Sentencing Council

OFFICIAL - SENSITIVE

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9 June 2023

Dear Members

Meeting of the Sentencing Council – 16 June 2023

The next Council meeting will be held in the **Queens Building Conference Suite, 2nd Floor Mezzanine** at the Royal Courts of Justice, on Friday 16 June 2023 at 9:45. This will be a hybrid meeting, so a Microsoft Teams invite is also included below.

A security pass is **not** needed to gain access to this meeting room and members can head straight to the room. Once at the Queen's building, go to the lifts and the floor is **2M** Alternatively, call the office on 020 7071 5793 and a member of staff will come and escort you to the meeting room.

The agenda items for the Council meeting are:

▪ Agenda	SC(23)JUN00
▪ Minutes of meeting held on 12 May	SC(23)MAY01
▪ Imposition	SC(23)JUN02
▪ Immigration	SC(23)JUN03
▪ Annual Report	SC(23)JUN04
▪ Proposed changes to Schedule 21	SC(23)JUN05
▪ Miscellaneous amendments	SC(23)JUN06
▪ Fraud	SC(23)JUN07
▪ Guideline priorities	SC(23)JUN08

Members can access papers via the members' area of the website. As ever, 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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COUNCIL MEETING AGENDA

16 June 2023
Royal Courts of Justice
Queen's Building

09:45 – 10:00	Minutes of the last meeting and matters arising (paper 1)
10:00– 11:00	Imposition - presented by Jessie Stanbrook (paper 2)
11:00 – 11:15	Break
11:15 – 12:30	Immigration - presented by Vicky Hunt (paper 3)
12:30 – 12:45	Annual report - presented by Phil Hodgson (paper 4)
12:45 – 13:00	Proposed changes to Schedule 21 – presented by Ruth Pope (paper 5)
13:00 – 13:30	Lunch
13:30 – 14:30	Miscellaneous amendments - presented by Ruth Pope (paper 6)
14:30 – 15:00	Fraud - presented by Ruth Pope (paper 7)
15:00 – 15:15	Guideline priorities - presented by Steve Wade (paper 8)

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COUNCIL MEETING AGENDA

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MEETING OF THE SENTENCING COUNCIL

12 MAY 2023

MINUTES

Members present:	Bill Davis (Chairman) Tim Holroyde Rosa Dean Diana Fawcett Elaine Freer Max Hill Jo King Stephen Leake Juliet May Mark Wall Richard Wright
Apologies:	Beverley Thompson
Representatives:	Claire Fielder for the Lord Chancellor (Director, Youth Justice and Offender Policy) Elena East for the Lord Chief Justice (Deputy to the Head of the Criminal Justice Team for the President of the King's Bench Division)
Observers:	Sukhi Bakhshi – Criminal Appeal Office Tammy Mears - CPS Jonathan Bushell - CPS
Members of Office in attendance:	Steve Wade Mandy Banks Ruth Pope Ollie Simpson Jessie Stanbrook

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 31 March 2023 were agreed.

2. MATTERS ARISING

2.1 The Chairman updated the Council on the progress in recruiting for the police and circuit judge vacancies on the Council.

3. DISCUSSION ON IMPOSITION – PRESENTED BY JESSIE STANBROOK, OFFICE OF THE SENTENCING COUNCIL

3.1 The Council discussed a number of amendments to the community order levels section and approved all proposals to amend, in part to encourage sentencers to use the list of possible requirements more flexibly and creatively and to encourage the imposition of requirements for the purposes of rehabilitation more in line with offenders' needs.

3.2 The Council also approved the addition of paragraphs on determining the length of a community order and the operational and supervision period of a suspended sentence order, including how to consider time remanded in custody or on qualifying curfew, with some amendments.

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

4.1 The Council considered final amendments to the motoring guidelines, including to the sentence levels and harm factors in the guideline for dangerous driving. The Council also noted the resource assessment and signed off the guidelines for publication in June.

5. DISCUSSION ON PERVERTING THE COURSE OF JUSTICE – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL

5.1 The Council discussed and agreed the final versions of the perverting the course of justice and witness intimidation guidelines and the final resource assessment. It was noted that the guidelines were generally well received during the consultation so the changes post consultation had been reasonably modest.

5.2 The Council agreed that the definitive versions of the guidelines would be published in the summer and come into force in the autumn.

6. DISCUSSION ON BLACKMAIL, KIDNAP AND FALSE IMPRISONMENT – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL

6.1 The Council discussed the findings of the recent resentencing exercise for kidnap and false imprisonment and agreed that the changes made to the guideline had had the desired effect. Some minor changes to the wording of some of the factors, arising out of the exercise was agreed.

6.2 The Council also agreed to change the title of the disclosing private sexual images guideline to include a reference to threats to disclose images. There will be one further meeting to sign off the guidelines ahead of the consultation, and to discuss the draft resource assessment.

7. DISCUSSION ON DOMESTIC HOMICIDE– PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

7.1 The Council considered the recommendations relating to sentencing guidelines in the Domestic Homicide Sentencing Review carried out by Clare Wade KC. The Lord Chancellor had written to the Chairman asking the Council to consider recommendation 16 in the review relating to manslaughter in the context of consensual sexual activity.

7.2 The Council noted that the Government was yet to issue a full response to the review and decided to set up a working group to consider the evidence relating to manslaughter and report back to the full Council.

7.3 The Council was particularly concerned that the issue of strangulation should be properly reflected in guidelines and noted that it planned to start work on a guideline for the new offence of non-fatal strangulation soon. The Chairman would write to the Lord Chancellor setting out the position.

8. DISCUSSION ON MISCELLANEOUS AMENDMENTS – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

8.1 The Council considered items for inclusion in this year's miscellaneous amendments and agreed to consult on small amendments to the Allocation, Children and young people, Breach of a protective order and Supply of controlled drugs guidelines.

8.2 The Council also considered possible changes to the wording relating to domestic abuse in offence specific guidelines and agreed to consider this further at a later meeting.

9. DISCUSSION ON BUSINESS PLAN – PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL

9.1 The Council considered and agreed the 2023-24 Business Plan for publication.

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Sentencing Council

Sentencing Council meeting:	**16 June 2023**
Paper number:	**SC(23)JUN02 - Imposition**
Lead Council member:	**Jo King**
Lead official:	**Jessie Stanbrook** Jessie.stanbrook@sentencingcouncil.gov.uk

1 ISSUE

1.1 This paper presents the full updated draft guideline on the Imposition of community and custodial sentences to the Council for the first time in this review. It does not ask for sign off, but instead some final questions on outstanding issues members requested to return to.

2 RECOMMENDATION

2.1 It is recommended that the Council considers the questions within the paper and confirms decisions so final work can be done over the summer and the updated guideline can be signed off for consultation in September after the resource assessment has been completed and Council can consider any potential impacts on prison and probation resources when signing off the guideline. The areas to be discussed in this meeting are:

- Deferred sentences
- Pre-sentence reports (cohorts, indication of sentence)
- Drug testing requirements
- Young adult and female offender sections
- Full guideline

3 CONSIDERATION

<u>Deferred Sentences</u>

3.1 In the December 2022 meeting, Council considered some new lines on deferred sentencing to be included in the imposition guideline. Council agreed with the inclusion of deferred sentencing in the guideline, but with more amended and detailed text than I had initially proposed, including to broaden out the line that suggested deferred sentencing might be particularly appropriate for young people to include those in transitional life circumstances.

3.2 I have slightly expanded on the original lines suggested and made all requested amendments. However, after considering the length of the full updated draft of the guideline, I would like to revisit the decision to make this section any longer. Especially as Council wished to maintain the line “However, deferred sentences will be appropriate only in very limited circumstances”, I believe any more text than the below would not be appropriate considering it is the first paragraph of the imposition guideline. Instead, I have suggested that the paragraph has a drop down which contains the text from the existing guidance on deferred sentencing.

3.3 This existing guidance on deferred sentences can be seen at **Annex A**, and already contains all the other suggestions Council members made to include in the deferred sentencing section. Currently, this page exists within the Explanatory Materials area which sits within in the magistrates section of the website (though is a standalone page that can be navigated to directly from a google search or website search). Only one change to the text is considered necessary in a drop down in the imposition guideline, and that is to add the word “Magistrates:” before the line “Always consult your legal adviser if you are considering deferring a sentence.” All other text in this current guidance is already applicable to both magistrates and crown courts.

