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26 February 2021

Dear Members

Meeting of the Sentencing Council – 5 March 2021

The next Council meeting will be held via Microsoft Teams, the link to join the meeting is included below. **The meeting is Friday 5 March 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)MAR00
▪ Minutes of meeting held on 12 February	SC(21)FEB01
▪ Action log	SC(21)MAR02
▪ Assault	SC(21)MAR03
▪ Sexual Offences	SC(21)MAR04
▪ Burglary	SC(21)MAR05
▪ What next foe the Sentencing Council	SC(21)MAR06

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

5 March 2021
Virtual Meeting by Microsoft Teams

09:30 – 09:45	Minutes of the last meeting and matters arising (papers 1 and 2)
09:45 – 11:00	Assault - presented by Lisa Frost (paper 3)
11:00 – 11:15	Tea break
11:15 – 12:00	Sexual Offences - presented by Ollie Simpson (paper 4)
12:00 – 12:45	Burglary - presented by Mandy Banks (paper 5)
12:45 – 13:00	Tea break
13:00 – 14:00	What next for the Sentencing Council? - presented by Emma Marshall (paper 6)

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Sentencing Council

MEETING OF THE SENTENCING COUNCIL

12 FEBRUARY 2021

MINUTES

Members present:	Tim Holroyde (Chairman) Rosina Cottage Rebecca Crane Nick Ephgrave Michael Fanning Diana Fawcett Adrian Fulford Max Hill Jo King Juliet May Maura McGowan Alpa Parmar Beverley Thompson
Apologies:	Rosa Dean
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)
Members of Office in attendance:	Steve Wade Vicky Hunt Ruth Pope

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 29 January 2021 were agreed subject to amendments.

2. MATTERS ARISING

2.1 The Chairman reported that the oral evidence session before the Justice Committee of the House of Commons on the work of the Sentencing Council on 2 February had gone well

2.2 The Chairman noted two changes in the office of the Sentencing Council. He welcomed Beth Brewer, an intern who is working the analysis and research team for three months, and noted that this would be the last Council meeting for Elaine Wedlock, head of the social research team, who is leaving to take up a post with the Royal Commission on Criminal Justice.

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

3.1 The Council discussed the scope and format of a guideline for firearms importation offences. It was agreed that the guideline should cover offences contrary to sections 50 and 170 of the Customs and Excise Management Act 1979 and should relate to the importation of firearms and ammunition only. In order to reflect the wide range of offending and sentence outcomes for the offences, the guideline should first consider the type of weapon before considering other culpability and harm factors.

3.2 The Council agreed that two sentencing tables (one for offences subject to a seven year maximum and one for those with a maximum life sentence) could provide the required range of sentence outcomes.

3.3 The Council agreed to set up a working group to make recommendations to the full Council on the factors to be included and on the detail of the sentence levels.

4. DISCUSSION ON ROBBERY – PRESENTED BY VICKY HUNT, OFFICE OF THE SENTENCING COUNCIL

4.1 The Council discussed the findings of the cumulative impacts report, specifically in relation to the impact of the robbery guideline.

4.2 The Council concluded that it should continue to monitor the impact of the robbery guideline to see if sentencing severity changes over the next year or so. It was also agreed that, at this stage, no revision of the guideline is required. Whilst the guideline may have led to an increase in sentence severity, the guideline is working well and it is appropriate

that the most serious cases, involving firearms and knives, receive the highest sentences.

5. DISCUSSION ON GUIDELINE PRIORITY– PRESENTED BY STEVE WADE, OFFICE OF THE SENTENCING COUNCIL

5.1 The Council agreed that pending a fuller discussion of its priorities, the next guidelines to be developed should be:

- motoring offences causing death and serious injury and other motoring offences not yet covered by Sentencing Council guidelines; and
- witness intimidation and perverting the course of justice.

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Sentencing Council | 10 years

SC(21)MAR02 March Action Log

ACTION AND ACTIVITY LOG – as at 26 February 2021

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 29 January 2021					
1	**Trade Mark**	Working group to be set up to discuss the issues raised at the January Council meeting around capturing additional harm in the guideline	**Ruth Pope and Mike Fanning**		**ACTION CLOSED:** Working group including two external experts met on 12 February. Issues to be referred back to the full Council.
SENTENCING COUNCIL MEETING 12 February 2021					
2	**Firearms importation**	Chairman and guideline lead to discuss membership of working group and meeting to be arranged to refine a draft of the guideline for consideration by the Council at the April meeting,	**Tim Holroyde, Maura McGowan and Ruth Pope**	**ACTION ONGOING:** Working group (consisting of TH, MM, AF, RC and a CPS rep) to meet on 5 March after the Council meeting	

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Sentencing Council

Sentencing Council meeting:	**5 March 2021**
Paper number:	**SC(21)MAR03 – 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, issues raised in respect of the proposed Common Assault revised guideline and related guidelines for Assaults on Emergency Workers and Assault with Intent to Resist Arrest.

2 RECOMMENDATION

2.1 That the Council:

- considers issues raised in relation to sentences, factors and approaches to assessing seriousness for common assault and related offences and;
- agrees any appropriate revisions.

3 CONSIDERATION

3.1 The draft common assault guideline which was subject to consultation is attached at Annex A. The consultation document set out the rationale for the revised guideline, and broadly respondents approved of the approach to address issues identified in the evaluation and to update the guideline. Some issues were raised in relation to step one and two factors, and sentences.

3.2 The Council agreed to consider whether to detach the guideline for Assaults on Emergency Workers guideline from the package of guidelines subject to the progress of proposals to double the statutory maximum sentence. As legislative change is expected to take longer than initially thought it is proposed the Emergency Workers

guideline be finalised and published, with a view to revising the guideline when sentences are increased.

3.3 The Assaults on Emergency Workers and Intent to Resist Arrest guidelines include the same factors as for the basic common assault offence guideline. The consultation sought views on factors and sentences within these draft guidelines. Responses were predominantly focused on the Emergency Workers guideline.

3.4 Some issues arose in respect of sentences for offences and the approach taken to these in the draft guideline. This paper addresses those issues first and will then consider responses to factors within the guidelines.

Sentences – Assaults on Emergency Workers

3.5 Views were split on the sentences for assaults on emergency workers with some respondents believing the sentences to be too low, while others considered them disproportionately high in comparison to the basic common assault offence;

The starting point must be custody regardless. This was the aim of the Assaults on Emergency Workers Act, and is what is continually pressed home by the government, yet here a person can be found guilty and escape prison. This should not be the case. This has to change if we are to address the continual and rising issue of assaults on emergency workers. As a minimum, this should start at 3 months imprisonment, moving up through the categories to 12 months for category 1. Again, any injury over minor should be treated as AOABH and aggravated further there if against an emergency worker. There really should be no exception whereby a person found guilty of assaulting an emergency worker does not receive a custodial sentence. I personally am very disappointed to see this being even considered here as it is completely at odds with the spirit of the Act which was put in to try and reduce these types of offences. This is the opportunity to send a clear message and really show that emergency workers are valued and should not, in any circumstances, be assaulted whilst at work. This is an opportunity to really demonstrate that these assaults are socially and morally repugnant and will always attract a custodial sentence. – **Representative of Yorkshire Ambulance Service**

I agree with the proposed starting points. I think the range for Cat 3B starts too low, but I think that the Starting-Points and Ranges are otherwise 'spot-on'. They do, however, put a sharp focus on the proposed Starting-Points and Ranges for assaults on non-emergency workers. In my respectful view, the SPs and Ranges here show

that the SPs and Ranges for assaulting non-emergency workers are too low and should be adjusted upwards. I think everyone would agree that the SPs and Ranges for assaulting emergency workers should be higher (although the police nowadays often charge the offence even where some minor, reckless, contact took place during an arrest); but the effect on members of the public of violence being used against them unlawfully needs to attract higher penalties than will follow from the suggested guideline for those assaults. – **Magistrate**

The uplift in sentencing starting points and ranges seems to be severe and does not differentiate between different emergency workers. There is a notable practical difference between the culpability and risk of harm of an assault on an off-duty paramedic, neither armed nor protected by personal equipment, and that on a police officer in full uniform on patrol with a colleague. Comparing this proposed guideline with the revised common assault guideline is likely to cause members of the public and complainants of domestic abuse to feel aggrieved that their complaints are treated less seriously when it comes to sentence than offences against emergency workers. Consider the following worrying example. An offender places his hands around the throat of his partner and strangles her causing more than minor psychological distress, this falls into category A1. The starting point is a high-level community order. Now consider this offence being committed against a police officer on full uniformed duty, where it is worth bearing in mind that he or she has been trained in self-defence, carries a radio for backup and most likely a CS gas spray which is prohibited to the general public. The proposed guideline suggests a starting point of an eight-month sentence, a period of custody which exceeds the statutory maximum in cases where a private citizen is the victim. – **Researcher to Chief Magistrate (Chief Magistrate submitted similar response)**

We question whether – given the current sentencing guidelines applicable to Assault with Intent to Resist arrest - whether the proposed starting points in this case are too high. We recognise that with a maximum sentence of 12 months for this offence and that of 2 years for the other the issue of maintaining some degree of relativity is difficult and there will be a degree of compression in the sentencing ranges. We suggest lower starting points be applied to reflect the difference in the maximum sentences applicable in these 2 cases. - **HM Circuit Judges**

All the category starting points here are significantly higher when compared with the guideline for common assault. We are doubtful as to whether this is proportionate. There is such a large difference here in starting points. We agree that a custodial sentence should be the starting point for the more serious cases being charged under

this offence, but looking at the Culpability A/Category 1 Harm in particular, a Starting Point of 8 months appears to us excessive. In particular: a. We do not consider that the one significant difference (the job / profession of the victim) with all other factors being equal should justify such a large difference in Starting Points as shown in bullet 5 above. b. We do not consider that the Starting Point should be in excess of that available in the magistrates' court. - **West London Bench**

Both HM Circuit Judges and the West London Bench suggested category A1 should include a lower starting point of 6 months custody and categories A2/B1 a starting point of 12 or 13 weeks custody.

The Sentencing Academy also considered the sentences disproportionate and disapproved of the degree of uplift in Emergency Workers offence sentences;

If the victim is an emergency worker, the starting point jumps to eight months, well above the common assault guideline and above the midpoint of the guideline's sentence range. We do not believe the occupational status of the victim justifies such a jump in severity. As a general observation, category starting points are usually set just below the midpoint of the category range. In this case that would result in a starting point of 4-5 months. This convention should apply here. In addition, the guideline range itself is problematic: it spans the statutory range, an anomaly in Council's guidelines. – **Sentencing Academy**

3.6 In developing sentences the Council were alert to the need to reflect Parliament's clear intention to increase sentences for these offences, but were also balancing this objective with not increasing sentences for all other common assault offences. This caused a wide disparity in sentence levels between the offences.

3.7 A further complexity to the issue has arisen with a number of respondents highlighting the contrast in the approach for sentencing racially aggravated common assault offences compared to the aggravated offence of Assaults on Emergency workers, when the statutory maximum for the latter is lower;

We thought it interesting to compare the available sentencing data for this offence to the racially / religiously aggravated common assault (section 29, Crime and Disorder Act 1998) offence sentencing. This is because they are both essentially common assault offences, but both have single aggravating features (inherent in the offence itself), taking their seriousness beyond the sentences for common assault per se, although their maximum sentences are different. We have extracted the following data from the Assault Offences Statistical Bulletin issued with the Consultation document

(although not for the same period of time, but this is the best we can do with the data provided). We note:

Disposal	**Racially / Religiously Aggravated Common Assault**	**Assault on Emergency Workers**
Immediate Custody	25%	17%
Suspended Custody	18%	10%
Community Order	37%	38%
Fine	13%	23%
Discharge	Not stated	8%

Statistics	**Racially / Religiously Aggravated Common Assault**	**Assault on Emergency Workers**
Number of Offenders Sentenced	800 (2018)	6,400 (2019 Q1-Q3)
Maximum Sentence	2 years' custody	1 years' custody
Average Custodial Sentence Length	4 months	3 months

a. There are many more custodial sentences for the section 29 offence (43%) than for the assault on emergency workers offence (27%). This would perhaps be expected, given the higher statutory maximum sentence for the section 29 offence.

b. Community disposals are very similar between the two offences, which is also perhaps to be expected.

c. The average custodial sentence length for the section 29 offence is not that much higher than that for assault on emergency workers. Given that the maximum sentence is double, we might expect the average custodial sentence to be higher.

Does this indicate that these offences should be aligned further in some way, or should they continue to be considered separately, without any attempt to draw any comparisons or equivalences between the two? We leave any further consideration of this point to the Sentencing Council. – **West London Bench**

3.8 While a direct comparison of the data referred to does not account for a number of variables, there is merit in the point. The Council did consider applying an uplift approach for this offence in developing the guideline but felt this would not achieve consistent sentences. Separate sentencing tables were explored for racially and religiously aggravated offences in developing the Public Order and Criminal Damage guidelines, and consultation was undertaken on a separate sentencing table for aggravated public order offences. However, in road testing it was found that

sentencers found it very difficult to separate the basic offence from the aggravated activity and apportion weight to each element. The uplift approach was preferred as sentencers felt the sentences arrived at were disproportionate to the overall offence seriousness. However, some consultation respondents have made the same point in respect of sentences for the emergency workers offence.

3.9 The emergency worker common assault offence does not include the same complexities as a racially or religiously aggravated common assault offence. The research undertaken as part of the Public Order guideline development highlighted that racial or religious aggravation can range in type and severity, whereas the aggravation in the common assault of an emergency worker offence is one dimensional and relates only to the profession of the victim. The aggravation assessment in a racially or religiously aggravated offence relates to the level of aggravation present and the proportion of aggravation within the offence, which is not applicable to aggravation in the emergency workers offence. However, when considered starkly it may appear as if the Council are content to specify high sentences to reflect legislation in relation to specified professions, but not to reflect legislation in respect of other victim characteristics. The statutory maximum sentence for basic common assault offences is currently one year which is half of the statutory maximum sentence for racially and religiously aggravated common assault. If legislative changes result in parity between the statutory maximum for each type of aggravation this could further legitimise concerns that the approaches for assessing the uplift, and the degree of uplift, should be consistent.

