Sentencing Council

Annex D

Consultation Stage Resource Assessment

Burglary Offences

Introduction

This document fulfils the Council's statutory duty to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services.[1]

Rationale and objectives for new guideline

In January 2012, the Sentencing Council's definitive *Burglary Offences* guideline came into force. As assessment of the guideline published in January 2016 found that sentencing severity had increased beyond what was expected for non-domestic burglary offences.[2] Sentences were also found to have increased beyond what was expected for aggravated burglary, although due to low volumes for this offence, the findings were less conclusive. A further assessment published in July 2017, found that the guideline may have contributed to increases in sentencing severity for all three burglary offences, although the increase in domestic burglary was within the expected range.[3]

In light of the assessment findings, the Council decided to update the guidelines. The Council also decided to bring the guidelines into line with the structure now used for most guidelines. Previously, there were two levels of culpability and two levels of harm, leading to a sentencing table with three starting points. In the draft guideline, there are now medium levels of culpability and medium levels of harm leading to nine possible starting points in the sentencing table.

The Council's aim in developing the guidelines has been to ensure that sentencing for these offences is proportionate to the offence committed and to promote a consistent approach to sentencing. It was accepted by the Council that sentencing levels had increased since the guideline came into force, and the draft revised guidelines have been developed with recent sentencing levels in mind.

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[1] Coroners and Justice Act 2009 section 127: www.legislation.gov.uk/ukpga/2009/25/section/127

[2] https://www.sentencingcouncil.org.uk/wp-content/uploads/Burglary-assessment.pdf

[3] https://www.sentencingcouncil.org.uk/wp-content/uploads/Burglary-further-assessment.pdf

Scope

As stipulated by section 127 of the Coroners and Justice Act 2009, this assessment considers the resource impact of the guidelines on the prison service, probation service and youth justice services. Any resource impacts which may fall elsewhere are therefore not included in this assessment.

This resource assessment covers the following offences:

- Non-domestic burglary, Theft Act 1968 (section 9);
- Domestic burglary, Theft Act 1968 (section 9);
- Aggravated burglary, Theft Act 1968 (section 10).

The *Burglary Offences* guidelines apply to sentencing adults only; they will not directly apply to the sentencing of children and young people.

Current sentencing practice

To ensure that the objectives of the guidelines are realised, and to understand better the potential resource impacts of the guidelines, the Council has carried out analytical and research work in support of it.

The intention is that the new guidelines will encourage consistency of sentencing and in the vast majority of cases will not change overall sentencing practice as it is currently. In order to develop a guideline that maintains current practice, knowledge of recent sentencing was required.

Sources of evidence have included the analysis of transcripts of judges' sentencing remarks, sentencing data from the Court Proceedings Database,[4] findings from the two burglary guideline assessments, Council members' experience of sentencing burglary cases and references to case law and news articles. Knowledge of the sentencing starting points, ranges and factors used in previous cases has helped the Council to create guidelines that should maintain current sentencing practice.

During the consultation stage, some small-scale research will be conducted with a group of sentencers, to check that the draft guidelines would work as anticipated. This research should also provide some further understanding of the likely impact of the guidelines on sentencing practice, and the subsequent effect on the prison population.

Detailed sentencing statistics for burglary offences covered by the draft guidelines have been published on the Sentencing Council website at the following link: http://www.sentencingcouncil.org.uk/publications/?type=publications&s=&cat=statistical-bulletin&topic=&year.

[4] The Court Proceedings Database (CPD), maintained by the Ministry of Justice (MoJ), is the data source for these statistics. Data on average custodial sentence lengths presented in this resource assessment are those after any reduction for guilty plea. Further information about this sentencing data can be found in the accompanying statistical bulletin and tables published here: http://www.sentencingcouncil.org.uk/publications/?s&cat=statistical-bulletin

Non-domestic burglary

Around 5,200 adults were sentenced for a non-domestic burglary offence in 2019. This number has been decreasing since 2011 when 8,500 adults were sentenced for this offence. Around 64 per cent of offenders were sentenced in magistrates' courts, the remaining 36 were sentenced in the Crown Court.

Just over half (55 per cent) of those sentenced for non-domestic burglary in 2019 were sentenced to immediate custody. A further 22 per cent and 17 per cent of adults received a community sentence and a suspended sentence respectively. The rest received a fine (2 per cent), a discharge (2 per cent) or were otherwise dealt with[5] (2 per cent).

The statutory maximum sentence for this offence is 10 years' custody. In 2019, the average custodial sentence length (ACSL)[6] was 11.3 months (after any reduction for a guilty plea).