3.4 The updated version of the text within the imposition guideline can be seen below. As specified, this is not a numbered section but a ‘Note’ before the first numbered section on Thresholds.

> Note: Deferred Sentences
>
> The court may consider whether it would be appropriate, beneficial and in the interests of justice for sentencing to be deferred for up to six months, and may attach conditions to that deferment.
>
> The purpose of deferment is to enable the court to have regard to the offender’s conduct after conviction or any change in their circumstances, including the extent to which the offender has complied with any requirements imposed by the court. Deferring sentence can be a valuable tool to assess whether a potential community or suspended sentence order is appropriate for a particular offender. Deferring sentencing may be particularly appropriate for young adults (18-25 years of age) or those who are in transitional life circumstances. However, deferred sentences will be appropriate only in very limited circumstances. When deferring sentence, the court must be clear what the two potential sentences are depending on whether the deferral period is successfully complied with, or not.
>
> If deferring the sentence is a consideration, please see further guidance on Deferred Sentencing in the drop-down below.

Question 1: Does Council agree that the deferred sentencing paragraph should be more limited considering the total length of the guideline?

Question 2: Does the Council have any final amendments to be made to the deferred sentencing paragraph?

Pre-Sentence Reports

3.5 Council has agreed to most of the updated draft of the pre-sentence report section. There were however two elements that were requested to be considered further.

3.6 The first of these was the line specifying that a pre-sentence report may be particularly important if the offender is one of a list of cohorts. The second was the differences between magistrates and crown courts (in particular) in what, if any, indication of sentence should be given to probation when requesting a PSR.

3.7 On the list of cohorts, amendments agreed in the October meeting have been made, and the updated list can be seen below, with lines to be discussed in **bold**.

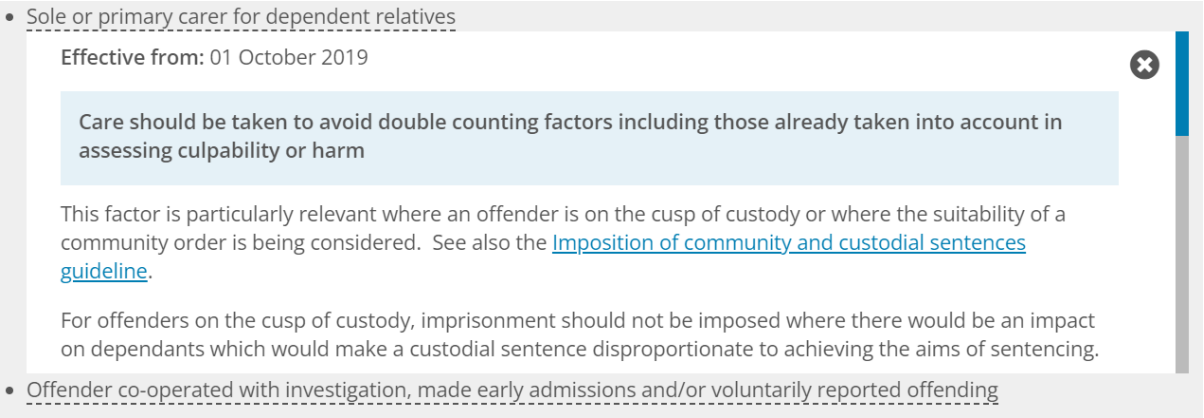
A pre-sentence report may be particularly important if the offender is:

- **at risk of a custodial sentence of 12 months or less;**
- a young adult (18-25 years);
- female (see further information below);
- **pregnant (see further information below)**
- **a sole or primary carer for dependant relative(s);**
- has disclosed they are transgender;
- has any drug or alcohol addiction issues;
- has a learning disability or mental disorder;
- Or; the court considers there to be a risk that the offender may have been the victim of domestic abuse, trafficking, modern slavery, or been subject to coercion, intimidation or exploitation.

3.8 The first cohort; those '**at risk of a custodial sentence of 12 months or less**' has been added after it was suggested by a number of members in the last meeting. Taking into account discussions around the use of the term "short custodial sentence" and the Council deciding not to directly specify in the guideline that a short custodial term is 12 months or less as specified by the Effectiveness review, this term aligns with that used later in the guideline under the question 'what is the shortest term commensurate with the seriousness of the offence' which refers to the effectiveness review findings. Council agreed in this discussion that the preferred term was 'immediate custodial sentence of up to 12 months' rather than 'short custodial sentence of up to 12 months' or indeed 'short custodial sentence' which leaves interpretation to what this might be open, so I have replicated this line in the list of cohorts.

Question 3: Does the council agree with the term 'at risk of a custodial sentence of 12 months or less' for this cohort of offenders in the list of cohorts for whom a PSR may be particularly important?

3.9 In a previous meeting, Council members expressed a desire to have the term '**previous term 'sole or primary carer for dependant relative(s**)' link to the expanded explanation for what is commonly a mitigating factor in many guidelines. Due to the way the expanded explanations are hosted on the website, it is not possible to link to these directly, however Council could decide to include the drop down for this expanded explanation in the same way drop downs are currently presented for aggravating and mitigating factors (currently a dotted line), such as the below.



3.10 If the Council decided to do this, it should be noted that no other cohort in the list of cohorts would have an expandable explanation, however Council may feel that the information within this explanation is particularly important to highlight. The full expanded explanation for sole and primary carer can be seen at **Annex B**.

Question 4: Does Council wish to include a drop-down for the expanded explanation of sole or primary carer within the list of cohorts in the PSR section?

3.11 I have added '**pregnant'** to the list of cohorts due to the recent discussions on pregnant offenders in prison. I have made this a separate factor as it is an important consideration in its own right, and if it were with 'primary carer' this may risk 'primary carers' only being applicable to female offenders.

Question 5: Does Council agree with 'pregnant' in the list of cohorts for whom a PSR may be particularly important?

3.12 There were previously some concerns from members about the description of what was previously '**minority ethnic background'** in particular. A policy briefing published by Action for Race Equality (ARE) and EQUAL on the 'Ethnic Inequalities in the Criminal Justice System' in January 2023 refers to "ethnic minority groups" or "ethnic minority communities". Action for Race Equality has been working for over 30 years to end race inequality for Black, Asian, Mixed heritage and ethnic minority communities and ARE is a Black and Asian-led organisation working collaboratively and in partnership with grassroots, voluntary and community organisations, so it is considered that these are acceptable terms to be used. Other than the key findings in this report, it is noted that "inadequate or poor-quality information in pre-sentence reports [or indeed, the lack of pre-sentence reports] can result in ambiguity about the seriousness of the offence which determines the decision to imprison, and potentially biased 'perceptual shorthands' which increase the risk of ethnic minority individuals receiving more punitive sentences."

3.13 Two of the recommendations in response to this finding were to:

- Ensure high quality standard delivery [*commonly adjourned*] pre-sentence reports are obtained in all cases where sentencers are considering a sentence of imprisonment, and
- Guidelines on pre-sentence reports should be revised to ensure they contain adequate information about the personal, cultural, and offending circumstances of individuals and pay attention to experiences of discrimination, racism, and victimisation.

3.14 It is therefore considered particularly important to include this cohort of offenders, and the cohort description has been amended to '**from an ethnic minority, cultural minority, and/or faith minority community."** This seeks to align with the terminology used in the recent policy briefing, as well as to include a wider group of individuals than simply from a 'ethnic minority background'.

Question 6: Does the Council agree with the term 'from an ethnic minority, cultural minority, and/or faith minority community' to be used instead of 'minority ethnic background' for this cohort of offenders?

3.15 The second issue that was noted to be discussed further within the PSR section was the indication of sentence given to probation when requesting a PSR. Council's discussion on this topic focused on the differences between magistrates and crown courts; in particular what level of information would be most useful to give to probation about the potential

sentence when requesting a report. It was concluded in this discussion that separate guidance may be necessary due to the different approaches in the different courts.

3.16 Members speaking on behalf of magistrates' courts mostly agreed that specifying an initial finding for harm and culpability factors would be a very helpful indication both to probation and the sentencing court (which would likely not be the same as the trial court), but requested it was clear this was a 'preliminary' indication, so a line has been developed accordingly specific to magistrates' courts. In addition, all members agreed that it would be useful for the court to indicate any specific requirements, needs or issues it would like probation to consider and/or assess, so this has been included in relation to all courts.