3.10 The Council are asked to consider this issue now as it is likely to become more of an issue at the point the Emergency Workers guideline would need to be revised and disproportionality between basic offence sentences and offences with comparable aggravated statutory maximums will be more pronounced. It is also likely to prove difficult at that stage to ensure proportionality with more serious assault offences such as ABH where a statutory aggravating factor is included rather than a statutory maximum sentence.

3.11 There are a number of issues and risks to consider. Although other aggravated offences exist, these are perhaps not considered to be substantive offences in the same way that the emergency workers offence is. However, the way in which the legislation provides for an increased offence is the same for each, and it has been defined as an aggravated form of an existing offence in the leading legal practitioner reference publications of Blackstone’s and Archbold;

The wording of s. 1 is such that it does not simply create a free-standing offence, as for example does the OAPA 1861, s. 47. Instead, it creates aggravated versions of the existing offences of common assault and common battery, and such offences should accordingly be charged as 'contrary to the CJA 1988, s. 39(2), and the Assaults on Emergency Workers (Offences) Act 2018, s. 1(2)'. Blackstone's - B2.39

Common assault and battery are triable summarily. The CDA 1998 created an aggravated form of this offence, committed when an attack is motivated by racial or religious hostility, which is triable either way. The Assaults on Emergency Workers (Offences) Act 2018 also created an aggravated form of the offence which is triable either way where it involves an assault on an emergency worker. Archbold - 25-2

That said, there is an expectation the Council will publish a specific guideline for the emergency workers offence. However, there is no difference in the basic elements of each offence which is reflected by the fact the guidelines include the same step one and step two factors (save for very minor differences).

3.12 Not proceeding with a specific guideline would be difficult. Sentencers have been requesting a guideline for this offence for some time, and there would likely be significant criticism of the Council if a full guideline for the offence were not published. However, there is precedent for approaches to change following consultation, and such a decision was taken following consultation on a prescribed sentencing table for Public Order aggravated offences. The reasons for not specifying aggravated sentence levels in the Public Order guideline also related to avoiding disproportionate sentences and maintaining a consistent approach for sentencing aggravated offences across guidelines. The Council could decide that the issues raised in respect of treating aggravating features and characteristics differently are compelling, and that proposed legislative changes will complicate and enhance disparity in approach further. The uplift approach would also avoid a greater disproportionality and greater lack of relativity with the basic offence at the point sentences would need to be increased.

3.13 Should the Council wish to consider an uplift approach, the model for aggravated offence uplifts used in other guidelines would not translate to this offence given the one-dimensional aspect of aggravation in common assault of an emergency worker already noted. It is thought the uplift would need to be related to the category of offence. As there are six offence categories, the Council would need to consider if the uplift should relate to specific categories such as A1, A2/B1 and A3/B2/B3 or relate to the level of harm involved in the offence, given that the provisions are predominantly

intended to punish the harm caused to emergency workers by these offences. Such an approach is illustrated below;

Harm Category 1 OR A1	Increase the length of custodial sentence if already considered for the basic offence **or** consider a custodial sentence, if not already considered for the basic offence.
Harm Category 2 OR A2/B1	Consider a significantly more onerous penalty of the same type **or** consider a more severe type of sentence than for the basic offence.
Harm Category 3 OR A3/B2/B3	Consider a more onerous penalty of the same type identified for the basic offence.

Alternatively, the level or range of uplift or increase to sentence could be specified. The level of increase is not usually specified with the uplift approach, although there is an exception with the s5 Disorderly Behaviour guideline due to the limited statutory maximum sentence of a fine not providing for any other type of sentence to be imposed.

3.14 Another option to address the lack of proportionality raised by respondents is that sentence starting points are reduced from the consultation version in line with respondent suggestions of a 6 month starting point in category A1 and 12 weeks in categories A2 and B1, which is more in line with the approach usually taken in reflecting statutory maximum sentences. As the statutory maximum sentence for this offence may now increase, the lack of proportionality will be even greater at that stage. However, there is a risk that if sentences are reduced it could be perceived as an attempt to undermine the proposed legislative changes to increase sentences.

3.15 This is a challenging issue and any revision to approach or sentences presents risks. The Council are often criticised for sentence inflation and given the high volume of assault offences even small increases for low level offences will cause inflation and sentence 'creep' with other assault offences. While all within the Criminal Justice system agree that emergency workers should be protected there are other aims of

sentencing which may be undermined by disproportionate sentences and excessive inflation, and the Council will be expected to make principled decisions in this regard.

3.16 In summary, the options the Council are asked to consider are therefore;

i) Retaining the sentence table as consulted, or with amended sentences, and agreeing to revise sentences at such time legislative changes necessitate or;

ii) Revising the guideline and adapting the uplift approach used for other aggravated offences.

Question 1: Does the Council wish to revise the approach to the Emergency workers guideline and include the uplift approach used for other aggravated offences? If it does not, does the Council wish to retain sentences as consulted or revise these down to address proportionality issues?

Sentences – Assault with Intent to Resist Arrest

3.17 Sentences for this offence were increased from the existing guideline levels to achieve relativity with Emergency Worker sentences, as this offence is effectively the same but with the added element of resisting arrest. The majority of respondents who commented on this aspect of the guideline noted it was rarely charged. A number of respondents considered increasing sentences for the offence was unnecessary, although recognised the objective;

We have already noted the issues in maintaining some degree of relativity and proportionality between the offences of assault on an emergency worker and assault with intent to resist arrest. We feel that a reduction in the sentencing proposals for the former and the application of those proposed for the latter achieve that result. - **HM Circuit Judges**

3.18 Proposals and any further consideration in respect of sentences for this offence will be informed by the approach to be taken for the Emergency Workers guideline.

Sentences – Common Assault (basic offence)

3.19 A number of respondents considered sentences too low, particularly in the categories B2/A3 and B3 where the starting points are fines;

'In my view, the starting-points and ranges are too low, certainly at the Category 2B and below levels. The current levels are leading magistrates to impose fines out of all proportion to the effect of violence on victims and society generally. For example, a

person on benefits, convicted of battery and placed in Category 2B, will be fined less than he would be for using a vehicle without insurance. Other comparisons would also serve. An offence deemed to fall into Cat 3B would receive a fine of a derisory amount - and that is happening now. I would respectfully suggest that the starting-points should be higher - certainly for Categories 2B and below, and probably above that too'. **Magistrate**

We agree that the amended wording concerning harm may put more cases into a higher category. We are concerned that there is not sufficient distinction between the starting points and ranges for grid 2B, 3A and 3B. We also observe that a starting point of a Band A & B for these assaults does not distinguish the severity of such offences from victimless strict liability offences such as failure to pay for TV licence. *Nevertheless, a Band A starting point for any common assault seems unjustly low, when considering that this is the minimum fine a person can receive in the guidelines for any offence whatsoever. –* **Justices' Legal Advisers and Court Officers' Service (JCS)**

If I were victim of an assault, I do not think I would be happy with the giving of a low level fine – **Magistrate**

I do not think a fine is an appropriate sentence to any assault offence, this does not feel proportionate to any level of harm caused to a victim of assault and in particular a domestic abuse survivor. One of my team made the comment that in every circumstance where she has informed a survivor of domestic abuse that their abuser had received a fine as a sentence, the survivor was unhappy with the outcome, finding this insulting and offensive given their traumatic experience – **Leeds Womens Aid**

3.20 The existing guideline includes 3 categories and starting points of a high level community order, medium level community order and a Band A fine, within a range of 26 weeks custody to a discharge. The sentences included were intended to reflect the existing starting points and ranges, and it is believed that revision to the guideline model and factors will address the evaluation finding that sentences for common assault decreased on the introduction of the existing guideline.

3.21 Further consideration of sentences has been undertaken with reference to sentences for s4 Threatening Behaviour offences, as these are similar to common assault and share the same statutory maximum sentence, although are likely to be considered less serious as do not involve physical harm but putting a victim in fear of harm. While there are only four categories of s4 offence (2 culpability and 2 harm categories), all categories include a community order starting point;

S4 Public Order Act sentences

Culpability		
Harm	**A**	**B**
Category 1	**Starting point** High level community order **Range** Low Level community order - 26 weeks' custody	**Starting point** Medium level community order **Range** Band C Fine – 12 weeks' custody
Category 2	**Starting point** Medium level community order **Range** Band C Fine – 12 weeks' custody	**Starting point** Low level community order **Range** Discharge - Medium level community order

3.22 While it is justifiable to include fines as a starting point for cases involving the lowest level of harm and this is included in the lowest category of the existing guideline, to ensure a common assault offence involving the highest degree of culpability or some degree of physical harm does not attract a sentence lower than an equivalent category s4 offence, the Council are asked to consider if the starting point of category B2 should be a low level community order. This would better reflect proportions of disposals imposed as illustrated by the updated statistics for common assault sentence distribution below. Only 17% of current disposals are fines and 12% are discharges, so maintaining starting points of fines across half of the categories may decrease sentences further rather than achieving the objective of addressing the evaluation findings in relation to decreases while ensuring just but proportionate sentences. Updated statistics are as follows;

Outcome	2015	2016	2017	2018	2019
Absolute and conditional discharge	15%	15%	14%	14%	12%
Fine	16%	16%	16%	17%	17%
Community sentence	39%	38%	39%	41%	43%
Suspended sentence	13%	14%	14%	12%	11%
Immediate custody	14%	14%	14%	14%	14%
Otherwise dealt with[1]	3%	3%	3%	3%	3%

3.23 Arguably the highest category should include a custodial starting point, given that 25% of offences receive immediate or suspended custody. This would address some of the proportionality concerns and better reflect the current sentence distribution. However, while the lower end of sentences were considered too low, few respondents raised concerns with the current highest starting point for common assault being maintained, and statistics illustrate custodial sentences are being imposed with the existing guideline which does not include a custodial starting point.

3.24 The Council is also asked to consider increasing the fine band of category B3 as this is exceptionally low, and as pointed out by some respondents similar to fines which would be received for offences such as no insurance and TV licence evasion.

Question 2: Does the Council agree that sentences in the lower categories should be increased as proposed?

Common Assault offences - Culpability factors

3.25 Some changes to factors have already been agreed in considering other draft guidelines and cross cutting factors. These include revising the 'prolonged assault' factor to 'prolonged/persistent assault' and expanding the strangulation factor to read 'strangulation/suffocation'.

3.26 The Council recently agreed to include an additional lesser culpability factor 'Impulsive/spontaneous and short lived assault' in the ABH and GBH guidelines as an alternative to lack of premeditation which is in the existing guidelines, in order to reflect the spectrum of planning and provide for appropriate balancing of factors. In revising the common assault guideline the Council removed 'significant degree of planning' and 'lack of premeditation' from the culpability assessment, as it was thought that planning was not often a feature of common assault offences. This was highlighted in consultation and some respondents disagreed;

We note that Sentencing Council research shows that premeditation is rare in common assault offences and the factor is more difficult to interpret, however magistrates do report seeing offences where the common assault is premeditated. – **Magistrates Association**

We are not convinced that premeditation should be removed from high culpability. We are not convinced that it "rarely" applies in common assault cases. Just because the injury is minor doesn't prevent there being pre-meditation. - **Criminal Law Solicitors' Association**

The Council is asked to consider whether planning, and a lack of, should be provided for the in the common assault guidelines. As many common assault offences will be short lived, inclusion of the recently agreed lesser culpability factor for ABH and GBH of 'Impulsive/spontaneous and short-lived assault' could result in a high proportion of common assault offences being assessed at lesser culpability.

Question 3: Does the Council wish to include factors relating to planning and lack of premeditation in the common assault guideline?

Intention to cause fear of serious harm, including disease transmission

3.27 The disease transmission factor was particularly well received, although a number of respondents including HM Circuit Judges and a number of magistrate respondents thought that spitting, even without an inference of disease transmission, should be provided for at step one. The Council debated at length whether to include spitting at step one or two during the guideline development, but ultimately decided to include it as an aggravating factor and include the high culpability factor 'Intention to cause fear of serious harm, including disease transmission' to capture cases where an offence includes spitting or any activity where there is an inference of potential disease transmission. This point was explained in the consultation document and the rationale will be included again in the consultation response.

Targeting of vulnerable victim

3.28 A high culpability factor included is '*targeting of vulnerable victim due to victim's personal characteristics or circumstances*'. The Justices' Legal Advisers and Court Officers' Service (JCS) agreed that targeting of a vulnerable victim increases culpability, but thought an additional higher culpability factor should be '*victim obviously vulnerable due to age, personal characteristics or circumstances*', which is included in the ABH and GBH guidelines. A related point was raised by the West London Bench, who thought 'targeting' was not necessary as the vulnerability of the victim is sufficient to assess the offence as high culpability. This point was also made by the Council of HM Circuit Judge's, who noted that '*it is the targeting of the victim because of their vulnerability that raises the offenders culpability'*.

3.29 In ABH and GBH 'targeting' was not included to ensure cases where a victim could not necessarily be said to be targeted but was vulnerable, such as baby shaking cases, could be captured at high culpability. In the existing guideline the same

vulnerability factor wording is included across guidelines, and for consistency of approach it may be preferable for the factor to be consistently worded in the revised guidelines. This would also avoid the factor not being applicable where a victim in vulnerable but not necessarily said to be targeted.

Question 4: Does the Council wish to phase the vulnerable victim factor as in the other Assault guidelines and remove the 'targeting' element?

