

21 January 2022

Dear Members

## Meeting of the Sentencing Council – 28 January 2022

The next Council meeting will be held via Microsoft Teams, the link to join the meeting is included below. **The meeting is Friday 28 January 2022 from 9:30 to 14:45.** 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(22)JAN00 |
| ▪ Minutes of meeting held on 17 December | SC(21)DEC01 |
| ▪ Burglary                               | SC(22)JAN02 |
| ▪ Guideline priorities                   | SC(22)JAN03 |
| ▪ Miscellaneous guideline amendments     | SC(22)JAN04 |
| ▪ Totality                               | SC(22)JAN05 |
| ▪ Perverting the Course of Justice       | SC(22)JAN06 |
| ▪ Sexual Offences                        | SC(22)JAN07 |

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

**28 January 2022**

**Virtual Meeting by Microsoft Teams**

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|---------------|---|
| 09:30 - 09:45 | Minutes of the last meeting and matters arising (paper 1)             |
| 09:45 - 10:45 | Burglary - presented by Mandy Banks (paper 2)                         |
| 10:45 - 11:00 | Break   |
| 11:00 - 11:30 | Guideline priorities – presented by Steve Wade (paper 3)              |
| 11:30 - 12:00 | Miscellaneous guideline amendments – presented by Ruth Pope (paper 4) |
| 12:00 - 12:15 | Totality – presented by Ruth Pope (paper 5)                           |
| 12:15 - 12:45 | Lunch   |
| 12:45 - 13:45 | Perverting the Course of Justice - presented by Mandy Banks (paper 6) |
| 13:45 - 14:45 | Sexual Offences - presented by Ollie Simpson (paper 7)                |

# Sentencing Council

## COUNCIL MEETING AGENDA

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## MEETING OF THE SENTENCING COUNCIL

17 DECEMBER 2021

### MINUTES

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<u>Members present:</u>	Tim Holroyde (Chairman) Rosina Cottage Rebecca Crane Rosa Dean Nick Ephgrave Michael Fanning Diana Fawcett Adrian Fulford Max Hill Jo King Juliet May Maura McGowan Alpa Parmar Beverley Thompson
<u>Representatives:</u>	Elena Morecroft for the Lord Chief Justice (Legal and Policy Advisor to the Head of Criminal Justice) Claire Fielder for the Lord Chancellor (Director, Youth Justice and Offender Policy)
<u>Observers:</u>	Eliot Porritt, Metropolitan Police Lynette Woodrow, Crown Prosecution Service
<u>Members of Office in attendance:</u>	Steve Wade Mandy Banks Lisa Frost Ruth Pope Ollie Simpson

## **1. MINUTES OF LAST MEETING**

- 1.1 The minutes from the meeting of 19 November 2021 were agreed.

## **2. MATTERS ARISING**

- 2.1 The Chairman welcomed Zeinab Shaikh a new member of the team who has joined as a senior policy officer.

## **3. DISCUSSION ON BURGLARY – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL**

- 3.1 The Council considered consultation responses relating to harm factors across the three guidelines. The Council agreed to a number of amendments to factors in response to suggestions by respondents. The Council also looked at responses regarding proposed sentence levels for non-domestic burglary, and agreed to some small changes at the lower end of the sentencing table.
- 3.2 Next month the Council will look at sentence levels for the other two burglary offences, and aggravating and mitigating factors across all three guidelines.

## **4. DISCUSSION ON MISCELLANEOUS GUIDELINE AMENDMENTS – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**

- 4.1 The Council considered the responses to the consultation. The Council agreed to amend and expand the wording relating to the court's powers on breach of a sexual harm prevention order in accordance with suggestions from consultees. A small addition to the wording relating to confiscation was also agreed.
- 4.2 The Council discussed the responses in relation to changes to the Domestic abuse guideline and agreed wording to clarify the scope of that guideline.

## **5. DISCUSSION ON MOTORING – PRESENTED BY LISA FROST, OFFICE OF THE SENTENCING COUNCIL**

- 5.1 The Council finalised draft culpability factors for careless driving offences, agreeing an additional factor at medium culpability for driving a vehicle where visibility or controls are obstructed.
- 5.2 The Council discussed issues related to the development of enhanced guidance for drug driving offences. The Council considered a range of information which highlighted the lack of evidence available to provide for development of drug driving guidelines which specify the level of

drug at which a driver's impairment worsens. The Council also noted evidential issues which would cause the operation of a guideline specifying drug levels to be problematic.

5.3 The Council agreed to monitor the development of work being undertaken by the Department of Transport in respect of drug driving to identify if further evidence becomes available in the future. In the interim it was agreed that a previously developed guideline for the section 5A offence of driving or being in charge with specified drug above specified limit should be included in the consultation for motoring offences.

5.4 Finally, the Council agreed the approach to assessing culpability for careless driving when under the influence of drink or drugs. The approach to assessing the seriousness of drugs and alcohol in this offence was agreed, and it was decided that any deliberate failure to provide a specimen for analysis should be assessed at the highest level of culpability.

**6. DISCUSSION ON ANIMAL CRUELTY – PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL**

6.1 The Council discussed amendments to be made to the existing magistrates' sentencing guideline for failure to provide for the welfare of an animal (section 9 of the Animal Welfare Act 2006), consequential to amendments made to the guideline for other animal cruelty offences (ss4-8 of the 2006 Act).

**7. DISCUSSION ON UNDERAGE SALE OF KNIVES – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**

7.1 The Council discussed culpability and harm factors and it was decided to seek clarification from police and trading standards on the issue of the sale of multiple knives by online retailers before these factors were agreed.

7.2 Sentence levels for organisations were discussed. The Council agreed that these should be proportionate to those for other offences of similar gravity and generally would be higher than sentences currently being passed.

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# Sentencing Council

**Sentencing Council meeting:** 28 January 2022  
**Paper number:** SC(22)JAN02 – Burglary Revision  
**Lead Council member:** Rebecca Crane  
**Lead officials:** Mandy Banks  
0207 071 5785

## 1 ISSUE

1.1 This is the third meeting to discuss the burglary guideline post consultation. There is one further scheduled meeting to sign off the definitive guideline and consider the resource assessment in March. The guideline will then be published in May and come into force in July. It is necessary to adhere to this timetable due to the data collection starting in the courts in the Autumn.

1.2 This meeting will focus on looking at responses relating to aggravating and mitigating factors across all three guidelines and continue considering sentence levels across the three guidelines. The changes agreed to the harm factors at the last meeting can be seen in track changes within the guidelines.

## 2 RECOMMENDATION

2.1 That the Council:

- Considers the responses relating to aggravating and mitigating factors
- Agrees to reword the aggravating factor regarding weapon carried
- Continues considering issues regarding sentence levels

## 3 CONSIDERATION

### *Aggravating and mitigating factors*

3.1 Three magistrates' benches asked for '*offence committed at night*' to be included within the non-domestic burglary guideline. In the consultation it was an aggravating factor within both aggravated and domestic burglary, but not non-

domestic burglary. In the original guideline there was an aggravating factor of *'offence committed at night especially where staff present or likely to be present'*. This factor was not included at consultation as there was a reference at step one of *'victim on the premises (or returns) while offender present.'* However, it is the reference to the offence occurring at night that these consultees felt was important, they commented that those present at night in non-domestic premises often have less support, with fewer staff on, sometimes working alone, hence aggravating the overall effect of the offence.

3.2 The Justice Committee (JC) questioned why *'use of a face covering or disguise'* was only an aggravating factor in aggravated burglary, and not in the other two guidelines.

***Question 1: Does the Council wish to add 'offence committed at night' to non-domestic burglary?***

***Question 2: Does the Council wish to add 'use of a face covering or disguise' to domestic and non-domestic burglary?***

3.3 The JCS suggested that there should be an additional aggravating factor of *'presence of a child, especially where used to facilitate the commission of an offence'*, in relation to distraction burglaries. Rory Kelly, an academic, suggested a number of additional aggravating and mitigating factors:

- *Stealing, attempting or intending to steal goods to order*
- *Attempts to conceal/dispose of evidence*
- *Offender motivated by revenge*
- *Self-reporting*
- *Co-operation with the investigation/early admissions*

It is not clear how often these factors may apply, particularly the presence of child factor. It may be appropriate not to include that factor as the list is non-exhaustive and courts could take it into account where appropriate. The other factors are more standard, the first three appear in the general theft guideline, and the mitigating factors are standard ones, therefore it may be more appropriate to add these to the guideline.

***Question 3: Does the Council agree not to include the presence of a child factor but include the rest in the list above?***

3.4 The Chief Magistrate and Council of Her Majesty's Circuit Judges questioned the inclusion of '*delay since apprehension*' as a mitigating factor, stating they did not think this was an appropriate factor to include. This was a mitigating factor in the original guideline, although it was '*lapse of time since the offence where this is not the fault of the offender*'. Some newer guidelines have '*delay since apprehension*' as a factor, and others don't, so its inclusion is decided on a guideline by guideline basis. There is an expanded explanation for this factor which explains it more fully. The Council did discuss this factor previously and had some reservations about its inclusion, so it may be appropriate to remove it.

**Question 4: Does the Council wish to remove '*delay since apprehension*'?**

3.5 Turning now specifically to the aggravated burglary guideline, attached at **Annex A**. The Council may recall that it was decided to move the '*weapon present on entry*' factor in culpability to become an aggravating factor. This was due to concerns around double counting, following *R v Sage*<sup>1</sup>. To assist sentencers to decide whether or not the factor applied, text was provided in a drop down box, shown here in print form on page four of **Annex A**. This movement of the factor and additional guidance was supported by consultation respondents, including CPS, CLSA, JCS, and HM Council of District Judges. The Council of HM Circuit Judges also agreed but commented that where a particularly dangerous weapon is used/carried to the property, then this should be a further aggravating factor

3.6 However, the results from the road testing (page five of **Annex B**) show that the additional guidance in the drop down box was misunderstood. Nine Judges sentenced scenario C, five out of the nine Judges incorrectly applied it as an aggravating factor, and two incorrectly applied it at step one. Only two correctly applied the guidance. In this case as it was a s.9(1)(a) offence, intent to steal, having a weapon present on entry was an essential element of the offence, so it should not have been taken into account a second time. When the expanded explanation text was pointed in the interviews Judges took note, however some Judges still chose to apply the factor in order to make an assessment of the dangerousness of the weapon. Although this was a small scale exercise, with nine Judges, the results of the road testing are never the less concerning.