> **Indication of sentence to Probation**
>
> In magistrates' courts, it may be helpful for the court to indicate to Probation the preliminary level of harm and culpability it has found for the offence.
>
> In all courts, it may be helpful for the court to indicate to Probation any specific requirements that probation should consider the defendant's suitability for should a community or suspended sentence order be imposed; and any needs or concerns the court would specifically like to be considered.

3.17 There is a small risk that referring to "community or suspended sentence order" in one line contrasts the Council's intention that an SSO is not seen as a more robust community order. Both a CO and an SSO are relevant in this context as probation are able to assess the offender's suitability for any requirement that can be attached to either, and both these sentences are served in the community, however Council may feel on balance it would be better to mention only CO here.

Question 7: Does the Council agree with the split between magistrates' courts and all courts and are there any other specific indications to probation that should be included in either of the lines?

Question 8: Does the Council have any concerns about the use of 'CO and SSO' together?

Question 9: Does the Council approve this paragraph?

<u>PSRs on Committal to Crown Court</u>

3.18 In the October meeting it was agreed to consider the new guidance that was being developed in the Better Case Management Handbook, particularly in relation to the question of mentioning court resources in the PSR section of the guideline.

3.19 This new guidance published in January 2023, the relevant part of which can be seen at **Annex C**, does reference court resources in relation to requesting PSRs, so it is considered that the guideline does not need to. The relevant excerpt is below.

> "There should be liaison between Crown Courts, Magistrates' Courts and the Probation Service about the resources available so that courts are aware what level of provision is available.
>
> In most areas the Probation Service will now be able to provide Pre-Sentence Reports (PSRs) in all cases which are committed to the Crown Court."

Please note, the line "This guidance applies pending an update to CrimPD 3A.9." remains in the Better Case Management Handbook despite the Criminal Practice Directions being updated in May 2023. There is no conflicting information in the respective documents nor is there in the updated version of the imposition guideline.

Question 10: Does the Council agree the PSR section should not include reference to court resources?

Requirements: inclusion of drug testing

3.20 The list of requirements was discussed by the Council in March. Council amended and then agreed to the current version of this list, but it was not decisively concluded whether the list should include reference to the drug testing requirement. This requirement is planned to be 'turned on' this month but will only be relevant and applicable to 3-5 single courts across England and Wales. As this is the case, it is recommended that it is not included in the Imposition guideline as it may otherwise confuse and can be added at a later date when it is more widely applicable. However, Council may feel it would be useful to include it considering it is in legislation.

Question 11: Does Council agree not include the drug testing requirement in the requirements list at this time?

Female offenders and young adult offenders

3.21 The paragraphs on female offenders and young adult offenders within the effectiveness section have been through considerable development. Having now brought all sections together, it is considered necessary to ask whether these sections are of a suitable length. This section has been put into bullet points for easier reading, but Council may feel that, considering the length of the updated full guideline, the paragraphs on female offenders

in particular are, arguably, disproportionately long. This may risk sentencers skipping over these paragraphs and/or not referring to them at all. It is clear from the BIT report, which has now been reviewed by the Analysis and Research Sub-Group and is currently with the peer reviewer, that sentencers do not necessarily read each guideline in full when referring to them. It is also clear, from a practical perspective, that the imposition guideline is not read in full while in court (particularly if sentencers are also looking at the relevant offence specific guideline and are having to flick between).

3.22 On the other hand, the issues surrounding sentencing female offenders, and pregnant offenders, are particularly prominent at this time and this is a discussion the Council has had many times over the last few years. The Council may feel a disproportionately long (at least to the proportion of female offenders) paragraph on female offenders ensures it is clear that the Council considers this an important issue and makes this an important point of reference for sentencers, and that the bullet point format ensures this section can be read as easily as possible.

Question 12: Is the Council content with the current length of the female offenders paragraph in particular, and also the young adult offenders paragraph?

Full guideline

3.23 While this meeting does not seek to ask the Council for sign off for the guideline considering the number of outstanding discussion points, it does provide an opportunity for members to read through the guideline in full for the first time and raise any concerns for any issues that may not yet have been discussed in detail. The full updated draft guideline is at **Annex D**.

3.24 Please note, the list of requirements within the guideline are also intended to be drop downs, which would make the overall length shorter if all contracted.

3.25 It may be helpful for members to email both Bill and Jessie any substantial additional points or concerns in advance of the meeting to aid time management during the meeting, but please also feel free to raise anything new during the meeting.

Question 13: Is there anything else members of Council wish to raise now seeing the whole guideline?

4 EQUALITIES

4.1 The updated draft Imposition guideline addresses some issues set out in University of Hertfordshire commissioned report on equality and diversity in the work of the Sentencing Council (“the equalities report”).

4.2 The Council agreed in response to the finding on personal mitigation that the Imposition guideline would consider this in relation to whether and the point at which sentencers request PSRs and consequently receive all the information necessary for sentencing. It is intended that the new PSR section states the legislation on PSRs more directly so to encourage courts to request PSRs in all cases unless considered unnecessary. This is strengthened by the encouragement for courts to give some indication of the harm and culpability (in magistrates’ courts only) and/or particular needs or issues they want probation to address in a PSR, and for a PSR to be requested on committal to the Crown court. This is also applicable to the new inclusion of the list of cohorts for whom a PSR may be particularly important, as information on personal mitigation of offenders in these cohorts obtained by the court through a PSR may affect the overall type or requirements on a sentence. While the list of cohorts may end up capturing the majority of offenders in courts, this is considered necessary to ensure the courts have the necessary information to make the most informed sentencing decision.

4.3 The equalities report recommended that pregnancy should be a distinct item where medical conditions are mentioned. The updated draft Imposition guideline newly makes reference to pregnancy in multiple places; first in the list of cohorts for whom a PSR may be particularly important (which, in line with the report, is distinct from both the primary carer cohort and female offender cohort) and then in more detail in a female offenders specific sub-section in a new Effectiveness section. This new section also addresses various equality issues related to the sentencing of female offenders that the Council has been recently lobbied to address.

4.4 Regarding the recommendation in the equalities report on communicating with other ‘consumers’ or stakeholders in the guideline development (or review) process, there has been significant engagement throughout the review of this guideline with various teams within Probation, including in particular the central court team. This has led to the Council being asked for direct feedback on a new PSR form which will be piloted later in the year, and it is hoped this closer relationship will continue for future guidelines.

4.5 More generally, the guideline sets out that the court should ensure that requirements imposed on an offender should be suitable according to a variety of factors. The updated draft guideline has expanded on this list of factors (newly adding, for example, ‘the ability of the offender to comply taking into account the offender’s accommodation, employment and

family situation including any dependants'). These new factors take more individualised needs into account, which may decrease the risk of some high-need cohorts of offenders being given unsuitable sentences. This approach is strengthened by the removal of rehabilitative requirements from the levels table lists that increase volume of requirement with severity of offence, and the statement that 'Any requirement/s imposed for the purpose of rehabilitation should be determined by and aligned with the offender's needs.'

4.6 Finally, after some initial conversations with organisations representing those with lived experience of the criminal justice system, it is intended that the consultation will be sent to these organisations with a request for input specifically from those with lived experience.

5 IMPACT AND RISKS

5.1 The resource assessments undertaken for each guideline must consider the potential impact of the guideline on prison, probation and youth justice resources. Typically, for offence specific guidelines, this tends to focus on the resource associated with prison places, as this is the analysis we can most easily conduct with the data we have access to. "For this guideline, any impact on prison resources is more likely to be from fewer people being sent to prison than more people being sent to prison."

It is anticipated, however, that the resource assessment for the Imposition guideline will need to consider in greater depth the impact on probation resources. This has historically been much harder to determine as the 'capacity' of probation services cannot be measured in the same way as beds in cells, and our access to probation data is much more limited. The A&R team intend to work with MoJ and the Probation Service to understand what impact the guideline may have regarding capacity and resources, and the draft resource assessment will be presented with the draft guideline for sign off in the September meeting.

Sentencing Council

Sentencing Council meeting:	**16 June 2023**
Paper number:	**SC(23)JUN03 – Immigration**
Lead Council member:	**Stephen Leake**
Lead official:	**Vicky Hunt** **vicky.hunt@sentencingcouncil.gov.uk**

1 ISSUE

The Council is invited to consider a revised draft of the facilitation guideline and a first draft of a guideline for the offence of possession of false identity documents with improper intention (s4, Identity Documents Act 2010).