Use of substantial force

3.30 A small number of respondents questioned the factor 'use of substantial force';

'Substantial force is unclear. What is substantial?' – **Birmingham Law Society**

'We are not sure what is meant by "substantial force". Almost by definition there will not be "substantial force" in a Common Assault case as if there were then ABH injurie would be used. We feel that the intention behind this element is dealt with in the Harm part of the guideline.' - **CLSA**

3.31 The CPS response suggested that the consultation document explanation for the factor should be included;

'We understand from the consultation document that the 'use of substantial force' culpability factor has been added to reflect an intention by the offender to cause more serious harm than may result from the offence. This explanation will not be a part of the final guideline and will not be available at the time of sentence. We think that for this factor to be applied consistently it requires further explanation as the use of substantial force will normally result in more than minor injury.' – **CPS**

However, this would undermine the purpose of the revision of the existing factor 'intention to commit more serious harm than actually resulted' which was found to be problematic in the evaluation of the existing guideline. Other respondents recognised that the factor would reflect the intention of the offender;

Sensible to have these as culpability rather than harm factors as they are more a measure of intent than effect. - **East Kent Bench**

3.32 This factor is also included in the definitive guidelines for S4 and S4A offences, which share some similarity with common assault offences, and it is not proposed that it be revised or qualified.

Question 5: Is the Council content to retain the use of substantial force factor as worded?

Assaults on individuals providing a service to the public

3.33 The draft guideline retains the current approach of providing for an offence committed against a person providing a service to the public to aggravate the offence at step two rather than being relevant to culpability. A significant proportion of responses were from representatives of workers not covered by the emergency workers provisions, arguing that higher sentences should be applicable to non-emergency workers in public facing roles. The Council may be aware that a Bill, the Assaults on Retail Workers (Offences) Bill has been introduced to Parliament and is currently due for a second reading. This seeks to put assaults on retail workers on a similar footing to assaults on emergency workers, and for a sentencing guideline to specifically provide for offences committed where a retail worker is enforcing a statutory requirement such as refusing to sell alcohol. This was highlighted in a letter from Chris Philp MP, Parliamentary Under-Secretary of State for Justice, which stated 'a*s you may be aware, there have been calls to increase protection for retail workers against assault, which have intensified since the onset of the Covid-19 pandemic. The Government has been clear that the Assault Guideline requires the court to treat the fact that an offence was committed against those providing a service to the public as an aggravating factor, making the offence more serious. We welcomed the Council's expanded explanation on this in 2019 and the recent interim guidance published in April for sentencers on sentencing common assault offences involving threats or activity relating to transmission of Covid-19. We would welcome, however, consideration by the Council of whether the guideline could include explicitly reference to retail workers as an example of those providing a service to the public. We believe this would make it clearer that retail workers are covered by the aggravating factor in the Assault Guideline*.'

3.34 The Justice Select Committee response raised only two points, one of which was to support this factor and to note its expansion;

'The revised guideline has expanded the factor to read as follows: "Offence committed against those working in the public sector or providing a service to the public or against a person who coming to the assistance of an emergency worker". Assaults against those working in public facing roles is a matter of increasing public concern, especially during the Covid-19 pandemic.

The Committee recognises that this is a pressing issue and support this aggravating factor. The Committee also wishes to note that the Sentencing Council may need to revise this guideline if and when the Assaults on Retail Workers (Offences) Bill has been enacted. An individual guideline dealing with offences under the relevant Act will be valuable to sentencers.' **Justice Select Committee.**

3.35 A number of respondents (including the All Party Parliamentary Group on Retail Crime (APPG on Retail Crime), British Retail Consortium (BRC), Union of Shop Distributive and Allied Workers, The Co-op Group, and the Association of Convenience Stores went further and called for increased sentences for offences against retail workers. Similar submissions were made by non-retail sector public service representatives including the Security Industry Authority, the Football Association and the Referee's Association.

Shopworkers are in a vulnerable situation, sometimes being alone in a store or with only one other colleague, perhaps late at night, facing intimidation from someone potentially carrying a knife or other dangerous implement. They are also in a different situation from many other victims in that their job requires them to return to exactly the same situation day after day and thus to fear that the next customer might be yet another attacker. More than that, some members report growing instances of threats such as – we know where you are and when you leave work and will come for you; and in similar vein others note increases in 'mental abuse' of stalking shopworkers when they leave the premises at lunchtime in order to intimidate them. - **BRC**

The APGG response highlighted that shop worker attacks are often related to them enforcing their legal duty to refuse restricted product sales without identification;

'A significant trigger for attacks on those working in newsagents and convenience stores is the refusal to sell age restricted products to customers who are known or believed to be under age or who are unwilling or unable to prove their age in a manner required by law. Thirty percent of instances of violence arise when shop workers request proof of I.D on age-restricted products, such as alcohol, tobacco and lottery products…. Having placed duties upon retailers to ensure that they do not sell to underage customers, it is the very least the justice system can do it to recognise the fact if a retailer is attacked as a result of doing what the law requires' – **APPG**

The APPG response also included the following quote from a shopworker;

" Receiving abuse after asking for ID is a weekly occurrence for me. I'm very often told they will be waiting for me outside when I finish my shift, which is very intimidating. I

feel sorrier for my staff having to put up with the abuse. We are only doing our job and the implications of failing to get it right can cost us our job".

3.36 The Referees Association requested the aggravating factor relating to assaults on public workers be moved to step one across the guidelines, to ensure high or medium culpability assessments for these offences;

'Factors indicating higher culpability should include 'The victim is a person acting on duty in the exercise of lawful authority or coming to the assistance of an emergency worker'. Examples should be included: sports match officials and referees, schoolteachers, public transport staff, NHS staff, shop workers, security staff, traffic wardens etc. This would automatically place such assaults into Category 1 or 2. It is not sufficient that such an assault might be treated as having a factor increasing seriousness within any of Categories 1-3 as an 'Offence committed against those working in the public sector or providing a service to the public or against a person coming to the assistance of an emergency worker'. - **The Referees Association**

3.37 It is not thought that this would be appropriate across all assault guidelines as even the emergency worker provisions only provide a statutory aggravating factor for more serious offences. However, the Council are asked to consider if this factor should be included at step one of in respect of common assault offences.

3.38 It was anticipated that the introduction of higher sentences for emergency workers would result in requests for sentences to be increased for other groups vulnerable to attacks. However, this would likely have the effect of elevating a high proportion of offences into high culpability. The vulnerable victim factor is broad in providing for other characteristics and circumstances to be taken into account, and would already capture lone shop workers and others who are vulnerable by circumstances. The factor may also have greater impact at step two where it will provide for an increased sentence in any offence category.

Question 6: Does the Council think common assault on public facing workers should be provided for at step one or step two?

Lesser culpability factors

3.39 The draft guideline includes three lesser culpability factors: lesser role in group activity; mental disorder or learning disability where linked to the commission of the offence and an 'all other cases' factor.

3.40 The Justices' Legal Advisers and Court Officers' Service (JCS) disapproved of the 'catch all' factor;

We are concerned by the catch all – "All other cases not captured by category 1 factors." It would include cases of targeting a victim who is not vulnerable in a premeditated assault. This could be avoided if targeting were part of high culpability (see above) and additionally lesser culpability included "lack of premeditation".

Further, a "catch all" factor is generally dangerous in our view as it means the list of higher culpability cases needs to completely cover all those cases where higher culpability truly exists, which is extremely difficult to do. Offenders with other higher culpability factors not predicted by the writers will receive lesser sentences as a result. Appreciating that sentencers can use their common sense, nevertheless in the interests of consistent sentencing and justice we think it too dangerous. – **JCS**

The consultation document will confirm that the highest category includes factors the Council considers reflect the most serious offences, most of which are present in the existing guideline, although some are rephrased in response to evaluation findings. It is common practice for guidelines to include a catch all factor, and this avoids the counter argument to the JCS point which is that it may not be possible to define every activity which may arise in an offence and the approach prevents any offence falling outside of any category.

3.41 Excessive self-defence is included at lesser culpability in the existing guideline but the Council moved to step two in the revised guideline for common assault, although it remains at step one for ABH and GBH offences. The LCCSA, CLSA and the Sentencing Academy disapproved of this and thought it should be retained at lesser culpability;

'We take issue with the removal of "excessive self-defence" as a mitigating factor because it is in our view a factor that can and should be properly be taken into account when assessing the overall seriousness of the offence.' - **LCCSA**

'Excessive self-defence should be retained as lessening culpability' - **CLSA**

'Excessive self-defence has been moved to Step 2. We disagree. Many assaults arise as a result of an excessive response to mild or moderate provocation or even assault, and this may be a compelling claim for diminished culpability. When the assault arises out of an excessive, criminal response to provocation, the assault carries an element of 'but for' of the provocation. This is an important reduced culpability factor which should be located at Step 1. We note that analyses of the Council's own Crown Court

Sentencing Survey data show this to be a very significant factor, much more predictive of seriousness than 'subordinate role' although that factor remains at Step 1.2 So theoretically and empirically there appears little reason to consign excessive self-defence to Step 2, where its influence will be greatly constrained.' – **Sentencing Academy**

The Crown Court Sentencing data referred to confirms that the factor was present in 4% of common assault cases in 2013 and 3% in 2014, while the subordinate role factor was present in 3% and 2% of cases respectively, so this observation is accurate. However, the data did not heavily influence the factors included in the guideline as it is Crown Court data and not considered to be illustrative of a high proportion of cases given that very few common assault offences would be sentenced in the Crown Court.

3.42 There is some merit however in the argument that the factor is highly relevant to the motivation of an offender and culpability, and where the factor is relevant offenders may be disadvantaged by removal of the factor from step one. The alternative argument is that the factor could have greater impact at step two, although the level of reduction would be at the discretion of the sentencer. The Council are asked to consider if the decision to move the factor to step two should be revised, particularly given that it has been retained at step one in other guidelines. If not then a clear rationale would be necessary to justify the decision in the consultation response document.

Question 7: Should excessive self-defence in common assault offences be provided for at step one or step two?

<u>Balancing culpability factors</u>

3.43 One response did highlight the difficulty presented by factors in both higher and less culpability categories being present, as no guidance is provided on how the seriousness assessment should then be undertaken;

'The culpability factors need to be addressed so as to state that, for example, if a higher factor is present but the Defendant had a lesser role in a gang, then lesser culpability would apply. At the moment, that is unclear.' - **Birmingham Law Society**

3.44 This will be even more of an issue if the Council does decide to add factors to the assessment. There are two options to address this; the first is that a balancing category be included as for other guidelines which would require a revised sentence table. This would require 9 sentence starting points as reducing harm categories would

not address the issues identified in the evaluation of the guideline of no medium category of harm being available. The second option is to include explanatory wording such as is included for attempted murder, which instructs sentencers to weigh factors to achieve the most appropriate culpability assessment. This wording reads as follows;

> The characteristics below are indications of the level of culpability that may attach to the offender's conduct. Where there are characteristics present which fall into both higher and lower categories, the court must carefully weigh those characteristics to reach a fair assessment of the category which best reflects the offender's overall culpability in all the circumstances of the case. The court may then adjust the starting point for that category to reflect the presence of characteristics from another category.

3.45 The Council are asked to consider the best approach taking into account any earlier decisions made in respect of culpability factors.

Question 8: Should the common assault guidelines include guidance on how to assess factors where higher and lesser culpability factors are present within an offence?

Harm

3.46 While almost all respondents approved of the revised harm model providing for three categories of harm, a number of respondents questioned the factors within the model, and in particular how to distinguish between category 2 and 3 harm. Philip Davies MP wrote to the Chairman with the following question, which it was agreed would be considered as a consultation response;

I would be very grateful if you could let me know what the difference is meant to be between "minor" and "very low level" in this context and what the rationale is for making this particular distinction. I am concerned that those using the guidelines in future may be asking the same question and would urge you to look again at this wording. Is there a reason that the wording in category 3 could, for example, not simply read "No physical harm and/or distress" especially given the fact that generally lower level assaults are charged under this offence anyway and not ones where there are more serious injuries which should be charged as more serious kinds of assaults?

The Council did originally agree to phrase the lowest harm category as 'no physical harm/distress', but there were concerns that very few cases would be charged which would fall within this category, so rephrased this category as 'no/very low level'.

3.47 Other dissenting respondents raised similar concerns regarding the potential for inconsistent harm categorisations and the lack of distinction between categories, and with other aspects of the harm assessment;

We agree with the observations that common assault will usually involve injuries which are minor and have no lasting impact and that more serious injuries would properly be charged as ABH. The consultation paper further explains that inconsistencies in assessment of harm have been identified as arising from use of 'serious in the context of the offence'. As common assault usually involves minor harm, we suggest that the highest category of 'more than minor physical or psychological harm/distress' appears to be redundant in its application to common assault raising a risk that most common assault offences will fall within category 2. Alternatively, we foresee inconsistency in interpretation of what more than minor harm is. Despite inconsistent interpretation of 'Serious in the context of the offence' as currently exists in the guideline this phrase sought to address the issue we raise. A revised high harm factor, for offences where more than minor harm in the context of common assault occurs, may better assist in the assessment of harm. – **CPS**

Not entirely because the court may have to decide either to sentence according to the effect on the victim or on an objective view of the results of the defendant's actions. As an example, take a case of a single punch between strangers, one of whom believes the other has said something unpleasant to his girlfriend in a pub. The case is proved and afterwards the victim impact statement is read out. It is long, detailed and makes for upsetting listening as it clearly details more than minor psychological distress. However, the police report, heard in evidence, of the injuries a few days later when the statement was taken showed nothing more than a one-inch bruise on the victim. Where in that circumstance does justice lie, with the demonstrable extent of the assault or the subjective view of the victim? The victim's statement would tend to suggest harm in Category 1 but the evidence, tested at trial, points to Category 2. The Council's guidelines are produced to foster consistency of approach yet there are two divergent paths which could be taken in sentencing that scenario. - **Chief Magistrate**

We don't agree that psychological harm/distress should ever take this into Category 1. If there is serious psychological harm/distress evidenced by medical evidence then the case can be charged as ABH. Our concern is that the current draft will put too many cases with no physical injuries into Category 1 – based solely on victim statement. Our suspicion is that victims are prone to overstate distress in Victim Impact Statements

and this amended guideline will lead to an increased number of cases attracting custody. – **CLSA**

It is felt that the proposed changes are better than the existing guidelines which are hopelessly vague, and the addition of a middle category is an improvement. However, level of harm assessed from various injuries always causes debate amongst a bench and the example of the black eye is a relevant and valid example, usually relying on bench members understanding of injuries and their impact. The graduated levels of harm, when read in conjunction with the explanation in the consultation exercise, make sense, but without this explanation there will still be very wide variations on what different sentencers consider to be minor physical and psychological harm. It would be helpful to have guidance along the lines of the current explanation included in this consultation, along with a note that this is not a harm tariff list. Some more explanation of what constitutes psychological harm would also be helpful to ensure more consistency in sentencing. Is psychological harm: Nervousness? Scared to go out? Unease? Need to see a counsellor to help overcome the experience? Etc. – **East Kent Bench**

3.48 Addressing these concerns poses difficulty, as an integral aspect of harm in these cases will require assessment of any distress or psychological harm suffered. Other guidelines require assessments of psychological harm, and sentencers are experienced in assessing such injuries and are assisted by medical reports where these are available. This point will be made in the consultation response document.