3.7 Rebecca, the guideline lead, and the Chairman have discussed these findings prior to the meeting, and propose alternative, simplified wording than that consulted on. The aggravating factor would become: '*In a s.9(1)(b) offence, weapon*

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

carried when entering premises'. Then in a drop down box the additional information would read:

*'This factor does not apply to s.9(1)(a) offences because it is an inherent part of such offences: see AG's Ref Sage [2019] EWCA Crim 934, [2019] 2 Cr App (S) 50. In s9(1)(b) offences, however, the fact that the offender had taken a weapon to the premises, and was in possession of it when entering, will normally aggravate the offence.'*

3.8 It is also proposed to remove the reference to a weapon within the harm factor at step one, *'violence used or threatened against the victim, particularly involving a weapon'*, so it would just read: *'violence used or threatened against the victim'*. The dangerousness of the weapon used was raised by some Judges in road testing and by the Council of HM Circuit Judges, however it is suggested that the aggravating factors do not reference this, as it may over complicate the issue. As the list of aggravating factors is not exhaustive sentencers could take the dangerousness of the weapon into account when applicable.

***Question 5: Does the Council agree to reword the aggravating factor involving a weapon in the way proposed?***

***Question 6: Does the Council agree to remove the reference to a weapon at step one?***

3.9 At the last meeting the Council discussed the response from English Heritage which asked that a harm factor of *'loss or damage caused to heritage and/or cultural assets'* be included at step one. The Council asked that the guidelines be checked to see if this factor occurs elsewhere at either step one, or at step two. This has been done. The factor is a step 2 aggravating factor of *'damage caused to heritage and/or cultural assets'* within:

- Criminal damage
- Arson
- Arson/criminal damage with intent to endanger life or reckless as to whether life was endangered

It occurs at step one in harm as *'damage to heritage assets'* in:

- Handling stolen goods
- General Theft

It may be more appropriate to add this as a step one factor for these guidelines as it

is an acquisitive crime like theft, so the loss of irreplaceable items should be captured within harm at step one. It is suggested it goes into category two harm.

***Question 7: Does the Council agree to add ‘loss or damage caused to heritage and/or cultural assets’ at step one harm?***

3.10 Turning now to sentence ranges, firstly non-domestic burglary at **Annex C**. At the last meeting the Council agreed to make some increases at the lower end of the table, as shown in the table below, specifically to C2, C3 and B3. This was because some respondents thought the gap between the starting points of C1 and C2 was too great. The comments from the Chief Magistrate were also considered, that compared to the sentences for going equipped, the sentences consulted on were too low. However, Rebecca has requested that we consider those decisions again, this time reflecting on the Council’s rationale for setting the sentence ranges at consultation. Sentencing data for this offence can be seen at tabs 1.1-1.8 of **Annex D** and shows that the average custodial sentence length (ACSL) was 10.6 months, 74 per cent of offenders receive sentences of one year or less, and only one per cent receive sentences above five years, the top of the range.

**Changes made at the last meeting to the non -domestic guideline**

Harm	Culpability		
	A	B	C
<b>Category 1</b>	<b>Starting Point</b> 2 years’ custody <b>Category Range</b> 1 -5 years’ custody	<b>Starting Point</b> 1 years’ custody <b>Category Range</b> High level community order - 2 years’ custody	<b>Starting Point</b> 6 months custody <b>Category Range</b> Medium level community order – 1 years’ custody
<b>Category 2</b>	<b>Starting Point</b> 1 years’ custody <b>Category Range</b> High level community order - 2 years’ custody	<b>Starting Point</b> 6 months custody <b>Category Range</b> Medium level community order – 1 years’ custody	<b>Starting Point</b> High level community order <b>Category Range</b> Low level community order – 6 months custody
<b>Category 3</b>	<b>Starting Point</b> 6 months custody <b>Category Range</b> Medium level community order - 1 years’ custody	<b>Starting Point</b> High level community order <b>Category Range</b> Low level community order- 6 months custody	<b>Starting Point</b> Medium level community order <b>Category Range</b> Band B fine –High level community order

3.11 At consultation, the Council set out the findings of the evaluation of the original [guideline](#), which had shown some unanticipated increases in sentence severity. Accordingly, some changes were made at the lower end of the sentencing range, to slightly decrease the sentence ranges, to assist in the appropriate sentence being given for low level offences. The sentence ranges consulted on can be seen below.

**Consultation version of the non- domestic guideline**

Harm	Culpability		
	A	B	C
<b>Category 1</b>	<b>Starting Point</b> 2 years' custody <b>Category Range</b> 1 -5 years' custody	<b>Starting Point</b> 1 years' custody <b>Category Range</b> High level community order - 2 years' custody	<b>Starting Point</b> 6 months custody <b>Category Range</b> Medium level community order – 1 years' custody
<b>Category 2</b>	<b>Starting Point</b> 1 years' custody <b>Category Range</b> High level community order - 2 years' custody	<b>Starting Point</b> 6 months custody <b>Category Range</b> Medium level community order – 1 years' custody	<b>Starting Point</b> Medium level community order <b>Category Range</b> Low -high level community order
<b>Category 3</b>	<b>Starting Point</b> 6 months custody <b>Category Range</b> Medium level community order - 1 years' custody	<b>Starting Point</b> Medium level community order <b>Category Range</b> Low – high level community	<b>Starting Point</b> Band B fine <b>Category Range</b> Discharge – Low level community order

3.12 Rebecca is concerned that in making any changes to the sentence levels consulted on, the Council should be mindful of the impact any changes would have, and to reflect on the rationale for setting the ranges at consultation. So that the ranges are not lower than those in going equipped, but are not increased as much as agreed at the last meeting, Rebecca proposes that in C3, the starting point could just be raised to a lower level community order, instead of a medium level community order, with the range a band B fine to a medium level community order. In addition, since there was rationale in the large gap between C1 and C2 at consultation, there is justification for leaving the ranges as they are, with a starting point of 6 months custody in C1, and a medium level community order in C2 and B3.

**Question 8: Does the Council wish to revise the decisions made at the last meeting and leave the starting point of C2 as a medium level community order?**

**Question 9: Does the Council wish to reconsider the changes at C3, so the starting point is a lower level community order, with the range a band B fine to a medium level community order.**

3.13 Turning now to the sentence levels for domestic burglary, at **Annex E**. Sentencing data can be seen at tabs 2.1 to 2.8 of **Annex D** and show that in 2020 the mean ACSL is two years four months, 91 per cent of offenders received a sentence of four years or less, and two per cent received sentences above six years, the top of the range. At the last meeting the Council agreed to remove the wording above the sentence table: *'for cases of particular gravity, sentences above the top of the range may be appropriate'*. Also at the last meeting the Council discussed whether or not there should be any increases to the top of the range in A1, as some respondents and some Judges at road testing thought the ranges and starting points were too low, particularly at A1.

3.14 To summarise the responses, one Judge commented that all the starting points and ranges were too low, and that he believed most Judges thought this, and that the reason why only 2 per cent of cases went above the top of the existing range was due to fear of the case being appealed if they sentenced above the range, which they may have wished to. Another judge and a magistrate bench thought the starting point for A1 was far too low, that it should be far closer to the statutory maximum. The JC also queried the large gap between the top of the range and the statutory maximum. The Judge thought the starting point should be nearer six years in a range of three - nine years. A barrister also said that the starting point in A1 was too low at three years, and it would lead to too many suspended sentences being given.

3.15 Another magistrate thought that all the sentences should be increased by one level. The JC thought the gap between the starting points in C2 and C3 was too great, at 1 year's custody and a high level community order, they suggested that the starting point in C3 should be six months' custody to reflect the seriousness of domestic burglary. The Council of Circuit Judges thought the ranges were too low, but with the additional wording above the table *'for cases of particular gravity'* etc, that it worked (although this wording is now being removed). In contrast, PRT thought there should be more community orders available within the table, and the MA

queried the ranges in A3/B2/C1, saying that they were higher than the equivalent in [the existing guideline](#), and asked if this was deliberate.

3.16 In road testing, a number of Judges felt from past experience that the area was under sentenced, and felt the proposed levels were too low, especially in A1. Alternative ranges of three to ten years with a starting point of four years, and four to eight years with a starting point of five years were suggested.

3.17 Before any decisions were made the Council asked that further work be carried out to look at the impact of making any of the changes to sentence levels of the various options suggested at the meeting. This has been done and is shown below. Also considered as part of this analysis was the estimated and actual impact of the original guideline published in 2012. Council may recall that there was unexpected increase in sentence severity following the publication of the guideline, although this was mainly seen in relation to non-domestic burglary, but it is thought that the domestic burglary guideline may have had a slight effect on increasing sentence severity. Given that this is revision of an existing guideline there may be an increased focus on the stated impact of the revised guideline. It is also worth noting here that the sentence levels of the original guideline were maintained at consultation, and not decreased, and that domestic burglary is a reasonably high-volume offence, with 3,700 offenders sentenced in 2020.

3.18 The Burglary resource assessment (published in October 2011) stated that the Burglary guideline would have no impact on prison places and resources. The Burglary guideline assessment (published in July 2017) stated:

‘For domestic burglary there has been a shift towards more severe sentences. However, this was anticipated and appears to be part of a long-term trend, and therefore unlikely to be as a result of the release of the guideline.’

Additional analysis of domestic burglary data has shown that the guideline may have had a slight effect on increasing severity for these offences: more offenders are now placed in category 1; the custody rate in category 1 has been increasing; and greater harm/higher culpability factors are taken into account more often than their counterparts.

3.19 The Burglary offences draft resource assessment (published June 2021) stated in the rationale and objectives section:



'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.'

In relation to domestic burglary, the resource impacts section stated:

'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. 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 domestic burglary guideline on sentences, and subsequently on prison and probation resources. '

3.20 Transcript analysis from the draft stage was available to use with this modelling. The majority of offenders sentenced for domestic burglary and all offenders for aggravated burglary are sentenced at Crown Court, so the transcripts should be representative of the majority of offending. However, the sample of domestic and aggravated burglary transcripts containing enough details for resentencing was extremely low (14 offender transcripts for domestic burglary compared to 5,100 offenders sentenced in 2018<sup>2</sup> and 20 offender transcripts for aggravated burglary compared with 170 offenders sentenced in 2018). Therefore, it was decided that any analysis using these volumes would not be robust enough on its own. Instead, pre-guilty plea estimates from the Court Proceedings Database (CPD) were used to compare the different options and to give an idea of the relative impacts.