2 RECOMMENDATION

That the Council discuss and agree the content of the draft guidelines.

3 CONSIDERATION

Facilitation

3.1 The Facilitation guideline covers the two offences of assisting unlawful immigration to the UK (s25, immigration Act 1971), and helping asylum seeker(s) to enter the UK (s25A, Immigration Act 1971). The Council considered the first draft of the facilitation guideline at the meeting at the end of March. A number of amendments were discussed and agreed at that meeting. Those changes can be seen in the draft at **Annex A**.

Question 1: Does the Council agree with the revised draft of the guideline (steps 1 and 2)?

Facilitation - Sentencing

3.2 At the last meeting the Council considered and agreed that the highest sentence that should be available in this guideline should be 16 years. Whilst the Council was mindful of the fact that Parliament has increased the statutory maximum sentence from 14 years to life the Council agreed that the highest sentence should be comparable to other offences of similar gravity, namely modern slavery which also has a top sentence of 16 years and death by dangerous driving which goes up to 18 years.

3.3 The Council also agreed that the increase in statutory maximum sentence does not mean that all sentences across the board should be inflated, just that the most serious cases should now attract higher sentences.

3.4 The Council is now invited to consider the sentencing table within the guideline (**Annex A**). The sentences aim to follow the principles agreed by the Council at the last meeting and are based on transcripts and Court of Appeal decisions.

Question 2: Does the Council agree with the sentencing table at Annex A?

False ID Documents with Improper Intent

Identity Documents Act 2010
4 Possession of false identity documents etc with improper intention
(1) It is an offence for a person ("P") with an improper intention to have in P's possession or under P's control—

(a) an identity document that is false and that P knows or believes to be false,

(b) an identity document that was improperly obtained and that P knows or believes to have been improperly obtained, or

(c) an identity document that relates to someone else.

(2) Each of the following is an improper intention—

(a) the intention of using the document for establishing personal information about P;

(b) the intention of allowing or inducing another to use it for establishing, ascertaining or verifying personal information about P or anyone else.

(3) In subsection (2)(b) the reference to P or anyone else does not include, in the case of a document within subsection (1)(c), the individual to whom it relates.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for a term not exceeding 10 years or a fine (or both).

3.5 The first draft of this guideline can be seen at **Annex B**. In addition, relevant case law can be seen at **Annex C**.

Culpability Factors

A-	• Possession of a large number of documents used for commercial scale criminal activity • Substantial financial gain/ expectation of substantial financial gain • A leading role where offending is part of a group activity • Sophisticated nature of offence/significant planning

B-	• Possession of multiple documents intended for the use of others • Financial gain/ expectation of financial gain • A lesser role where offending is part of a group activity
C-	• Possession of one or two false documents for own use • Involved due to coercion or pressure

3.6 From the case law it appears that cases involving large numbers of documents, clearly intended to be sold to others on a commercial scale, tend to attract the very highest sentences. For example, in the case of *R. v Kuosmanen* the offender had 250 fake passports and other identification documents. The factors in culpability A attempt to reflect this sort of case.

3.7 The lowest culpability is for offenders who had false documents for their own use. In addition, I have included a factor for those who are involved in a commercial scale enterprise due to coercion or pressure. I did not see any examples of such cases but thought it may be possible.

3.8 This leaves the middle category for offenders either who have multiple documents (more than necessary for personal use), but not on the scale of category A. For example, in the case of *Cheema* the offender had 12 false passports.

3.9 In addition, category B could also capture those who play a lesser role in a commercial type of enterprise.

Question 3: Does the Council agree with the proposed culpability factors?

<u>Harm Factors</u>

Category 1	• Document(s) used to evade immigration controls
Category 2	• Document used to assist criminal activity (other than that described in category 1 or 3) • Document used to evade responsibility for criminal activity
Category 3	• Document used to obtain rights, services or benefits [such as employment, accommodation, bank accounts etc]
Category 4	• All other cases

3.10 The proposed harm factors are based on the offender's use or intended use of the document(s). The case law makes clear that using false documents for the purposes of evading immigration controls is the most serious form of the offence and should be distinguished from those cases where the offender is using a document to obtain work or acquire a bank account. Based on that principal I have set out category 1 and 3 above.

3.11 The Council will note that category 3 includes some examples. This is not normal practice for guidelines and so the examples could be removed if the Council considers that the factor is clear enough without them.

3.12 Category 2 includes two factors:

- Document used to assist criminal activity

For example, in the case of *R v Oryem* – the offender used a false identification document in a fraudulent attempt to purchase an expensive watch using another person's bank card.

- Document used to evade responsibility for criminal activity

This might apply where the offender is apprehended by police for another offence and produces a fake identification document.

Question 4: Does the Council agree with the factors set out in categories 1-3?

3.13 One of the most common type of case is where the offender is driving a motor vehicle which is stopped by the police and the driver produces a false driving licence. The case law in this area seems to be a little inconsistent and so it is unclear whether current sentencing practice would dictate that these cases receive a similar penalty to the employment type cases (category 3) or if they should attract a higher sentence, and fall into category 2.

3.14 For example in the recent Court of Appeal case of *R v Lumanaj* *[2022] EWCA Crim 725* (described in **Annex C**) the offender's sentence was reduced on appeal but was still rather high at 2 years (prior to reduction in sentence for guilty plea). In part the reason for the high sentence was due to relevant previous convictions but even accounting for this the sentence is still significantly higher than the average employment type case and it is clear that the Court of Appeal considered it to be more serious:

> *"The present case did not involve the use of a false passport to evade immigration control, but equally it was not a case at the bottom of the*

spectrum where a false document is used to gain employment or to open a bank account. Instead, the appellant obtained and used a false driving licence to drive a vehicle when he was not allowed to drive at all. This improper purpose was serious because the appellant was seeking to avoid detection of his failure to obtain a proper licence, thereby putting at risk the safety of other road users and the public more generally. Given the appellant's previous offending, it is reasonable to infer that he has repeatedly relied upon having a false license with him while continuing to drive. The previous offending seriously aggravated the index offence."

3.15 Whereas in the earlier cases of *Mehmeti* and *Hidri* (also described in **Annex C**) the offenders both had their sentences reduced on appeal to 9 months (prior to reduction for guilty plea) which is entirely in line with an employment type case.

Question 5: Does the Council consider that a false driving licence case should be treated the same as an employment offence (category 3) or should it have a higher (or lower) starting point?

3.16 The final category is for any other cases. The Council may consider that this category is necessary to enable the guideline to include the possibility of a community order. The statistics are discussed further down this paper, and can be seen at **Annex D**, but 9 per cent of cases in 2021 were dealt with by way of community order.

Question 6: Does the Council want to include category 4?

<u>Aggravating Factors</u>

3.17 In addition to the standard factors:

- Offending conducted over a sustained period
- Involvement of others through pressure, influence
- Offender not lawfully present in the UK (unless taken into account at step 1)
- Abuse of position of trust
- Obtained document from a forger

Offending conducted over a sustained period

3.18 This factor can feature in all types of cases and is frequently cited as a reason to increase the sentence.

Involvement of others through pressure, influence

3.19 This factor could occur in a large commercial scale operation or in a personal use case, for example a person puts pressure on another party to allow them to use their passport to enter the UK unlawfully, or to obtain work under a false identity.

Offender not lawfully present in the UK

3.20 In a number of employment type cases the court draws a distinction between those who are lawfully present in the UK but do not have a legal entitlement to work, and those who have no lawful entitlement to be in the UK at all, treating the latter more seriously.

Obtained document from a forger – unless already taken into account at step 1

3.21 The Council may consider that a sentence should be higher where the offender seeks out and pays a forger to provide them with false documents, rather than a less sophisticated option such as using a family member's documents.

3.22 This is likely to be a key feature of a commercial case and would already have been taken into account at step 1.

Mitigating Factors

3.23 The mitigating factors are all standard factors.

Sentence Levels

3.24 The statistics can be seen at **Annex D**, section 4. Council will note that the volume of cases appears to be reducing. In the last couple of years of data we can see that there were just under 250 cases, whereas in 2012 the volume was as high as 860. Speaking with the CPS about the potential reasons for the reduction they inform us that there may be a couple of reasons for the decline. Firstly, as these offences frequently arise at airports one explanation for the decline between 2020 and 2021 is because of COVID and the huge reduction in air traffic at that time. Secondly, there had been a greater focus on organised immigration crime over the last few years which involved redeploying resources away from

airports. However, since the new offences have come in under the Nationality and Borders Act 2022 this work is increasing again.