3.49 The response from the West London Bench on the harm assessment was extensive and comprehensive and repeated the concerns of other respondents that the categories as worded could be inconsistently interpreted and applied. They agreed with other respondents that psychological harm is difficult to assess, and that in many cases the physical harm and psychological harm may be of different levels for the same assault. They suggested some description of injuries and psychological impact would have to be included to provide for consistent assessments of harm. They summarised their extensive consideration of the point as follows;

'As the SC has mentioned, there could be a range of harm within specific physical injuries (like for example a scratch, a bruise or a small cut) depending on factors such as the location, severity and pain suffered. We agree that this is very difficult to do within a guideline, and we have no suggestions to make as to how this could be accomplished. We agree that it should be left to the sentencers as to how to take factors such as the location, severity and the pain suffered into account, as they will

be very offence-specific. But we recommend that these factors should be mentioned in the guidelines, to assist setting the harm category. This could be done by modifying the note to the harm category table, so that this now reads:

"The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim. When assessing the level of harm, consideration should be given to the number of injuries, injury location(s), injury severity and pain caused, and the time span of any harm or distress caused."

West London Bench

3.50 A small scale road-testing exercise was undertaken to identify how the factors were applied to scenarios and if issues arose with consistency of assessment (the exercise was also undertaken to identify how harm was assessed in a strangulation case with a low level of physical injury but high level of psychological harm). An alternative model with a 'cases between' category was also tested to identify if this influenced assessments differently where differing levels of physical and emotional harm were involved. The findings are at **Annex B**. While the research sample was too small to draw firm conclusions, there is some indication from the results of the harm assessment in the biting scenario that the alternative model enabled sentencers to balance the harm involved, and that the current draft model led to greater inconsistency of assessment.

3.51 The Council is asked to consider the concerns raised and if the harm model should be revised based on concerns raised by consultation respondents which the limited road testing does indicate are not unfounded. The Council has already agreed previously that descriptions of injuries should not be included due to the difficulty in categorising injury types as these can very in severity (eg; a black eye could involve minor or severe bruising and differing impacts).

3.52 A number of options have been identified for revised harm models;

Option 1) Adopt the alternative model used in road testing which was as follows;

Harm The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.	
Category 1	More than minor physical or psychological harm
Category 2	Harm falling between categories 1 and 3

Category 3	No physical injury No/very low level of distress

Option 2) Retain the draft guideline model and include explanatory text similar to that proposed by the West London Bench response, as follows;

Harm The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim. In assessing the level of harm, consideration should be given to the number of injuries; severity of injury and pain suffered and; the duration or longevity of any psychological harm or distress caused.	
Category 1	More than minor physical or psychological harm/distress
Category 2	Minor physical or psychological harm/distress
Category 3	No/very low level of physical harm and/or distress

Option 3) A hybrid of options 1 and 2, using the alternative model tested which includes the 'cases between' category and guidance to instruct sentencers how to identify the most appropriate category;

Harm The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim. In assessing the level of harm, consideration should be given to the number of injuries; severity of injury and pain suffered and; the duration or longevity of any psychological harm or distress caused.	
Category 1	More than minor physical or psychological harm
Category 2	Harm falling between categories 1 and 3
Category 3	No physical injury No/very low level of distress

3.53 There is a risk with the third option that given the limited range of harm the middle category will be overused.

Question 9: Does the Council agree the harm model should be revised and which option, if any, does it prefer?

Aggravating factors

3.54 As anticipated and noted earlier in this paper, a high number of respondents thought that spitting should be provided for at step one of the common assault guideline. The Council debated this at some length in developing the guideline, and ultimately decided that the seriousness of spitting is increased where this is undertaken with the intention of causing the victim to believe they will contract a disease. Many respondents approved of this approach and it is not suggested that this decision be revised.

The Sentencing Academy response thought that spitting and coughing should not be included as an aggravating factor;

'Spitting/ coughing' is a particularly unpleasant form of assault; it is not an aggravating way of committing the offence. All other aggravating factors are enhancements to an act of assault. Spitting may well cause more harm and distress than, say, a slap in the face. Or it may not. For example, if the offender spits on a clothed limb of the victim. The offender's level of culpability should be left to the court to determine. As a general rule, the form of the offence should not be construed as an aggravation. The effects of spitting can be placed within the guideline, such as exposure to the transmission of disease, which can encompass spitting and coughing without the need to specify the nature of the behaviour.'

3.55 The addition of coughing specifically as an aggravating factor raised some concerns. The Criminal Law Committee of the Birmingham Law Society response stated;

'*Coughing should not be included. This would lead to higher sentences for the many poor, ill and homeless clients convicted of these offences. Many are in bad health and cough intermittently anyway. It would be regrettable if the new Guidelines were to impose a higher sentence on someone because they are ill, and involuntarily cough*.'

Other respondents thought the 'spitting/coughing' factor should be clarified as deliberate, to avoid such concerns.

Question 10: Does the Council wish to qualify the 'spitting/coughing' factor as 'deliberate spitting/coughing'?

3.56 A few responses raised the issue of biting;

We strongly recommend that biting be included as an aggravating factor along with spitting and coughing. – **Restore Justice**

I would also be grateful if you could let me know what consideration the Sentencing Council has given to the issue of biting - in terms of harm, culpability and/or as an aggravating factor. I note that the intention to cause fear of serious harm, including disease transmission, is something currently indicating higher culpability in the new guideline but if there was a bite without the intention element what would the Council envisage would be the situation in relation to the guideline as it stands? - **Philip Davies MP**

The Council did include biting in an early version of the guideline, but later decided to remove this to avoid overloading aggravating factors. It was thought that the culpability factor 'use of substantial force' would capture particularly forceful incidents of biting. However, this was tested in the recent road testing of the draft guideline and not found to be the case. Even though the bite in the scenario was hard and teeth marks were left on the victim's skin for some time, only two out of 11 sentencers identified the offence as involving high culpability due to biting and one identified bite marks as an aggravating factor; none of the assessments were due to applying the 'use of substantial force' factor. The Council are therefore asked to consider if 'biting' should be included as an aggravating factor. This is a common feature of assaults on emergency workers.

Question 11: Should biting be included as an aggravating factor?

3.57 Some respondents suggested an additional factor of the factor 'presence of children' should be expanded to 'offence committed in presence of others'. The existing guideline includes the factor 'presence of others including relatives, especially children or partner of victim'. The general guideline includes a factor 'Offence committed in the presence of other(s) (especially children)' and the factor as worded currently is included in the Manslaughter and overarching Domestic Offences guidelines. It may be that 'others' is too wide and would capture too many cases, but the Council are asked if the factor should be expanded to include other family members as it is thought that it would be particularly distressing for a victim for their family members or loved ones to witness an assault on them.

Question 12: Should the factor 'presence of children' be expanded to 'presence of children or relatives of victim'?

Mitigating factors

3.58 There were no new mitigating factors suggested and comments were mainly focused on matters which should not be taken into account as mitigation. These related to factors such as remorse and good character which are standard mitigating factors included n guidelines.

4 IMPACT /RISKS

4.1 The risks associated with the points in this paper are highlighted in the body of the paper.

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Sentencing Council

Sentencing Council meeting:	**5 March 2021**
Paper number:	**SC(21)MAR04 – Sexual Offences**
Lead Council member:	**Adrian Fulford**
Lead official:	**Ollie Simpson** **07900 395719**

1 ISSUE

1.1 Seeking Council's sign off to the draft revisions to the sexual offences guidelines for consultation.

2 RECOMMENDATIONS

2.1 That Council:

- notes the resource assessment at **Annex A** and, subject to that assessment's findings;
- signs off the revisions to the sex offences guidelines for consultation.

3 CONSIDERATION

Resource assessment

3.1 The draft consultation stage resource assessment is at **Annex A**. It estimates that the new guidelines for section 15A (sexual communication with a child) may lead to a small increase in sentencing severity, with some offenders who would previously have received a community order now receiving a suspended sentence order.

3.2 The amendments we are making as a result of *Privett* are not strictly themselves the cause of any impacts on sentencing practice, prison and probation services. Assuming the courts follow the approach set out in *Privett* these impacts would be seen anyway; the revised guidelines simply reflect the approach (although it may be an open question whether that approach applies to cases where activity has been incited with a real child, but not caused). Nonetheless, the resource assessment covers what impacts we expect to see as a result of this approach, as set out in the revised guidelines, becoming the norm.

3.3 For section 14 the resource assessment suggests there may be a small increase overall in sentence levels for cases in which no actual child exists. It estimates, based on 2019 data, that there may be an increase in average custodial sentencing lengths for these cases by 5 months, from two years 10 months to three years 3 months. This means the potential requirement for approximately 40 additional prison places per year. The increase in severity may not appear too dramatic, and this appears to be because several judges are

already taking the approach in these cases (as in all cases conjoined in *Privett*), often placing activity in category 1 or 2 harm regardless of whether there is a real child victim. However, we are also making assumptions about the reductions made to take account of the lack of a real child (generally using 1 year as a rule of thumb) which we can test as part of road-testing.

3.4 The similar changes made to the section 10 guideline (causing or inciting a child to engage in sexual activity) are estimated to result in an increase in sentencing severity for cases where no child exists (which are charged as attempts), or where the child does exist and the offence was incited but did not occur. The average custodial sentence length may increase by about two years 4 months, from one year 2 months to three years 6 months, with the potential requirement for around 190 additional prison places per year.

3.5 This is greater than the increase for section 14, probably because in these cases the courts have till now more usually been following the previous *Baker* approach. The greater impact on the prison population reflects to a degree the greater volumes of cases (around 100 section 14 cases in 2019, compared to about 260 for section 10).

3.6 Beyond section 10, the revisions are not expected to have a measurable impact on other "causing or inciting" offences. For section 8 (causing or inciting sexual activity with a child under 13), the structure of the harm categories means that there is unlikely to be a difference in the harm categorisation. There are such low volumes of cases for the other offences (sections 17, 31, 39, 48 and 52 of the 2003 Act, which altogether saw around 190 offenders sentenced between 2015 and 2019) that any impacts of the revisions are hard to quantify, but likely to be small.

3.7 The further amendments in scope of the consultation (providing clarification on the factors "abuse of trust" and "severe psychological harm" and amendments to the wording in guidance on historic sex cases are not expected to have any impact on sentencing severity and are therefore not covered in the resource assessment. This will be set out in the consultation document.

Question 1: do you have any concerns with the findings of the resource assessment?

Revisions to the sex offences guidelines

Section 14 – arranging or facilitating

3.8 The draft short narrative section 14 guideline is at **Annex B**. As now this directs users to the guidelines for the offences which have been arranged or facilitated (sections 10 to 13), and we have provided links to those.

3.9 The guideline tells sentencers to determine harm on the basis of what the offender had intended, and then to provide a discount (ahead of any further aggravation or mitigation) to reflect the fact that lesser or no harm has been caused. We do not provide specifics about the extent of the discount, but note that where someone has only been prevented by others at the last minute the discount will usually be a small one within the category range. At the other end of the spectrum (voluntary desistance at an early stage), a larger discount will be appropriate, even outside of the category range.

Causing or inciting offences

3.10 The revised guidelines for section 10 are at **Annex C** with the additions highlighted. These changes would also be made to other "causing or inciting" offences under the Sexual Offences Act 2003.

3.11 Aside from the central issue of situations where sexual activity has been incited but has not taken place, we have added a paragraph to be clear that activity incited outside of England and Wales and/or remotely is to be treated no less seriously than activity incited in person/within this jurisdiction.

3.12 The guideline then replicates the approach to take from the section 14 guideline (above). This has been placed before the Step One tables to ensure it does not get missed. A modification to the wording is needed for the circumstance where a child does not exist, as this will be charged as an attempt. We are clear in these circumstances that the discount for the victim not being real is the discount for the offence being an attempt.

3.13 We propose deleting the mitigating factor "Sexual activity was incited but no activity took place because the offender voluntarily desisted or intervened to prevent it" as this scenario has now been covered with the earlier wording.

Additional guidance

3.14 Following the findings of the 2018 assessment of the existing guidelines, we have decided to consult on including expanded explanations in all relevant sexual offences guidelines of the harm factor "severe psychological harm" and the culpability factor "abuse of trust". This would be the first use of expanded explanations at Step One.

3.15 We are also consulting on amendments to the guidance on historic sex offences to reflect more closely Court of Appeal authority in the cases of *Forbes* and *R v H*.

3.16 Both of these proposed clarifications are shown at **Annex D** and I will demonstrate the drop down expanded explanations at the meeting.