A number of assumptions have been made for this analysis:

- Since the guideline sentence tables are developed with pre-guilty plea sentences, the estimated pre-guilty plea custodial sentence lengths from the CPD were used

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<sup>2</sup> 2018 is used as the comparison year for these volumes as this is the year in which sentencing occurred that the transcript sample was taken from. The impact calculations use 2019 instead since this is the most recent year of data for which volumes were not potentially impacted by the COVID-19 pandemic.

instead. These are calculated using an algorithm to estimate what the pre-guilty plea sentence could be, using the known final sentence and proportions from the CCSS, since guilty plea details are not available in the CPD.

The aggregate impacts give an indication of the pre-guilty plea sentence levels, but these estimates are not reliable on an individual case level.

- The CPD does not include detail on the offence categorisation e.g. A1. Therefore, when it comes to modelling the impacts of changes to cases falling within A1, the scope of these impacts have been assumed based on the length of the pre-guilty plea custodial sentence alone.

An offender receiving a sentence of four years pre-guilty plea could have been categorised as A1 but they also could have been categorised as an A2 or B1.

However, since four years' custody is above the starting point for category A1, this case would be included in the scope of potential impacts regardless.

**Table 1:** comparison of impacts of options for increasing sentence levels for domestic burglary

Option	Impacts	Assumption
1 – No change	No impacts.	No changes to sentence levels from current draft.
2 – Increase top of A1 range by 2 years (from 6 to 8)	<ul style="list-style-type: none"> <li>• At least 7 per cent of adult offenders (around 260) could get a custodial sentence 2 years longer. Findings consistent with transcript analysis where 1/14 transcripts (7 per cent) were categorised as A1 receiving exactly the top of range.</li> <li>• Further 38 per cent (1,300) could also be in scope of increase of up to 2 years who currently receive above starting point but below top of range.</li> <li>• Further 5 per cent (160) could also be in scope of increase of up to 2 years who currently receive above top of current category range but below top of new range.</li> <li>• <b>Total: 49 per cent of adult offenders (around 1,800)</b></li> </ul>	<ul style="list-style-type: none"> <li>• Assumes all offenders previously receiving a pre-GP sentence at top of category range (5-6 years) get 2 years longer</li> <li>• Assumes offenders with pre-GP sentence between starting point (3-4 years) and top of category range (5-6 years) could get 2 years longer.</li> <li>• Assumes offenders currently receiving pre-GP sentence above 6 but less than 8 years could get 2 years longer.</li> </ul>
3 – Increase top of A1 range by 1 year (from 6 to 7 years)	<ul style="list-style-type: none"> <li>• At least 7 per cent of adult offenders (around 260) could get a custodial sentence 1 year longer.</li> <li>• Further 38 per cent (1,300) could also be in scope of increase of up to 1 year who currently receive above starting point but below top of range.</li> <li>• Further 3 per cent (100) could also be in scope of increase of up to 1 year who currently receive above</li> </ul>	<ul style="list-style-type: none"> <li>• Assumes all offenders previously receiving a pre-GP sentence at top of category range (5-6 years) get 1 year longer</li> <li>• Assumes offenders with pre-GP sentence between starting point (3-4 years) and top of category range (5-6 years) could get 1 year longer.</li> </ul>

	<p>top of current category range but below top of new range.</p> <ul style="list-style-type: none"> <li>• <b>Total: 48 per cent of adult offenders (around 1,700)</b></li> </ul>	<ul style="list-style-type: none"> <li>• Assumes offenders currently receiving pre-GP sentence 6-7 years could get 1 year longer.</li> </ul>
<p>4 – As with option 2 but also increase starting point for A1 by 2 years (from 3 to 5)</p>	<ul style="list-style-type: none"> <li>• At least 45 per cent of adult offenders (around 1,600) could get a custodial sentence 2 years longer. Findings consistent with transcript analysis where 7/14 offenders were categorised as A1.</li> <li>• Further 5 per cent (160) could also be in scope of increase of up to 2 years who currently receive above top of current category range but below top of new range.</li> <li>• Further 17 per cent (600) receiving between bottom of range and starting point currently could also be in scope of increase of up to 2 years.</li> <li>• <b>Total: 66 per cent of adult offenders (around 2,400)</b></li> </ul>	<ul style="list-style-type: none"> <li>• Assumes all offenders with pre-GP sentence higher than current starting point (3-4 years) and up to top of current category range (5-6 years) will get up to 2 years longer.</li> <li>• Assumes offenders currently receiving pre-GP sentence above 6 but less than 8 years could get 2 years longer.</li> <li>• Assumes offenders receiving pre-GP sentence between bottom of range and current starting point (2-3 years) could get 2 years longer. Please note it is likely that a high proportion of offenders currently receiving a pre-GP sentence in this bracket are not A1.</li> </ul>
<p>5 – Same as option 4 but increasing all other sentences proportionately</p>	<ul style="list-style-type: none"> <li>• At least as much impact as option 4 but possibly all offenders in scope of some increase since all categories except C3 have a starting point of custody. 1/14 offenders in the domestic burglary transcript sample was categorised as C3.</li> </ul>	

Source: Court Proceedings Database (2019 data)

3.21 The Council can see from this analysis that there could be a considerable impact in implementing any of the options above, except for option one. In the response to consultation the Council would need to set out the reasons for making any increases to levels, given the potential impact and the fact that the guideline consulted on already incorporated the increase in sentence severity from the original guideline. The Council would need to explain why it thought the levels were still too low and what had happened since setting the levels for consultation to merit increases. As noted above, some respondents felt the levels were too low, but it was not an overwhelming majority of respondents that thought so.

**Question 10: In light of the analysis above, does the Council wish to make any changes to sentence levels? If so, what are the reasons for doing so?**

*Aggravated burglary*

3.22 The guideline is attached at **Annex A**. Sentencing data can be seen at tabs 3.1 to 3.8 and show that the mean ACSL in 2020 is seven years two months, 89 per cent of offenders received sentences of 10 years or less, and only two per cent

received a sentence above 12 years. The vast majority of respondents agreed with the proposed sentence levels, with just one Judge saying he thought the levels were too low and the starting point should be closer to the top of the range. In road testing, the majority of the Judges were comfortable with the proposed sentence levels. At the last meeting the Council asked that further work be carried out to consider the impact of making any increases to the ranges. This has been done and is shown below.

3.23 Volumes for aggravated burglary are much lower, with around 200 offenders sentenced in both 2019 and 2020. The 2011 Resource Assessment had forecasted that no change in sentencing severity would occur as a result of the original guideline. The evaluation of the original guideline showed that there was an increase in sentence severity for these offences following the introduction of the guideline, and it was thought that the increase was attributable to the guideline; custodial sentence lengths increased and a higher proportion of offenders were placed in category one. However, these findings need to be treated with caution due to the low numbers involved.

**Table 2:** comparison of impacts of options for increasing sentence levels for aggravated burglary

Option	Impacts	Assumption
1 – No change	No impacts.	No changes to sentence levels from current draft.
2 – Increase top of A1 range by 2 years (from 13 to 15)	<ul style="list-style-type: none"> <li>At least 2 per cent of adult offenders (fewer than 5) could get a custodial sentence 2 years longer. In transcript analysis no offenders received exactly 13 years' custody pre-GP, but in 13/20 transcripts the offender was categorised as A1.</li> <li>Further 27 per cent (around 50) could also be in scope of increase of up to 2 years who currently receive above starting point but below top of range.</li> <li>Further 8 per cent (around 10) could also be in scope of increase of up to 2 years who currently receive above top of current category range but below top of new range.</li> <li><b>Total: 36 per cent of adult offenders (around 60)</b></li> </ul>	<ul style="list-style-type: none"> <li>Assumes all offenders previously receiving a pre-GP sentence at top of category range (12-13 years) get 2 years longer</li> <li>Assumes offenders with pre-GP sentence between starting point (10-11 years) and top of category range (12-13 years) could get 2 years longer.</li> <li>Assumes offenders currently receiving pre-GP sentence above 13 but less than 15 years could get 2 years longer.</li> </ul>
3 – Increase top of A1 range by 1 year (from 13 to 14 years)	<ul style="list-style-type: none"> <li>At least 2 per cent of adult offenders (fewer than 5) could get a custodial sentence 1 year longer.</li> <li>Further 27 per cent (around 50)</li> </ul>	<ul style="list-style-type: none"> <li>Assumes all offenders previously receiving a pre-GP sentence at top of category range (12-13 years) get 1 year longer</li> </ul>

	<p>could also be in scope of increase of up to 1 year who currently receive above starting point but below top of range.</p> <ul style="list-style-type: none"> <li>• Further 5 per cent (around 10) could also be in scope of increase of up to 1 year who currently receive above top of current category range but below top of new range.</li> <li>• <b>Total: 34 per cent of adult offenders (around 60)</b></li> </ul>	<ul style="list-style-type: none"> <li>• Assumes offenders with pre-GP sentence between starting point (10-11 years) and top of category range (12-13 years) could get 1 year longer.</li> <li>• Assumes offenders currently receiving pre-GP sentence 13-14 years could get 1 year longer.</li> </ul>
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3.24 The Council can see that there could be a considerable impact if either option two or three was implemented. The majority of consultation respondents were content with the proposed sentence levels, so the Council would need to articulate in the consultation response document the reasons for any increase to sentence levels.

**Question 11: In light of this analysis, does the Council wish to make any changes to sentence levels? If so, what are the reasons why?**

*Aggravated burglary and the minimum term*

3.25 Whilst working on the ACE tool Ruth has noticed that it differentiates between domestic and non-domestic aggravated burglary. This is because for the domestic version it says that the minimum term applies. This has led Ruth to consider whether we should include some minimum term wording within the aggravated burglary guideline. The domestic burglary guideline contains wording relating to the minimum three-year term for a third domestic burglary:

‘Where sentencing an offender for a qualifying **third domestic burglary**, the Court must apply [section 314 of the Sentencing Code](#) and impose a custodial term of at least three years, unless it is satisfied that there are particular circumstances which relate to any of the offences or to the offender which would make it unjust to do so.’

It is arguable that the minimum term also applies to an aggravated burglary committed in respect of a dwelling. Section 10 of the Theft Act 1968 defines the aggravated offence in the following terms:

(1) 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; etc...

The provisions relating to the minimum term are in the Sentencing Code which states:

314 Minimum sentence of 3 years for third domestic burglary

- (1) This section applies where—
- (a) a person is convicted of a domestic burglary (“the index offence”) committed on or after 1 December 1999,
- .....
- (5) In this section “domestic burglary” means a burglary committed in respect of a building or part of a building which is a dwelling.

