in a planned and in a spontaneous assault may be the same, the guideline does not currently reflect the spectrum of culpability if both planning, and a lack of, are not provided for.

3.8 The removal of lack of premeditation was also disapproved of by a few other respondents, including the Prison Reform Trust, although this was specifically in respect of the Common Assault guideline. The PRT response stated that lack of premeditation is often highly relevant in common assault offences committed by young people whose decision making may be impacted by their immaturity, and that its removal disadvantages this group:

'*We are unclear why the Council has removed "lack of premeditation". This is particularly confusing given that common assault offences are by definition less serious in nature, and do not require any injury to be caused. We are particularly concerned that this could potentially disadvantage young adults, with lower levels of maturity and whom may act on impulse without thinking through the consequences of their actions. This is further reason why age and / or lack of maturity should be recognised as a factor indicating lower culpability'*.

3.9 The working group considered the point at some length. On the one hand it was thought that lack of premeditation did not necessarily reduce the culpability of an offender, as the intention to commit the assault was not necessarily less serious if the intention was formed shortly before an attack as opposed to a longer period of planning. Domestic incidents in particular were considered, as these may commonly occur without planning, but a view was that an offender should not necessarily benefit from a reduced culpability assessment in such cases. The alternative view was also considered, and it was agreed there is merit in the argument that if planning and premeditation increases the culpability in an offence, then a lack of premeditation should reduce culpability. The CLSA argument that lack of premeditation should be included if planning is, particularly to provide fairly for balancing of factors, was also thought to have some force.

3.10 The working group also considered an option of including lack of premeditation as a mitigating factor but agreed if it is included the factors should both be assessed at the same stage and that step one is most appropriate.

3.11 A further point to consider is that lack of premeditation is included in the existing guideline, and CCSS data illustrated that this was the most frequently applied lesser culpability factor for ABH and both GBH offences. It's exclusion in the revised guideline therefore presents a risk that a higher proportion of cases will attract a higher seriousness assessment, and a higher sentence, than currently.

Question 2: Does the Council think lack of premeditation should be included at lesser culpability for ABH and GBH offences?

Provocation

3.12 In the existing guideline 'a greater degree of provocation than normally expected' is provided for at lesser culpability across the assault guidelines. This was removed from the culpability assessment and 'significant degree of provocation' provided for at step two of the revised guidelines. The East Kent Bench response thought it should be retained at lesser culpability;

'*The issue of self-defence has been rebadged as 'significant provocation' in common assault. There are occasions in ABH where self-defence may not indicate lesser culpability but significant provocation would e.g. where someone's partner has been attacked to provoke a reaction, it could not be said that they acted in self-defence but were provoked by the deliberate attack on their partner. Consideration should therefore be given to including significant degree of provocation in lesser culpability*.'

3.13 The working group agreed that the decision to remove provocation from the culpability assessment should not be revised, given the concession this may appear to provide to revenge type situations. At step 2 the factor can be applied where sentencers think appropriate.

Question 3: Does the working group agree that the factor relating to provocation should remain at Step 2?

S18 Culpability factors

3.9 The GBH S18 guideline includes the same factors as for ABH and GBH s20 but includes two additional factors; these are 'Revenge' at high culpability and 'Offender acted in response to prolonged or extreme violence or abuse by the victim' at lesser culpability. The latter 'abused offender' factor was included to capture cases where loss of control manslaughter may have been proved if death rather than GBH

was caused. The revenge factor was included to address concerns that such offenders who act out of vengeance rather than in circumstances analogous to a loss of control should not automatically achieve a lesser culpability assessment. An example considered was one of an offender who sees their childhood abuser in the street years after suffering abuse and attacks them out of revenge.

Revenge

3.14 The Council debated whether it was necessary to include revenge at all for s18 offences, particularly as any case involving revenge would be highly likely to involve planning or premeditation. However, it was present in a number of cases analysed and the Council agreed that consultation of the factor should be undertaken as well as additional research to test its application. The objective of the testing was to identify if the inclusion of revenge at high culpability had the effect of increasing starting points for s18 offences where other high culpability factors were also present, as there were concerns regarding potential sentence inflation. It was also agreed that 'revenge' should be tested as an aggravating factor for ABH offences, to provide for consideration of whether it should be included in the ABH and GBH s20 guidelines. A specific example was cited by a Council member of rival gang members attacking others they see in the street out of revenge for previous altercations, and such a scenario was tested.

3.15 Road testing was carried out for a s18 and an ABH scenario to explore these issues. The findings are attached at Annex B. Two versions of the guideline were used, one including the factors to be tested and one which did not, to observe the influence on the sentence.

3.16 Predominantly, the road testing sought to identify;

i) if the inclusion of revenge as a high culpability factor increased the starting point of a sentence where premeditation was also present in a GBH s18 offence, and;

ii) if revenge was identified as an appropriate aggravating factor in a relevant ABH case where the guideline did and did not specifically reference it. This was to determine whether it was necessary to include it in a non-exhaustive list of factors, to avoid too many aggravating factors being included.

3.17 A summary of the findings is as follows;

i) For the s18 scenario tested, which was an offence involving both planning and revenge, the presence of both factors did not necessarily increase the starting point of the sentence. A few sentencers (3 out of 13) moved above the starting point where revenge was included as a high culpability factor, and one sentencer moved above the starting point, where revenge was not included in the guideline as a high culpability factor. It was not possible to assess the specific additional sentence imposed where the starting point was increased due to the inconsistent application of some other factors, which included the assessment of poison as a highly dangerous weapon and the harm assessment (which will be discussed later).

ii) For the ABH scenario, revenge not being explicitly referenced as an aggravating factor did not prevent it being taken into account in sentences imposed, although it was applied more frequently where referenced. Most sentencers (11 out of 13) identified revenge when it was included in the guideline as an aggravating factor while 3 out of 13 identified revenge as an aggravating factor when it was not included in the guideline. Sentencers in Group A (revenge explicitly referenced) were slightly more likely to increase the sentence from the starting point, than those in Group B (revenge not referenced); six out of 11 in Group A, compared with four out of ten in Group B. The difference is very small, so it is difficult to draw inferences about the impact of the inclusion of revenge as an aggravating factor. The other difficulty is that other aggravating factors not specified (such as the gang context even though the scenario offence was not committed in this context) were taken into account and the sentence increased in the round.

3.18 The working group considered these findings and discussed at length whether or not revenge should be included in the guidelines. It was agreed that an offence motivated by revenge is more serious, and that it is an important aspect of assessing culpability. However, the working group noted the likelihood that the majority of offences involving revenge would involve premeditation or planning was still a valid one and presented a risk of double counting or extra weight being given to revenge in such a case. It was also noted that in some cases revenge may occur spontaneously, where an offender who has previously suffered at the hands of another then sees them by chance and acts in a state of high emotion. An alternative option was considered of including revenge at step 2 where the sentencer would have discretion in applying it rather than including as part of the culpability assessment. In the draft guideline it is

only present in the s18 culpability assessment, but it was thought that if it is included it should be in all Assault guidelines at step 2.

3.19 It is important to note that there are risks involved in including the factor. There were initial reservations at including the factor at step two due to the potential for an imbalance between aggravating and mitigating factors. It was also noted in the ABH road testing that it was taken into account more frequently where expressly referenced, although it was still taken into account by some sentencers where it was not listed as a factor. As its absence did not prevent sentencers applying it where they thought appropriate, the Council are asked to consider if it is necessary to reference the factor, given the risks this presents to inflating sentences if it is more likely to be applied if referenced.

Question 5: Does the Council think revenge should be included as an aggravating factor for all Assault offences at Step 2, or should it be left out entirely?

Harm

3.20 While the objective of road testing was to test the application of culpability and aggravating factors, important findings arose in relation to GBH and ABH harm assessments. Harm assessments were very inconsistent, as illustrated by the tables included within Annex B. This research has therefore provided useful and important supplementary findings on the GBH and ABH harm models.

3.21 Consultation responses to GBH harm factors met with broad approval, save for the same point made in respect of responses to attempted murder harm factors (as the highest harm category is the same as for GBH) which were considered by the Council at the November meeting. At that meeting it was also highlighted that different interpretations of the term 'day to day activities' to find a category 1 harm assessment were evident in road testing undertaken for attempted murder. The Council decided it should be for the sentencer to determine whether the activity affected should fall within the assessment, and the guideline should not distinguish between recreational and necessary activities (for example, drinking alcohol and dressing independently). However, the impact of differing assessments of 'day to day activities' was starkly illustrated in the recent GBH research findings, where in one group assessments were almost equally split between harm 1 and harm 2 categorisations with differing starting point sentences of 5 years. This raises concerns that this could result in inconsistent assessments of harm and references to the Court of Appeal to interpret which activities

should be included, and the working group were asked to consider this in respect of GBH.

3.22 The phrase 'day to day activities' is included in the Health and Safety guideline and reflects the definition of a disability[1] as it was intended that it capture injuries which result in a disability. However, the relevant disability legislation does not define a day to day activity as these will vary between individuals and how they live their lives. While the Council considered that this was appropriate, the working group were asked to consider a concern that the guideline will be applied inconsistently if this wording is retained. They considered if amending the term 'day to day activities' to 'life changing injuries' may provide a higher threshold, although agreed that this threshold may be too high and would likely still provide for considerable discretion in determining what amounts to a life changing injury. It was considered that the factor could be limited and not assess the impact, but this could broaden its scope and capture harm which would currently fall within category 2.

3.23 Ultimately the working group decided that it is right that the assessment should be undertaken based on the impact on the victim, and that it should not seek to limit or define which activities are appropriate. It was also noted that the harm involved in the scenario tested was very unusual and it is highly likely that most cases involving this category will involve harm resulting in physical disability of a victim and the assessment will not be difficult. However, it was proposed that the Council be asked to consider if a slight wording amendment to the harm factor should be effected to be clear that 'day to day activities' are subjective to the victim. It is proposed that the word 'their' (underlined in the text below) be inserted before 'normal day to day activities so the factor reads;

'*Offence results in a permanent, irreversible injury or condition which has a substantial and long term effect on the victim's ability to carry out <u>their</u> normal day to day activities or on their ability to work'*

Question 5: Does the working group agree the wording for the GBH harm factor relating to day to day activities should be retained and amended as suggested?

[1] The definition of a disability in the Equality Act 2010 is 'a physical or mental impairment which has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.' The Act does not define what is meant by normal day to day activities.