Section 15A

3.17 The new draft guideline for sexual communication with a child proposed for consultation is at **Annex E**.

3.18 The guideline starts with the standard text (covered above) for attempts where no child has been the recipient of sexual communication. We are proposing just two levels of harm: a raised level where sexual images have been sent/received or where significant psychological harm or distress has been caused, and a lower level covering all other cases. Culpability is separated into two levels and is a departure from the usual child sex guidelines, where raised culpability is represented by a series of grooming elements. Here, raised culpability is indicated by abuse of trust, use of threats, targeting of a particularly vulnerable child, commercial exploitation and/or motivation, and soliciting images. Culpability B captures all other cases.

3.19 All starting points are custodial with only Category 2B cases being within the powers of the magistrates' courts. We have deliberately not left "headroom" given the relatively low maximum penalty and the dangers that this offending can pose. The range goes down to a medium level community order as a fine alone was not thought appropriate for this offence.

3.20 We have so far proposed the fairly standard list of aggravating and mitigating factors for child sex offending. There had been debate about whether lying about age/identity should be a step one factor, but we concluded it should be step two. "Offence involved sustained or persistent communication" is bespoke to this guideline, and its corresponding mitigating factor is "Isolated offence".

3.21 In finalising the guideline I have also considered two further amendments to the standard mitigating factors. Firstly, for "*Age and/or lack of maturity where it affects the responsibility of the offender*" given that our understanding of neurological development amongst youths has advanced since 2013, it may be helpful to rename it simply "*Age and/or lack of maturity*" and have the expanded explanation as set out in **Annex E.**

3.22 I also propose adding in the standard mitigating factor "*Physical disability or serious medical condition requiring urgent, intensive or long-term treatment*" with its accompanying expanded explanation. This is also set out at **Annex E**. The latter in particular may come into play when sentencing historic sex offences. If we were to consult on including these in the section 15A guideline I would also propose including them as standard in all sex offence guidelines.

Question 2: do you want to add/amend these mitigating factors to the section 15A guideline and all sex offence guidelines?

3.23 It was suggested that step seven, covering ancillary orders should make specific mention of sexual harm prevention orders (SHPOs). At the moment, the definitive guidelines for sexual offences provide a link to the Crown Court compendium and a dropdown at this stage. The dropdown gives information on Slavery and Trafficking Prevention Orders (STPOs and the automatic orders relating to notification and vetting. We could therefore add wording on SHPOs at this step (like that proposed in **Annex E**) of all sex offence guidelines, and I propose adding it to the dropdown ahead of the wording on STPOs. The possible downside is that it could get overlooked there, but most prosecutors are likely to be pushing for one in appropriate cases.

3.24 There was text on the predecessor for SHPOs (Sexual Offences Prevention Orders, SOPOs) in the definitive sex offence guidelines when published in 2013, but this was outdated by the time the definitive guidelines went online. Adding them to step seven would not strictly require consultation so we could make that change to all existing sex offence guidelines now. Alternatively, Council may wish to consult on the point as we consult on these other changes.

Question 3: (subject to the answer to Question 1) are you content with the proposed amendments and the new section 15A guideline as set out in the annexes?

Question 4: do you want to consult on adding information on Sexual Harm Prevention Orders to the ancillary orders step of all sex offence guidelines?

4 EQUALITIES

4.1 In 2019, immediate custody was the most common sentence for most offences, except section 13 and section 15A for which the most common was a community sentence. Generally, younger offenders seem to get a ‘less severe’ sentence – a higher proportion of younger offenders receive community sentence. As offenders get older, the proportion receiving custody seems to increase.

4.2 Males are overrepresented in every offence: overall, females only accounted for 2% of offenders sentenced for the sexual offences we are looking at. Because the number of female offenders is so low we cannot highlight any obvious trends but from what we do have, generally female offenders are getting the same sentences as their male counterparts.

4.3 In general, there seems to be equal treatment between ethnicities, probably stemming from the fact that most offenders are receiving a custodial sentence and again we are considering very small numbers in each group.

Question 5: are there any equalities issues that you think the consultation should address or seek views on, or are you content simply for the above information to be set out in the document?

5 IMPACT AND RISKS

5.1 The impact of these proposals is covered above. As mentioned there, any increase from the additional guidance on cases where no child exists or activity is incited but not caused is strictly speaking a result of the Court of Appeal case law, rather than directly from the change to our guidelines.

5.2 Aside from the new guideline for s15A offences, these changes respond to Court of Appeal case law. There may be further issues related to sex offences and the operation of the guidelines that we are unaware of and the consultation may provide an opportunity for people to raise a wide range of specific issues beyond those we are consulting on. Given the need to clarify the situation for the issues raised by ***Privett*** and other cases, we would need to be clear in responding to the consultation that other issues would need to await a fuller revision of the guidelines.

5.3 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 conducted with the University of Leicester. That could be mitigated to a degree by providing clarity on those factors which the report concluded were creating uncertainty.

5.4 We are aware that legislation is planned that would amend section 14. As we understand it, this could involve adding section 8 (sexual activity with a child under 13) to the possible offences which could be planned and facilitated under section 14 and provide for different possible maximum penalties that track those for the underlying offences (so from life imprisonment for a section 8 offence involving penetration, down to five years' imprisonment for a child sexual offence committed by a child). We are unaware of the precise timing of this legislation, but it should not affect our approach to the revisions; we may simply want the consultation document to refer to the possible changes.

Sentencing Council

Sentencing Council meeting: **5 March 2021**
Paper number: **SC(21)MAR05 – Burglary Revision**
Lead Council member: **Rebecca Crane**
Lead officials: **Mandy Banks**
0207 071 5785

1 ISSUE

1.1 This is the final meeting to discuss the revision of the existing burglary guideline, ahead of consultation in early June. At this meeting the Council will be asked to consider the amendments to the guidelines recommended by the working group and to consider the draft resource assessment.

2 RECOMMENDATION

2.1 That the Council:

- Considers the changes to the guidelines recommended by the working group
- Considers the draft resource assessment

3 CONSIDERATION

Amendments proposed by the burglary working group

3.1 At the December meeting it was agreed that a burglary working group should be set up to consider some matters of detail, to be brought back to this meeting for consideration. A working group consisting of Tim, Rebecca, Maura, Rosina and Naomi from the CPS was set up and met in January.

3.2 The first matter the group considered was the issue of '*weapon present on entry'*, a high culpability factor in the existing aggravated burglary guideline, and the concerns raised in *Sage*[1]. In summary, the concern raised in *Sage* is one of double counting around '*weapon present on entry',* as set out below.

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

3.3 If an offender commits an aggravated[2] burglary with intent to steal/inflict GBH/intent criminal damage [a 9(1)(a) burglary], they commit the offence at the point of the trespass when they enter the building. So for these offences, all aggravated burglaries would have the weapon present on entry. For the aggravated version of s.9(1)(b) the offence is not committed until the point of the theft/attempted theft or GBH/attempt GBH and therefore the offender may have the weapon on entry or have picked it up in the address. The point from *Sage* is that *'weapon present on entry'* is an essential element of an aggravated s.9(1)(a) offence and so should not automatically be put into high culpability.

3.4 The group considered some of the options put forward in the December meeting to deal with this issue, either to remove the factor all together, or try to differentiate between types of weapon, or try to focus on the use of the weapon, rather than whether it was being carried when the premises were entered or picked up whilst in the premises. The group also noted that there was a category 1 harm factor of '*violence used or threatened against the victim, particularly involving a weapon'.*

3.5 This issue is quite a difficult one to resolve. However after careful deliberation the group decided to remove the factor from high culpability and move it to step 2, to become an aggravating factor of '*weapon carried when entering the premises'.* By doing so, and retaining the harm factor referencing a weapon, it would avoid the problem of double counting referred to in *Sage,* but at the same time would:

- Enable the court to distinguish between the burglar who goes armed and the burglar who does not [with a warning, to avoid double counting]
- Enable the court to deal more severely with a burglar who uses/threatens a weapon which he brought into the premises
- Catch the armed burglar who finds the premises empty and therefore has no opportunity to use/threaten violence.

These proposed changes have been made and can be seen on page 4 of **Annex A.**

Question 1: Does the Council agree with the working groups' recommendation that 'weapon carried when entering the premises' becomes a step 2 aggravating factor?'

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[2] A person is guilty of aggravated burglary if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon of offence, or any explosive.

3.6 The next matter the working group considered was the issue discussed at the last Council meeting of sentence ranges and whether there should be some wording added that referred sentencers to the assault guidelines in burglary cases involving violence.

3.7 The working group noted the information provided by the CPS at the December meeting around charging decisions, that there would not be many cases charged as burglary which involved actual physical injury that didn't have additional assault charges (at the relevant level for the assault inflicted). Or, if there was actual violence or threats of violence in order to effect a theft then cases would probably be charged as a robbery rather than burglary.

3.8 Therefore, the group decided that on balance, that it was not necessary to have any additional wording on this point. In making this decision the group also considered concerns around fairness to offenders, that they should only be sentenced for matters that they have been charged with, (e.g burglary) and not for those that they haven't (e.g assault). The group was also concerned that any possible wording would become quite complicated if it also tried to advise sentencers about totality where the violence is separately charged.

Question 2: Does the Council agree with the working groups' recommendation that the guidelines should not have any wording that refers to the assault guidelines?

3.9 The third issue the working group considered was the wording that the Council discussed at the last meeting should be added to the domestic burglary guideline, that cases of particular gravity could result in sentences above the top of the range. The group discussed this and agreed the wording should say:

'For cases of particular gravity, sentences above the top of the range may be appropriate.'

This can be seen above the sentence table in the domestic burglary guideline on page 3 of **Annex B.**

Question 3: Does the Council agree with the working groups' proposed wording for the domestic burglary guideline?

3.10 The rest of the changes agreed at the last Council meeting in December have been made to the guidelines and can be seen within **Annexes A-C.** The

consultation document and finalised guidelines will be circulated via email to Council members for comment in due course.

Draft resource assessment

3.11 The full draft resource assessment can be found at **Annex D.** Analysis was undertaken to assess whether changes to the existing guidelines would have an impact on sentencing for burglary offences. In summary, there is not enough evidence to suggest that the guidelines will have a notable impact on prison or probation resources at this stage.

3.12 There have been several changes to the placement of factors in the draft revised guidelines, which the analysis suggests may lead to changes in the categorisation of culpability in some cases, with potential subsequent impacts on sentences. This comprises the factor related to group offending within the non-domestic and domestic burglary guidelines, and the factor related to a weapon being present on entry to the premises within the aggravated burglary guideline. Additionally, some new wording related to alcohol dependency/misuse may lead to lower sentences.

3.13 Further research during the consultation stage will explore these issues in more detail, and there should therefore be further evidence available to estimate the impact of the guidelines for the final resource assessment.

3.14 Overall, aside from the specific issues mentioned above which will be explored during the consultation, for all three offences (non-domestic, domestic and aggravated burglary), analysis suggests that sentences should remain similar under the revised guidelines, and at this stage, there is no conclusive evidence to suggest that the guidelines will have a notable impact on prison or probation resources.

Potential changes as a result of the resource assessment analysis

3.15 At this stage of reviewing the guideline ahead of consultation, and considering the findings of the draft resource assessment, the Council could choose to look again at some of the decisions around the factors, in particular the one related to group offending. In discussing this factor previously the Council thought this factor could be problematic, citing concerns as to how many offenders constitute a group for example, and it was moved from high culpability to become an aggravating factor. However, there is the text within the expanded explanations on the '*offence committed as part of a group*' factor, which states that membership of a group is two or more persons, so this and other additional detail on this factor may assist

sentencers. With burglary offences there does seem something inherently more serious from a victim's perspective in a group of offenders breaking in, as opposed to one person.

3.16 Given that the resource assessment indicates that for domestic and non-domestic burglary the removal of this factor from culpability may lead to a decrease in sentencing, the Council could decide to put the factor back into culpability from step two. In addition, the Council could decide to put the factor back into culpability for aggravated burglary also. The number of high culpability factors has reduced from five in the existing guideline to two or three in the revised guidelines, potentially making it more difficult for an offender to be placed in this category. Adding the '*offence was committed as part of a group'* factor will help redress this balance and make sure that the most serious cases can be sentenced accordingly. It is suggested that the mitigating factor of '*offender was in a lesser or subordinate role if acting with others/performed limited role under direction'* remains at step two, as in the existing guideline (rather than moving to become a lesser culpability factor).

3.17 It is not suggested however that the '*weapon present on entry'* factor is placed back into high culpability, for the reasons set out earlier in the paper. This was a difficult matter to resolve and the solution of placing the reworded factor at step two, with the existing reference to a weapon in harm is recommended as the most appropriate solution. And, the resource assessment indicates that the movement of this factor from step one to step two will not have an effect on the sentence in most cases.

Question 4: Does the Council have any observations on the draft resource assessment?

Question 5: Does the Council wish to place 'offence committed as part of a group' back into high culpability for all three offences?

4. EQUALITIES

4.1 At the December meeting the Council considered the additional demographic tables on ethnicity data broken down by sentence types, ACSLs and sentence length. **(Annex E)**. This suggested that for burglary offences overall, the evidence for disparities in sentencing is not as clear as it appeared to be for firearms or drug offences. Given this finding, the Council discussed whether the guideline should make any reference to it or not. It was then decided that the matter should be remitted to the Equalities and Diversity working group for further discussion, as any decision could have implications for other guidelines.

4.2 The Equalities and Diversity working group has met and decided that there should not be any reference to the research on the face of the guideline. The consultation document will explain what work has been carried out in this area and what it has shown and will ask if consultees have any comments.

Question 6: Is the Council content to sign off the guideline ahead of consultation?

Sentencing Council

Meeting date:	**5 March 2021**
Paper number:	**SC(21)MAR06 – What next for the Sentencing Council?**
Lead official:	**Emma Marshall**

ISSUE

1.1 Responses put forward in the Vision consultation in relation to the Council's analytical work.

RECOMMENDATION

2.1 That the Council considers the issues raised and provides indicative responses to the questions posed; in particular, that the Council agrees to devote some time in the Analysis and Research (A&R) team to scoping out an enhanced approach to data collection which in the longer term may facilitate improvements to some of the issues outlined in this paper.