Very few offenders convicted of aggravated burglary receive sentences of less than three years and it is likely that where the offence takes place in a dwelling, higher harm factors would apply and so the guideline would lead to a sentence in excess of three years in any event. However, for completeness it is proposed that the minimum term wording is included in the aggravated burglary guideline.

***Question 12: Does the Council agree to include the minimum term wording in the aggravated burglary guideline?***

#### **4. EQUALITIES**

4.1 The available demographic data is provided for each guideline within **Annex D**. The Council may recall that at the consultation stage the available demographic data had shown that Black offenders seemed to represent a larger proportion of those sentenced for aggravated burglary. In their consultation response the Howard League suggested that the Council should carry out some further analysis in this area, which has now been done. The analysis added in 2020 data and looked at the last five years of data, from 2016, grouped together for higher volumes, looking at volumes, sentence outcomes, ACSLs and sentence lengths split by the offender’s self-reported ethnicity. In summary the results of this analysis showed:

- For aggravated burglary, a larger proportion of Black adults are getting custodial sentences over 10 years when compared to White adults sentenced for the same offence between 2016 and 2020 (20 per cent versus 14 per cent). However, despite grouping five years of data, numbers are still very low (the 20% equates to 17 Black adults and the 14 per cent equates to 82 White adults) so unable to say if this is a statistically significant difference and not just down to chance.
- No large differences could be seen in sentence outcomes or ACSLs for the different ethnic groups who had been sentenced for aggravated burglary.

- No large differences could be seen in sentence outcomes, ACSLs or sentence lengths banded for the different ethnic groups sentenced for the other types of burglary (domestic and non-domestic).
- In terms of volumes for each year from 2016 to 2020, the proportion of each ethnic group sentenced stayed fairly stable for all three offences. The only trend worth picking out was in aggravated burglary where the number of Black adults dropped in 2020 and White adults increased. However, aggravated burglary numbers are low each year and so any small change in volumes can lead to substantial changes in proportions.

4.2 This further work will be outlined in the response to consultation paper. Since no strong evidence of disparities in sentencing relating to ethnicity were found as a result of this further analysis, it will not be necessary to include any text on this within the guideline. All guidelines have text stating:

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

***Question 13: Does the Council have any comments or concerns on this further analysis?***

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**Sentencing Council meeting:**  
**Paper number:**

**28 January 2022**  
**SC(22)JAN03 – Priorities for the next 12 months**

**Lead Council member:**  
**Lead official:**

**N/A**  
**Steve Wade**  
**Steve.wade@sentencingcouncil.gov.uk**

## **1 ISSUE**

1.1 To agree the Council's immediate priorities for upcoming guidelines over the next few months.

## **2 RECOMMENDATION**

2.1 That the Council agrees to the ordering of priorities as outlined below.

## **3 CONSIDERATION**

### *Background information*

3.1 The Council published its most recent business plan on 19 May 2021 (Annex A). Due to the combination of issues arising from the Covid-19 situation and our (then) ongoing deliberations to finalise our 5-year strategy, the business plan covered two years: 2019/20 (retrospectively) and 2020/21. Ordinarily each year's business plan includes a rolling 3-year work plan that is then updated annually. Given at the time of publication of our most recent plan, the Council was still settling its priorities for the next five years it only included a workplan covering the period April 2020 – Mar 2022. This was so as not to overcommit ourselves in advance of finalising our longer-term priorities.

3.2 As the Council will be aware, we have had a number of changes in staffing over the last few months. With Lauren's arrival the Analysis and Research team is now at full strength as she fills Charlotte's old role, while Charlotte covers Amber's role during her maternity leave (however, we anticipate another staff change by early April which is likely to leave another vacancy in the team for at least a short period). On the policy side of the office, although Zeinab's arrival to cover Vicky's maternity leave meant we were very briefly at full strength we have since lost Lisa and now advertising to fill her role: this will likely not be filled until April.

3.3 In addition to our usual work schedule of producing and revising guidelines we of course now have a wider range of work across the office to take forward our strategic objectives for 2021-26, which will require input and resource from across the office.

3.4 Today's discussion is to make decisions on what the ordering of guidelines should be in terms of priorities for the policy team to pick up as they become available. Those decisions will then feed into this year's business plan which is due to come to Council to be considered at our March meeting for publication in April. This will be the first business plan under our new 5-year strategy and will revert to our usual practice of including a rolling plan for the next 3 years.

#### *Discussion*

3.5 In terms of sentencing guidelines our current activity is as follows:

- Motoring Offences (minus some guidelines that the Council agreed to remove in order to be able to consult as soon as possible on the most serious offences that have been out of date for some time) – currently at the drafting stage;
- revision of Terrorism – consultation now closed but yet to commence post-consultation work;
- Underage Sale of Knives – currently at the drafting stage
- Minor Amendments (the first of what will be an annual update of minor or consequential amendments to guidelines) – currently being revised post-consultation;
- revision of Sex Offences – currently being revised post-consultation;
- Perverting the Course of Justice – currently at the drafting stage;
- revision of Burglary – currently being revised post-consultation;
- revision of Totality – currently at the drafting stage; and
- Animal Cruelty – currently at the drafting stage.

3.6 All the above guidelines have previously been identified by the Council as priorities and significant work has been put into all of them. There are no compelling reasons to cease or pause work on any of them and the rationale for each remains strong. We propose to continue with each of these (absent any compelling reason that may arise to give us reason to reconsider) through to their completion.

**Question 1: Do you agree we should continue as is with the guidelines above?**

3.7 You will note that, taking into account the work in progress above, there are relatively few remaining guidelines listed in the current business plan at Annex A, that are not either in progress or already completed. Those yet to be started are:

- Immigration Offences;
- the remaining Motoring Offences; and
- Cybercrime.

3.8 Of these, both Immigration offences and the remaining Motoring offences (Motoring 2) have been at the top of our work plan for some time. Each would have been taken forward already (Immigration offences alongside Modern Slavery offences, the motoring offences as part of the main guideline) were they not to have been disconnected from other guidelines and paused. For each, when Council made the decision to pause it was on the basis that they would be picked up again as soon as time allowed. Immigration offences have been listed for some time as our next guidelines in business plans. The one potential reason to pause on Immigration was that previously Government was planning to legislate in this space but that legislation is nearly complete with Royal Assent expected in March, with high profile changes to the criminal law and raised maximum penalties. We therefore propose that these two guidelines are to be picked up when policy resource becomes free.

**Question 2: Do you agree we should pick up Immigration and Motoring (2) as our next two guidelines?**

3.9 Cybercrime is in a slightly different position. Despite it being on our work programme for some time, and currently listed in our business plan, no work of any real substance has been committed this far and we have not had any representations from others to pick it up for some years now. When Council considered the potential scope for such a guideline previously, once those 'cyber offences' that are already covered by other guidelines are excluded (e.g. digital fraud, online public order offences, sexual offending committed via digital medium) the offences not yet covered are probably limited to computer hacking offences. We therefore propose keeping it on our list but, unless we receive further representations as to why it is a priority, or become aware of a more pressing reason to start work, we propose parking it for the moment until some of the guidelines listed below are picked up.

3.10 In addition to the work above (that is either ongoing or had otherwise already been identified as a priority) other possible guideline work that has arisen since last year includes:

- any revisions that may be necessary as a result of recently announced changes to increase magistrates' sentencing powers from 6 months' custody to 12 months' custody.

- any other revisions consequent to the various provisions of the Police, Crime, Sentencing and Courts (PCSC) Bill not covered specifically below;
- revisions to Child Cruelty guidelines resulting from changes under the PCSC Bill to increase statutory maxima;
- revisions/ additions to the Intimidatory guidelines resulting from changes under the Domestic Abuse Act 2021 to create a new offence of threats to disclose private photographs and films with intent to cause distress, which commenced in June 21, and to create a new offence of non-fatal strangulation or suffocation, which is to be commenced spring 2022;

possible revisions/additions to the Bladed articles/offensive weapons guidelines resulting from provisions in the Offensive Weapons Act 2019 due to be commenced spring 2022 (we are also currently in the middle of an evaluation of this guideline which may also necessitate changes);

- Creation of a guideline covering the new offence of pet abduction.

3.11 Taking these in order, the changes relating to magistrates' sentencing powers should require relatively little work. Most either way guidelines already refer to 'the statutory maximum' as opposed to 'six months' imprisonment' and Ruth has already made some minimal amendments to a few guidelines that did not have the more general wording. There will be some other textual amendments to a few specific guidelines that will be required but it does not appear at present that the change to 12 months requires anything more substantial by way of amendment to guidelines. We therefore intend to take forward any necessary changes as soon as possible but are confident the resource requirements (on Ruth's side) will not be great and can be fitted in alongside the more substantial work that is ongoing.

3.12 There are a number of more detailed changes that may be required to guidelines relating to changes to the PCSC Bill, some of which may require minor changes to Imposition. We are also currently evaluating the Imposition Guideline which may itself result in the guideline requiring amendment and much of the work we are doing on effectiveness as part of the 5-year plan may also raise the possibility of amending Imposition. All of these potential changes are likely to require a little more drafting and at least some changes that are more than technical in nature (as opposed merely to updating wording). Again, we intend to take forward any such changes as a priority but our provisional view is that this year's Miscellaneous Amendments consultation is the best vehicle to achieve this. We propose that Ruth continues to maintain a watch on the Bill and brings a paper for discussion once this has been finalised and we are clearer of what changes are required. Again, we do not see this as

requiring significant resource and will be picked up in the now usual annual process of miscellaneous amendments.

**Question 3: Do you agree that we should take forward consequential amendments arising from the PCSC Bill and the changes to magistrates' sentencing powers as soon as practicable?**

3.13 Both the change to the statutory maxima for serious offences under the Child Cruelty guidelines, as well as the two new offences introduced as a result of the Domestic Abuse Act 2021, seem to us to be significant changes to areas that require a response sooner rather than later. The child cruelty changes are a significant change to offences in an existing guideline and we believe there is merit in amending those guidelines as a priority. This would be a self-contained discrete project. Although the non-fatal strangulation and threats to disclose offences are new, they again cut across existing offences for which there are guidelines and we feel there is merit in drafting new guidelines for these as a priority. However, given they are new, we propose that we hold off starting work until we have an opportunity to see how many of the new offences are brought, and what their essential features are, before fully committing and starting work. With that proviso, we propose that the two new offences are dealt with together as one small project.