ABH Harm

3.24 The ABH harm model was one of the most contentious areas of the consultation. While there was broad approval of removal of 'injury serious in the context of the offence', some respondents considered the new approach to assessing ABH harm was not a significant improvement and that clearer guidance on the types of injury in each category should be provided;

The removal of the 'injury serious in the context of offence' harm factor is to be welcomed. This led to unattractive arguments about how much worse it could have been. The preamble to the three categories is not helpful. It will add to the time of sentencing hearings by submissions from advocates on the range of the harm that can be caused. This is in danger of being 'injury serious in the context of the offence' but another name. – Birmingham Law Society

We agree with the high, medium low approach to assessing harm and believe it is clear. However, we think further explanation is needed to define the range of injuries that can occur in cases of "assault occasioning actual bodily harm" (as in the header above). Whilst we understand the Council's desire not to give examples of injuries, our concern is that the court will have to have in its mind such examples of injuries and then in its judgement allocate this case into a low, medium or high category. That will be problematic, certainly for lay Benches. It leaves it very open to personal views and therefore inconsistent sentencing. Justice Clerks Society

The currently used ABH guidance provides marginally more help when trying to assess harm than the proposed guidance does. The proposed guidance makes no mention of the victim or their vulnerability, repeat attacks, disease transmission, etc.

This looks like a complete cop out in term of the 'additional wording accompanying the harm assessment', it does nothing to clarify how sentencers should assess the level of harm present within the offence. Not every Bench will contain medical experts who would have the expertise to assess injury harm. Is it expected a sentence should be based on a subjective view of high, medium, or low harm based on individual experiences, or an objectively measured view?- East Kent Bench

The relatively open wording on the definitions of harm in this section may raise concerns about consistency of assessment across cases. When assessing the level of physical and psychological harm reference could be made to the expected period of recovery and treatment that would be needed according to the harm caused (along similar, but less serious lines, to the categorisation used for GBH offences). This would be on a general basis, rather than based on the specific effects on the actual victim.

On this basis cuts and bruises given in a relatively less traumatic incident would qualify as lesser harm and more serious injuries, requiring longer term treatment in hospital or counselling, with some possible permanent effects or likely to cause longer lasting trauma would be seen as more harmful. – MOPAC

3.25 The Council had already discounted including descriptive injuries in developing the guideline as it would not be possible to gradate the broad range of potential ABH injuries by seriousness. However, some consultation respondents suggested the harm factors should focus on the level of injury and impact upon the victim in broad terms as in the GBH harm model.

3.26 Based on these responses, some additional road testing was undertaken on ABH harm. This was a very limited exercise but sought to identify if a slightly amended, more descriptive model influenced consistency of harm assessments. The findings from this additional testing are at Annex C which includes the harm models tested. The alternative model was based on an early draft which was considered by the Council and was as follows;

Harm	
Category 1	Serious physical injury or serious psychological harm and substantial or ongoing impact upon victim
Category 2	Harm falling between categories 1 and 3
Category 3	Low level of physical injury or psychological harm with no ongoing impact upon victim

3.27 In summary, assessments were consistent in one scenario adapted for sentencing by both magistrates and Crown Court Judges but were inconsistent in the other two scenarios sentenced by Crown Court judges only. The revised model did not therefore achieve greater consistency. However, it is important to note that the injury level was fairly low, and it is known that sentencers tend to avoid using a category referencing 'low' harm. Some sentencers also highlighted the limitations of sentencing a scenario rather than having the benefit of photographs and fuller information to enable them to assess injuries as they would usually.

3.28 While the alternative model was not proven to produce greater consistency of assessment of harm in the limited exercise undertaken, the working group were asked to consider if it may still be an improvement on the high/medium/low model. The SGC Assault guideline included three categories of harm: *injury just short of GBH; relatively*

serious injury and *minor injury*. The Council did not wish for the revised guideline to reference GBH to avoid 'guideline shopping' and did not wish to include the word 'serious' in revising the guideline given that GBH is defined as 'really serious harm'. However, this latter decision limited the potential for other factors to be developed. ABH injuries can be serious, and in fact many are, and the assessment would be based on the level of harm involved in the offence being sentenced. The model also includes a 'low' category which it has been noted in other road testing exercises that sentencers may avoid using as it may not justly reflect or recognise the harm suffered by a victim, and this may have led to underuse of the category.

3.29 The working group were asked to consider an alternative model which sought to 'benchmark' the level of injury as requested by consultation respondents. This was as follows;

Harm	
Category 1	Serious physical or psychological harm
Category 2	Substantial physical or psychological harm
Category 3	Some physical or psychological harm

3.30 The working group preferred the alternative model tested, but with the lowest harm category amended to from 'low' to 'some'. Other minor wording changes were suggested and it was agreed that the following model should be proposed to the Council;

Harm	
Category 1	Serious physical injury or serious psychological harm <u>and/or</u> substantial or ongoing impact upon victim
Category 2	Harm falling between categories 1 and 3
Category 3	Some level of physical injury or psychological harm but no ongoing impact upon victim

3.31 The working group did raise concerns as to whether the middle category may be underused in the alternative model, as previous research into overarching findings on categories worded as 'cases falling between categories 1 and 3' had highlighted this as a finding. This research has been reviewed and the finding was in relation to this approach being included at culpability. Specifically, it related to where specific factors in the highest and lowest categories did not logically have a middle ground or

provide for high and low factors to be balanced. The approach has been used in harm in child cruelty, breach offences and harassment where road testing did not identify issues with underuse. It is also thought that given the threshold for application of categories 1 and 3 it is unlikely that category 2 harm findings will be uncommon.

3.32 The working group considered that the options should be between retaining the existing model or adopting the revised model proposed at paragraph 3.30. The Council are asked to consider which option is preferred. It is intended that research will be undertaken using both models prior to sign off of the guideline to test its application against a range of ABH injuries, and that the findings presented to the Council prior to sign off to inform a final decision if this would be preferred.

Question 6: Does the Council prefer the original or revised ABH harm model, and is it content for the revised model to be tested?

Sentencing Council

Sentencing Council meeting:	**29 January 2021**
Paper number:	**SC(21)JAN03 – 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 individual offenders and one for organisations.

1.2 This is the first of two meetings to consider the responses to the consultation, and the results of research carried out with sentencers. At this meeting the Council will be asked to consider possible changes to the guideline for individuals.

1.3 The plan is to sign off the definitive versions of the two guidelines and the resource assessment at the March meeting, for publication in April and to come into force on 1 July 2021.

2 RECOMMENDATION

2.1 That the Council considers the responses to the consultation and the evidence from the road testing and agrees changes to culpability and harm factors at step 1 and aggravating and mitigating factors at step 2 in the guideline for individuals to address the issues raised.

2.2 That the Council confirms its intention broadly not to alter overall sentencing severity and considers if there are any equalities issues that can be addressed by the guideline.

3 CONSIDERATION

Overall

3.1 This paper concentrates on the guideline for individuals though many of the same points apply to the guideline for organisations which will be considered at the March meeting. 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/

3.2 There were 41 responses to the consultation from a wide range of interested parties including those representing magistrates, district judges (MC) and circuit judges; those who investigate and prosecute these offences; academics; legal professionals; trade mark holders from industry and the charitable sector; and anti-smoking organisations. In general,

responses to the consultation were positive about the draft guidelines, recognising that they were an improvement on the current situation. 'Road testing' of the guidelines was carried out with seven Crown Court judges and 11 magistrates and again, the general response to the draft guidelines was positive. Evidence has also been drawn from 45 Crown Court transcripts covering 86 offenders.

3.3 For each element of the guideline there were some issues that were mentioned more than once, or which otherwise appear to merit close consideration. To keep this paper focussed on the more important issues, any other points are contained in **Annex A**.

Culpability Individual

3.4 In the responses to consultation there was general agreement with the culpability factors, with several respondents approving of the similarity to the fraud culpability factors. However, a significant minority of respondents made suggestions for changes and in road testing a few magistrates and several judges commented on the culpability factors.

3.5 The Magistrates' Association (MA), the Council of Her Majesty's Circuit Judges (HMCJ) and City of London Police (CLP) all suggested a factor relating to the length of time offending had been carried out. The MA and HMCJ both proposed 'activity conducted over a sustained period of time' as a high culpability factor, whereas CLP suggested that this could be a factor even for those in low culpability. In road testing, one judge suggested an aggravating factor relating to the offending having gone on for a long period of time which would indicate that it was 'endemic'.

3.6 If the Council feels that the length of time of the offending is relevant to culpability (rather than relating to harm where it would be reflected in a higher value of goods sold or possessed) it could either be included as a high culpability factor or as an aggravating factor at step 2. Including it at step 2 would reduce the danger of double counting with harm and enable it to be taken into account at all levels of culpability but would reduce the impact of the factor. There are difficulties with interpretation of a factor relating to length of time. In general, the Council prefers not to define precisely what constitutes a long (or sustained) period, but this can make it difficult for sentencers to apply the factor consistently and with confidence. This might be a reason for not making it a step 1 factor, although it does appear in the fraud guideline at step 1. Alternatively (as suggested below) it could be cited as an example of sophisticated offending/ significant planning.

3.7 Looking at the transcripts and case studies that we have, very few of them specifically refer to long standing offending as a factor. Quite a few cases arise after test purchases are made and there is perhaps not always clear evidence of how long the offending has gone on.

3.8 The Association of Chief Trading Standards Officers (ACTSO) were concerned that high and medium culpability appear to assume that the offender is operating as part of a group: 'many counterfeiters [ ] fall within the category of lone individuals rather than operating within a group.' They suggest adding 'where the offending is conducted independently or as part of a group activity' to the leading role and significant role factors. They are concerned that it will be argued that higher culpability is 'reserved for organised group activities and not the lone individual.' The only high culpability factor that does not relate to group offending is 'Sophisticated nature of offence/significant planning'. In road testing some magistrates made a similar point noting that the explicit mention of group activity in the factors for category A felt as though it limited their ability to put a sole trader into that category.

3.9 The Chief Magistrate suggested that there should be a high culpability factor to cover the offender who trades in goods, knowing that are not manufactured by the trademark holder, and is reckless as to safety with an even higher penalty if the offender knew that the goods were unsafe.

3.10 There is some danger of double counting with harm in this suggestion – though what is being captured by the harm assessment is subtly different. 'Purchasers put at risk of significant physical harm' implies an actual risk of harm (as opposed to a potential one) irrespective of the offender's level of understanding of the risk. There is also a possibility of double counting with other offences that may be charged alongside the trademark offence, for example under electrical safety regulations although the court would take this into account in totality.

3.11 Several of the judges in road testing perceived the culpability factors to be very 'general' across both guidelines and lacking specific features that related to trade mark offences - there was a feeling from some that this made it difficult to differentiate between the category levels. In the context of offences that most sentencers see only very rarely, this can be a particular issue as they have no experience to assess what constitutes 'significant planning' as opposed to 'some planning'.