CONSIDERATION

3.1 As discussed in previous Council meetings, one of the overarching themes of the Vision consultation was analysis and research. Of the 23 questions asked, six covered this work and included issues such as whether there were any technical aspects of the Council's analytical work that could be improved, whether the focus and prioritisation of the work was appropriate and whether there were any other areas the Council should be considering as part of its programme of analytical work. There was also a question on whether there are any areas of work that would be more suitable for an academic institution or external organisation to undertake.

3.2 This area of the Council's work attracted a lot of comments. Some of these have already been discussed in previous meetings and views/ actions already noted:

- The agreement that, subject to resources and availability of data, more analytical work should be undertaken in relation to specific groups, most notably those with

protected characteristics. It was noted that in order to do this, we may need to seek money from elsewhere and/ or collaborate with external partners.

- That to facilitate further work in the area of ethnicity we would seek permission to include case identifiers in future data collections to permit data linking.

- That the Council would consider undertaking more qualitative work with offenders and victims, and other relevant groups, on a case by case basis.

- That we would provide information around how to obtain sentencing transcripts, given that the Council cannot share these with external people/ organisations.

3.3 The new Equality and Diversity working group, along with the Analysis and Research subgroup, will steer work in these areas to ensure that the relevant issues are considered in our analytical work. This paper will therefore cover issues not yet raised in feedback to the Council.

The prioritisation of the Council's analytical work

3.4 Although very few people specifically addressed the question around whether the Council had correctly prioritised its duties in relation to analytical work, the volume and diversity of comments more generally indicated how important this area is regarded in terms of the overall functioning of the Council.

3.5 Of the small number that did address this question, there were contrasting views. The MA felt that the *"correct balance has been achieved in this regard"*, whereas, the Prison Reform Trust felt that work to evaluate guidelines should be prioritised more highly than work on developing new guidelines. The Justice Select Committee also felt that whilst guidelines should continue to be a core part of the Council's work, it should rebalance "*so that it can dedicate more resources to evaluating the impact of guidelines, producing research and analysis on sentencing trends and promoting public confidence in sentencing".*

3.6 One member of the judiciary was, however, less supportive of a high priority being given to this area: *"the sentencing guidelines are the priority. Analytical work comes a very poor second and so it should"* (although arguably, this may more reflect the need to be clearer about the role of research and analysis in guideline development).

3.7 In terms of more specific comments, respondents felt there should be further work undertaken in the following areas:

- Assessing the impact and implementation of guidelines, including resources and consistency of sentencing;
- Data issues;
- Local area data;
- Sentencing and non sentencing factors reports;
- Other areas for research and analysis; and,
- Collaborating with others and seeking external sources of funding.

Assessing the impact and implementation of guidelines

3.8 The need to more fully assess the impacts of guidelines was raised in several submissions. This covered assessment of resources, as well the impact on sentencing outcomes (generically and for specific groups, as discussed previously in relation to groups with protected characteristics). It was felt that we should not only be evaluating more of our guidelines, but undertaking fuller and more informed evaluations.

The Council has neglected its duties to monitor the operation and effect of its sentencing guidelines and consider what conclusions can be drawn from the information obtained…The Council has not reliably been able to fulfil its core function of estimating the impact of its guidelines on prison and probation resources. For most of the offences covered in the arson and criminal damage guideline, for example, it was not possible to predict whether the guidelines would have an impact because of a lack of available data on how cases would be categorised under the new guidelines; on breach of a suspended sentence order it was not possible to assess previous sentencing practice or to make any realistic or informative estimate of the impact of the guideline on prison or probation services. Transform Justice thinks that much more priority needs to be given to assessing the resource impact of guidelines and monitoring what happens after they come into force. Indeed, there is a strong case that guidelines should not be developed in relation to a particular offence unless and until sufficient data is available to assess current sentencing practice, Transform Justice

We would also suggest that more work could be done to assess the impact of sentencing guidelines once they have been implemented. This is crucial in ensuring that they are being implemented consistently and having the intended effects. This may be particularly important in magistrates' courts, where there is a large volume of cases and a relative lack of available information on sentencing decisions, Magistrates' Association

To-date, the Council's work has been too descriptive and not sufficiently explanatory. Without a good understanding of the mechanisms explaining the effect of the guidelines on sentencing practice, the Council's efforts to improve the guidelines (and practice) are lacking the relevant evidence and consequently unlikely to succeed. Examples of research questions that could be pursued in order to adopt a more evidence-based approach to the monitoring and evaluation of guidelines include: (1) Why do sentencers depart from the guidelines (not simply "the frequency/extent to which courts depart from sentencing guidelines")? (2) What is the effect of specific legal and extra-legal factors on sentencing, controlling for the effects of other factors, and examining their interactions (not simply "factors that influence the sentencing imposed by the courts, Professor Mandeep Dhami

We agree with Anthony Bottoms that the Council has fulfilled its statutory duty to assess the impact of every guideline "only to a limited extent"…We note with concern that two of the three impact assessments for assault and burglary revealed unexpected increases in sentencing for some offences. Rightly, the Council is now conducting a further review of the assault guideline in order to address these anomalies. However, a concern remains that, as with the guidelines on assault and burglary, other guidelines will have had similar and unexpected consequences for sentencing practice which will not have been identified because of a lack of resource available to monitor their impacts…Guidelines for high volume offences, which the Council has prioritised over the past 10 years, will have a disproportionate impact on sentencing practice overall. Therefore, it is vital that the Council has a good understanding of their impact in order to address any unintended outcomes. We therefore believe this work should be prioritised over fresh analytical work on proposed new guidelines, Prison Reform Trust

3.9 Both the Justice Select Committee and Transform Justice also recommended that all legislative and policy proposals which could have an impact on the prison population should be subject to a resource assessment by the Council at an early stage.

3.10 For several respondents, a view was expressed that there was also a need to assess the impact of guidelines on consistency in sentencing, and consequently to address more fully the duty in this area. The Sentencing Academy also noted the relative lack of analysis of the impact of overarching guidelines.

To date, the Council's research has concentrated on projecting the impact of an impending guideline on prison capacity or evaluating the impact of an existing guideline on trends in sentence severity, including prison admissions and sentence lengths. The Council's guideline assessments have overlooked the question of consistency, Sentencing Academy

The Council also needs to have a clear definition of consistency, and it should examine alternative types of consistency so it can conduct a more accurate and nuanced analysis of the "the effect of guidelines in promoting consistency". The main examples of alternative types of consistency include variation (1) across different areas, courts, and judges, as well as (2) within areas, courts, and judges. Statistical analyses of consistency could also distinguish between consistency achieved by chance v. intention. Analysis along these lines could pinpoint the areas where more or less intervention is required to promote consistency, Professor Mandeep Dhami

3.11 In conducting assessments of impacts, some respondents felt that the Council needs more fundamentally to reconsider what it regards as "success" and therefore how it interprets its evaluation evidence.

3.12 The Prison Reform Trust (PRT) in particular questioned the way in which we interpret our evaluation findings. Citing the burglary evaluation, they flag that this found an upward trend in sentence severity prior to introduction of the guideline and consequently concluded that the continuing increase after introduction of the guidance was in line with anticipated results. However, in support of a point made by Professor Sir Anthony Bottoms in his review of the Council[1], they feel that any pre-guideline increases in sentencing severity that continue after implementation of a guideline should be regarded as an unanticipated outcome. Other comments are below:

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

The effectiveness of sentencing appears to focus on reoffending rates whereas maybe a focus on positive outcomes and how sentences influenced that outcome and why… I think the general approach of the Council in providing guidance is ok at the moment but the measure of success is in my view very flawed, Magistrate

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

Prevention of offending should be the main consideration of the Council, Member of the public

3.13 The issue of effectiveness in sentencing will be discussed in more detail at the April Council meeting and any decisions on this can be fed into the impacts that we consider in our future evaluations (caveated with the fact that for some areas data may be limited).

3.14 For all of the areas flagged here under the general theme of assessing the impact and implementation of guidelines, the two key constraints for any future work is availability of data and the capacity of the analytical team to undertake more in-depth work, as outlined below.

Assessing resources

3.15 From a data perspective, our earlier resource assessments were less problematic. Early guidelines produced by the Council – e.g. assault, burglary and drugs – related to offences where more data, particularly on volumes and outcomes, were available. However, for later guidelines, there has not been as much data available on which to base these assessments.

3.16 Resource assessments are also particularly problematic for guidelines that cover lower level offences as the data on non-custodial sentences is poorer, or for overarching guidelines which tend to cover broader areas or areas which are not offences in their own right (e.g. the mental health guideline and the domestic abuse guideline). This means that our resource assessments tend to focus on prison places, as noted by the MoJ who felt that

this should be broadened out: *"I would be interested in further information on how fine levels are likely to be used and distributed across the courts for draft and definitive guidelines. This would be particularly helpful for low level offences in the magistrates' court".*

3.17 The lack of data we often have is explicitly acknowledged when we publish resource assessments, and is an area that has been flagged in the past by others (for example by the JSC in response to specific guideline consultations). We do, however, endeavour to collect as much information as possible. This includes conducting our own data collection exercises, liaising with other agencies and stakeholders to establish what other data might be available (e.g. NHS England for data on mental health disorders), conducting road testing exercises to explore the potential behavioural implications of guidelines, and buying in transcripts of sentencing hearings wherever possible and using these to "re-sentence" cases using draft guidelines. However, it remains the case that the information that we have to draw on for resource assessments is problematic.

Assessing impacts and implementation issues

3.18 In terms of our evaluations, we again endeavour to cover as much as possible based on the data and resources we have available. Although each evaluation is different, we generally explore both the impact and implementation issues, using a range of different approaches. These include time series analysis to look at trends in sentencing severity before and after a guideline came into force, regression analysis to explore the impact of different guideline factors on outcomes, and qualitative research to ascertain sentencers' views on guidelines and whether they have experienced any issues with using the guideline in practice.

3.19 Over time, we have worked to make improvements to our evaluations, where possible. This has included starting to look at sentence outcomes for different ethnic groups (as we did in the Children and Young People guideline evaluation), making improvements to our data collections to anticipate what we might need for future evaluations and exploring what other data we might be able to draw on (e.g. we now have an agreement to access Court of Appeal data). We are also currently in discussions with an external academic to update our sentencing severity scale[2] after which we plan to consider changing our approach to the time series analysis.

[2] For our statistical analysis, we need to convert sentences to enable meaningful comparisons to be drawn. Sentences are converted into a continuous "severity scale" with scores ranging from 0 to 100, representing the full range of sentence outcomes from a discharge (represented by 0) to 20 years' custody (represented by 100); this allows the creation of a consistent and continuous measure of sentencing severity that can be used to evaluate changes in sentencing.

3.20 There is undoubtedly more we could do to enhance our evaluations; as highlighted by some respondents, we could look in more detail at impacts on specific groups and could try to build in analysis that could potentially attempt to isolate the impact of the guidelines on outcomes, as opposed to, for example, case mix or legislative changes. However, this would require access to more data (assuming it exists in all areas) and would be extremely resource intensive if we were to do this for every evaluation. The gap between the implementation of a guideline and its evaluation is already longer than we would want, due to the pressure of other analytical work in the team, and without more resources, any more in-depth work would further widen this gap. We would also need to spend some time developing a suitable methodology for this type of analysis which is potentially complex.

3.21 This means that as resources currently stand, it will be difficult to conduct more in-depth evaluations, and even if we maintain our current approach, it will difficult to conduct more evaluations on a more frequent basis. If we were to do this, other work would need to be slowed down, for example, the rate of new guideline production. If more evaluative work is to be a priority, then some reprioritisation of other work will be needed.

3.22 On the specific point raised by Transform Justice - that all legislative and policy proposals which could have an impact on the prison population should be subject to a resource assessment by the Council at an early stage – again, set against the Council's resources and other priorities, this would not seem to be a possibility. Civil servants in the relevant department would also be better placed to make this assessment than the Council's officials.

Assessing consistency

3.23 On consistency, the Council has adopted an approach that focusses on consistency of approach rather than outcome. This makes measurement problematic as it relies on having information on starting points (which is only available through our data collections) rather than outcome data (which is more readily available through administrative data sources).

3.24 The area of consistency is also an extremely complex one, as will be outlined in a report that we plan to publish later in 2021 (this will be circulated for comment in due course). In addition to a literature review of recent work in this area, the report outlines a methodology to measure consistency of approach to sentencing that was developed and applied to data covering three Sentencing Council guidelines – domestic

burglary, supply/possession with intent to supply a controlled drug, and theft from a shop or stall - to understand whether the guidelines have achieved the Council's aim of improving consistency in sentencing.

3.25 To date, we have not included an assessment of consistency as a routine part of our evaluations; the assessment in relation to the three offences mentioned above is the first time we have done this. This is because the whole area of measurement of consistency is complex, it can be measured in a variety of different ways, and it requires data that we sometimes do not have available to us. More work needs to be done in this area (including on a methodology as the one used previously has some limitations) and this will be flagged in the report referred to above.

Data issues

3.26 Respondents were asked to consider whether there are any improvements we could make in terms of the data sources we draw on and the time we give to accessing different types of data.

3.27 In general, respondents called for more of most things: a greater volume of data (mainly quantitative, but also qualitative), a greater diversity of data and more robust data. The overall sense that the Council needs to improve the data and evidence it draws upon was also something that was emphasised in the recent Justice Select Committee evidence session. In their response to the consultation they also said that "*improving the quality of information and analysis on sentencing, including the sentencing decision process and on sentencing outcomes, should be a key priority for the Sentencing Council over the next decade".*

3.28 Responses on data clearly have a large overlap with the issues presented above: if we are able to improve our data sources, then arguably some of the issues raised in relation to resource assessments and guideline evaluations could more easily be addressed.