**Question 4: Do you agree that we should take forward two separate projects to deal with the changes to the Child Cruelty statutory maxima and the new Domestic Abuse legislation offences as the next two priority projects (the DA offences once sufficient cases have been brought)?**

3.14 There are also a number of changes that may require changes to the scope of the current work on Under-age Sale of Knives and our Bladed Articles guidelines. There are changes to legislation in the Offensive Weapons Act 2019 due to be commenced in the next few months that will bring in measures to strengthen the law on the sale and delivery of knives to under 18s and delivery to residential premises. There is an argument for including these in the current underage sale of knives project **and Ruth will discuss this in a paper to the Council in March**. There are also new offences relating to the sale, delivery and possession of corrosive substances which could be added to the current suite of guidelines relating to bladed articles and offensive weapons as well as other provisions that may require minor changes to the existing guidelines. One option would be to make any small changes required by legislation as part of the miscellaneous amendments in 2022/23 and to await more detail on the volume and nature of cases for new offences before embarking on new guidelines. In addition, Emma's team is currently taking forward the evaluation of the Bladed Articles and

Offensive weapons guidelines and we should have the results of that by the summer; further argument that we hold fire for now on anything other than immediately necessary changes.

**Question 5: Do you agree that we should take forward any immediately necessary amendments as part of the next miscellaneous amendments consultation and pause on more substantive work until we have the result of the evaluation and more detail on the volume and nature of any cases for the new legislation?**

3.15 Finally in this category we have the new pet abduction offence. This is a novel offence and at present it is impossible to predict the range or volume of cases that may come to the courts under this offence or what the most salient features will be. We feel to rush to produce a guideline would be precipitous and that we are better off waiting to see how the offence beds in, what cases come to the courts, and how they are dealt with before embarking on a guideline. We therefore propose putting this on the longer list to be considered in due course.

**Question 6: Do you agree that we should pause any work on a pet abduction guideline for now?**

3.16 Finally, there are a number of guidelines that we have kept on our 'long list' of potential guidelines to be picked up once our current workplan is complete. These are:

- Vehicle Excise and Registration Act offences;
- Blackmail;
- Kidnap and False Imprisonment;
- Wildlife offences;
- Fire Regulation offences;
- Landlord offences and offences relating to houses of multiple occupation;
- Data Protection Offences;
- Female Genital Mutilation;
- Child Abduction;
- Offences against vulnerable adults;
- Sentencing of Young Adults;
- Prisoner Offences;
- Sentencing of (much) older adults;
- Sentencing of Women

3.17 This is quite a mixed assortment of offences/ issues! A number of these offences are ones that we have captured as they were raised as part of the 'Vision' consultation or which we have skirted around for various reasons over the last few years: female offenders/ a fuller guideline on young adults etc. Our 5-year strategy proposes to revisit the need for some of these guidelines as a result of other work we are doing or research undertaken (for example, an evaluation of the Expanded Evaluations which has not yet started) and so there is a rationale for leaving these here for the moment. Others are here either because others may have raised them in the past (fire regulation offences), but we have had no recent strong representations or evidence that a guideline is needed; others because we thought there may be pressure to pick them up as a result of other guidelines (FGM offences for example) but that pressure, or any strong evidence of a need, has not yet materialised. Most of these therefore seem safe to leave on this 'long list'. However the first three items on the list are ones that we feel merit moving up to be on our current priorities list (albeit at the back end). Vehicle Excise and Registration Act offences are relatively minor and rarely prosecuted but are still current and are the very final offences for which there is an SGC guideline. We therefore do need to pick them up at some point for completeness. Blackmail and offences of Kidnap and False Imprisonment are serious offences with not insignificant numbers and are offences for which the Council has previously felt there would be some merit in producing a guideline. The scope of kidnap and false imprisonment could also potentially be broadened to include Child Abduction if it was felt to be appropriate.

**Question 7: Do you agree that these three offences should be moved up to the end of the current priorities list?**

3.18 Below is a final version of the proposed priority list categorised as either (1) – immediate next guidelines high priority (2) – medium priority and (3) – lower priority. Depending on decisions as we have gone through this paper, the proposed ordering is:

- Motoring '2' – 1
- Immigration – 1
- Amends resulting from magistrates' sentencing powers – 1 (within Ruth's work schedule)
- PCSC wider changes arising – 1 (next Misc. Amends consultation)
- Possible PCSC minor changes to Imposition – 1 (possibly next Misc. Amends consultation)
- New Domestic Abuse Act offences – 2

- Child Cruelty statutory max changes – 2
- Bladed articles and other dangerous weapons - 2 (necessary changes only by way of next Misc. Amends consultation)
- Vehicle Excise and Registration Act Offences – 3
- Kidnap and False Imprisonment (possibly including child abduction) – 3
- Blackmail – 3
- Cybercrime (hacking) – 3

**Question 8: Do you agree that this is the correct list of priorities and the correct ordering of those priorities?**

#### **4 RISKS AND ISSUES**

4.1 It should be noted that this paper has just been to agree the list and ordering of priorities. Timing for when each guideline is picked up will depend on when policy and analytical resource becomes available and will need to be balanced against the other 'non-guideline' elements to our 5-year plan. In addition, our ongoing evaluations of existing guidelines could throw up additional work that may require revision of guidelines not currently on our existing plans. Our business plan (due for discussion in March) will set out the fuller range of work we are undertaking and the indicative timings for the guidelines listed above.

4.2 As ever, the work programme is dependent on us continuing to have the same level of resources currently assigned to us and there not being any other changes or requests that might affect the ordering of priorities above. Currently we expect our budget to remain at least at current levels for the next FY.

4.3 However, in any event, our business plan always makes clear that the published work programme is subject to change depending on new priorities arising. Were anything significant to materialise, we would come back to the Council to seek a decision on whether to amend the work programme.



**Sentencing Council meeting:**  
**Paper number:**

**28 January 2022**  
**SC(22)JAN04 – Miscellaneous guideline  
amendments**

**Lead Council member:**  
**Lead official:**

**Jo King**  
**Ruth Pope**  
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## **1 ISSUE**

1.1 The annual consultation on overarching issues and miscellaneous minor updates to guidelines ran from 9 September to 2 December 2021. At the December meeting the Council considered the responses to the consultation and agreed some changes.

1.2 At this meeting the Council is asked to sign off the changes which will come into effect on 1 April 2022. The annual process will then begin again.

## **2 RECOMMENDATION**

2.1 That the Council signs off the changes for publication.

## **3 CONSIDERATION**

3.1 To briefly recap the changes that have been agreed:

*Breach of a sexual harm prevention order (SHPO)*

3.2 The additional wording agreed upon for this guideline is highlighted below:

### **Step 6 – Ancillary orders**

In all cases the court should consider whether to make compensation and/or ancillary orders.

- [Ancillary orders – Magistrates' Court](#)
- [Ancillary orders – Crown Court Compendium](#)

Note: when dealing with a breach of a sexual harm prevention order, the court has no standalone power to make a fresh order or to vary the order.

The court only has power to vary an order if an application is made in accordance with section 103E of the Sexual Offences Act 2003 or section 350 of the Sentencing Code.

The court only has the power to make an order in the circumstances set out in section 103A of the Sexual Offences Act 2003 or section 345 of the Sentencing Code.

### *Compensation*

3.3 The additional wording agreed for inclusion in all relevant guidelines is highlighted below:

In all cases, the court should consider whether to make [compensation](#) and/or other ancillary orders. **Where the offence has resulted in personal injury, loss or damage the court must give reasons if it decides not to order compensation ([Sentencing Code, s.55](#)).**

### *Confiscation*

3.4 The following wording relating to confiscation was agreed for all relevant guidelines:

**Confiscation orders** under the Proceeds of Crime Act 2002 may only be made by the Crown Court. The Crown Court must proceed with a view to making a **confiscation order** if it is asked to do so by the prosecutor or if the Crown Court believes it is appropriate for it to do so.

Where, following conviction in a magistrates' court, the prosecutor applies for the offender to be committed to the Crown Court with a view to a confiscation order being considered, the magistrates' court must commit the offender to the Crown Court to be sentenced there (section 70 of the Proceeds of Crime Act 2002). This applies to summary only and either-way offences.

Where, but for the prosecutor's application under s.70, the magistrates' court would have committed the offender for sentence to the Crown Court anyway it must say so. Otherwise the powers of sentence of the Crown Court will be limited to those of the magistrates' court.

Confiscation must be dealt with before, and taken into account when assessing, any other fine or financial order (except compensation).  
(See Proceeds of Crime Act 2002 sections 6 and 13)

The court should also consider whether to make [ancillary orders](#).

### *Uplift for racially or religiously aggravated offences*

3.5 It was agreed to amend existing guidelines to create a separate step for the uplift for racial/ religious aggravation as has been done with the new assault guidelines. The guidelines it would apply to are:

- [criminal damage \(under £5,000\)](#) and [criminal damage \(over £5,000\)](#)
- [s4](#), [s4A](#) and [s5](#) Public Order Act offences
- [harassment/ stalking](#) and [harassment/ stalking \(with fear of violence\)](#)

### *Domestic abuse – overarching principles*

3.6 It was agreed to amend the definition of domestic abuse as follows (paragraphs 2, 3 and 4 are new or revised):

1. This guideline identifies the principles relevant to the sentencing of cases involving domestic abuse. Domestic abuse is a general term describing a range of violent and/or controlling or coercive behaviour.

2. This guideline applies (but is not limited) to cases which fall within the statutory definition of domestic abuse as defined by [Part 1 of the Domestic Abuse Act 2021](#). In summary domestic abuse is defined for the purposes of that Act as:

Behaviour (whether a single act or a course of conduct) consisting of one or more of:

- physical or sexual abuse;
- violent or threatening behaviour;
- controlling or coercive behaviour;
- economic abuse (any behaviour that has a substantial adverse effect on the victim's ability to acquire, use or maintain money or other property, or obtain goods or services);
- psychological, emotional or other abuse

between those aged 16 or over:

- who are, or have been married to or civil partners of each other;
- who have agreed to marry or enter into a civil partnership agreement one another (whether or not the agreement has been terminated);
- who are, or have been, in an intimate personal relationship with each other;
- who each have, or have had, a parental relationship in relation to the same child; **or**
- who are relatives.

This definition applies whether the behaviour is directed to the victim or directed at another person (for example, the victim's child). A victim of domestic abuse can include a child who sees or hears, or experiences the effects of, the abuse, and is related to the primary victim or offender.

3. For the purposes of this guideline domestic abuse also includes so-called 'honour' based abuse, female genital mutilation (FGM) and forced marriage.