3.12 The culpability assessment consulted on was:

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

- A leading role where offending is part of a group activity
- Involvement of others through coercion, intimidation or exploitation
- Sophisticated nature of offence/significant planning

B – Medium culpability

- A significant role where offending is part of a group activity
- Some degree of organisation/planning involved
- 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

- Performed limited function under direction
- Involved through coercion, intimidation or exploitation
- Little or no organisation/planning
- 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.

3.13 By comparison the fraud culpability assessment is:

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.

Culpability demonstrated by one or more of the following

A – High culpability

- A leading role where offending is part of a group activity
- Involvement of others through pressure, influence
- Abuse of position of power or trust or responsibility
- Sophisticated nature of offence/significant planning
- Fraudulent activity conducted over sustained period of time
- Large number of victims
- Deliberately targeting victim on basis of vulnerability

B – Medium culpability

- 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

- Involved through coercion, intimidation or exploitation
- Not motivated by personal gain
- Peripheral role in organised fraud
- Opportunistic 'one-off' offence; very little or no planning
- Limited awareness or understanding of the extent of fraudulent activity

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.

3.14 One way to address the issue of the high culpability factors appearing to relate only to group offending would be to change the order of the factors so that 'Sophisticated nature of offence/significant planning' is first in the list.

3.15 Consideration has been given to whether it would be possible (and helpful) to give some non-exhaustive examples of what might indicate sophisticated offence/significant planning in the context of this offence.

- 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, offending over a sustained period of time)

3.16 If it was felt that a factor relating to the offender's recklessness or knowledge as to the safety risk from the counterfeit items was relevant, this could be added, again potentially with examples:

- Offender was reckless as to the potential risks to health or safety from the counterfeit goods (examples may include but are not limited to: offending relating to cosmetics, electrical goods, toys, car parts, cigarettes)

3.17 Or alternatively:

- Offender was reckless as to whether the counterfeit items complied with safety regulations (examples may include but are not limited to: offending relating to cosmetics, electrical goods, toys, car parts, cigarettes)

3.18 The MA also suggested two other additional high culpability factors:

- Abuse of position of power or trust or responsibility, such as a reputable organisation selling fake goods alongside real ones
- Large number of victims, such as an online store which sells a large number of fake goods, compared with a market stall owner who sells a much smaller scale of fake goods.

3.19 And a lesser culpability factor of 'Not motivated by personal gain'.

3.20 A magistrate respondent suggested the quantity of counterfeit items, what the items should have cost compared to price for the counterfeit goods and 'is this the way the def makes a living' as culpability factors.

3.21 The first of the MA suggestions is interesting as the guideline currently has a mitigating factor of 'Business otherwise legitimate' which could be seen to run counter to the MA suggestion and more in line with what is being suggested by the magistrate. In general, evidence from transcripts suggests that sentencers regard the existence of legitimate trading alongside the offending behaviour to be mitigating rather than aggravating. The current mitigating factor could be qualified to indicate that it would not apply if the legitimate

business had been used to mislead consumers or as a 'front' for the offending. This is discussed further below under aggravating and mitigating factors.

3.22 Cases where the offender was not motivated by personal gain would be rare (though not impossible – the offence is made out if 'committed with a view to gain for himself or another or with intent to cause loss to another') and would be likely to be covered by other lesser culpability factors.

3.23 Linked to this and the magistrate's other point about the relative cost of the legitimate and counterfeit items, there is possibly room for a factor relating to the profitability of the offending. If so, this would probably work best at step 2. See also the discussion on harm at 3.34 below for consideration of this and the MA point about the number of victims.

Question 1: Should the culpability factors be modified in accordance with any of the suggestions at 3.15 to 3.17 above?

Question 2: Does the Council wish to make any other changes to culpability factors?

Harm

3.24 It was recognised in the consultation document that the harm model consulted on was 'somewhat complex and nuanced'. Most respondents to the consultation broadly supported the approach but there were various suggestions as to how the model could be improved.

3.25 The version consulted on was:

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

The general harm caused to purchasers, legitimate businesses and to the owners of the trade mark is reflected in the sentence levels at step two. 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 put at risk of significant physical harm from counterfeit items

	Equivalent value of legitimate goods	Starting point based on
Category 1	£1million or more	£2 million

	or category 2 value with significant additional harm	
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

3.26 The West London Bench (WLB) suggested that more guidance/examples could be given to assist sentencers in the assessment of harm. They also suggested that the guideline should provide more guidance on what is covered by the term 'general harm' in the harm assessment to enable sentencers to identify what amounts to 'significant additional harm'. They proposed that general harm could be defined as:

(a) The financial loss to the legitimate owners of the trade mark.

(b) Any normal loss of, or impact on, reputation for the owners of the trade mark, following from its misuse.

(c) The financial loss to legitimate businesses in the supply chain (wholesalers, retail outlets, distributers, etc.).

(d) The financial loss suffered by purchasers who bought the counterfeit items (for example, because of substandard quality, or the counterfeit item not being worth the same in value as the legitimate item).

3.27 They also suggested that the guideline should provide further examples of significant additional harm.

3.28 The Law Society thought that the calculation of volume can be complex and suggested adding the words below in italics to the harm guidance:

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; Evidence of volume may be assessed, *for example, by looking at the evidence of the length of time the operation has been trading in the illegally trade marked goods, as well as the numbers of illegally trade marked items found on the premises at particular times, numbers of transactions/sales/ purchases of the items/goods evidenced, and the amount of money made during the period. This list is not exhaustive*.

3.29 An individual respondent queried how the harm categorisation would work in the 'case of small number of products, not necessarily of high value, where there is potential physical harm to an end user unaware that goods are counterfeit'. They also wanted

clarification that ‘Purchasers put at risk of significant physical harm from counterfeit items’ would cover other end users.

3.30 City of London Police were concerned about the burden of proving ‘significant’ harm:

1. ‘An investigation into counterfeit car airbags involved the prosecution proving that 400 had been sold but seizing only a proportion on a search. A proportion of that smaller number were tested and showed that they were not fit for purpose, however there was no means to test the hundreds that had already been sold and sent to consumers (as there was no way to trace them).
2. An investigation into a defendant selling counterfeit perfume for a number of years may involve testing some bottles seized, but there would be no way for the defendant or the prosecution to show that the bottles had always contained the same mix of chemicals (those seized on a search may or may not be dangerous).

   I would argue that cases like these lend themselves to asking whether the defendant took steps to satisfy him/herself that the items he/she was selling was safe or not. The reality is that perfume bottles could contain anything - some chemicals would cause harm and others would not - and that therefore the defendant put the consumer at risk of "some" harm, rather than "significant" harm.’

3.31 ACTSO noted ‘It can be difficult to assess retail value of genuine goods in some cases. This may be if there is no retail "equivalent" or where there are large mixed counterfeit goods seizures, including multiple brands and multiple types of items.’ They suggest adding wording to the harm assessment ‘to specifically mention situations where the value cannot be determined for any reason and in those cases permit the court to make an assessment and assign an equivalent value’.

3.32 HMCJ stated ‘The method of assessing financial harm is not controversial albeit the court will be assisted in any sentencing process by schedules setting out the alleged financial harm and the basis of any calculation. This is likely to be an area of dispute from the Defence and will require careful consideration at this stage of the sentencing exercise.’

3.33 In road testing the harm model generally met with approval as it was felt to be tailored to the offence. There were some inconsistencies in the harm categorisation, but this was probably due to the way the scenarios were presented rather than to a difficulty in interpreting the guideline. One judge felt that there should be a greater distinction between the types of counterfeit goods: 'When you're dealing with medicines, brake pads, where people can die…that needs to be represented better.'

3.34 Another issue that was raised by one judge in road testing and has been noted in a case example provided by Trading Standards is the situation where an offender is selling counterfeit items at a small profit at a price that is a tiny fraction of the retail price of a genuine product. The example seen was a market stall holder selling a watch bearing the

'Rolex' logo for £25, where a genuine Rolex watch would retail for £25,000. This would lead to a disproportionately high harm categorisation.

3.35 Many of the practical concerns raised about the operation of the harm assessment should be dealt with by the prosecution providing the court with the information needed to make the correct categorisation. The model was developed in conjunction with Trading Standards on the basis that equivalent retail value was a figure that could be provided to the court (backed up by statements from trade mark owners).

3.36 The points about clarifying what is covered by 'general harm' and what comes under 'additional harm' may be valid, bearing in mind the fact that most sentencers are unfamiliar with the offence.

3.37 A revised version of the harm wording to deal with the points raised in consultation and road testing is suggested below (additions highlighted):

The assessment of harm for this offence involves putting a monetary figure on the offending with reference to the **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 entirely 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 two.

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

3.38 If the Council adopts the suggestion to add a culpability factor relating to recklessness as to safety, the comments above relating to insufficient weight being given to safety concerns would be addressed.

3.39 Consideration was given to adding a note to the effect that the prosecution should provide the court with the information needed to assess harm, but on reflection this is the case in every sentencing exercise and so there is maybe no reason to specifically mention it in this guideline.

Question 3: Does the Council wish to adopt any of the suggested changes to harm at 3.37 above?

Question 4: Should any other changes be made to harm?

Aggravating and mitigating factors

3.40 Most respondents to the consultation agreed with the proposed aggravating factors and in road testing they were generally applied consistently and as expected.

3.41 WLB proposed adding two aggravating factors that relate to culpability which could possibly be covered by the proposed additional culpability factor at 3.16 or 3.17:

- Evidence of intentional or reckless risk to life.
- Deliberate targeting of children or vulnerable persons by virtue of the nature of the counterfeit goods (for example, counterfeit and potentially dangerous toys or medicines).

Other suggestions from WLB related to harm:

- Significant ongoing effect on those harmed
- Evidence of community impact

3.42 There were various other suggestions for aggravating factors relating to harm. A magistrate suggested an aggravating factor relating to damage to the business of the owner of the trademark. For example, if the actions have damaged the business to the extent that staff had to be let go. The MA suggested an additional factor: 'reputational damage to the owner of the trade mark (where not considered in Step One)'. The Dogs Trust suggested adding 'unauthorised use of a charity trademark'. Some respondents commented on the aggravating factor, 'Purchasers put at risk of harm from counterfeit items (where not taken into account at step one)' suggesting variously that this was something that should be considered earlier in the process or that it should be clearer how it might differ from the consideration at step 1.

3.43 Allowing for the fact that aggravating factors are non-exhaustive and depending on what decisions are made relating to the harm assessment at step 1, the existing factor could be amended slightly to read:

- Purchasers/ end users put at risk of harm from counterfeit items (where not taken into account at step 1)

3.44 WLB also queried whether the location of the sale could be an aggravating factor, suggesting that selling through an ostensibly legitimate outlet was worse than, for example, a market stall. A magistrate and GlaxoSmithKline suggested removing the mitigating factor, 'Business otherwise legitimate'. This reflects points made at 3.21 above under culpability factors. A magistrate respondent also considered that the location of the sale was relevant but came to the opposite conclusion reasoning that purchasers through a website or legitimate trader would be better protected than someone who bought something for cash from a market stall. Another suggested that the location (e.g. selling outside a school) could be relevant. On reflection, these issues are perhaps already covered by culpability factors relating to the sophistication of the offending and the harm assessment which would take account of a situation where a purchaser suffered additional harm, for example, as a result of being deceived as to the safety of an item.