3.29 Specific comments included the need to include specific subsamples in work (e.g. the YJB felt that there should be a standard youth subsample in all data collections) and others that more data on groups with protected characteristics was needed. Some people flagged the need for more qualitative work (although note that this was at odds with others' views, who clearly felt that the focus should be on larger scale quantitative work):

I am convinced that you should do a lot more small-scale qualitative research: it remains striking that one of the very rare times when you decided to 'nudge' sentences down was when your researchers had actually spoken to some drugs 'mules' in prison. The Sentencing Council and its staff (as well as judges and magistrates, as part of their training) should spend more time speaking with offenders and their families, and victims, to understand what works, and what people consider to be appropriate punishments, Professor Nicky Padfield

3.30 Some of the specific points mentioned are likely to be covered in the actions agreed in the Equality and Diversity working group; for example we agreed to consider more qualitative work with victims and offenders on a case-by-case basis.

3.31 More commonly, respondents called for a more ambitious programme of data collection, analysis and publication – one that would facilitate more evaluation of guidelines and more analysis of their impact. Some felt that a Crown Court Sentencing Survey (CCSS)[3] should be resurrected (or something akin to this) or they stated that it had been a loss to have stopped this exercise in the first place.[4]

Improving the quality of information and analysis on sentencing, including the sentencing decision process and sentencing outcomes, should be a key priority for the Sentencing Council over the next decade, Justice Select Committee

Sentencing Council to facilitate ongoing data collection and monitoring of sentencing, …Given that ongoing data collection about sentencing practice is key to monitoring the operation and effect of sentencing guidelines, it is regrettable that the CCSS was ended…The revised approach - bespoke data collection in the Crown Court and magistrates' courts to inform the development of (offence) specific guidelines – represents a loss of

[3] Between 1 October 2010 and 31 March 2015, the Council conducted the CCSS, a census survey in all Crown Courts collecting data on the majority of offences sentenced. The CCSS was a paper-based survey and was completed by the sentencing judge. It collected information on the factors considered by the judge for the principal offence involved in the case, including harm and culpability, aggravating and mitigating factors, sentence starting points, end sentences and guilty plea reductions.

[4] Due to resource constraints, it was decided to cease the CCSS from March 2015 and to move to targeted bespoke data collections to permit a continuation of data collection in Crown Courts, whilst also collecting data in magistrates' courts where most cases are sentenced (previously there had been no data collection in magistrates' courts). We now tend to run an exercise once every 18 months or so, in either the Crown Court or magistrates' courts. These exercises are targeted in the sense of covering specific offences, a sample of courts, and specific time periods (generally three to five months).

transparency in monitoring how sentencing impacts upon minority and disadvantaged groups and limits insight into changing practices over time, Dr Carly Lightowlers

We believe that an increased use of data collection exercises in the magistrates' courts could assist the Council's analytical work, Justices' Clerks Society

The Sentencing Council's Crown Court Sentencing Survey (CCSS) was very useful in stimulating external research. The publicly available database has been used by a significant number of scholars…However, the CCSS is now over five years old. The SC discontinued the survey in 2015 and replaced it by periodic, bespoke data collections. If these data were made publicly available, they would also be useful to external researchers. Otherwise researchers will have to work with data which too old. Sentencing Academy

3.32 People also wanted the data that we collect to be more routinely published.

Periodic, bespoke data collections…If these data were made publicly available, they would also be useful to external researchers. Otherwise researchers will have to work with data which too old, Sentencing Academy

Please publish the data. You do not have to interpret it, nor control it. We may be able to inform some of our own questions ourselves!, Member of the Judiciary

Sentencing Council to facilitate ongoing data collection and monitoring… and facilitate the transparent release of these. In order to deliver on a commitment to justice and to allow for ongoing evaluation of the work of the courts, "a robust strategy for data collection, analysis and sharing must be in place"…As well as quantitative data, the Council themselves have showcased how the analysis of sentencing transcripts can be illuminating. I encourage the Council to consider whether these can be made either open access or available to accredited researchers for their own content analysis, thus allowing the potential of these data to be more fully exploited and for furthering our understanding of sentencing practice, Dr Carly Lightowlers

3.33 As previously discussed, we are planning on publishing data from our bespoke data collections on a regular basis and the first of these – on theft from a shop or stall – was published in December. However, the work involved in cleaning, quality assuring and

publishing these datasets is substantial and if this was to be prioritised more highly, then we would need to slow down other aspects of the team's work (we already have a backlog of data to be cleaned because the 3.5 statisticians in the team are covering higher priority work in relation to producing resource assessments, analysing evaluation evidence and providing statistics for guideline development etc). We therefore currently work on the publication of data when resources permit and prioritise these other areas to a greater extent.

3.34 In relation to transcripts of sentencing remarks, as discussed previously, we are unable to facilitate access to these given the sensitive nature of some of these and the data sharing agreement we have with HMCTS. However, in a previous Council meeting, we agreed to publish information on our website to this effect and to advise people on how they may access these independently.

Enhanced data collection

3.35 The Council's Vision working group discussed data collection issues in their January meeting and the Analysis and Research subgroup have also fed into this. It was agreed that enhancing our data collections would yield benefits in a number of areas:

- It would permit more robust and meaningful analysis in some areas, based on potentially larger sample sizes.[5]

- It may permit us to undertake more analysis on key areas, for example, the exploration of whether any disproportionality in sentencing exists in relation to particular guideline offences.

- It would allow us to publish more in-depth data, thus promoting greater transparency in our work.

- It would create further opportunities for research in the MoJ and academia, which would not only further analysis more generally in the area of sentencing, but may lead to work being conducted that would directly benefit the Council.

[5] Professor Dhami argued that "*the Council ought to recognise the fact that some data collection methods (e.g., focus groups, interviews, observations) as well as data analysis techniques (e.g., simple descriptive statistics) are less rigorous and reliable than others (e.g., statistical modelling, randomized controlled trials).*

3.36 Crucially, in the context of many of the consultation responses, it could provide data to help strengthen our resource assessments, facilitate more robust and in-depth evaluations and explore issues around consistency of approach to sentencing more.

3.37 There are, however, some general constraints to any improvements we could consider making in this area:

- the type/ volume of data that could be collected (e.g. in some areas – particularly on protected characteristics – data/ sufficient data may not exist).

- if we wanted to increase the scale of frequency of our data collection in courts, we would need to obtain permission for data collections from the SPJ and HMCTS and agree any changes to the current approach.

- If we wanted to increase the scale and frequency of our data collections, we would need to ensure we had sufficient participation from sentencers to justify the increased effort (the MA pointed out the need to consider the timing and burden of any exercise on magistrates)[6].

- The resources available in the analytical team. At this stage, without an agreed new model of data collection, it is difficult to estimate the resource impacts. However, any increased collections – beyond that which we already take forward – is likely to require the equivalent of an additional 0.5-1 FTE analyst.[7]

3.38 The vehicle through which we collect our data (i.e. as a survey hosted on our website/ app as is currently the case) or through digital court systems will also be dependant on our discussions with HMCTS on the Common Platform. We are currently discussing the type of information the system holds/ may hold in the future and the ways in which we might use this to feed into our guideline development and evaluation work.

3.39 Ideally, we would want to draw all the data needed from the Platform so that we do not have to ask for additional information from sentencers. However, it is likely that

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[6] *"It is important for the Council to consider the timing of any research targeted towards magistrates to take account of any other consultations or data collection exercises that might be ongoing. In addition, it should be remembered that there is less time during sittings in magistrates' court to respond to surveys or fill in feedback forms".*

[7] It should be noted however, that the financial requirements for the data collection has decreased substantially (from around £89,000 per annum to less than £8,000 per exercise). This is due to the move from paper-based surveys to electronic surveys.

whatever data we could get from the Platform would need to be supplemented by additional information added by sentencers – for example data that relate specifically to harm, culpability, aggravation and mitigation, which are very specific to individual sentencing guidelines[8]. Anything that might be possible will also be subject to the timing of existing planned development work for the Common Platform, including its pilot. We have arranged a meeting with the HMCTS Transformation Director in order to push forward with these discussions.

3.40 Regardless of whether the Common Platform can fully meet our needs in the future, there are several different approaches that we could adopt for future data collection. These span retaining our current approach of bespoke targeted collections at one end of the spectrum, through bringing back a census survey in the Crown Court only with bespoke surveys in the magistrates' courts, to census surveys in both courts at the other end.

3.41 The final decision regarding which approach will be optimal will depend on a variety of issues, including the constraints outlined in paragraph 3.37 and available resources. The working group considered some of these of their recent meeting, but concluded that more detail would be needed, as well as a clearer sense of what the Common Platform might offer. It was therefore recommended that the A&R team devote some short-term resource to working up a clearer proposal for an enhanced approach to data collection which can then be considered alongside all of the priorities emerging from Vision discussions. Given the comments above regarding the need to potentially cover more elements in our evaluations (e.g. more subsample analysis, analysis of consistency etc), we suggest that part of this review is a consideration of how we might broaden out our evaluations in the future.

3.42 Although undertaking this review will require some resource from the A&R team, which may necessitate slowing down other work briefly[9], it would be a useful exercise to inform our future direction in this area.

Question 1: does the Council agree that the A&R team should devote some time to scoping out possibilities for future data collection/ evaluation, even if this

[8] One magistrate respondent emphasised this point: *"One concern I have is that data drawn from court resulting does not capture issues that can affect sentencing and therefore does not identify issues requiring guidance. An example would be where magistrates consider public interest, illness of the offender or issues that lead to an absolute discharge. I am concerned that sentencing results do not capture the issues that affect final decisions".*

[9] If this was agreed, we would discuss in our planning meetings how to do this without impacting on the overall work programme of the Council.

necessitates slightly slowing other down work? We will then discuss options more fully with the Analysis and Research subgroup and Vision working group.

Question 2: Does the Council agree that enhancing our data collections, and improving our evaluations and resource assessments, are priority areas?

Question 3: In the context of stretched staffing resources, is the Council content with the current situation regarding the publication of data (that we work on this when resources permit and prioritise other analytical work to a greater extent)?

Local area data

3.43 The Council has a statutory duty to publish, at intervals the Council considers appropriate, information regarding the sentencing practice of magistrates in relation to each local justice area and the practice of the Crown Court in relation to each location at which the Crown Court sits.

3.44 The Council carefully considered this duty when it was first set up and to date has not formally gathered or published information of this nature[10]. This is mainly due to the difficulties with interpreting data produced on a local level (it could be potentially misleading if the analysis were not able to control for other factors that may have an influence, for example, the type of case load, socio-economic status of the population in the area, and the type of area). In addition, in the early days of the Council, it was felt that publishing local area data might be seen as a way of monitoring different courts, which might lead to a lack of support for the CCSS.

3.45 Only a small number of respondents addressed this, but those that did tended to feel that the rationale for not producing this type of information – especially given that it is a statutory duty - was inadequate and could be overcome.

We agree that publishing misleading statistics is worse than not publishing data. However, the solution is rather to ensure that the comparisons are appropriate. Local statistics are published for a wide range of issues; sentencing statistics should not be excluded. The problem appears to be that the Council has the mandate to publish these statistics but not

[10] We have, however, looked at the specific court where the offender was sentenced as part of a wider piece of work on consistency in sentencing (this work will be briefly covered in the review due to published later in 2021). The findings do not identify or comment on specific courts.

the resources, while the Ministry of Justice has the resources but not the mandate. The impasse should be resolved, and these statistics published on a routine if not annual basis, Sentencing Academy

The reasons given are not convincing: of course "interpreting data produced on a local level would be potentially misleading" but so what? That is not a reason to hide the data, particularly given concerns about racial, sexual and class-based discrimination. Personally, I think much more local data would be useful. As long as there are the 'critical friends' with time to critique and deconstruct it, Professor Nicky Padfield

3.46 Again, resources and priorities are key here. Whilst it may be possible to analyse at a more local level in the future, we do not feel this is the highest priority issue at present. Given the greater emphasis we are now placing on exploring issues such as disproportionality in sentencing, and the likelihood that we will need to improve our resource assessments and evaluations, we would recommend that our limited resource is focused in those areas instead. We can, however, return to this issue at a later date when we are clearer what data we will have to draw on in the future. In the meantime, it may be worth considering whether we can provide information on what data is actually available elsewhere and to signpost people to this.

Question 4: Does the Council agree that the analysis and publication of data on a local area level basis should continue to currently be lower priority, but that this can be reviewed if resources in the future permit?

Question 5: If more resources were available would analysis and publication of data at a local level be a priority for the Council?

Sentencing and non-sentencing factors

3.47 The Coroners and Justice Act 2009 requires the Council to produce, as part of its annual report, a sentencing factor report (s130) and a non-sentencing factor report (s131).

3.48 The sentencing factors report is required to contain an assessment of the impact of the Council's guidelines on prison, probation and youth justice services. The Council complies with this by including in the annual report a summary of the resource assessments for definitive guidelines that it has published during the reporting year.

3.49 The non-sentencing factors report requires the Council to identify the quantitative effect that non-sentencing factors are having or are likely to have on the resources needed or available to give effect to the sentences imposed by the courts. These factors include the volume of offenders coming before the courts, recall, breaches (of community orders, suspended sentence orders and youth rehabilitation orders), patterns of re-offending, decisions by the Parole Board, early release from prison and remand.

3.50 The Council complies with this requirement in each annual report by providing short summaries of the data available on each of these topics, where available, and providing links where users can find further information.

3.51 Only a small number of respondents commented on the way in which the Council has chosen to fulfil these duties. However, when comments were put forward these suggested that the Council should do more work in these areas and that a less narrow view should be taken of the way in which it complies with its duties.