4. The principles in this guideline will also apply to persons living in the same household whose relationship, though not precisely within the categories described in para 2 above, involves a similar expectation of mutual trust and security.

5. Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capabilities for personal gain, depriving them of the means needed for independence, resistance and escape and/or regulating their everyday behaviour.

6. Coercive behaviour is an act or pattern of acts of assault, threats, humiliation (whether public or private) and intimidation or other abuse that is used to harm, punish, or frighten the victim. Abuse may take place through person to person contact, or through other methods, including but not limited to, telephone calls, text, email, social networking sites or use of GPS tracking devices.

7. Care should be taken to avoid stereotypical assumptions regarding domestic abuse. Irrespective of gender, domestic abuse occurs amongst people of all ethnicities, sexualities, ages, disabilities, religion or beliefs, immigration status or socio-economic backgrounds. Domestic abuse can occur between family members as well as between intimate partners.

8. Many different criminal offences can involve domestic abuse and, where they do, the court should ensure that the sentence reflects that an offence has been committed within this context.

### *Publication of the changes*

3.7 As these are minor changes to existing guidelines it is not practicable to publish the changes ahead of them being live on the Council's website. The plan is to publish the response to consultation on 1 April and to make the changes to the guidelines on or soon after that date.

### **Question 1: Is the Council content to sign off the above changes for publication on 1 April?**

#### **4 EQUALITIES**

4.1 The consultation did not include any proposals expressly relating to equalities. Only three respondents responded to a question in the consultation paper asking if there were any equality issues relating to the proposals and none identified any issues.

#### **5 IMPACT AND RISKS**

5.1 No resource assessment was produced at the consultation stage, but the consultation document briefly addressed the potential impact of each proposal. The same approach is proposed for the published changes – the response to consultation document will address the impact of each change.

5.2 There were only a few comments relating to the impact of the changes and these generally welcomed the clarity that the changes would bring. The exception was the Prison Reform Trust who stated:

We understand that proposed changes to the guidelines are to aid clarity and consistency between a broad range of guidelines for offences which can attract a confiscation order. We also recognise that similar wording on the use of confiscation orders is already used in a number of existing guidelines.

However, we are concerned that there are currently insufficient measures to enable effective monitoring of this change. Yet despite this admission consultees are being asked to take on trust that this amendment will not lead to a change in their use.

We welcome any changes that improve clarity and that ultimately deliver greater consistency, however we question how the council can make such a declaratory statement, given that it has no way of monitoring the impact of such a change?

Should the change be made, we would recommend that the council sets out what actions they would take to ensure that this does not lead to a change in their use—as stated.

5.3 The consultation document stated: *'There are no published figures for the number of confiscation orders made but the proposed changes to wording in guidelines is unlikely to*

*influence the making of confiscation orders – the changes simply seek to aid clarity and transparency.’* The Ministry of Justice does not publish data on the imposition of confiscation orders. We have access to some unpublished figures from the MoJ Courts Proceedings Database (CPD) on the volumes of confiscation orders made, but these figures are not considered to be reliable and so would not assist in monitoring any impact of the changes. The consultation response document can acknowledge that the lack of reliable data is regrettable but say that it is not a justification for failing to make changes which will aid clarity and transparency.

**Question 2: Is the Council content that there are no further issues relating to the impact of the changes?**

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

**28 January 2022**  
**SC(22)JAN05 - Totality**  
**Ruth Pope**  
**Ruth.pope@sentencingcouncil.gov.uk**

## **1 ISSUE**

1.1 In July 2021 the Council agreed to publish a research report on the Totality guideline: [Exploring sentencers' views of the Sentencing Council's Totality guideline](#). The Council stated that in the light of the findings of the research it would review the guideline and consult on the proposed changes in 2022.

## **2 RECOMMENDATION**

2.1 That the Council agrees the scope and timing of revisions to the Totality guideline.

## **3 CONSIDERATION**

### *Background*

3.1 The Council has a statutory duty to 'prepare sentencing guidelines about the application of any rule of law as to the totality of sentences.'<sup>1</sup> The [Totality guideline](#) has been in force since 11 June 2012 and is used in all criminal courts. When sentencing an offender for more than one offence, or where the offender is already serving a sentence, courts must consider whether the total sentence is just and proportionate to the overall offending behaviour. The Totality guideline sets out the principles to be followed, the approach for different types of sentence and gives examples of how sentences should be structured in different circumstances.

3.2 There are no published figures on multiple offences and data issues make obtaining reliable figures very difficult,<sup>2</sup> but an estimate of how often more than one offence was sentenced (this does not include cases where the offender was already serving a sentence) for adult offenders (rounded to the nearest 1,000) in 2019 is:

- Around 84% (912,000 offenders) were sentenced for one offence and around 16% (179,000 offenders) were sentenced for two or more offences in magistrates' courts.
- Around 40% (28,000 offenders) were sentenced for one offence and around 60% (41,000 offenders) were sentenced for two or more offences in the Crown Court.

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<sup>1</sup> Coroners and Justice Act 2009 s120(3)(b)

<sup>2</sup> There is an action arising from the 'Vision' consultation to look at data on multiple offences which the Council decided should be lower priority.

3.3 As set out at the July 2021 meeting, there has been some criticism of the Totality guideline from academics who consider that it does not give sufficient principled or practical guidance on totality.

#### *The research and findings*

3.4 In response to this, in 2021, the Council carried out qualitative research with sentencers to explore their views of the guideline and how it is used in practice. The key findings of the research can be summarised as follows:

- Most survey respondents thought that the guideline provides practical help in sentencing. Several made positive comments regarding the guideline's examples, clarity and usefulness.
- Survey respondents and interviewees both said that they do not always refer to the guideline. The most common way that survey respondents use the guideline is to apply its principles, based on their knowledge of its contents, and consult it only for difficult or unusual cases.
- Nearly half the survey respondents said that they can find it difficult to apply the guideline in some circumstances, for example when sentencing offences that are dissimilar or have multiple victims, and some specific offences.
- Sentencers also told us that, in cases with multiple victims and a range of offending, it can be difficult to reflect the seriousness of the offending against each individual victim in the final sentence.
- To counter a perception among the public and victims that the totality principle is lenient, some interviewees thought it could be helpful to include in the guideline a reminder to the court to explain how a sentence has been constructed.
- Most survey respondents commented on the length of the guideline, and some requested improvements to its format. We showed interviewees ideas for improving the format of the guideline (bullet points, drop-down menus and tables) and most were positive about the proposals.

#### *Proposals for reviewing the guideline*

3.5 The Council has said that it will review the guideline and consult on changes this year. The proposal put to the Council last July was that the guideline should be updated without changing the essentials of the content. The revised version would be subject to consultation which would also serve to bring the guideline to attention of users.

3.6 The publication of the research findings prompted Mandeep Dhami, Professor in Decision Psychology at Middlesex University, to contact us enclosing a report on the application of the Totality guideline. The report (at Annex A) details research carried out using data from the Crown Court Sentencing Survey (CCSS) comparing sentences for multiple offence and single offence cases after controlling for potential differences between the two types of case, i.e., offender gender and age, offence seriousness, aggravating and mitigating factors and guilty plea reduction.



3.7 The report indicates that in many (but not all) cases there is no clear association between the number of offences being sentenced and either the likelihood of receiving a custodial sentence or the length of that sentence – contrary to what might be expected, multiple offences sentenced at the same time were not always more likely to receive a custodial sentence or a longer custodial sentence than comparable single offences. The report acknowledges limitations of the data<sup>3</sup> and therefore the findings, but we have considered the implications of the findings taken at face value.

3.8 The report (at the top of page 9) identifies several reasons why the issue is important:

- because cases involving multiple offences are common;
- because perceptions of fairness may shape public confidence in the criminal justice system; and
- sentences may be appealed on the basis that they are too severe or too lenient.

3.9 The report (from midway on page 9) also puts forward several potential explanations for the findings:

- personal mitigation may be considered multiple times in multiple offence cases (when the initial sentence is considered for each offence and again when the totality principle is applied);
- personal mitigation may be over-weighted relative to aggravating factors;
- the adjustment made to the sentence for the principal offence (upwards for concurrent sentences or downwards for consecutive sentences) may be too low or too high respectively.

3.10 The first of these potential explanations is based on the wording in the General principles section of the guideline which states:

It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.

3.11 This seems to have been interpreted in the report as though ‘factors personal to the offender’ are always matters of mitigation, but they could equally be aggravating factors, for example, the lack or presence of previous convictions. If the Council thought that this was a point that required clarification, it could be addressed in any revision of the guideline.

3.12 The second and third potential explanations relate to how sentencers exercise their discretion and (as discussed at 3.17 below) our research indicates that sentencers are broadly content with the level of guidance provided by the guideline.

3.13 The report highlights several areas where further research would be useful, including:

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<sup>3</sup> in particular the sentence information in the CCSS relates only to the principal offence and there is no data on whether sentences are concurrent or consecutive.

- comparing data on concurrent and consecutive sentences;
- taking into account the seriousness of the ‘other’ (i.e. not the principal) offence(s);
- taking into account whether the other offence(s) were related to the principal offence;
- taking into account whether all of the offences were of the same type; and
- examining the order of reasoning in guidelines.

3.14 Professor Dhimi suggests that she could assist the Council to improve the guideline using rigorous evidence-based approaches.

*The suggested approach*

3.15 The Council has already considered devoting resources to obtaining improved data on multiple offences and has said the following in the response to the ‘What next for the Sentencing Council’ consultation:

[I]n relation to analysis on multiple offences, we do not currently have access to extensive information on secondary/ non-principal offences or the sentences imposed for them. An approach based on the principal offence is therefore considered the most effective and pragmatic way of conducting our analysis given the data that is available and the difficulties of disentangling the effect of secondary offences on the overall sentence. We do agree that this might be an area to explore in the future but have decided that we need to prioritise other areas of work in the short and medium term. Once we have a clearer idea of the data we might be able to draw from the Common Platform, we will be able to reconsider this. We have therefore not included this as a specific action in our five year strategy but have included it in our longer-term analytical plan.

3.16 Consequently, there is little prospect of obtaining the data required to carry out further meaningful research in this area in the short to medium term without changing our strategy and workplan. Other approaches to research could be considered, such as analysing transcripts of sentencing remarks or carrying out road testing, but these would have limitations as well as having resource implications.

3.17 The way sentencers apply the Totality guideline is inevitably at least partially subjective. The basic principle of the guideline: that the court ‘should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate’, requires sentencers to exercise judgment and discretion. Much of the academic criticism relates to the perceived imprecision of the guideline, but the work that we carried out with sentencers showed that they were generally content with the approach of the guideline and agreed with the content.