Domestic burglary

Around 4,700 adults were sentenced for a domestic burglary offence in 2019. This has been sharply decreasing since a high of 11,100 in 2011. Around 87 per cent of offenders were sentenced in the Crown Court, the remaining 13 per cent were sentenced in magistrates' courts.

Around 77 per cent of those adults sentenced for domestic burglary in 2019 received an immediate custodial sentence. This was followed by 12 per cent receiving a suspended sentence and 9 per cent receiving a community sentence. The rest received a fine (less than 0.5 per cent), a discharge (1 per cent) or were otherwise dealt with[7] (2 per cent).

The statutory maximum sentence for this offence is 14 years' custody. The ACSL in 2019 was 28.6 months (after any reduction for a guilty plea).

Aggravated burglary

Around 190 adults were sentenced for an aggravated burglary in 2019. This is a reduction from 2011 when 320 adults were sentenced for the same offence. This offence is indictable only and therefore all offenders were sentenced in the Crown Court.

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[5] The category 'Otherwise dealt with' in this case includes: one day in police cells; hospital order; forfeiture of property; restraining order; a deferred sentence; compensation; and other miscellaneous disposals. Due to a data issue currently under investigation, there are a number of non-domestic burglary cases which are incorrectly categorised in the CPD as 'Otherwise dealt with'. The figures shown for 'Otherwise dealt with' should therefore be treated with caution.

[6] The average referred to in the text is the mean, which is calculated by adding all of the individual values and dividing the total by the number of values.

[7] The category 'Otherwise dealt with' in this case includes: one day in police cells; hospital order; compensation; restraining order; and other miscellaneous disposals. Due to a data issue currently under investigation, there are a number of domestic burglary cases which are incorrectly categorised in the CPD as 'Otherwise dealt with'. The figures shown for 'Otherwise dealt with' should therefore be treated with caution.

Nearly all (91 per cent) of the offenders received an immediate custodial sentence with the remaining 9 per cent 'otherwise dealt with'[8].

The statutory maximum sentence for this offence is life imprisonment. The ACSL in 2019 was 7.8 years (after any reduction for a guilty plea). Under 0.5 per cent of those sentenced in 2019 received an indeterminate sentence[9].

Key assumptions

To estimate the resource effect of a new guideline, an assessment is required of how it will affect aggregate sentencing behaviour. This assessment is based on the objectives of the new guideline and draws upon analytical and research work undertaken during guideline development. Additionally, in this case, findings from the two guideline evaluations have helped to inform guideline development. However, some assumptions must be made, in part because it is not possible precisely to foresee how sentencers' behaviour may be affected across the full range of sentencing scenarios. Any estimates of the impact of the new guideline are therefore subject to a substantial degree of uncertainty.

The resource impact of the new guideline is measured in terms of the change in sentencing practice that is expected to occur as a result of it. Any future changes in sentencing practice which are unrelated to the publication of the new guideline are therefore not included in the estimates.

In developing sentence levels for the different guidelines, existing guidance and data on current sentence levels has been considered.

While data exists on the number of offenders and the sentences imposed, assumptions have been made about how current cases would be categorised across the levels of culpability and harm proposed in the new guidelines, due to a lack of data available regarding the seriousness of current cases. Additionally, the draft guidelines have a medium level of culpability and a medium level of harm, which are not part of the current guideline, meaning that it is difficult to foresee how offences will map from the existing to draft guidelines. As a consequence, it is difficult to ascertain how sentence levels may change under the new guidelines.

It therefore remains difficult to estimate with any precision the impact the guidelines may have on prison and probation resources. To support the development of the guidelines and mitigate the risk of the guidelines having an unintended impact, interviews will be undertaken with sentencers during the consultation period, which will provide more information on which to base the final resource assessment accompanying the definitive guidelines.

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[8] The category 'Otherwise dealt with' in this case includes: otherwise dealt with on conviction (or finding of guilt). Due to a data issue currently under investigation, there are a number of aggravated burglary cases incorrectly categorised in the CPD as 'Otherwise dealt with'. The figures shown for 'Otherwise dealt with' should therefore be treated with caution.

[9] Adults sentenced to indeterminate sentences are not included in ACSL and sentence length figures.

Resource impacts

This section should be read in conjunction with the draft guidelines available at: http://www.sentencingcouncil.org.uk/consultations/.

Summary

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.

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.

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.

Non-domestic burglary

The assessment of the impact of the existing guideline for this offence found that average sentencing severity increased beyond the expected levels when the guideline came into force, suggesting that the guideline had had an unintended impact of increasing sentences. The Council considered the findings of this assessment, as well as findings from the further assessment which explored the possible reasons for the increases.