It would also be helpful to include some more detail on the youth jurisdiction within the sentencing factors and non-sentencing factors reports within the Annual Report, or elsewhere, should that be deemed inappropriate, YJB

The Council has taken a very narrow and technical approach to the sentencing and non-sentencing factors reports…The first considers changes in the sentencing practice of courts and their possible effects on the resources required in the prison, probation and youth justice services. However, the Council considers only changes in sentencing practice caused by changes in sentencing guidelines, ignoring changes in law or Court of Appeal guidelines. A more comprehensive analysis would be much more useful. The non-sentencing factors report aims to identify the impact on prison and probation resources of any changes in the volume of offenders coming before the courts or of alterations in release provisions resulting in prisoners spending longer or shorter periods in prison when serving a particular sentence. Because of technical complexities the Council has not attempted to untangle the interactions between different non-sentencing factors to explain the causes of observed changes and their impact on resources, Transform Justice

3.52 The way in which the Council has addressed these two duties thus far again reflects the general analytical constraints that its faces: a lack of data in some areas and a lack of capacity to undertake more detailed analysis.

3.53 For the sentencing factors report, the “narrow” approach taken is necessary, given that we currently have very little information in some areas (for example, on lengths of suspended sentence orders, levels of community orders and bands of fines) and there are no continuously collected data sources on the relative seriousness of offences (for example, the culpability of the offender and the harm caused by the offence). We also confine the work here to the impact of guidelines in order to retain analytical resource for other more pressing work.

3.54 In the future, if we are able to enhance our data collections, it may be possible to consider more data when we undertake resource assessments, and thus to feed this into the sentencing factors report. Improvements to the data collected by the Ministry of Justice (for example, more detailed data on suspended sentence orders and community orders) would also help to facilitate this. We now also have a data sharing agreement that allows us to access Court of Appeal data and are intending to build an analysis of that into future evaluations. However, the extent to which we can widen out this aspect of our work will be limited by how quickly we can obtain more data and the more general resources in the team.

3.55 Regarding the non-sentencing factors reports, whilst it is relatively straightforward to analyse the available data on non-sentencing factors, it is extremely difficult to identify why changes have occurred and to isolate the resource effect of any individual change to the system. This is because the criminal justice system is dynamic and its processes are interconnected.

3.56 Improvements to the data collected by the Ministry of Justice would go some way to improving the Council's ability to comply with this requirement (for example, on breaches of community and suspended sentence orders). However, we would also need more staffing resources to undertake this work every year (in the first three years of the Council, a more comprehensive analysis of these factors was attempted for the Annual Report, but the work required was disproportionately large and had an impact on other work the team could conduct).

3.57 At this stage, without more data and more analytical staff, it is therefore unlikely that the Council will be able to provide more detailed or extensive sentencing and non-sentencing factors reports. Again, we may be able to review this when we are in a position to access more data.

Question 6: Does the Council agree that in the short to medium term the way in which it addresses its sentencing factors report is an appropriate and proportionate approach to this duty? This can be revaluated at a later stage if and when more data becomes available.

Question 7: Does the Council agree in the short to medium term the way in which it addresses its non-sentencing factors report is an appropriate and proportionate approach to this duty? This can be revaluated at a later stage if and when more data becomes available.

Question 8: if more resources were to become available, would further work on the sentencing and non-sentencing factors report become a higher priority?

Other areas for research and analysis

3.58 There were a number of other more specific areas that people raised for attention. Some of these will be covered as part of other workstreams/ discussions (e.g. the need to obtain more evidence on female offenders when we come to scoping out a guideline/ guidance in this area, the need for more information on patterns of reoffending when we come to discuss the broader comments on effectiveness in sentencing.) However, there were also the following suggestions for future work:

<u>Information on aggravating and mitigating factors</u>

3.59 The MoJ called for more information on aggravating and mitigating factors to be available:

As a Department, we are regularly approached by stakeholders seeking to add or strengthen aggravating factors in sentencing for certain offences such as for assaults on retail workers. 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

3.60 Dr Carry Lightowlers also felt that there should be a specific review of the impact of the aggravating factor of intoxication and how it is implemented.

3.61 If we are able to collect more data generally, then it would be possible to analyse and publish more data on aggravating and mitigating factors. However, this would need to be obtained through the Council's data collections, rather than administrative data sources, as this is the only source of information on these factors. Our proposed work to scope out an enhanced data collection will therefore impact on this. In terms of evaluating the impact of any specific factor/ set of factors, this would be covered in an evaluation of the expanded explanations, which we hope to start scoping out later this year.

Analysis on multiple offences

3.62 Professor Mandeep Dhami encouraged the Council to move away from analysis based on the principal offence only and to consider sentencing across all offences. The Council's assessment of sentencing practice is currently based on data for the offender's principal offence; we do not collect any further information about secondary/non-principal offences or the sentences imposed for them. This approach has been considered the most effective and pragmatic way of assessing this, given the data that is available and the difficulties of disentangling the effect of secondary offences on the overall sentence.

In my recent analysis of CCSS data (Dhami, 2020), I found that multiple offence (MO) cases represent common court business – they represented approximately half of the sentenced cases in the CCSS datasets examined. Therefore, the Council currently does not know the sentences meted out at least half (and likely to be much more) of the offences that appear before the Crown Court. Given that offences in MO cases are subject to the offence-specific guidelines, this means that the extant findings of the Council's work on the monitoring and evaluation of its guidelines are unreliable and invalid; they provide only a partial and skewed picture. This oversight of the sentences given to the non-principal offences in MO cases also means that the Council cannot properly consider the implications of the implementation and application of guidelines. It also means that other criminal justice bodies (e.g., probation and prisons) cannot make fully-informed resourcing decisions, Professor Mandeep Dhami

3.63 We have not done our own analysis of this, so are unable to verify the proportion of cases to which this applies. However, it is the case that there is an argument for us exploring this in the future, especially given that there are examples of situations that could be concealed behind the principal offence. This might include where there is more than one count of the same offence against different victims on the same occasion e.g. where a single act of dangerous driving causes the death of multiple victims, or where there is more than one count of different offences against the same victim on the same occasion e.g. an assault and criminal damage in a domestic abuse situation. There may also be various counts of

the same offence on different occasions e.g. several shoplifting offences and a mixture of counts of various offences on several different occasions.

3.64 We have already started discussing within the Office the possibility of ascertaining if there is a more sophisticated methodology that we can use to assess current sentencing practice and that would consider all offences dealt with in a sentencing occasion and the impact of the totality on the final sentence outcome. The work is likely to involve an in-depth review of the way in which sentencing data is recorded in the relevant datasets (e.g. is it consistent and accurate, how many offences are typically dealt with in one hearing, are sentences consecutive or concurrent, does recording vary across different offences etc), with comparison against sentencing transcripts (where available).

3.65 It will not be possible to use data from the Crown Court Sentencing Survey (CCSS) for this, as although the CCSS recorded whether the offence was sentenced as a single offence or alongside other offences, no information about the other offences was collected, and so the CCSS cannot be used to answer the questions posed. We would therefore need to explore other data sources and/ or build extra questions into future data collections.

3.66 We would recommend undertaking such a review at some point in the near future in order to ensure we can fully account for all impacts on sentencing outcomes. Given that this will inform any future revision of the totality guideline, we propose that the scale and remit of this is considered after we have reviewed the findings from the small-scale piece of qualitative work that we are currently undertaking on totality (possibly some time towards the end of this year). This will again be subject to overall priorities and resources within the analytical team (a review of the data in this area would not be a quick or simple review) and our general progress on improving our data sources.

Question 9: Does the Council agree that, subject to overall resources, we should consider building in some resource for a review of the data/ potential methodologies for future analysis of multiple offences?

<u>Research on behavioural insights</u>

3.67 Whilst acknowledging the need for resources, The MA suggested that the Council consider *"research on behavioural insights in determining how best to achieve desired behaviours through effective communication (as recommended by Sir Anthony Bottoms in a previous review of the Sentencing Council)".* The Sentencing Academy said it is *"unaware of*

any research which has explored users' perceptions and experiences with the guidelines. Are the guidelines applied in practice in the ways expected by Council?".

3.68 It is likely that this type of information could be derived through our proposed work on user testing which we have already developed a specification of requirements for. In this, the stated aim of the project is to test how sentencers use, access and experience digital sentencing guidelines. The project will investigate whether digitisation of guidelines has had any impact on the way in which the guidelines are used and propose any potential changes to improve the provision of digital sentencing guidelines and ensure they are used in line with the intentions of the Council.

3.69 An Invitation to Tender for this project was issued in late 2020, but unfortunately we received no bidders. We have not yet reissued this tender as the delay in the work will now necessitate funds from next year's budget which are currently not confirmed. However, if and when these funds are confirmed as available from the budget, we will pick this up again and reissue it for tender.

Research on attitudes to sentencing

3.70 Transform Justice stated that: *"Consideration should be given to undertaking more surveys and research studies to understand the complexity of attitudes to particular offences".* We have in the past commissioned such work – e.g. on public attitudes to drug offences and to guilty plea reductions, and in 2019 we published Comres research on public knowledge and confidence in the criminal justice system and sentencing.

3.71 As highlighted above, we plan to consider qualitative research with victims and offenders on a case-by-case basis and could also include these types of surveys. We also plan to repeat some of the survey questions included in the Comres research to look at trends over time (again subject to resources).

Research on Victim Personal Statements

3.72 The Sentencing Academy felt there should be more research on Victim Personal Statements (VPS) to ascertain if more guidance is needed in this area: "*Research with sentencers would provide clarification on the issue by revealing whether they share a common understanding of the role of the VPS and whether they are satisfied with current levels of guidance. Additionally, CoA guidance is now rather dated, and produced at a time*

when VPSs were used less frequently than at present". They recommended we undertake a survey to look into this issue.

3.73 As discussed in December, in relation to the similar comment made by the Sentencing Academy on areas in which further guidance was required, the expanded explanations cover this to a limited extent, and we would be able to pick up on related issues through any evaluation of those.

Research on protective and preventative orders

3.74 A member of the public called for this, saying this is *"An area of sentencing that has been neglected… I don't think that any research has been done into how frequently some of these orders are made/how effective they are".* This linked to their view that more guidance was needed in this area. This was flagged in the December Council paper, but was not considered a priority area.

A survey to identify areas for future guidance/ guidelines

3.75 More generally, the Sentencing Academy suggested that the Council should conduct a survey with judges and magistrates *"to help identify areas of sentencing law where there is a perceived need for greater guidance. This might take the form of a new guideline or the revision of an existing guideline".*

3.76 Given that the Council already has a full workplan going forward and is considering proposals for further guidance/ guidelines put forward more generally as part of the Vision consultation, we do not recommend putting in place such a survey.

Question 10: Does the Council agree that we have sufficient information on this and that a further survey is not necessary?

Collaborating with others and seeking external sources of funding

3.77 As highlighted several times, many of the issues presented above are extremely dependant on the resources available to the Council, particularly the staffing resources in the analytical team, and in the context that covering even our current work programme is becomingly increasingly problematic. Many responses acknowledged this. Accordingly, there were several respondents who felt that the Council could benefit from collaborating with external partners and/ or seeking funding from elsewhere.

Analysis of the impact of sentences on reducing reoffending, as well as understanding of victims' views about the process, could be appropriately carried out by academic institutions, YJB

The Council should continue to work alongside academics to apply for funding from research councils to support its research and analysis as this will increase its capacity to look at a range of priority issues and base the development of guidance on rigours research findings. Such external critical input from academics, adds a level of rigour and in turn public trust and support in the work of the Council, Carly Lightowlers

The Sentencing Council has conducted several seminars in conjunction with academic researchers, the last being in 2018 in conjunction with City Law School. We encourage the Council to continue this collaborative activity and the Sentencing Council could identify a list of research questions for which it is particularly interested in seeking answers…Sentencing Council support for research projects conducted by academics and other organisations could be key to unlocking philanthropic/research council funding, Sentencing Academy

3.78 As discussed in the November Council meeting, specifically in relation to research and analysis on diversity and equality issues, we are increasingly working with external academics and will continue to do so. We already endorse applications for research funding where applicable to the work of the Council (most recently in late 2020 we endorsed a project to look at disproportionality in sentencing amongst different ethnic groups and, subject to the Council's agreement, we plan to endorse a second similar project later in 2021). We are also strengthening our links with MoJ analysts and in the first week of March are attending a meeting to discuss future work with academics.

3.79 We also plan to continue our engagement with external academics/ organisations in the form of seminars and workshops. Our anniversary event would have been a good opportunity to do this, but unfortunately needed to be cancelled. The current plan – to convene a number of workshops on relevant issues over the course of this year - will, however, be an opportunity to engage more fully.

3.80 Again, as noted in November, enhancing our links with external organisations and collaborating on more work is not resource free and it will require some staffing resources. This was also flagged by Professor Padfield:

You should encourage more academic researchers to use your data. But remember that Universities are probably even more short of money than you are. And one risk with working with "external organisations" is the additional costs (e.g. huge data protection issues). Working with other organisations is of course a good thing – we all need critical friends, 'deconstructors', who can peel back our onion skins and challenge our ways of thinking – but it is not a way of saving money.

3.81 On balance, however, although collaboration with others requires some staffing resources, it does have the potential to provide access to data and generate findings without any financial input. We would therefore recommend that we invest time into having these wider discussions with external organisations and academics and to explore opportunities to collaborate on work/ obtain additional funding.

Question 11: Does the Council agree that the Office should invest the necessary time into enhancing our links with external organisations and academics and considering the opportunities for future collaborative work?

RISKS AND IMPACT

4.1 Whilst enhancing future data collections will be welcomed by other departments, organisations and academics, this is likely to require additional resources and it will be important not to raise expectations before securing this. The early scoping work on potential future approaches to data collection and methodologies for taking account of multiple offences will also require a relatively large amount of resource from the analysis and research team in the short to medium term. This will need to be taken into account when planning other work.

4.2 The other areas of work flagged for development will also require resource and it will be important that once we have indicative views from Council we look across the piece to ensure that we can effectively plan our resources for the forthcoming period.

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