3.18 The report at Annex A implies that multiple offence cases are sentenced too leniently and this would negatively affect confidence in the sentencing process. The issue of

perceived leniency in multiple offence cases and public confidence is one that sentencers also raised, but in terms of ensuring that the sentences reflect the seriousness of the offending against each individual victim and explaining how the sentence has been constructed.

3.19 In view of the lack of evidence that there is problem with the approach taken by the existing guideline (which was based on case law), the recommended approach remains one of updating the guideline without radically changing the content.

3.20 Consideration can be given to whether there are any ways the guideline could provide more assistance to sentencers when there are multiple victims or dissimilar offences.

**Question 1: Should the revision of the Totality guideline be limited to making adjustments within the current structure/ approach?**

3.21 If the Council is content to proceed on the basis of a limited revision, proposals could be brought to the Council in March and April and the consultation could be held from June to August.

**Question 2: Is the Council content with the proposed timings?**

#### **4 EQUALITIES**

4.1 The nature of the guideline and the lack of reliable data on multiple offences will make it difficult to draw any conclusions about how the guideline applies to different demographic groups. However, in reviewing the guideline, the Council can have regard to how the provisions may apply to different offences or cohorts of offenders and consider whether there are potential inequities that can be addressed. Consideration could be given to cross referencing to material in the Equal Treatment Bench Book or elsewhere in guidelines if appropriate.

#### **5 IMPACT AND RISKS**

5.1 If the Council limits the review of the guideline as proposed, this is likely to attract some criticism from academics. The consultation document will need to explain why the Council is taking this approach and leave open the possibility of a future revision if and when better data become available.

5.2 The guideline is of wide application and therefore any changes could have a significant impact on sentencing practice, although the proposed revision of the guideline is unlikely to make substantive changes.

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**Sentencing Council meeting:**  
**Paper number:**

**28 January 2022**  
**SC(22)JAN06 - Perverting the Course of  
Justice and Witness intimidation**

**Lead Council member:**  
**Lead official:**

**Juliet May**  
**Mandy Banks**  
**0207 071 5785**

## **1 ISSUE**

1.1 This is the final meeting to sign off the guidelines ahead of a planned consultation in March. This meeting will look at the proposed draft resource assessment (RA) and ask the Council to confirm it is content with the guidelines ahead of consultation. During the 12 week consultation we will also do some road testing of the guidelines.

## **2 RECOMMENDATION**

2.1 At today's meeting the Council are asked:

- To consider the draft RA
- To sign off the guidelines ahead of consultation

## **3 CONSIDERATION**

*Perverting the Course of Justice (PTCJ)- Annex A*

3.1 The changes agreed at the meeting in November have been made, and can be seen within **Annex A**. The Council agreed that the top of the range in A1 should increase from six to seven years, with the consultation explaining the reasons for the gap between the top of the range and the maximum sentence. As shown on page 2 of **Annex B**, only two offenders received a sentence greater than seven years in 2020. The Council also agreed to include the wording '*for cases of particular gravity, sentence above the top of the range may be appropriate*', as can be seen on page three. In light of the decision made on the burglary guideline at the last meeting to remove that exact wording from the guideline, the Council are asked to confirm whether this wording should remain or not. It may be that the Council feels it is appropriate to include this wording for this guideline, given the maximum sentence of life imprisonment.

***Question 1: Does the Council want the wording 'for cases of particular gravity, sentences above the top of the range may be appropriate' to remain or not?***

3.2 In considering the guideline for PTCJ ahead of sign off a further aggravating factor is

suggested. This is prompted by the recent case of *R v Ahmed*<sup>1</sup>, which concerned a barrister who conducted a prolonged campaign against an ex-partner when the relationship ended acrimoniously. This took the form of forging emails and texts to propret that the victim was harassing her, falsely accused him of rape, which resulted in him being arrested and questioned, and culminated in the offender stabbing herself, claiming the victim had stabbed her. In reading transcripts of cases there was also a similar case of a police officer who framed his partner, also a serving police officer, to make it look as if she was dealing drugs, was part of a drugs crime gang, was tampering with evidence and so on, seemingly because he was jealous of her success at work.

3.3 The fact that both these offenders used their knowledge of the criminal justice system to help them commit the crimes seems to make the offending worse. In addition, there is arguably something about the fact that as police officers/barristers the fall into criminality seems that much greater than for an ordinary citizen. There may not be many of these cases but it still may be appropriate to have an aggravating factor for when these cases arise. Therefore, a new aggravating factor of '*Offender was in a position of responsibility within the criminal justice system (e,g police officer, solicitor)*' is proposed. It may not be as relevant in witness intimidation although conceivably could still arise.

***Question 2: Does the Council wish to include a new aggravating factor of 'Offender was in a position of responsibility within the criminal justice system' for PTCJ? Should it also go into witness intimidation?***

3.4 There are not many other offence specific aggravating and mitigating factors currently for both guidelines. It may be that there are not any further relevant ones, but at this stage the Council are asked to consider whether there are any others that should be added. The witness intimidation guideline is at **Annex C**.

***Question 3: Are there any further aggravating or mitigating factors that should be included for both offences?***

3.5 The changes agreed at the last meeting to the witness intimidation guideline have been made and can be seen at **Annex C**, namely the removal of '*unsophisticated nature of conduct*' from low culpability.

*Sign off of final guideline for consultation*

3.6 The Council are now asked to review both guidelines for the last time prior to the consultation and confirm that it is content to sign them off ahead of the consultation. The

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<sup>1</sup> R v Ahmed (Anisah Arif) [2021] EWCA Crim 1786

draft consultation document will be circulated to the Council for comment via email in February.

***Question 4: Is the Council content to sign both guidelines off ahead of the consultation?***

#### **4 EQUALITIES**

4.1 At this stage of guideline development, there are no obvious disparities in sentencing outcome or sentence lengths between offenders of each age, sex and ethnicity. However, this will continued to be monitored during the consultation stage and the decision whether or not to add wording regarding disparities to the published guidelines will be made alongside the development of the definitive guideline as we will have an extra year of data available to check the trends and make a more informed, up-to-date decision.

4.2. The consultation document will include a section on equalities and outline the work we have done so far and will ask respondents questions on the issues to see if there are any other equalities issues not already considered that should be.

#### **5 IMPACT AND RISKS**

5.1 Overall, it is anticipated that the new draft guidelines will improve consistency of sentencing for these offences, but not lead to any notable changes in sentencing severity. The full draft resource assessment for these offences can be found at **Annex D**.

5.2 For perverting the course of justice, estimating the impact is made more difficult by the varied nature of the underlying offences and the somewhat limited information in the transcripts available, so it's important to note that these findings should be treated as indicative only. However, using the information available, we anticipate that sentences and sentence lengths using the draft guideline will remain broadly in line with the outcomes given by sentencers prior to the draft guideline. Therefore, we anticipate that there will be limited impact on prison and probation resources.

5.3 For witness intimidation, it is also anticipated that sentencing levels will remain relatively stable under the new draft guideline. There was some variation in the lengths of sentences given in transcript resentencing, but overall, it is anticipated that the length of sentences received by offenders will remain broadly stable. As such, it is anticipated that any impact the guideline has on prison or probation resources would be limited.

5.4 During the consultation road testing will be conducted on the guidelines which will test how sentencers use the draft guidelines which can highlight areas that cause confusion and will generally aid our understanding of how the guidelines will operate in practice.

***Question 5: Is the Council content with the draft resource assessment at Annex D?***





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

**28 January 2022**  
**SC(22)JAN07 – Sexual Offences**  
**Adrian Fulford**  
**Ollie Simpson**  
**07900 395719**

## **1 ISSUE**

1.1 Signing off finalised revisions to the sexual offence guidelines and a new guideline for sexual communication with a child.

## **2 RECOMMENDATIONS**

2.1 That Council:

- signs off the revisions to the sexual offences guidelines and the new section 15A guideline (subject to two final points in relation to the new guideline) as set out in **Annex A**; and
- signs off the revised publication stage resource assessment at **Annex B**;
- agrees that, with the exception of the new section 15A guideline, the changes should come into effect from the point of publication.

## **3 CONSIDERATION**

3.1 The consultation on revisions to the sexual offences guidelines ran between 13 May and 13 August 2021. This paper summarises revisions made to the draft guidelines and the resource assessment following consultation, and raises a specific point covered in the resource assessment relating to the new proposed aggravating factor on age disparity.

### *Section 14*

3.2 The draft revised guideline for section 14 of the Sexual Offences Act 2003 is at page 1 of Annex A, with post-consultation amendments in red. As agreed by Council, it remains a brief textual guideline directing sentencers to the guideline for the offence which was being facilitated or arranged.

3.3 Currently those are the guidelines for sections 9 to 12 of the 2003 Act: sexual activity with a child/causing or inciting sexual activity with a child, and engaging in sexual activity in the presence of a child/causing a child to watch a sexual act. When the relevant provisions in the Police, Crime, Sentencing and Courts Bill are commenced that will be extended to the

guidelines for offences under sections 5 to 8: rape of a child under 13, assault of a child under 13 by penetration, sexual assault of a child under 13 and causing or inciting a child under 13 to engage in sexual activity.

3.4 Following consultation and road testing, we amended the section 14 text to:

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

to mitigate the risk that sentencers give too much of a discount to reflect the lack of a real victim. We have also added brackets to the text consulted on to be clearer that the guidance covers all cases where no sexual activity takes place, including but not limited to cases where the victim is fictional:

*“No sexual activity need take place for a section 14 offence to be committed (including in instances where no child victim exists). In such cases the court should identify the category of harm on the basis of the sexual activity the offender intended etc etc”*

*“Causing or inciting” offences*

3.5 The additional text being added to the guidelines for the “causing or inciting” offences in the Sexual Offences Act<sup>1</sup> is on page 3 of Annex A. This simply mirrors the change outlined above for section 14. Whilst the fictional victim scenario is unlikely to occur with some of those offences, it was agreed that it could not hurt to include the guidance. The reference to a “child victim” will simply be to a “victim” if the offence involves adult victims.

3.6 Council has agreed to add a drop down in the guidelines for the child sex offences covered by section 14 which replicates in full the guidance from the section 14 guideline, in response to concerns that this could get missed by sentencers in the process of cross-referencing.