3.45 The Sentencing Academy suggested adding a mitigating factor relating to voluntary reparations. This does not appear to be a common feature of cases but there is one example of it in the transcripts we have.

3.46 As mentioned above respondents questioned the factor 'business otherwise legitimate'. This is a factor that appears in seven of the 45 transcripts. In the consultation version of the guideline the following expanded explanation has been added to this factor:

> Where the offending arose from an activity which was originally legitimate, but became unlawful (for example because of a change in the offender's circumstances or a change in regulations), this may indicate lower culpability and thereby a reduction in sentence.
>
> This factor will not apply where the offender has used a legitimate activity to mask a criminal activity.

3.47 This expanded explanation was devised for use in the fraud guidelines for the factors 'Activity originally legitimate' and 'Claim not fraudulent from the outset' and does not apply so well in the Trade mark guideline (although there is at least one example in the transcripts of a case where the judge mentions that the business was originally legitimate). An alternative would be to remove the expanded explanation but to reword the factor to:

- Business otherwise legitimate (this factor will not apply where the offender has used a legitimate activity to mask a criminal activity).

3.48 HMCJ suggested a mitigating factor of 'Little or no prospect of success (especially in respect of convincing victims that goods are counterfeit)'. It is not clear that focussing on whether or not purchasers were deceived is helpful – save in as far as it relates to safety

issues. In many cases purchasers know the goods they are buying are, or are likely to be, counterfeit and there is unlikely to be evidence of this before the court one way or the other. However, depending on the decisions made in relation to the harm assessment, there may be an argument for adding a factor along the lines of that at step 1 in the Fraud guideline: 'Not motivated by personal gain' or the factor at step 2 of the General guideline 'Little or no financial gain'. The expanded explanation for this is:

> Where an offence (which is not one which by its nature is an acquisitive offence) is committed in a context where financial gain could arise, the culpability of the offender may be reduced where it can be shown that the offender **did not seek to gain financially** from the conduct and did not in fact do so.

3.49 Consideration could be given to balancing this with an aggravating factor of 'High level of profit from the offence' which appears in the General guideline with the expanded explanation:

- A high level of profit is likely to indicate:
  - high culpability in terms of planning and
  - a high level of harm in terms of loss caused to victims or the undermining of legitimate businesses
- In most situations a high level of gain will be a factor taken in to account at step one – care should be taken to avoid double counting.
- See the guidance on fines if considering a financial penalty

3.50 High level of profit is a factor that is mentioned in at least two of the transcripts. However, the Council may feel that a significant level of profit will be present in most cases (especially those in high culpability) and that it would risk double counting to include it as an aggravating factor. In cases where it was a factor that had not been taken into account at step 1, courts could still take it into account even if it is not specifically listed.

Question 5: Does the Council wish to adopt the suggested changes at 3.43, 3.47 and 3.48 above?

Question 6: Should any other changes be made to aggravating or mitigating factors?

Sentence levels

3.51 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.

3.52 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; one commented:

> 'I thought it was a bit harsh. Before I looked at the guideline, I assumed when I read it that he was going to get just a financial penalty, rather than a custodial...immediate custodial sentence.'

3.53 Most magistrates in road testing thought that the sentences were 'about right' – although there was some inconsistency in the sentences arrived at.

3.54 In their response to consultation ACTSO stated that the 'proposed ranges mean that a very high proportion of Trading Standards prosecutions are likely to end up being dealt with through community orders and fines or at the most a 26-week (6mth) custodial sentence even if they played a significant role. The suggestion is to increase Category 5 to Less than 10k with a starting point of £3k and alter Category 4 £10-£30k with a lower starting point of £15k or 20k and alter the other categories proportionately/appropriately.'

3.55 The Sentencing Academy suggested that more use should be made of non-custodial sentences at the lower end. They are concerned that the guideline may nudge cases over the custody threshold. In particular they consider that sentences in 4A and 1C could be too high.

3.56 If changes are made to culpability and harm factors as suggested above, this may change the categorisation for some cases. The likely effect of any changes on sentence outcomes will be presented to the March meeting to enable decisions to be made about sentence levels.

3.57 The draft resource assessment published alongside the consultation concluded that the guidelines would not change sentencing severity for most cases, but that there may be some increases in custodial sentence lengths for individuals sentenced for the most serious types of cases.

3.58 At this stage it would be helpful to have an indication of whether the intention remains to maintain current sentence severity for most cases.

Question 7: Does the Council wish to maintain current sentence levels?

Steps 3 to 8

3.59 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. The MA and Justices Clerks Society suggested that the guideline should make it clear that if confiscation is being considered the case must be committed to the Crown Court. Other respondents sought more information about disqualification as a

company director and deprivation orders. HM Council of District Judges (Magistrates' Courts) suggested that the information on s97 forfeiture order could be re-worded to make it more understandable.

3.60 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).
>
> 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

3.61 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 closely reflect the legislation in a comprehensible form.

Question 7: Does the Council wish to adopt the proposed amendments to step 6?

4 EQUALITIES

4.1 The consultation document stated:

> The data indicate that the majority of offenders are male and the largest age group is 30 –39 years. There are very little data recorded on the ethnicity of offenders but the impression gained from reading transcripts of sentencing remarks is that a significant proportion may be from a BAME background. The Council is concerned to ensure that the guidelines operate fairly across all groups.

4.2 It went on to point out the steps that the Council has already taken to address concerns around equality and diversity (referring to the ETBB in all guidelines, provision of expanded explanations, road testing guidelines) and invited suggestions for matters that should be addressed.

4.3 There were no clear themes to the responses to this consultation question. Some focussed on the wider victims of the offending: two respondents said that the guidelines should highlight the harmful consequences of counterfeit tobacco especially on lower socio-economic groups; one respondent said there should be a category relating to counterfeit aids for the disabled; another said, 'slave trade/sweat shops/minimum wage'. Others made general comments about the desirability of fairness in sentencing without offering suggestions for how the guidelines could address this. One magistrate suggested that consideration should be given to, 'Whether or not others involved come from within a family group. The overall impact on other members of the family may be disproportionate as a consequence. For example father and two sons who are breadwinner, sentenced to prison may leave other family members destitute.'

4.4 This is not an offence for which we have sufficient data to draw any conclusions about disparity in sentencing to enable the inclusion of any specific information in the guidelines.

Question 8: Are there any further steps that can be taken to address issues of equality in this guideline?

5 IMPACT AND RISKS

5.1 There is a risk that by consulting on comprehensive guidelines for this offence, the Council has raised expectations that the offence will be dealt with more rigorously than in the past.

5.2 The impact of the definitive guidelines will depend on the decisions made at this meeting. A revised resource assessment for the definitive guidelines will be provided at the March meeting.

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Sentencing Council

Sentencing Council meeting:	**29 January 2021**
Paper number:	**SC(21)JAN04 – Sexual Offences**
Lead Council member:	**Adrian Fulford**
Lead official:	**Ollie Simpson** **07900 395719**

1 ISSUE

1.1 Seeking Council's agreement to two further issues relating to the current sex offences guideline revision:

- the wording of the sexual assault and sexual assault of a child under 13 guidelines, following the findings of the 2018 assessment;
- minor revisions to the guidance on sentencing historical sex offences to reflect Court of Appeal case law.

2 RECOMMENDATIONS

2.1 That Council:

- agrees to consult on additional explanations to sexual offences guidelines to clarify how to approach the factors of psychological harm and abuse of trust;
- considers whether to make this change to all other (non-sex) guidelines where those factors appear at step one; and
- agrees to consult on changes to the guidance on historic sexual offences to make youth at the time of commission of the offence a culpability factor rather than personal mitigation, and to alter the wording of how to follow the guideline to reflect the case law.

3 CONSIDERATION

Sexual assault and sexual assault of a child under 13

3.1 The 2018 assessment of the sexual offences guidelines, conducted jointly with the University of Leicester, found that the guidelines published in 2013 did not appear to have had an impact on average sentencing severity for most offences. The two exceptions were sexual assault and sexual assault of a child under 13. The report concludes by saying "The Council … is committed to revisiting areas of the guideline where issues were identified".

3.2 In the case of sexual assault, the assessment found that the increase was at the upper limit of expectations. This appeared to be caused by two factors: the category 1 harm

factor “violence or threats of violence” (cf the previous guideline which included physical harm, but not the threat of it), and the new harm factor “severe psychological harm”. Linked to this there appeared to be some uncertainty and inconsistency about what amounted to “severe psychological harm” and the report concluded that “additional guidance on psychological harm may be required”.

3.3 For sexual assault of an under-13, the assessment found that the guideline may have increased sentencing severity: after the guideline came into force this was towards the upper confidence limit of the forecast range, which was unanticipated in the resource assessment. This was found to be linked with the category 2 harm factor “prolonged detention/sustained incident” (cf “sustained assault/repeated assault on same victim” in the predecessor guideline); the new Culpability A factor “significant degree of planning”; and the Culpability A factor “abuse of trust” (which existed in the predecessor guideline but had a greater impact on sentencing severity after the guideline came into force). The report suggested that further guidance on the factor “abuse of trust” may be needed.

3.4 There is evidence to suggest that the new guidelines for both offences have continued to increase sentencing severity (see **Annex A**). However, since the guideline came into force there have only been small increases in the sentencing severity for both offences. For sexual assault the (immediate) custody rate in 2014 was 36% compared to 38% in 2019. The Average Custodial Sentence Length (ACSL) was 1.4 years in 2014, and was 1.5 years in 2019 (although the median ACSL remained at 1 year). Severity for sexual assault of an under-13 increased a little more in comparison: the custody rate in 2014 was 79% and that had increased to 82% in 2019. The ACSL was 3.2 years in 2014, and 3.7 years in 2019 (although the median in 2014 was 3 years, compared to 3.1 years in 2019).

3.5 The Council may take the view that, although at the upper end of what had been anticipated, the current levels of sentencing for these offences are not necessarily troubling and do not need addressing/reversing, particularly when the more pressing priorities of the current revisions are a) to ensure that there is clear guidance on other offences where no sexual activity take place and b) to produce a guideline for sexual communication with a child. We do not have any further evidence or representations to suggest that these factors are causing either unwarranted sentencing severity or confusion. We could, therefore, conclude that no further amendments are needed to the sexual assault and sexual assault of a child under 13 guidelines.