3.25 Tab 4.2 of the data sets out the sentence outcomes for these offences over the last 11 years. In 2021, around 90 per cent of offenders received a custodial sentence (either immediate or suspended) and in the years prior to 2021, the percentage was around the same or higher. In 2020, the proportion of offenders receiving a suspended sentence increased to 27 per cent, there was a slight decrease in 2021 (22 per cent) but the proportion was still higher than in years prior to 2020. The proportion of offenders receiving a community sentence has been steadily increasing since 2019.

3.26 For those receiving immediate custody, most offenders receive a sentence of 1 year or less (88 per cent in 2021). The (mean) average custodial sentence length was around 9 months.

3.27 The sentences set out in the draft guideline at **Annex B** attempt to reflect current sentencing practice.

Question 7: Does the Council agree with the sentences proposed?

4 EQUALITIES

4.1 The demographics of the offenders sentenced for s4 in 2021 can be seen in **Annex D** at tabs 4.5-4.8.

4.2 The figures show that the majority of offenders sentenced are male (93 per cent in 2021). From tab 4.6 we can see that female offenders are far more likely to receive a community order than males, but that for both male and female offenders custody (immediate or suspended) is the most common sentence. Note that the volume of female offenders is much smaller than male (around 20 female offenders compared to 230 male offenders in 2021).

4.3 Looking at ethnicity you will note that for around 90 (38 per cent) out of the 250 offenders sentenced, the ethnicity is not recorded or not known, and volumes for ethnicity groups other than white are also much smaller in comparison. Therefore, conclusions that can be drawn based upon the known ethnicity figures may be unreliable. However, with the information available, looking at tab 4.6 there does not appear to be any disparity in sentence for these offences that would require the Council to take action at this stage.

Question 8: Does the Council agree that no further action is required as a result of the demographics data for these two offences?

5 IMPACT AND RISKS

We will consider the impact of the guidelines in the usual way through the resource assessment.

Sentencing Council

Sentencing Council meeting:	**16 June 2023**
Paper number:	**SC(23)JUN04 – Annual report**
Lead official:	**Phil Hodgson 020 7071 5788**

1. Issue

1.1 This paper presents the Sentencing Council annual report 2022/23 for consideration by members of the Council. The full report is at annex A.

2. Recommendation

2.1 That the Council approves the annual report for submission to the Lord Chancellor and subsequent laying before Parliament.

3. Consideration

3.1 The annual report is a summary of the activities and achievements of the Sentencing Council between 1 April 2022 to 31 March 2023.

3.2 This year's report follows the new structure that reflects the strategic objectives set by the Council in the five-year strategy. It includes:

- Foreword from the Chairman
- Strategic objective 1: reporting on all work done during the year relating to the development, revision and release of sentencing guidelines, including policy development, consultation, A&R and communication
- Strategic objective 2: reporting on all other aspects of A&R work
- Strategic objective 3: reporting on the work we have done in relation to equality and diversity
- Strategic objective 4: reporting on our effectiveness research
- Strategic objective 5: reporting on work done to improve public confidence in sentencing
- Sentencing and non-sentencing factors reports
- About the Sentencing Council section, including membership, governance and budget

3.3 The report also includes four feature articles reporting on:

- the academic seminar co-hosted by the Council, City Law School and the Sentencing Academy in January 2023
- the research into equality and diversity in the work of the Sentencing Council
- the literature review on the effectiveness of sentencing options on reoffending, and
- the most recent research on public knowledge of and confidence in sentencing and the criminal justice system

4. Photography

4.1 Some of the photographs in this proof are place holders. They will be replaced with pictures featuring current members of the Council and the Office. There will also be a new portrait photograph of the Chairman (page 1).

5. Next steps

5.1 The Council is required by statute to provide the Lord Chancellor with a report on the exercise of the Council's functions during the year. The Lord Chancellor must lay a copy of the report before Parliament, after which the Council will publish it. The schedule for this year is as follows:

- Friday 16 June – consideration at Council meeting
- Thursday 22 June – submission to the Lord Chancellor and sponsoring Minister Edward Argar MP; circulation to MoJ Bail, Sentencing and Release Policy Unit
- Wednesday 12 July – laid in Parliament (am) and published (pm)

3.4 Members are asked to discuss any substantive corrections or suggestions for changes to the report at the Council meeting on Friday 16 June and to forward any further minor changes to Phil (phil.hodgson@sentencingcouncil.gov.uk) by end of Monday 19 June.

Question 1: Are there any substantive corrections or suggestions for changes members would want me to make to the report today?

Question 2: Subject to any minor amendments and the selection of photographs, does the Council approve the Annual Report 2022/23 for submission to the Lord Chancellor?

Sentencing Council

Sentencing Council meeting:	**16 June 2023**
Paper number:	**SC(23)JUN05 – Amendment to Schedule 21**
Lead Council member:	**Bill Davies**
Lead official:	**Ruth Pope** **Ruth.pope@sentencingcouncil.gov.uk**

1 ISSUE

1.1 Sentencing for murder is governed by Schedule 21 to the Sentencing Code.

1.2 The Chairman has received a letter from the Lord Chancellor stating:

> As you are aware, the Government published Clare Wade KC's Domestic Homicide Sentencing Review on 17 March, alongside the announcement of an initial package of reforms to change the law so that sentencing for domestic murders always reflects the seriousness of these crimes. This includes the introduction of 'overkill' and a history of coercive or controlling behaviour against the victim as statutory aggravating factors in Schedule 21 of the Sentencing Act 2020. The Government committed to introducing legislation to implement these reforms as soon as possible.
>
> Paragraph 19 of Schedule 23 of the Sentencing Act 2020 allows for the Lord Chancellor to amend Schedule 21 by regulations subject to the affirmative resolution procedure, but stipulates that before making regulations the Lord Chancellor must consult the Sentencing Council for England and Wales. As such, I have appended a draft Statutory Instrument for the proposed amendments to Schedule 21, for your consideration.
>
> Recommendation 5 in the Review is that Schedule 21 should be amended to make coercive or controlling behaviour both an aggravating factor and a mitigating factor, depending on the circumstances. Whilst the Government thus far has only committed to making this behaviour a statutory aggravating factor to murder, our intention is to legislate for both parts of the recommendation at the same time. This will be announced in the Government's full response to the Review. Therefore, for the purposes of this consultation, the draft Statutory Instrument also includes reference to coercive or controlling behaviour against the offender as a statutory mitigating factor.
>
> The Government's full response to the Domestic Homicide Sentencing Review will be published before summer recess. I would be grateful for the Council's views on this by Friday 30 June.

1.3 The draft SI is attached. It creates two additional statutory aggravating factors, and one additional statutory mitigating factor. The new aggravating factors apply where:

> (1) the offender had repeatedly or continuously engaged in behaviour towards the victim that was controlling or coercive and, at the time of the behaviour, the offender and victim were personally connected within the meaning of section 76 of the Serious Crime Act 2015; and

(2) the offender used violence significantly greater than that which was necessary to cause death (sometimes referred to as “overkill”).

1.4 The new mitigating factor applies where the victim had repeatedly or continuously engaged in behaviour towards the offender that was controlling or coercive and, at the time of the behaviour, the offender and victim were personally connected within the meaning of section 76 of the Serious Crime Act 2015.

1.5 The new factors only apply to offences committed on or after the day on which these Regulations come into force.

2 RECOMMENDATION

2.1 That the Council agrees to respond to the Lord Chancellor stating that the changes are in line with current sentencing practice and are unlikely to have a significant impact on sentencing levels overall.

3 CONSIDERATION

3.1 As a statutory consultee the Council should consider the SI and provide a response to the Lord Chancellor.

3.2 The aggravating and mitigating factors in Schedule 21 are non-exhaustive. While sentencing for murder is governed by Schedule 21 rather than by a sentencing guideline, courts must still follow any sentencing guidelines relevant to the case and any relevant case law.