The existing guideline has two levels of culpability and two levels of harm, leading to three levels of seriousness in the sentence starting point and range table. This goes from a starting point of a medium level community order for the least serious offence up to a starting point of two years' custody for the most serious.

The draft guideline has three levels of culpability and three levels of harm, leading to nine possible starting points and ranges. This goes from a starting point of a band B fine for the least serious offences up to two years' custody as a starting point for the most serious offences.

The Council decided to look carefully at the top categories of culpability and harm within the guideline, to ensure that only the most serious offences lead to the highest sentences. Accordingly, some changes to the factors in these categories were made. The intention was not necessarily to maintain or to decrease sentences, but instead to ensure that proportionate sentences were imposed relative to the seriousness of the offence. The Council also decided that sentences at the lower end of offending could better address the causes of the offending behaviour. Therefore, it was decided to include a new reference to alcohol treatment requirements alongside the

existing reference to drug treatment requirements in the guideline, as alternatives to short or moderate custodial sentences in appropriate cases. It was acknowledged that this may lead to decreases in sentence severity in some cases at the lower end of offending, but is intended to help reduce future offending.

A number of changes have been made to the wording and placement of the factors in the guideline. For example, the culpability factor of 'member of a group or gang' has been re-worded to 'offence was committed as part of a group' and has been moved from step one of the guideline to step two. Also 'premises or victim deliberately targeted'[10] has been removed from the guideline factors. Several of the harm factors and aggravating and mitigating factors have also been re-worded, and the factor 'offence committed at night' has been removed from the aggravating factors.

An analysis of a small sample[11] of transcripts of Crown Court judges' sentencing remarks was undertaken to assess whether there might be any potential resource impact related to these changes. It should be noted that transcripts of judges' sentencing remarks are only available for offenders sentenced at the Crown Court. As around two thirds of offenders (64 per cent in 2019) are sentenced in magistrates' courts for this offence, this means that this transcript analysis covers only the most serious end of offending. Therefore, findings will not be representative of all offenders sentenced for this offence. Additionally, the sample analysed was fairly small, and is unlikely to have accounted for the full range of offending at the Crown Court, and so findings for this offence are tentative.

Based on this analysis of a small sample of cases, most of the changes in the draft guideline are not expected to result in an impact on prison or probation resources. Where a change in sentences was found, it was minimal in size, and where an increase in the sentence under the new guideline was observed for some cases, this was usually balanced out by a decrease of around the same magnitude in other cases.

One exception to this was for several cases where the judge had placed the offence within the higher culpability category under the existing guideline where one of the relevant factors was that the offender committed the offence as part of a group. Under the revised guideline, the analysis found that other higher culpability factors (such as 'significant planning was involved') would be taken into account in most cases to keep the offender within this higher culpability category. This suggests that this would not have an impact on sentences. However, different findings were found for domestic burglary (see later),[12] The impact of this change will therefore be explored in more detail as part of research planned for during the consultation.

As explained above, the small sample of transcripts analysed was mainly comprised of more serious offences, in particular those which judges had put into the highest harm categories. This means that it has not been possible at this stage to determine

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[10] The factor 'vulnerable victim' appears instead at step two under aggravating factors.

[11] A total of 15 transcripts were analysed for this offence, of which 9 transcripts covering 19 offenders contained enough detail to provide evidence of the possible impact of the revised guideline on sentences.

[12] Where similar changes were made to these factors in the domestic burglary guidelines, the analysis suggested that in some cases, the movement of this factor from step one to step two may lead to a lower culpability categorisation. However, while sentencers may take the 'offence committed as part of a group' aggravating factor into account at step two and increase the sentence, this may not fully offset the decrease in culpability.

the possible impact of the lower starting point for the lowest level of offending[13]. It is possible that sentences may decrease for the least serious offences, but without further evidence, it is not possible to determine this at this stage.

A few of the transcripts of sentencing remarks mentioned the offender having an issue with alcohol addiction. The text above the sentencing table in the existing guideline mentions that sentencers may choose a community order with a drug rehabilitation requirement (DRR) as an alternative to a custodial sentence where the offender is dependent on or has a propensity to misuse of drugs and there is sufficient prospect of success. The draft guideline has the same text but also mentions alcohol dependency/misuse and alcohol treatment requirements, which may lead to more community orders being given to those with alcohol dependency or misuse issues, leading to a possible decrease in sentencing severity in some cases. However, it has not been possible to estimate the impact of this change from the sample of sentencing remarks, as it was not possible to identify when this factor may be a sufficient reason to impose a community order instead of a custodial sentence, and it may be that community orders with alcohol treatment requirements are already being imposed whenever relevant. Additionally, as the transcripts covered the more serious end of offending for this offence, it may be that the relevant types of cases where this change could occur were just not present in the evidence used to inform this resource assessment.