*Drop down explanations*

3.7 The drop down text proposed as a step one “expanded explanation” for the harm factor “significant psychological harm” is at page 4 of Annex A, again with post-consultation changes in red. In response to various comments received on the text we have amended the

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<sup>1</sup> These are section 8 (causing or inciting a child under 13 to engage in sexual activity); section 10 (causing or inciting a child to engage in sexual activity); section 17 (abuse of position of trust: causing or inciting a child to engage in sexual activity); section 26 (inciting a child family member to engage in sexual activity); section 31 (causing or inciting a person with a mental disorder impeding choice to engage in sexual activity); section 39 (care workers: causing or inciting sexual activity); sections 48 (causing or inciting sexual exploitation of a child); and section 52 (causing or inciting sexual exploitation for gain).

text for clarity, to be clear that a degree of psychological harm is inherent in the offending and taken into account in setting sentencing levels, and that the absence of a finding of significant psychological harm is not to diminish the psychological harm which has occurred.

3.8 The proposed drop down text on abuse of trust, which is based on the existing expanded explanation, is on page 5 of Annex A. No changes are being made to this post-consultation.

#### *Mitigating factors*

3.9 Council has also agreed to amend the mitigating factor “age and/or lack of maturity where it affects the responsibility of the offender” to the new standard “age and/or lack of maturity” and to add the now standard “physical disability or serious medical condition requiring urgent, intensive or long-term treatment” to all relevant sexual offence guidelines.

#### *Overseas victims/remote offending*

3.10 In response to the concerns about the potential for confusion, Council has agreed to revise the text consulted on in relation to remote offending and the approach to victims who are overseas (see page 6 of Annex A, post-consultation changes in red). This reflects the fact that there may be factual elements in an individual case related to the location of offender or victim, and the remote nature of the offending that *do* merit consideration as part of the assessment of seriousness, but the *approach* to that assessment should be the same regardless.

3.11 We consulted on adding this text to the guidelines for section 8 (causing or inciting a child under 13 to engage in sexual activity); section 10 (causing or inciting a child to engage in sexual activity); section 48 (causing or inciting sexual exploitation of a child); and section 52 (causing or inciting sexual exploitation for gain). Following responses to the consultation, we will also add it to the guidelines for section 17 (abuse of a position of trust: causing or inciting a child to engage in sexual activity) and section 47 (paying for sexual services of a child).

#### *Sexual Harm Prevention Orders*

3.12 We are amending the wording on information on sexual harm prevention orders in response to requests for additional information from consultees (see page 7 of Annex A). These cover the time limits on foreign travel restrictions, and the effect on existing orders, Although we are not providing exhaustive information on SHPOs, we will provide a link to the relevant part of statute. The changes also reflect the fact that the Police, Crime, Sentencing and Courts Bill will permit positive obligations to be imposed via SHPOs.

### *Historical sexual offences*

3.13 We had proposed two changes to the guidance on historical sexual offences to bring its wording more into line with Court of Appeal case law, and following consultation we are changing these amendments. The final text (with our proposed changes as they now stand) is at page 8 of Annex A.

3.14 For the third bullet, we had consulted on the text “The court should sentence by reference to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003.” However to avoid creating yet another formulation for the Courts to follow, this will now be “The court should sentence by **measured** reference to...” which is the exact wording used in *R v H [2011] EWCA Crim 2753*.

3.15 The existing guidance speaks of youth/immaturity being a mitigating factor. The Court of Appeal in *R v Forbes [2016] EWCA Crim 1388* said in fact this should be a culpability factor (presumably because it related to the circumstances of the historical offending, not the offender currently before the courts). We consulted on moving to this approach, but concerns were raised about the difference in treatment between these and present-day cases (where youth/immaturity is a step two factor under the guidelines). In practice, a mitigating factor can relate both to the circumstances of the offence and the offender. The proposed wording therefore acts as a compromise and says “...[youth/immaturity] may be regarded as mitigation affecting the offender’s culpability.”

3.16 We will also change the title of the guidance to “Approach to sentencing historicala sexual offences” following feedback provided during consultation.

### *Section 15 A – Sexual communication with a child*

3.17 The proposed section 15A guideline with post-consultation amendments is at page 10 of Annex A. In the raised harm category we are expanding sending or receiving “images” out to “digital media” in response to consultation responses.

3.18 Council also wanted to reflect in this category the raised harm that was likely to have been caused to a victim, bearing in mind many are fictitious. I have inserted “Significant psychological harm or distress caused, **or very likely to have been caused**, to victim/**intended victim**”. At the meeting where we considered this the wording suggested was “Significant psychological harm or distress caused to victim, **or very likely to result from intended conduct**”. The difficulty with that wording is that with section 15A no particular further conduct is intended. So I recommend adopting the amendment I have suggested.

**Question 1: are you content with the raised culpability factor now being “Significant psychological harm or distress caused, or very likely to have been caused, to victim/intended victim”?**

3.19 In raised culpability, we have expanded “Use of threats (including blackmail)” to include gifts and bribes in response to suggestions from consultees. We have also added “Offender acted together with others to commit the offence” which appears in a number of child sexual offence guidelines.

3.20 We have removed the aggravating factor “Commission of offence whilst under the influence of alcohol or drugs” as it is irrelevant to this offence. In response to one respondent’s suggestion we have amended the aggravating factor “attempts to dispose of or conceal evidence” to include “asking the victim to conceal the offending”.

3.21 Council agreed to include “substantial disparity between age of offender and victim/intended victim” as an aggravating factor (where it appears as a culpability factor in other child sexual offence guidelines). This arose from a discussion which concluded that lying about one’s age was so commonplace in this offending that it should not be included as an aggravating factor. On reflection, the same could be said of this factor: this is discussed further in the Impact section below.

3.22 We have added the mitigating factor common in sexual offence guidelines “steps taken to address offending behaviour” in response to a suggestion from consultees.

## **4 EQUALITIES**

4.1 The consultation asked

- Do you consider that any elements of the draft guidelines and revisions presented here, or the ways in which they are expressed, could risk being interpreted in ways which could lead to discrimination against particular groups?
- Are there any other equality and diversity issues these guidelines and revisions should consider?

4.2 We are not making any amendments in relation to the few points raised in response to this question. The only substantive response on this had suggested that offending by women should be treated more seriously (which the Council did not propose to take up) and that, in general, there were disparities in sentencing between different ethnic groups. Given the low volumes of Black, Asian, Mixed and Other ethnicity offenders for these offences, this is difficult to evidence.

## 5 IMPACT AND RISKS

5.1 The resource assessment to accompany the definitive guideline is at Annex B. There are only a few substantive changes to the resource assessment which was published at the point of consultation, but the new resource assessment updates the latest statistics, and highlights some findings from road testing and changes made as a result of consultation.

5.2 There has been little change to the guideline for sexual communication with a child (section 15A) since the draft stage that would have any further impact on resource. Therefore, we still estimate that there may be a small increase in sentencing severity, with some offenders who would previously have received a community order now receiving a short immediate custodial sentence. However, it is likely that most of these would be suspended resulting in minimal impact on prison resources.

5.3 The revised resource assessment highlights that post-consultation we have tightened the language used for the section 14 guideline and the “causing or inciting” offences to ensure that sentencers do not provide too great a discount where no sexual activity takes place (“...**only** a **very** small adjustment...”). This change should confirm our original assessment about the expected impact of the revised guidance as the new wording should be in line with our original intentions. We therefore still estimate that there may be a small increase overall in sentence levels for cases in which no actual child is present for section 14 offences, with the potential requirement for approximately 40 additional prison places per year. For causing or inciting a child to engage in sexual activity (section 10), there may be an increase in sentencing severity for cases where no child exists, with the potential requirement for around 190 additional prison places per year.<sup>2</sup> The changes for the other “causing or inciting” guidelines are likely to have negligible impact on prisons or probation resources due to the small number of offenders sentenced for these offences.

5.4 Note, in any case, that these changes arise from the Court of Appeal case law so the changes in sentencing practice can be attributed to this rather than any intention of the Council to influence sentencing practice, albeit we publish these guidelines in the knowledge of what future sentencing practice will be.

5.5 Another post consultation change highlighted by the revised resource assessment is the addition of the aggravating factor “substantial disparity between age of offender and victim/intended victim” to the section 15A guideline. As mentioned above, this is likely to be

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<sup>2</sup> As set out at Annex B, the transcripts used for the estimates for section 10 and 14 are cases from 2019, before the Court of Appeal ruling occurred in May 2020, therefore, the findings presented here represent the estimated impact of the guideline on 2019 sentencing practice.

present in a large number of these cases. Looking at the transcripts we have, in 89 per cent of cases, there was an age disparity of 10 years or more and the average difference in age between offender and victim was 24 years. Although not possible to quantify, this may lead to an increase in sentencing severity, although, based on current sentencing practice, these are likely to be suspended and as such would have limited impact on prison resource.

**Question 2: can Council confirm it still wishes to add an aggravating factor of “substantial disparity between age of offender and victim/intended victim”?**

**Question 3: subject to that, is Council content with the revised resource assessment at Annex B?**

5.6 Despite the public focus last year on sexual offences, particularly the safety of women and girls, it was readily understood that our consultation was seeking views on a specific and discrete issue. As covered in previous papers, there were a variety of views about how to deal with the central issue of cases where no sexual activity took place, with respondents from academia and the judiciary arguing in favour of a greater discount than we were suggesting. Others, such as the Howard League, were concerned that the sentencing levels for section 15A (sexual communication with a child) were too high. They may be disappointed by our ultimate approach.

5.7 Our rationale for the definitive guideline and any changes made (or not made) as a result of consultation will be set out in the consultation response document, which I will circulate in due course, and in communications material that we shall develop at the time of publication, which is scheduled for April.

5.8 The section 15A guideline would therefore come into effect from 1 July. Most of the other changes we are making involve clarifications to wording and expanded explanations which should reflect current case law. There is no particular necessity therefore for the changes to come into effect a period after publication.

5.9 The changes to the section 14 guideline and the insertion of text into the “causing or inciting” offences for cases where there is no victim is perhaps less clear cut as this could have a material impact on sentences (albeit in line with current Court of Appeal case law). In the case of the section 14 guideline the new addition adds significantly to the existing guideline.

5.10 I nonetheless propose that given the courts should be applying these rules already the changes come into effect upon publication of the changes. The “Effective from” date on the guideline should remain as 1 April 2014, but we will add a note to the guideline to be clear of the date that the revisions we are making have come into effect.

**Question 4: does the Council agree to sign off the revisions to the existing sexual offence guidelines and guidance, and the new guideline for sexual communication with a child?**

**Question 5: are you content for all the changes to be effective from the point that we publish, with the exception of the new section 15 A guideline?**