3.3 The proposed aggravating factor relating to coercive and controlling behaviour is covered by the Domestic abuse guideline and the factor relating to ‘overkill’ is not dissimilar to the existing aggravating factor in Schedule 21: ‘(c) mental or physical suffering inflicted on the victim before death’.

3.4 The proposed mitigating factor is one that courts do take into account across a range of offences.

3.5 While we have not carried out any analysis of murder cases, it seems likely that courts are already taking into account the proposed new factors in relevant cases and we therefore would not expect these proposals to have a significant impact on sentencing.

3.6 The suggestion is that the Council responds to the Lord Chancellor in its capacity as a statutory consultee, noting the proposals and indicating that, for the reasons outlined above we do not expect them to have a significant impact on sentencing for murder, nor would they necessitate any changes to current sentencing guidelines.

Question: Does the Council agree with the suggested approach?

Sentencing Council

Sentencing Council meeting:	**16 June 2023**
Paper number:	**SC(23)JUN06 – Miscellaneous amendments**
Lead Council member:	**Jo King**
Lead official:	**Ruth Pope** **ruth.pope@sentencingcouncil.gov.uk**

1 ISSUE

1.1 This is the second of three meetings to consider items for inclusion in this year's consultation on amendments to sentencing guidelines and supporting material. The consultation will take place in September to November to allow time for consideration of the responses in December and January before publication of the changes in March which will come into effect on 1 April 2024.

2 RECOMMENDATION

2.1 The Council is asked to consider the various matters set out below and decide:

- if any changes to guidelines are required;
- if so, whether the changes should be consulted on; and
- if so, should they be included in this year's miscellaneous amendments consultation.

3 CONSIDERATION

SOCPA agreements

3.1 The Council received a request from the Serious Fraud Office (SFO) in July 2022 for sentencing guidelines covering the reduction to be afforded to offenders who enter in to an agreement to assist the prosecution. This was discussed by the Council in October 2022 and the conclusion arrived at was that the best approach would be to consider adding a note (as a dropdown) to the relevant step in guidelines summarising the case law regarding SOCPA agreements as set out in R v Blackburn [2007] EWCA Crim 2290 paragraphs 37 – 41. The SFO were content with this approach.

3.2 The following is a proposed draft:

Step 3 – Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account section 74 of the Sentencing Code (reduction in sentence for assistance to prosecution) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

Guidance on the effect of an agreement under section 74 on sentencing	V

Case law has established that there are no inflexible rules as to the method by which any reduction should be assessed nor the amount of the reduction. It will be a fact specific decision in each case. The following sequence of matters for a sentencing court to consider reflects the judgment in *R v P; R v Blackburn* [2007] EWCA Crim 2290:

1. The court should assess the seriousness of the offences being sentenced following any relevant sentencing guidelines.
2. The court should then consider the quality and quantity of the material provided by the offender in the investigation and subsequent prosecution of crime. Particular value should be attached to those cases where the offender provides evidence in the form of a witness statement or is prepared to give evidence at any subsequent trial, especially where the information either produces convictions for the most serious offences, or prevents them, or which leads to disruption of major criminal networks.
3. This consideration should be made in the context of the nature and extent of the personal risks to, and potential consequences faced by, the offender and the members of the offender's family.
4. Any reduction for a guilty plea is separate from and additional to the appropriate reduction for assistance provided by the offender. The reduction for the assistance provided by the offender should be assessed first to arrive at a notional sentence and the guilty plea reduction applied to that notional sentence.
5. A mathematical approach is liable to produce an inappropriate answer – the totality principle is fundamental.
6. The court should take into account that the procedure requires offenders to reveal the whole of their previous criminal activities which will often entail pleading guilty to offences which the offender would never otherwise have faced.
7. The totality principle is critical in the context of an offender who is already serving a sentence, and who enters into an agreement to provide information which discloses previous criminal activities and comes before the court to be sentenced for the new crimes, as well as for a review of the original sentence (under section 388 of the Sentencing Code).
8. Where an offender has committed serious crimes, the process under sections 74 and 388 does not provide immunity from punishment, and, subject to appropriate reductions, an appropriate sentence should be passed. By participating in the written agreement system the offender is entitled to a reduction from the sentence which would otherwise be appropriate to reflect the assistance provided to the administration of justice, and to encourage others to do the same. It is only in the most exceptional case that the appropriate level of reduction would exceed three quarters of the total sentence which would otherwise be passed, and the normal level will be a reduction of somewhere between one half and two thirds of that sentence.

3.3 I have shared this draft with officials from the SFO they have no suggestions for changes. They have, however, noted the following (which they acknowledge is outside the scope of the proposed consultation):

> We have been advised that confidential texts compete with statutory processes for assisting offenders. The envisaged use of texts when SOCPA was enacted bears no resemblance to how they are actually used now.
>
> However from a SFO perspective we understand that SOCPA 2005 was never intended to replace texts. Our understanding is that legislators envisaged SOCPA would complement the existing Common Law procedures and not replace it. Our perspective is that law enforcement uses texts very effectively. However as LEA partners have asked us to flag this (as they knew we were engaging with you) we felt that we should do so.

3.4 The Council could consider, separately and at a later date, whether to provide any guidance on how texts should be taken into account in sentence. Though the concern here seems to be more in relation to the decision to use them (which is not a sentencing decision) rather than the way the courts take them into account. I propose to respond to the SFO suggesting that those who had concerns contact me directly to discuss what they consider to be the issues.

Question 1: Does the Council wish to consult on the proposed dropdown on SOCPA agreements?

Abuse of trust

3.5 We have received feedback from a magistrate who suggested that there should be a factor in sexual offences guidelines of ‘person in a trusted position’. The particular guideline he was looking at was the sexual assault guideline which has ‘abuse of trust’ as a high culpability factor with the following dropdown:

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

3.6 In correspondence with the magistrate he said that he was thinking of a doctor or nurse and indicated that it would be helpful to give further examples. The same explanation is used where abuse of trust is an aggravating factor in various different guidelines. The Council may feel that the explanation cannot include every example (and it clearly states that the examples are non-exhaustive) and that it would be counterproductive to include more. An alternative way of looking at it is that including any examples in unhelpful. The content of the explanation has been consulted on and in the absence of any clear need for change – none is proposed.

Question 2: Does the Council agree not to change the Abuse of trust factor or expanded explanation?

Previous convictions

3.7 The Council has previously noted that the definition of 'relevant' in legislation is not the same as the meaning we attach to it in the expanded explanation in guidelines. The factor in guidelines reads:

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

3.8 The expanded explanation reads:

Guidance on the use of previous convictions

The following guidance should be considered when seeking to determine the degree to which previous convictions should aggravate sentence:

Section 65 of the Sentencing Code states that:

(1) This section applies where a court is considering the seriousness of an offence ("the current offence") committed by an offender who has one or more relevant previous convictions.

(2) The court must treat as an aggravating factor each relevant previous conviction that it considers can reasonably be so treated, having regard in particular to— (a) the nature of the offence to which the conviction relates and its relevance to the current offence, and (b) the time that has elapsed since the conviction.

(3) Where the court treats a relevant previous conviction as an aggravating factor under subsection (2) it must state in open court that the offence is so aggravated.

1. Previous convictions are considered at step two in the Council's offence-specific guidelines.
2. The primary significance of previous convictions (including convictions in other jurisdictions) is the extent to which they indicate trends in offending behaviour and possibly the offender's response to earlier sentences.
3. Previous convictions are normally **relevant** to the current offence when they are of a similar type.
4. Previous convictions of a type different from the current offence **may** be relevant where they are an indication of persistent offending or escalation and/or a failure to comply with previous court orders.
5. Numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary.
6. If the offender received a non-custodial disposal for the previous offence, a court should not necessarily move to a custodial sentence for the fresh offence.
7. In cases involving significant persistent offending, the community and custody thresholds may be crossed even though the current offence normally warrants a lesser sentence. If a custodial sentence is imposed it should be proportionate and kept to the necessary minimum.
8. The aggravating effect of relevant previous convictions reduces with the passage of time; **older convictions are less relevant** to the offender's culpability for the current offence and less likely to be predictive of future offending.
9. Where the previous offence is particularly old it will normally have little relevance for the current sentencing exercise.
10. The court should consider the time gap since the previous conviction and the reason for it. Where there has been a significant gap between previous and current convictions or a reduction in the frequency of offending this may indicate that the offender has made attempts to desist from offending in which case the aggravating effect of the previous offending will diminish.
11. Where the current offence is significantly less serious than the previous conviction (suggesting a decline in the gravity of offending), the previous conviction may carry less weight.