Due to the small sample of transcripts and lack of cases falling into the lower harm categories, these issues will be explored further during the consultation stage. This will include research with sentencers, which will include offences at the lower end of seriousness as this is where most change to sentence starting points in the draft guideline, have been made.

Domestic burglary

The assessment of the impact of the existing guideline for this offence and the further assessment conducted to explore the evidence in more detail both concluded that sentencing severity had increased following the introduction of the guideline, although severity stayed within the bounds of the expected levels. The Council considered these findings and concluded that the higher sentences imposed under the existing guideline were proportionate to the seriousness of the offences. However, to bring the guideline into line with the Council's now standard structure and to revise some of the factors, the Council decided that a revision was still necessary.

The existing guideline has two levels of culpability and two levels of harm, leading to three levels of seriousness in the sentence starting point and range table. This goes from a starting point of a high level community order for the least serious offence up to a starting point of three years' custody for the most serious.

The draft guideline has three levels of culpability and three levels of harm, leading to nine possible starting points and ranges. This goes from the same starting point as

[13] The lowest starting point in the current guideline is a medium level community order whereas the lowest starting point is a Band B fine in the draft guideline.

the current guideline (high level community order for the least serious offences) up to again, the same starting point for the most serious offences (three years' custody).

A number of changes have been made to the wording and placement of the factors in the guideline. For example, similarly to the non-domestic burglary guideline, the culpability factor of 'member of a group or gang' has been re-worded to 'offence was committed as part of a group' and moved from step one of the guideline to step two. Several of the harm factors and aggravating and mitigating factors have also been re-worded. Text has been added above the sentencing table telling sentencers that sentences above the top of the range may be appropriate for cases of particular gravity.

An analysis of a small sample[14] of transcripts of Crown Court judges' sentencing remarks was undertaken to assess whether there might be any potential resource impact related to these changes. As the majority of offenders are sentenced at the Crown Court for this offence (87 per cent in 2019), it is expected that these transcripts are representative of most types of offending for this offence, except for those with the very lowest levels of seriousness. However, as this is a high-volume offence and the sample was small, it is unlikely that all types of offending have been captured within the analysis. Further research will be conducted during the consultation stage to better understand the possible impact of the guideline on sentencing.

Based on this analysis of a small sample of cases, most of the changes in the draft guideline are not expected to result in an impact on prison or probation resources. However, there were some exceptions.

The analysis found that in some cases, the movement of the factor related to group offending from step one to step two of the guideline could lead to a lowering of the culpability category under the draft guideline. Sentencers may take into account the relevant aggravating factor, but this may not fully offset any decrease to sentences caused by the lower culpability categorisation. There is not enough evidence at this stage to suggest that a decrease in sentences may occur as a result of this, but this will be explored in more detail as part of research planned for during the consultation.

A few of the transcripts of sentencing remarks mentioned the offender having an issue with alcohol addiction. The text above the sentencing table in the guideline has been revised in the same way as within the non-domestic burglary guideline, to capture dependency on or propensity to misuse alcohol. Similarly, this may lead to a greater use of community orders for this offence, but it has not been possible to estimate the impact of this from the sample of sentencing remarks.

Within the sample of transcripts, there were several cases which might fall under the definition of 'cases of particular gravity', and the text above the sentencing table advising sentencers that a sentence above the top of the range may be appropriate might apply in cases such as these. However, the sentence imposed in these cases was already above the top of the range, demonstrating that sentencers may already be sentencing in the way recommended by the additional wording. There is a possibility that in some cases, this is not currently happening, and so sentences may

[14] A total of 21 transcripts were analysed for this offence, of which 11 transcripts covering 14 offenders contained enough detail to provide evidence of the possible impact of the revised guideline on sentences.

increase, but any impact of this is likely to be minimal, as the evidence suggests that for the small proportion of cases where this text would apply, at least some if not many sentencers are already imposing more severe sentences.

As explained above, due to the small sample of transcripts, it is recommended that further analysis and research is undertaken during the consultation stage to better understand the possible impact of the revised guideline on sentences, and subsequently on prison and probation resources.