3.6 However, as it happens, in the last few years, the Court of Appeal has clarified two of the matters raised in the assessment: how to assess psychological harm (see *R v Chall*

[2019] EWCA Crim 865), and the parameters of "abuse of trust" (see *R v Forbes [2016] EWCA Crim 1388*).

3.7 *Chall* confirmed that:

- expert evidence is not an essential precondition of a finding that a victim has suffered severe psychological harm;
- a judge may assess that such harm has been suffered on the basis of evidence from the victim, including evidence contained in a Victim Personal Statement (VPS), and may rely on his or her observation of the victim whilst giving evidence; and
- whether a VPS provides evidence which is sufficient for a finding of severe psychological harm depends on the circumstances of the particular case and the contents of the VPS.

Further, on the level of psychological harm experienced, the Court of Appeal pointed out at para 16 that:

> *"The assessment of whether the level of psychological harm can properly be regarded as severe may be a difficult one. The judge will, of course, approach the assessment with appropriate care, in the knowledge that the level of sentence will be significantly affected by it, and will not reach such an assessment unless satisfied that it is correct. But it is an assessment which the judge alone must make, even if there be expert evidence. It is the sort of assessment which judges are accustomed to making."*

3.8 To provide extra assistance on assessing psychological harm in sexual offence cases, we could summarise the above principles as follows in a drop down box, similar to an expanded explanation:

"The assessment of psychological harm experienced by the victim is for the sentencer. Whilst it may be assisted by expert evidence, such evidence is not necessary for a finding of psychological harm, including severe psychological harm. A sentencer may assess that such harm has been suffered on the basis of evidence from the victim, including evidence contained in a Victim Personal Statement (VPS), and may rely on his or her observation of the victim whilst giving evidence."

3.9 On "abuse of trust", *Forbes* has this to say at paras 17 and 18:

"…in the colloquial sense the children's parents would have trusted a cousin, other relation or a neighbour…to behave properly towards their young children, the phrase "abuse of trust", as used in the guideline, connotes something rather more than that. The mere fact of

association or the fact that one sibling is older than another does not necessarily amount to breach of trust in this context.

The phrase plainly includes a relationship such as that which exists between a pupil and a teacher…a priest and children in a school for those from disturbed backgrounds…or a scoutmaster and boys in his charge… It may also include parental or quasi-parental relationships or arise from an ad hoc situation, for example, where a late night taxi driver takes a lone female fare. What is necessary is a close examination of the facts and clear justification given if abuse of trust is to be found."

3.10 The existing expanded explanations for aggravating factors include one for "abuse of trust" which is informed by *Forbes*:

- *A close examination of the facts is necessary and a clear justification should be given if abuse of trust is to be found.*
- *In order for an abuse of trust to make an offence more serious the relationship between the offender and victim(s) must be one that would give rise to the offender having a significant level of responsibility towards the victim(s) on which the victim(s) would be entitled to rely.*
- *Abuse of trust may occur in many factual situations. Examples may include relationships such as teacher and pupil, parent and child, employer and employee, professional adviser and client, or carer (whether paid or unpaid) and dependant. It may also include ad hoc situations such as a late-night taxi driver and a lone passenger. These examples are not exhaustive and do not necessarily indicate that abuse of trust is present.*
- *Additionally an offence may be made more serious where an offender has abused their position to facilitate and/or conceal offending.*
- *Where an offender has been given an inappropriate level of responsibility, abuse of trust is unlikely to apply.*

3.11 There would be a logic to including these expanded explanations not just in the guidelines for sexual assault and sexual assault of a child under 13, but for all sexual offence guidelines – indeed for all offence-specific guidelines where they occur. These factors can cause difficulties for sentencers across the board, and in principle the case law could be applied across a range of offences.

3.12 However, when introducing expanded explanations we deliberately decided not to include them at step one. This was primarily because it was felt that the factors could mean

different things in the context of different offences: for example, “abuse of trust” may mean something different in the context of fraud or funding terrorism than it would in the context of a sex offence. These factors were carefully drafted and calibrated, and consulted on, in the context of the offence-specific guidelines in which they occurred. Whilst aggravating and mitigating factors are also carefully drafted, it is more likely that aggravating and mitigating factors are generic and have a common meaning across offences, particularly if linked to personal mitigation or aggravation.

3.13 The factors appear at step one in the offence-specific guidelines at **Annex B**. Abuse of trust appears in, for example, the guidelines for drugs offences, benefit fraud, robbery, theft and funding terrorism. Psychological harm in various forms appears in, for example, guidelines on child cruelty, arson, robbery, assault and harassment.

3.14 This would be the first time we would be adding expanded explanations at Step One. Aside from the consideration above, this is not necessarily a problem: we should simply pause to consider whether we want to start to increase the use of expanded explanations in this way. We have not conducted a thorough examination of whether the expanded explanations would work in each instance. For the moment we could restrict these ones to sexual offences, given that is the scope of our consultation, with a view either to coming to a broader settled view on the scope of expanded explanations, or to making those changes at the next relevant opportunity. Alternatively, we could use this consultation to seek views on making the changes to all relevant guidelines where they may assist sentencers.

Question 1: does the Council agree to add expanded explanations to assist with the factors “severe psychological harm” and “abuse of trust”?

Question 2: does the Council wish to consult on them for sexual offences only, or more broadly?

Historic sex offences principles

3.15 The guidelines published in 2013 included as an annex principles for the courts to follow when sentencing historic sexual offences. These were drawn from the case of *R v H [2011] EWCA Crim 2753*, and are set out at **Annex C.** The definitive version of this guidance is now published as a drop-down on the page on historic sexual offences: https://www.sentencingcouncil.org.uk/offences/crown-court/item/sexual-offences-historic/ The substance of the principles largely stands, but the Court of Appeal found the need to gloss them in the case of *Forbes*.

3.16 The Court of Appeal was explicit that it viewed Annex B as misworded on the question of immaturity/youth at the point of offending. The guidance says at paragraph 9: “If

the offender was very young and immature at the time of the offence, depending on the circumstances of the offence, this may be regarded as personal mitigation". Whereas para 20 of *Forbes* says "In R v H, at [47(c)] the view is expressed that immaturity goes to culpability. We consider that to be the approach that better accords with principle than the guidance given at paragraph 9 of annex B."

3.17 To meet this point, we could amend paragraph 9 to say:

"If the offender was very young and immature at the time of the offence, depending on the circumstances of the offence, this may ~~be regarded as personal mitigation~~ have a considerable bearing on the offender's culpability."

Question 3: do you agree to consult on this revised text in paragraph 9 of the guidance?

3.18 There is also some discussion in *Forbes* of how to apply existing guidelines to historic offences. *Forbes* rejects the idea that the court should simply look at the guidelines in force today and then apply them to an historic case, capped only by the maximum penalty available at the time (so, for example, coming to a sentence of five years by following the guidelines for today's offence, but automatically imposing a sentence of two years – without any further consideration - because that was the maximum available for the predecessor offence). The position, as established by *R v H* is more nuanced. That case said (at para 47(a)):

"Sentence will be imposed at the date of the sentencing hearing, on the basis of the legislative provisions then current, and by measured reference to any definitive sentencing guidelines relevant to the situation revealed by the established fact".

This principle is reflected in the Council's guidance as:

"[1] The offender must be sentenced in accordance with the sentencing regime applicable at the date of sentence…. [2] The sentence is limited to the maximum sentence available at the date of the commission of the offence. If the maximum sentence has been reduced, the lower maximum will be applicable…[3] The court should have regard to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003."

3.19 As *Forbes* acknowledges the guidance's "have regard to" is meant to reflect *R v H*'s "measured reference to". These are clearly very close in meaning, but given the questions which have arisen over how to use guidelines in such cases, there is scope to become closer to the authorities. We could amend the wording of principle 3 to:

"The court should impose a sentence by measured reference to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003."

Question 4: do you agree to amend the guidance to more closely reflect the wording of *R v H*?

4 EQUALITIES

4.1 We do not expect that the changes outlined above will themselves raise equality issues.

4.2 In 2019, the vast majority of offenders sentenced for sexual assault were male (97%) and a higher proportion of males were sentenced to immediate custody than females (39% v 22%). Just over half of offenders were between the ages of 22 and 39, with 41% of those sentenced to immediate custody. When looking at ethnicity, 39% of White offenders received immediate custody compared to 48% of Black offenders but average custodial sentence lengths were broadly comparable across ethnic groups, (a mean of 1.4 years for White offenders, 1.5 years for Black offenders and Other ethnicity offenders and 1.2 years for Asian offenders).

4.3 Figures on sexual assault of a child have been based on five years (2015-2019) rather than for a single year, due to the small number of offenders sentenced in some demographic groups for these offences each year. As with sexual assault, nearly all offenders sentenced for sexual assault on a child were male (99%). Just over a third of offenders were between the ages of 22 and 39 and 25% were over the age of 60. Of those aged 22 to 39, 82% were sentenced to immediate custody compared to 85% of offenders over 60. The proportion of offenders receiving immediate custody was similar across all ethnicities (81% of White and Other ethnicity offenders and 81% of Black and Asian offenders). The average custodial sentence lengths were also broadly similar across ethnicities (3.7 years for White offenders, 3.3 years for Black offenders, 2.6 years for Asian offenders, and 3.1 for Other ethnicity offenders).

4.4 It is likely that offenders being prosecuted for committing historic sex offences will be older on average than offenders as a whole. Taking adults sentenced in 2019 under the 1956 Sexual Offences Act as a very rough proxy for "historic" sexual offences, over half (55%) were aged over 60 and more than three quarters (78%) were over 50. In some cases, the age of an elderly offender may become a factor for consideration in personal mitigation: the guidance does not address this explicitly but says "The court must consider the

relevance of the passage of time carefully as it has the potential to aggravate or mitigate the seriousness of the offence".

5 IMPACT AND RISKS

5.1 An impact and risk assessment will be conducted prior to consultation and we will come back to Council with a resource assessment in March.

5.2 There is a risk that the Council is seen to be ignoring the increased sentencing severity for sexual assault and sexual assault of a child under 13 observed in the 2018 assessment. That could be mitigated to a degree by providing clarity on those factors which the report concluded were creating uncertainty. There would equally be handling issues were the Council to issue a consultation with the aim of decreasing sentences for these offences.

5.3 If the Council does not address the Court of Appeal's gloss on the historic sex offence guidance there is a risk of continued uncertainty about how precisely to interpret the guidance. This may not have a significant impact in practice (particularly if advocates and sentencers are aware of the case law), although it would have the unfortunate result that live Sentencing Council guidance needed supplementary information, or caveating (for example in the CPS Rape and Sexual Offences guidance, currently out for consultation: https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-13-sentencing) .