12. When considering the totality of previous offending a court should take a rounded view of the previous crimes and not simply aggregate the individual offences.

13. Where information is available on the context of previous offending this may assist the court in assessing the relevance of that prior offending to the current offence

3.9 The quote from the legislation in the expanded explanation omits subsection (4) onwards:

> (4) In subsections (1) to (3) "relevant previous conviction" means—
>
> (a) a previous conviction by a court in the United Kingdom …

3.10 Subsequent provisions refer to convictions under service law and in certain other jurisdictions as relevant previous convictions.

3.11 The legislation perhaps lacks clarity in that it refers to 'relevant' previous convictions meaning any conviction in the UK or service courts etc, but also to the 'relevance' of previous convictions: "(a) the nature of the offence to which the conviction relates and its relevance to the current offence" which appears to be something different.

3.12 In the expanded explanation what we refer to as 'relevant' is the 'relevance' of the previous conviction to the current offending. Perhaps the easiest way of addressing this would be to reword some of the points in the expanded explanation slightly:

3. Previous convictions are normally ~~**relevant**~~ **of relevance** to the current offence when they are of a similar type.

4. Previous convictions of a type different from the current offence **may** be ~~relevant~~ of relevance where they are an indication of persistent offending or escalation and/or a failure to comply with previous court orders.

5. …

6. …

7.

8. The aggravating effect of relevant previous convictions reduces with the passage of time; **older convictions are ~~less relevant~~ of less relevance** to the offender's culpability for the current offence and less likely to be predictive of future offending.

9. Where the previous offence is particularly old it will normally have little relevance for the current sentencing exercise.

Question 3: Does the Council wish to make the suggested changes to the expanded explanation for previous convictions and should this be consulted on?

Foreseeable harm in assault guidelines

3.13 A judge raised the following point:

> It relates to offences of violence. The guideline and the references to harm- there is intended harm and actual harm, but no reference whatsoever to section 63 of the Sentencing Act, which also requires a court to take into account foreseeable harm. There is no categorisation where there is no actual harm or very little actual harm, but the foreseeable harm could potentially be extremely grave.
>
> For example, I had a case not that long ago, and it was a young defendant who had stabbed his victim, who was also young, and it was quite clear that he was aiming for the sternum or thereabouts. And the victim just shuffled on point of impact and it went through his leather jacket and just caused a very small wound to his arm. So the actual harm was minimal, but the foreseeable harm would have been a life threatening injury. I found the guideline unhelpful in that regard.

3.14 The judge did not specify the offence in the example – but presumably it was either ABH or s20 wounding (unless there was evidence to prove an intention to cause serious harm). The harm assessments for these guidelines read:

ABH

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

S20

Harm
All cases will involve 'really serious harm', which can be physical or psychological, or wounding. The court should assess the level of harm caused with reference to the impact on the victim
Category 1
• Particularly grave and/or life-threatening injury caused

- Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment
- Offence results in a permanent, irreversible injury or condition which has a substantial and long term effect on the victim's ability to carry out their normal day to day activities or on their ability to work

Category 2

- Grave injury
- Offence results in a permanent, irreversible injury or condition not falling within category 1

Category 3

- All other cases of really serious harm
- All other cases of wounding

3.15 In both guidelines the use of a knife would put the case into high culpability ("Use of a highly dangerous weapon or weapon equivalent").

3.16 Section 63 of the sentencing Code says:

> Assessing seriousness
>
> Where a court is considering the seriousness of any offence, it must consider—
>
> (a) the offender's culpability in committing the offence, and
>
> (b) any harm which the offence—
>
> (i) caused,
>
> (ii) was intended to cause, or
>
> (iii) might foreseeably have caused.

3.17 The harm assessment in the assault guidelines does not specify whether the levels of harm refer to harm caused, intended and/or foreseeable, but the implication is that it is harm caused – physical or psychological. This is particularly the case where a certain level of injury is an element of the offence. The guidelines, and in particular the harm assessments, were extensively tested with sentencers when the revised guidelines were being developed to ensure that the overall sentences were appropriate. Adding a reference to harm intended or foreseeable could risk double counting with culpability factors (such as 'Use of a highly dangerous weapon or weapon equivalent', 'Prolonged/persistent assault' and 'Significant degree of planning or premeditation').

3.18 That said, it could be argued that some reference in the guidelines as to how harm, other than actual harm caused, should be treated would be helpful. In some guidelines we specifically address this by saying that harm risked should be treated as the category below the equivalent actual harm. For example, in the Fraud guideline:

Risk of loss (for instance in mortgage frauds) involves consideration of both the likelihood of harm occurring and the extent of it if it does. Risk of loss is less serious than actual or intended loss. Where the offence has caused risk of loss but no (or much less) actual loss the normal approach is to move down to the corresponding point in the next category. This may not be appropriate if either the likelihood or extent of risked loss is particularly high.

3.19 Clearly, any reference to foreseeable harm in assault guidelines would have to be tailored to those guidelines.

3.20 Alternatively or additionally the Council may consider it helpful if the guidelines explicitly stated that harm in these guidelines relates to actual harm caused.

Question 4: Does the Council wish to amend the assault guidelines to:

(a) make it explicit that the harm in refers to actual harm? and/or

(b) add in a reference to intended and/or foreseeable harm?

Changes to the Criminal Practice Directions

3.21 There are new Criminal Practice Directions (CPD) which came into force in on 29 May. A number of guidelines and other material on our website refer to the CPD and we have updated the references in guidelines where these are straightforward.

3.22 In the explanatory materials to the MCSG there is a page on victim personal statements.

3.23 The revised CPD says the following:

9.5 Victim personal statements

9.5.1 Victims of crime are invited to make a Victim Personal Statement (VPS). The court will take the statement into account when determining sentence. In some circumstances, it may be appropriate for relatives of a victim to make a VPS, for example where the victim has died as a result of the relevant criminal conduct.

9.5.2 The decision about whether or not to make a VPS is entirely a matter for the victim; no pressure should be brought to bear, and no conclusion should be drawn if no statement is made. A VPS, or a further VPS, may be made at any time prior to the disposal of the case. A VPS after disposal is an exceptional step, should be confined to presenting up to date factual material, such as medical information, and should be used sparingly, most usually in the event of an appeal.

9.5.3 Evidence of the effects of an offence on the victim contained in the VPS or other statement, must be:

a. in a witness statement made under s.9 Criminal Justice Act 1967 or an expert's report; and

b. served in good time upon the defendant's solicitor or the defendant, if they are not represented.

9.5.4 Except where inferences can properly be drawn from the nature of or circumstances surrounding the offence, a sentencing court must not make assumptions unsupported by evidence about the effects of an offence on the victim.

9.5.5 The maker of a VPS may be cross-examined on its content.

9.5.6 At the discretion of the court, the VPS may also be read aloud or played in open court, in whole or in part, or it may be summarised. If the VPS is to be read aloud, the court should also determine who should do so. In making these decisions, the court should take account of the victim's preferences, and follow them unless there is good reason not to do so; examples include the inadmissibility of the content or the potentially harmful consequences for the victim or others.

9.5.7 Court hearings should not be adjourned solely to allow the victim to attend court to read the VPS. A VPS that is read aloud or played in open court in whole or in part ceases to be a confidential document. The VPS should be referred to in the course of the hearing.

9.5.8 The opinions of the victim or the victim's relatives as to what the sentence should be are not relevant, unlike the consequences of the offence on them, and should therefore not be included in the statement. If opinions as to sentence are included in the statement, then it is inappropriate for them to be referred to, and the court should have no regard to them.

3.24 The current wording in the explanatory materials is:

A victim personal statement (VPS) gives victims a formal opportunity to say how a crime has affected them. Where the victim has chosen to make such a statement, a court should consider and take it into account prior to passing sentence.