Aggravated burglary

The assessment of the impact of the existing guideline for this offence and the further assessment conducted to explore the evidence in more detail both concluded that sentencing severity had increased following the introduction of the guideline. However, as the volume of offenders sentenced for this offence is relatively low, the findings needed to be treated with caution. The Council considered these findings and concluded that the higher sentences imposed under the existing guideline were proportionate to the seriousness of the offences. However, to bring the guideline into line with the Council's now standard structure and to revise some of the factors, the Council decided that a revision was still necessary.

The existing guideline has two levels of culpability and two levels of harm, leading to three levels of seriousness in the sentence starting point and range table. This goes from a starting point of two years' custody for the least serious offence up to a starting point of 10 years' custody for the most serious.

The draft guideline has three levels of culpability and three levels of harm, leading to nine possible starting points and ranges. This goes from the same starting point as the current guideline (two years' custody for least serious offences) up to again, the same starting point for most serious offences (10 years' custody).

In addition to the structural changes, a number of changes have been made to the culpability factors. The factors 'weapon present on entry' and 'member of a group or gang' have been moved from step one to step two (aggravating factors) and re-worded. 'Equipped for burglary' has been removed from all steps of the guideline and 'use of face covering or disguise' has been added to step two (aggravating factors).

An analysis of a small sample[15] of transcripts of Crown Court judges' sentencing remarks was undertaken to assess whether there might be any potential resource impact related to these changes. As all offenders are sentenced at the Crown Court for this offence, the sample should represent the full range of offending, although, as with the burglary offences covered earlier, it is possible that some types of offending have not been captured by these transcripts as the sample is small.

Based on this analysis of a sample of cases, the movement of the 'weapon present on entry' factor may mean some cases are put into a lower level of culpability at step one, when under the existing guideline they were put into higher culpability. In three of the transcripts analysed, the removal of this factor from step one was not balanced out by taking into account 'weapon carried when entering premises' as an aggravating factor and instead led to a lower final sentence. However, in the majority

[15] A total of 20 transcripts were analysed for this offence, of which 13 transcripts covering 20 offenders contained enough detail to provide evidence of the possible impact of the revised guideline on sentences.

of transcripts analysed, the culpability stayed at the same level due to the 'significant degree of planning' factor being present in the case. The factor 'Violence used or threatened against the victim, particularly involving a weapon' has remained within the high harm box and will also keep these cases within the higher end of the sentencing table. Therefore, the evidence suggests that the movement of this factor ('weapon present on entry') will not have an effect on the final sentence in most cases. There may be a decrease in sentences in a small proportion of cases where this factor is present. The analysis for domestic burglary found that the movement of the factor 'offence was committed as part of a group' from step one to step two may lead to lower categorisations of culpability. However, the analysis for aggravated burglary did not suggest a similar finding: there seemed consistently to be enough other culpability factors available in the revised guideline to maintain a high level of culpability for those offenders previously placed in higher culpability. Therefore, for this offence, categorisations of culpability are not expected to decrease. Given that this finding has not been consistent across the three burglary offences, this will be explored in more detail as part of research that will be conducted during the consultation, and may provide further evidence for the final resource assessment.

Further research will be conducted during the consultation stage to explore in more detail the possible impact of the guideline on sentences and subsequently on prison and probation resources.

Risks

Risk 1: The Council's assessment of current sentencing practice is inaccurate

An important input into developing sentencing guidelines is an assessment of current sentencing practice. The Council uses this assessment as a basis to consider whether current sentencing levels are appropriate or whether any changes should be made. Inaccuracies in the Council's assessment could cause unintended changes in sentencing practice when the new guidelines comes into effect.

This risk is mitigated by information that is gathered by the Council as part of the guideline development and consultation phase. This includes providing case scenarios as part of the consultation exercise which are intended to test whether the guidelines have the intended effect and inviting views on the guidelines. However, there are limitations on the number of factual scenarios which can be explored, so the risk cannot be fully eliminated.

Risk 2: Sentencers do not interpret the new guideline as intended

If sentencers do not interpret the guidelines as intended, this could cause a change in the average severity of sentencing, with associated resource effects.

The Council takes a number of precautions in issuing new guidelines to try to ensure that sentencers interpret them as intended. Sentencing ranges are agreed on by considering sentencing data in conjunction with Council members' experience of sentencing. Transcripts of sentencing remarks for 56 cases have also been studied to ensure that the guidelines are developed with current sentencing practice in mind. Research with sentencers carried out during the consultation period should also

enable issues with implementation to be identified and addressed prior to the publication of the definitive guidelines.

Consultees can also feed back their views of the likely effect of the guidelines, and whether this differs from the effects set out in the consultation stage resource assessment. The Council also uses data from the Ministry of Justice to monitor the effects of its guidelines.

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