Sentencing Council

Sentencing Council meeting:	**29 January 2021**
Paper number:	**SC(21)JAN05 "What next for the Sentencing Council?" – public confidence**
Lead Council member:	**Vision working group**
Lead official:	**Phil Hodgson, 020 7071 5788**

1. Issue

1.1 This paper considers the responses to the anniversary Vision consultation that relate directly to work the Council does and could do to promote public confidence. It also takes note of responses that are covered by other themes of the consultation such as legitimacy but have a significant bearing on public perceptions of, and so confidence in, the Council, the guidelines and sentencing.

2. Recommendations

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

3. Consideration

3.1 In the Vision consultation paper, we set out the Council's reasons for resourcing work to promote public confidence and described the work we are already doing. We asked three, questions:

- which areas of activity do you think could achieve most in promoting public confidence, and why (Q19);
- are there any areas of existing activity in relation to promoting public confidence that you think the Council should do more of or less of, and why (Q20); and
- are there any other avenues we could use to inform the public about the Council and the guidelines (Q21)?

3.2 There is a consistent message running through the majority of responses: the work that the Council is already doing to promote public confidence is making an impression and is welcome but that we could be doing considerably more.

3.3 All the activities suggested by respondents have value but each has implications for our resources in terms of budget and the level of input required from the Communication team, colleagues across the office and, to some degree, members of Council.

3.4 Looking across all responses, this paper identifies themes that relate to public confidence and distinguishes between those that would fall within the remit of the Council's existing communication strategy and those that have wider implications, such as the extent to which the Council should contribute to public discussion about sentencing policy. These themes inevitably overlap with, for example, questions relating to the legitimacy of the Council. I have included them in this paper because of their potentially significant influence on public confidence in the Council and the guidelines, but have not included discussion points. Council will have opportunities to explore these themes when considering other parts of the Vision response.

SHOULD PUBLIC CONFIDENCE BE A PRIORITY FOR THE COUNCIL?

3.5 The majority of respondents agreed that:

- public understanding of and confidence in the criminal justice system is limited;
- improving public confidence is important and necessary work; and
- the Sentencing Council has a key role to play in doing such work.

3.6 In addition, respondents across the board said that the Council should consider promoting public confidence to be a priority, although each had distinct ideas as to what might be done.

> *Promoting public confidence in the criminal justice system, and the associated duty to promote public awareness of the realities of sentencing, are areas of the Council's remit where increased prioritisation and resource would be justified.* (Prison Reform Trust)

> *Dedicating additional resources to educating the public would be a welcome step, bringing important clarity to offenders, victims, and wider society about the process of sentencing as well as the implications of specific sentences, thereby helping to build support for more evidence-based and effective sentencing policy.* (Catholic Bishops Conference)

PROMOTING CONFIDENCE THROUGH COMMUNICATION

Media and social media

3.7 Respondents agreed that public awareness of sentencing and the guidelines had an important role to play in improving public confidence and advocated that we should continue to use both traditional and social media to reach the public, but most said that we could do more:

> *The MA welcomes the work of the Sentencing Council to promote new guidelines in the media and, where appropriate, to correct misleading or incorrect information. Its use of social media is also welcome, although it could be expanded.* (Magistrates' Association)

> *Active use of social media, including engaging with other users, and proactive media work can also ensure that the Sentencing Council's work is as accessible as possible.* (Magistrates' Association)

> *Get the TV, Radio and written press to see your very worthwhile work.* (Magistrate)

> *More public awareness of the Sentencing Guidelines would instil more faith and confidence in our Criminal Justice system.* (HMCTS)

3.8 Some respondents suggested that we could extend our use of social media to include other channels such as Facebook and YouTube, particularly to reach younger audiences. Also a suggestion that we should use Linked In to reach "decision makers in society":

> *The SC's social media presence is quite limited and this is an area that may offer scope to reach additional parts of the public… Other social media platforms, for example, have a wider reach than Twitter.* (Sentencing Academy)

3.9 Extending our use of social media would enable us to reach wider audiences and, potentially, to engage more fully with our existing audiences by allowing us to contribute information (not opinion) to existing discussions. However, any extension of our social media profile would have significant resource implications for the Communication team and colleagues across the office.

Question 1: Does Council consider that extending our social media activities, either by making more engaging use of our Twitter account and/or by establishing profiles on other channels should be a priority?

Public education and partnerships

3.10 Respondents were keen to see the Council do more work in partnership with other organisations to extend our reach to the public; the main focus for these respondents were children and young people. The two leading suggestions were that the Council should work more with the Magistrates' Association and Young Citizens, both of whom we are working with already. The YJB also offered us the use of their networks to reach young people:

> *I welcome the focus the Council has given to improving public education, particularly with young people in schools. Looking to the future, I very much support and encourage the Council to continue to advance this area of its work.* (MoJ)

> *We would like to see the Sentencing Council focus on better outreach to children and young people via schools, colleges and universities. For example, the Sentencing Council could work with the MA's Magistrates in the Community programme (which sees magistrates engaging with children and young people in primary and secondary schools and community groups), Your Life You Choose in secondary schools and the National Mock Trial Competition, which is run by Young Citizens in partnership with the MA. Children and young people are very interested in the criminal justice system and are also very keen to know their rights and responsibilities.* (Magistrates' Association)

> *Magistrates in the community is a way of fostering understanding amongst school children. It could be re-engineered to include local community groups and interest groups so that the message could be further conveyed and could be helped by local police officers who could convey the message about end to end justice.* (Magistrate)

> *The … plan to target children of secondary-school age is very welcomed by the YJB, as we believe that it is important to educate and positively engage with them at the earliest opportunity. We consider that this approach is helpful for and will empower children and may in some cases help serve to prevent their involvement with the youth justice system. The YJB has a number of networks in place connected to children across England and Wales, which may also help with the dissemination of the pack that that the Council have created. We would be happy to use our networks with children, and young adults who have lived experience of the criminal justice system, to help with the dissemination of your materials.* (YJB)

> *The Council could engage more with the Magistrates Association and other organisations with a view to planning joint activities – for example, holding public meetings where magistrates explain the role of the lay magistracy and the guidelines to members of the public.* (Sentencing Academy)

We believe that public education could achieve the most in terms of promoting public confidence. This may be an area in which a shift in resources could be justified and would not have to be at the expense of producing sentencing guidelines. (HMCTS)

Resources permitting we would, however, like to see support from the Sentencing Council for a broader range of work to inform the public about sentencing practice. (Magistrates' Association)

3.11 The Council is already contributing to the Young Citizens' national schools mock trial competitions at secondary level and is in discussion with them as to how we can contribute, in partnership with the Judicial Office, to the work they do at primary level. We have also had an initial conversation with the Magistrates' Association about how the Council could take part in their outreach activities.

Question 2: Do members think we should seek to work more in partnership with other organisations to take advantage of their audience reach and existing networks?

Question 3: If so, do members have in mind any other organisations we could partner with to reach other audiences?

Making sentencing accessible

3.12 A few respondents thought the Council could do more to make the topic of sentencing more easily understood by the public both through its use of language…:

Messaging could use clear, impartial language to promote discussion around sentencing. (HMCTS)

The Council should produce Plain English versions of its guidelines and a glossary of terms. (Transform Justice)

To the extent that it is possible, the Sentencing Council should ensure that information made available on its website and through the media (including social media) is presented in accessible language, free of jargon. (Magistrates' Association)

While guidelines will, by their nature, be technical in the way they are presented, they should still be written as clearly as possible to maximise the extent to which they can be understood by offenders, victims and members of the public. (Magistrates' Association)

3.13 …and the use of alternative formats:

The internet, social media, audible reporting eg; talking newspapers, information produced for the blind and disabled in appropriate formats. (Magistrate)

Activities such as the short video for the public on the sentencing process are very welcome. Explaining the process in a clear, and straightforward way should be a focus of the Council. (Magistrates' Association)

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. (Diversity Cymru)

There is a need to promote the guidelines more, and to produce the guidelines in accessible formats. (Diversity Cymru)

Question 4: Do members think that the Council should consider producing our publications in alternative formats:

- ***for consultation; and/or***
- ***for definitive guidelines?***

Explaining the realities of sentencing

3.14 A number of respondents suggested that putting a greater focus on improving people's understanding of the details of sentencing practice would be a valuable mechanism for promoting public confidence:

There is limited public understanding of sentencing practice and what factors are taken into account in deciding on an appropriate sentence. This has an impact on confidence in the justice system. As the body that develops guidelines, the Sentencing Council is well placed to play an important role – alongside other organisations working in the field – in explaining these issues to the public. (Magistrates' Association)

I do not feel that guidelines reassure victims necessarily as they often will not be aware of the mitigation taken into account. This is often quoted to me as a soft CJS and comes back to victims not understanding the longer term objective of sentencing. (Magistrate)

We believe that the best approach the Council could take to promoting public confidence would be to seek to address the lack of knowledge and understanding of the realities of sentencing exhibited by the majority of the public. This may require understanding public confidence, or the lack of it, in a more sophisticated way. (Prison Reform Trust)

Whilst I note some information on aggravating and mitigating factors is made available as part of the Annual Report, I would like the Council to consider making more of the information it collects on the impact of aggravating and mitigating factors on

sentencing outcomes publicly available. This would help to improve public understanding around the impact these factors are having on sentencing. (MoJ)

Framing messages about guidelines and sentencing using media coverage around factors that the public sympathise most with such as harm done to the victim or the seriousness of the crime, would be an effective way to challenge misconceptions or negative slants. (HMCTS)

3.15 One respondent thought that a solution to public misunderstanding of sentencing lay in more detailed sentencing remarks, albeit outside the existing remit of the Council:

Often the sentencing remarks of judges are extensively reported as are the particular of the case. What is not explained is how the decision was reached and what was considered. It is in my view vital that courts explain what they considered and why as all too often, the public raise concerns as to the inadequacy of sentencing. (Magistrate)

Question 5: Do you agree that focusing our communications on the mechanics of sentencing would contribute to greater public confidence?

Question 6: What more do you think we could be doing to correct misunderstandings?

Question 7: If sentencing remarks are outside our remit, what could we do in this area?

Reaching a wider public

3.16 A number of consultees said that involving a "wider public" in consultation and guideline development would contribute to the legitimacy of the Council and, by extension, strengthen confidence in the Council and the guidelines both among the general public and among the particular communities represented:

The Sentencing Council could also consider how to better engage with people caught up in the justice system, especially those already sentenced, so they can better understand the sentencing process. This could include engaging with those under probation supervision, as well as those in prisons. (Magistrates' Association)

There is a need to involve a wider range of victims and perpetrators in the development of guidelines and background evidence. In particular, there needs to be wider involvement of people with one or more protected characteristics, in order to ensure consistency in sentencing for all, integrate the impacts on different victims, and

promote public confidence in the criminal justice system within all communities. (Diversity Cymru)

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. (Diversity Cymru)

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. (MoJ)

Engagement with Parliament

3.17 Only one respondent, the MoJ, recommended that the Council do more to reach parliamentarians:

I very much support and encourage the Council to continue to advance this area of its work. In particular, 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… 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. (MoJ)

3.18 The Council makes considerable effort, particularly in its consultations, to reach a wide and relevant audience. Some of the consultation responses to our questions about equality suggested we should do more to engage with under-represented groups. In Ollie's paper on legitimacy, you will also be asked to consider specific questions about who we should include in our consultations but, as a matter of public confidence, respondents identified two audiences that we do not currently reach: offenders and parliamentarians.

Question 8: Should we do more to seek wider public views on guidelines at consultation stage?

Question 9: Do you agree that we should broaden the scope of our target audiences, in particular to reach offenders and people under probation supervision?

Question 10: How should the Council renew its efforts to engage parliamentarians?

THEMES WITH A BEARING ON PUBLIC CONFIDENCE

3.19 A number of themes emerged consistently across the consultation responses that have a significant bearing on how the public perceive the Sentencing Council and the guidelines but either fall outside the Council's existing communication strategy and/or have wider implications for how the Council perceives itself and its purpose.

3.20 Members will have opportunities to discuss these themes in the paper that Ollie is presenting today, and we will return to them in later meetings as well. This paper does not seek your views on these themes but would ask that, as you consider them in the discussion of Ollie's paper, you bear in mind the impact they have on the public's understanding of, and confidence in, sentencing and the Council.

An (the) authority on sentencing

3.21 A significant theme that emerged from several responses relates to how the Council should position itself. These all imply a more active role for the Council and perhaps a different relationship with various arms of the State:

> *The Council is now an established and respected body. It ought to re-appraise the appropriateness of the boundaries it has drawn for itself. Not only the implications of the coronavirus pandemic for custodial sentence regimes but also the sentencing of BAME offenders should be at the top of the Council's list. Now is the opportunity for the Council to grasp these nettles, and to show leadership on these sentencing issues of the moment.* (Professor Andrew Ashworth)

> *The Council needs to reinvent itself as an expert body on sentencing which does not simply reflect existing norms but challenges them based on evidence of effectiveness…. These are missed opportunities for the Council to develop its role as an expert body on sentencing which can be looked to by legislators and the executive, as well as the judiciary, for information, data, research and evaluation.* (Transform Justice)

3.22 The Communication team already identifies and, where possible, acts to correct misunderstandings or errors in the media. A few respondents identified a wider role for the Council, recommending that we act to correct misinformation circulating in the public domain:

> *[Challenging misinformation] is likely to necessitate the more assertive approach we advocate, including challenging inaccurate information about sentencing in the public domain. Such an approach is likely to pose challenges to the independence and*

neutrality of the Council. However, given the extent of misinformation about sentencing spread through the mainstream and online media, sometimes actively propagated by parts of the political establishment, the necessity of such an approach can no longer be avoided. (Prison Reform Trust)

3.23 Professor Padfield recommended that the Council could achieve most in promoting public confidence by:

Encouraging Government to be much more honest in how they report crime and justice… It is the role of the SC to take strong leadership role in correcting Government misinformation. (Professor Nicky Padfield)

What is effective?

3.24 Respondents agreed that sentencing guidelines provide greater transparency in sentencing, which contributes to public confidence, but that the existence of guidelines alone is not sufficient to earn public confidence and that more clarity is required as to the intended purpose of the guidelines and how we measure success.

3.25 Professor Padfield questioned how any evaluation of "confidence" could be made until the Council has considered what it regards as success. She also questioned the Council's measures of "effectiveness" and "fairness", suggesting they were:

…meaningless without clarification of which of the five purposes of sentencing the public is assessing. I would therefore suggest that a pre-requisite for building public confidence must be clarifying these purposes, by way of public discussion based on well-documented and accessibly written research findings. (Professor Nicky Padfield)

3.26 Transform Justice and the Sentencing Academy also considered that our efforts to promote public confidence would be improved if the Council were able to demonstrate the effectiveness of guidelines:

To the extent that public confidence does increase as a result [of the guidelines], this is a benefit, but the SC probably has only a limited ability to engineer significant shifts in public opinion – particularly if guidelines cannot be shown to be effective in terms of reducing re-offending. (Sentencing Academy)

If the Council gives greater weight to effectiveness in the development of its guidelines, this will provide a sound basis for promoting public confidence. (Transform Justice)

Sentencing Council

Sentencing Council meeting:	**29 January 2021**
Paper number:	**SC(21)JAN06 - "What next for the Sentencing Council?" legitimacy**
Lead officials:	**OSC Vision group**

1 ISSUE

1.1 Looking at responses to the 'Vision' consultation which relate to the legitimacy of the Council as a body, how it is composed and structured, and the way in which it fulfils its statutory functions.

2 RECOMMENDATIONS

2.1 The below recommendations and any agreement should be provisional until the Council has considered all the areas emerging from the Vision consultation.

2.2 That:

- we consider at the scoping stage of each future guideline whether to draw on external expertise;
- when restrictions ease, we consider meetings held in different regions, and add Local Criminal Justice Boards as standard recipients of consultations;
- we should reach out proactively to offenders and victims (via representative groups as necessary) as part of consultations; and
- a periodic/annual revision of cross cutting elements in guidelines is one way of meeting the suggestion that the guideline process be made more "nimble" and responsive; and
- Council note and consider responses which suggest the Sentencing Council should more actively involve itself in the public and parliamentary debate on sentencing matters, and the ongoing debate on the role of guidelines in influencing the prison population

3 CONSIDERATION

3.1 Looking across all responses, matters relating to the "legitimacy" of the Council can be categorised into three sets of themes. Firstly, there are answers which are specifically about the Council's structure and governance. Secondly, there are some broadly consistent responses about the role of the Council in acting on and reacting to events (linked with informing the public) and in setting sentence levels. And finally, there are the broader themes which overlap with other parts of the vision consultation.

3.2 A small handful of themes came out strongly across a number of different responses, but much of what respondents said were individual suggestions from quite specific perspectives.

The Council's structure and governance

3.3 There were no obvious common themes on the makeup of the Council but individuals made the following proposals:

> *"…given that the vast majority of cases are sentenced in magistrates' courts and the different experiences of magistrates in, for example, urban and rural areas, we would welcome an increase of magistrate members on the Sentencing Council (in addition to, as currently, a district judge) to give a broader range of views."* (The Magistrates' Association)
>
> *"There is a case for reviewing the criteria for membership of the Council, including whether the judicial members should form the majority (currently eight of the 13 members are full or part-time judges, and the President is the Lord Chief Justice). People with expertise in mental health or addiction, or the media and ex-offenders could make good candidates for membership. The prison system should also be represented, for example by the head of HMPPS. Without the involvement of HMPPS, it is hard to see how the Council can properly understand the impact of sentences on the agencies which implement them"* (Transform Justice)
>
> *"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"* (Prison Reform Trust)
>
> *"The fact that there are no disabled representative reviewing the sentencing guidelines is a glaring omission in the fact that 20% of the population have disabilities and equality issues… the committee* [sic] *should set up a sub-committee drawing*

upon truly disabled members of the Magistracy to review the hidden impact on the disabled and ethnic communities…[You should be reaching out to the] disabled community. Use magistrates who are members of these communities. Have a more diverse sentencing council." (Ian Pearson, magistrate).

3.4 Attempting to draw a thread through these responses one could note that no one is pushing for more senior judges and lawyers to sit on the Council. Rather, specialist expertise and "lived experience" could be reflected more.

3.5 We are constrained by Schedule 15 to the Coroners and Justice Act 2009 to have eight judicial members and six non-judicial members, and the non-judicial members need experience in certain areas.[1] There is leeway within those categories in terms of emphasis. But there is a suggestion in some responses that short of there being a formal position on the Council for representatives of certain groups, then establishing some more or less formal route to hear such opinions may also be valuable. We have in the past used outside experts to attend Council meetings and help inform guidelines (for example on Health and Safety offences) and could look to do that on a more consistent basis in the future by considering at the scoping stage of each new guideline whether we will need external expertise. For example, we could ensure that we request input from HMPPS more consistently to understand the implementation of sentences. Further, we could then be more explicit in consulting on and publishing new guidelines that we have drawn on this expertise so that interested parties are aware that we have done so.

Question 1: Do you agree that we should consider at the scoping stage of each guideline whether to draw on external expertise?

3.6 In terms of attracting people with disabilities, minority voices etc, all of the Council's adverts carry the usual wording: "Applications are encouraged and welcomed from women, members of ethnic minorities, and people with disabilities. There is strong commitment to equality of opportunity in the appointments process for all those who are eligible". Respondents/the public are unlikely to know the extent to which members of the Council have disabilities, including hidden disabilities. However, we could consider ways of demonstrating our commitment to diversity on the Council (the Government's kitemark Disability Confident system is more aimed at employers, but we could explore similar options).

[1] One of the following: criminal defence; criminal prosecution; policing; sentencing policy and the administration of justice; the promotion of the welfare of victims of crime; academic study or research relating to criminal law or criminology; the use of statistics or; the rehabilitation of offenders.

3.7 A magistrate respondent, valuing consistency, thought that the term of office should be five years. This is something set by statutory instrument (the Sentencing Council for England and Wales (Supplementary Provisions) Order 2010). In practice, many members of the Council have had their three year terms renewed and it is a question as to whether that would happen if the terms were five years. Such a change might have the practical effect of Council members serving *less* time on the Council. Equally, some applicants might regard five years as too long a commitment. Some members of the judiciary might be excluded if they are nearing retirement age.

3.8 In terms of the Council's structure, Professor Nicky Padfield had this suggestion:

> *"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"*

This would be practically and financially difficult to establish, and we would need a clear view of what the intended outcomes were. On the one hand, it might highlight particular perspectives (rural, inner city etc), and allow prevalence of certain offences in certain areas to be reflected in guidelines. However, it risks inconsistency of approach across the jurisdiction and unfair outcomes for both offenders and victims depending on their location. The proposal also implies a role for these councils in training.

3.9 The Office has tried to guard against being too London-centric. Our advertisements are clear that members do not need to be based in London to apply, and we have deliberately tried to make consultations fully E&W-wide. When pandemic restrictions are lifted we could look to organise meetings in different parts of the country, inviting local criminal justice partners to attend. We could also ensure that Local Criminal Justice Boards are added to the list of standard recipients of our consultations. This links somewhat to the question of publishing sentencing data from local areas, which we will discuss separately.

Question 2: do you agree that these are good ways of seeking a local/regional view? Are there any others?

The role of the Council

3.10 One major theme which emerged from several responses was a fundamental one about how the Council should see itself. These all imply a more active role for the Council and perhaps a different relationship with various arms of the State:

> *"The Council needs to reinvent itself as an expert body on sentencing which does not simply reflect existing norms but challenges them based on evidence of*

effectiveness….These are missed opportunities for the Council to develop its role as an expert body on sentencing which can be looked to by legislators and the executive, as well as the judiciary, for information, data, research and evaluation" (Transform Justice)

"When there are crises of sentencing policy, the Council steps back, or is invisible… Not only the implications of the coronavirus pandemic for custodial sentence regimes but also the sentencing of BAME offenders should be at the top of the Council's list. Now is the opportunity for the Council to grasp these nettles, and to show leadership on these sentencing issues of the moment." (Andrew Ashworth)

"Now that the Council is an established part of the criminal justice system it must reflect on the degree to which it can be responsive to such events and assert its position at the forefront of sentencing guidance in this jurisdiction" (Sentencing Academy).

3.11 The Justice Committee also suggested a more proactive role for the Council in contributing to public and parliamentary debate on sentencing. They propose that the Council could "proactively [publish] information or analysis on sentencing that is topical and relevant to public debates on sentencing". This picks up on the power envisaged by section 132 of the Coroners and Justice Act for the Council to assess the impact of government policy proposals on prison, probation and youth justice services, albeit it is for the Government to use that power to consult the Council. This has been used once for reforms to suspended sentences under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Committee also proposed that the Chair give evidence on a regular or annual basis as a means of promoting awareness of the work of the Council.

3.12 Other respondents picked up on the related idea of the Council as myth-buster:

"We believe that the best approach the Council could take to promoting public confidence would be to seek to address the lack of knowledge and understanding of the realities of sentencing exhibited by the majority of the public….This may necessitate the Council being more assertive in responding to factors which undermine public confidence, including correcting inaccurate and misleading commentary as well as to promoting accurate commentary." (Prison Reform Trust)

"It is the role of the SC to take strong leadership role in correcting Government misinformation." (Prof Nicola Padfield).

The Council already does outreach and myth-busting as part of its communications work, but we might interpret this suggestion as going above and beyond that to getting more actively involved in live debates around sentencing.

3.13 As the Justice Committee themselves acknowledge, this would test the limits of some constitutional boundaries. If the Chair or Council members were to put themselves forward for commentary on 'live' sentencing topics it would be almost impossible for the media or parliamentarians not to seek to draw inferences either for particular cases, or to try and elicit a critique of government policy. The Justice Committee itself may be a somewhat more "controlled environment", where members should be more sensitive to the limits of what the Council can say as part of live debates. A regular scheduled appearance before them may be an appropriate opportunity for the Council to feed in to the discussion.

3.14 A further small way in which we may be able to demonstrate that we are grappling as a Council with live sentencing issues may be to provide some more detail in the published minutes of what is discussed at the start of each meeting when the Chair updates the Council on recent developments. This would deflect criticisms (made most recently by Transform Justice) that the Council is not engaging with current sentencing policy and practice, such as the Government's legislative proposals or the pandemic.

Question 3: to what extent does the Council think it should be more active in public (and parliamentary) debate on matters of sentencing?

3.15 Several respondents picked up on the idea that the Council should be more proactive in tackling sentence inflation:

"*Transform Justice considers that the priority for the Sentencing Council in the coming years should be to take a range of measures to challenge and reduce the sentence inflation which has taken place since 2010 …A priority for the Council should be to rethink its approach to guidelines in order to stabilise or reduce levels of punishment. The Council should be recalibrating the going rate for certain offences to address the inflation in sentence lengths that has taken place in recent years, in most cases in the absence of any change in primary legislation*." (Transform Justice)

"… 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 Church)

"As we argued in 2008, the Prison Reform Trust believes that the Council has an important (but as yet unfulfilled) role in addressing the problems of prison over-use and sentence inflation." (Prison Reform Trust)

"…despite the intention behind its creation, the Sentencing Council has not curbed the use of imprisonment by the courts, and regard for the cost and effectiveness of different sentences is hard to discern in the sentencing guidance produced to date. Instead the Council has focused its efforts on ensuring that its guidelines reflect, and thereby institutionalise for good or ill, current sentencing approaches (Roberts and Ashworth 2016, 340). Transparency and consistency have to an extent been improved, but generally with the result of ratcheting up sentencing levels and length…. The Council has not so much controlled as contributed to the problem of the over-use of imprisonment." (Howard League)

3.16 For many respondents this was closely linked with the Council's duty to have regard to the cost of different sentences and their relative effectiveness in preventing re-offending (section 120 (11)(e) Coroners and Justice Act 2009), and pointed to the research on the ineffectiveness of short sentences in preventing re-offending as a basis for the Council to either steer sentencers away from them, or actively call for their abolition.

3.17 Such proposals have been made before. The argument echoes points made by Professor Bottoms[2]: it is argued that, at the very least, the Council should look to stop upward trends, and view any ongoing upward trend as an unanticipated increase. There is force in that argument, although sentencing trends will be influenced by other factors like case mix and legislative changes.

3.18 In general terms, the Council has thus far tended to focus on ensuring consistency, only seeking to achieve changes in severity one way or another when given evidence of a specific problem (as with the sentences imposed on drugs mules, or Environmental and Health and Safety guidelines). This has left the Council open to the criticism made by the Howard League and others that it is passively entrenching upward trends of severity.

3.19 On the related but separate point made by the PRT on short sentences and "encouraging" or "discouraging" the use of custody, it could be argued that within the current

[2] "[I]t is recommended that when conducting impact assessments, if there is a pre-existing upward trend and sentence severity continues to rise after the implementation of a guideline, the Council should in future treat this as an unanticipated, and not an anticipated, increase in the sentence level" (para 29, 'The Sentencing Council in 2017')

statutory framework the Council is already crystal clear (in the Imposition guideline, and in the principles on sentencing children and young people) that custody is a last resort.

3.20 The Sentencing Academy was a little more circumspect, agreeing firmly that consistency should be a key priority for the Council. However, they suggested that the Council

"could consider simply making these trends (costs; effectiveness [related to short prison sentences]) more widely known to sentencers by publishing them on their website. … 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."

This hints at retaining the current neutral stance, whilst doing more to publicise the data surrounding costs and effectiveness of different disposals.

3.21 In general, we would not propose moving to a position of seeking actively to influence the prison population one way or the other. Sentencing levels are the result of a wide range of variables - including what Parliament has set as the maximum penalty for an offence, and the case mix coming before the courts - and it is not necessarily the role of the Council to come down on one side of the debate about the use of prison.

3.22 On the other hand, as an established part of the criminal justice system the Council's guidelines undeniably have an influential role in determining the disposals received by offenders and their severity. Looking to the near future, we have yet to see the difference that the new legislation will make to the overall framework, and the impact that new forms of community order might have on the custody threshold and on guidelines. If the final package does provide for what the Government has proposed, the Council will inevitably have a role to play in embedding those new disposals in sentencers' practice.

3.23 We could look to explain with more clarity what we *intend* a guideline to achieve alongside, but distinct from, what we *expect* the result to be. It may be the case that in the past we have not separated these out for our audience as clearly as we could have. In many cases that intention will remain focused on consistency, and ensuring that the right factors are taken into account when sentencing. This ties in with the other vision strand about research and analysis.

Question 4: in what ways (if any) should the Council respond to the debate about increasing sentence severity, the use of custody and the rise of the prison population?

Broader themes on what the Council does

3.24 Some broader ideas emerged from responses about how the Council can retain public confidence. These cover a diverse range of themes. The legitimacy of the Council is linked for some respondents very specifically with the priorities they would like the Council to have. Indeed, the Magistrates' Association suggested that the Council's workplan itself should be consulted on annually.

3.25 However, some common themes can be detected:

- a focus on disparities in sentencing outcomes for minorities and vulnerable offenders;
- different suggestions on the ways in which the Council runs its consultations:
    - making the format engaging and easy to read, including the suggestion from one magistrate that we "do some work with universities to understand what appeals psychologically to the human mind and consult accordingly";
    - opening up consultation to as wide an audience as possible, including those with a "lived experience" of the criminal justice system, such as offenders and their families, ex-offenders and victims;
    - having a more consistent approach to holding events, building on some that have already occurred (proposed by the Sentencing Academy);
    - beyond formal consultations, a magistrate respondent suggested a mechanism for users to feed back on guidelines in real time.
- during and after consultations, it was suggested by a few respondents that the Council explain better the rationale for why guidelines were drawn up as they were (presumably by setting this out in greater detail in consultation documents and consultation responses) to provide useful reference points for sentencers to understand the thinking behind guidelines;
- some respondents (the MoJ, the Sentencing Academy and a magistrate) thought that the current timeline for publication, assessment and revision of guidelines was too protracted and needed to be "nimbler" in modern society;
- linked with responses on research on analysis, many respondents thought the Council should focus more research work on the effectiveness of sentences in preventing reoffending (Transform Justice; Nicola Padfield; Howard League); several respondents suggested the internal document on reoffending studies mentioned in the consultation document be published (Nicola Padfield; Prison Reform Trust; Youth

Justice Board), as well as local sentencing statistics (the Sentencing Academy; Justice Committee).

3.26 We are undertaking work on disparities in a number of areas. Recently, we have published data on racial disparities in sentencing outcomes in relation to selected drugs offences, as well as inserting wording into the new firearms guidelines reminding sentencers of these disparities in relation to firearms offences. Inevitably, we will continue to work on identifying disparities for minority offenders and highlighting them, even though analysing and understanding their root causes is a more complex matter.

3.27 We do attempt to reach a wide range of people via consultations, although this is an area where we could do more. We have a number of criminal justice stakeholders who can be relied upon to provide helpful technical expertise on draft guidelines, but we have not sought in general to reach out to offenders and ex-offenders, or directly to the victims of crime. These groups would provide a particular insight, and help us to understand what is understood about sentencing for offenders and victims, both before and after the point of sentencing, what expectations are and how it matches up against reality.

3.28 If we were to invite responses from these groups, it would be important to be proactive in allowing them to feed in. Our "usual suspect" stakeholders are used to providing responses and are reasonably well resourced to do so. We could, as part of consultations, run more events and meetings (or, for the time being, webinars) with victims and offenders, working in tandem with representative groups as necessary.

3.29 Aside from the question of minor amendments to guidelines which the Council has already considered, we are looking at a mechanism which could make annual revisions to a number of guidelines. This could assist in making the guideline process more "nimble" and allow us to be more responsive to user feedback.

Question 5: do you agree that we should reach out more proactively to offenders and victims as a standard part of consultations?

Question 6: do you agree that an annual process of consultation on cross-cutting revisions is a responsive and nimble way to make necessary changes to guidelines?

Question 7: are there any other proposals above that the Council should consider prioritising in its response to the Vision consultation?