The Criminal Practice Directions [Link currently not working] (external website) emphasise that:

- evidence of the effects of an offence on the victim must be in the form of a witness statement under section 9 of the Criminal Justice Act 1967 or an expert's report;
- the statement must be served on the defence prior to sentence;
- except where inferences can properly be drawn from the nature of or circumstances surrounding the offence, the court must not make assumptions unsupported by evidence about the effects of an offence on the victim;
- At the discretion of the court the VPS may also be read aloud in whole or in part or it may be summarised. If it is to be read aloud the court should also determine who should do so. In making these decisions the court should take into account the victim's preferences, and follow them unless there is a good

reason not to do so (for example, inadmissible or potentially harmful content). Court hearings should not be adjourned solely to allow the victim to attend court to read the VPS;

- the court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and the offender, taking into account, so far as the court considers it appropriate, the consequences to the victim;
- the opinions of the victim or the victim's close relatives as to what the sentence should be are not relevant.

See also the guidance on compensation particularly with reference to the victim's views as to any compensation order that may be imposed.

3.25 The highlighted section is no longer part of the CPD and so it is not accurate to include this in the list of bullets. However, the text could be moved to the opening paragraph.

3.26 The following (which is part of the CPD) could be added to the list of bullets:

- The decision about whether or not to make a VPS is entirely a matter for the victim; no pressure should be brought to bear, and no conclusion should be drawn if no statement is made.

Question 5: Does the Council wish to make the suggested changes to the explanatory materials page on VPS? Do these changes need to be consulted on?

Bladed articles etc guidelines

3.27 Stephen Leake has suggested the following changes because the titles of the guidelines all use the word "possession" whereas the offences are actually "having" (which is a different concept to possession):

CURRENT TITLE	SUGGESTED AMENDED TITLE
Main guideline Bladed articles and offensive weapons – possession	Bladed articles and offensive weapons – having in a public place
Main guideline Bladed articles and offensive weapons (possession and threats) – children and young people	Bladed articles and offensive weapons (having in public/education premises and threats) – children and young people
Sub-title/ search result Possession of an article with blade/point in a public place	Having an article with blade/point in a public place
Sub-title/ search result Possession of an article with blade/point on school premises	Having an article with blade/point on education premises

Sub-title/ search result Possession of an offensive weapon in a public place	Having an offensive weapon in a public place
Sub-title/ search result Possession of an offensive weapon on school premises	Having an offensive weapon on education premises
Main guideline Threatening with an article with blade/point or offensive weapon on school premises	Threatening with an article with blade/point or offensive weapon on education premises
Sub-title/ search result Unauthorised possession in prison of a knife or offensive weapon, Prison Act 1952 (section 40CA)	*No change needed – the offence is "possession"*

3.28 The change from 'school premises' to 'education premises' has already been made as this was a result of legislative change.

3.29 If the suggested changes are made, the search term 'possession' could still be used to locate these guidelines.

3.30 Stephen has suggested that the existing Bladed articles and offensive weapons – possession guideline could also apply to the offence of 'Having a corrosive substance in a public place' (contrary to section 6 of the Offensive Weapons Act 2019). His view is that this offence could be added to the guideline without any other amendment as the elements of the offence are the same and the harm levels in the guideline would apply to corrosive substances. The guideline already specifically references 'a corrosive substance (such as acid)' as an example of a highly dangerous weapon in the assessment of culpability. This is a new offence which came into force in April 2022 and from the data we have, fewer than five offenders were sentenced for the section 6 offence in 2022.

3.31 He has also suggested that the Council could consider whether 'Threatening with offensive weapon, bladed article, corrosive substance in a **private** place (OWA 2019, s.52) should be added to the existing Bladed articles and offensive weapons – threats guideline (which currently lists offences in public places). This offence also came into force in April 2022 and around 70 offenders were sentenced for this offence in 2022.

3.32 Adding it to the guideline would involve a consideration of the relative seriousness of offending in public and private places. The culpability and harm factors were developed with public places in mind but arguably could apply to the threatening in a private place offence:

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

Culpability demonstrated by one or more of the following

A – higher culpability

- Offence committed using a bladed article
- Offence committed using a highly dangerous weapon*
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity
- Significant degree of planning or premeditation

B – lower culpability

- All other cases

*NB an offensive weapon is defined in legislation as ‘any article made or adapted for use for causing injury, or is intended by the person having it with him for such use’. A highly dangerous weapon is, therefore, a weapon, including a corrosive substance (such as acid), whose dangerous nature must be substantially above and beyond this. The court must determine whether the weapon is highly dangerous on the facts and circumstances of the case.

Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim

Category 1

- Offence committed at a school or other place where vulnerable people are likely to be present
- Offence committed in prison
- Offence committed in circumstances where there is a risk of serious disorder
- Serious alarm/distress caused to the victim
- Prolonged incident

Category 2

- All other cases

3.33 If these factors were considered appropriate, the next issue is whether the sentence levels apply equally to threats in private and public. The statutory maximum sentence for all of these offences is 4 years’ custody although the statutory minimum sentence does not apply to the section 52 offence.

3.34 On balance, adding these new offences is not recommended at the moment. The offences only came into force in April 2022 and so we only have limited data to compare with the existing offences. We are currently evaluating the bladed article and offensive weapons guidelines and it would be preferable to await the results of that before deciding whether and how to address the new offences.

Question 6: Does the Council wish to change the titles of the bladed article and offensive weapons guidelines? If so, should this be consulted on?

Question 7: Does the Council agree not to add the offence of having a corrosive substance in a public place to the possession of bladed articles and offensive weapons guideline?

Question 8: Does the Council agree not to adding the offence of threatening with an offensive weapon, bladed article or corrosive substance in a private place to the bladed articles and offensive weapons – threats guideline?

3.35 We are aware that the Home Office is considering asking the Council to add an aggravating factor relating to prohibited weapons to the bladed articles and offensive weapons guidelines. It is not entirely clear why this is considered helpful or necessary (such weapons presumably full under high culpability 'Offence committed using a highly dangerous weapon'). The Council could consider adding an aggravating factor without waiting to be asked, but again we would recommend awaiting the results of the evaluation before considering it.

3.36 One further issue raised by Stephen is that the Common assault guideline does not reference 'Assault by beating'. Neither does it reference 'battery', though the guideline can be found by searching on either of these terms. Section 39 of the Criminal Justice Act 1988 states:

> Common assault and battery to be summary offences.
>
> (1) Common assault and battery shall be summary offences and a person guilty of either of them shall be liable to a fine not to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding six months, or to both.

3.37 The heading of the guideline reads:

Common assault / Racially or religiously aggravated common assault/ Common assault on emergency worker

Assaults on Emergency Workers (Offences) Act 2018, s.1, Crime and Disorder Act 1998, s.29, Criminal Justice Act 1988, s.39

Effective from: 1 July 2021

Common Assault, Criminal Justice Act 1988 (section 39)
Racially/religiously aggravated common assault, Crime and Disorder Act 1998 (section 29)
Assaults on emergency workers, Assaults on Emergency Workers (Offences) Act 2018 (section 1)

Section 39
Triable only summarily
Maximum: 6 months' custody

Offence range: Discharge – 26 weeks' custody

Racially or religiously aggravated offence – Section 29
Triable either way
Maximum: 2 years' custody

Offence committed against an emergency worker – Section 1
Triable either way
Maximum: 2 years' custody (1 year's custody for offences committed before 28 June 2022)

3.38 If it was felt to be helpful the main heading and/or the sub headings of the guideline could be amended to include references to 'battery' and/or 'assault by beating'.

Question 9: Does the Council wish to add 'battery' and/or 'assault by beating' to the headings of the Common assault guideline? If so, should this be consulted on?

4 EQUALITIES

4.1 No equalities issues have been identified with the changes proposed above.

5 IMPACT AND RISKS

5.1 By their nature the matters that are included in the miscellaneous amendments are unlikely to have a significant impact on correctional resources. An assessment of each proposed change will be made and included in the consultation document.

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Sentencing Council

Sentencing Council meeting:	**16 June 2023**
Paper number:	**SC(23)JUN07 - Fraud**
Lead Council member:	**TBC**
Lead official:	**Ruth Pope**
	Ruth.pope@sentencingcouncil.gov.uk

1 ISSUE

1.1 The fraud, bribery and money laundering guidelines came into force in October 2014. An assessment of the impact of the guidelines on sentence outcomes was published in June 2018. This found: "For most offences, average severity either stayed within the expected boundaries (based on historical data) or volumes were too low to assess with robustness whether the guideline had caused a shift".

1.2 In the absence of evidence to the contrary, the guidelines have been considered to be operating as intended. However, there have been some recent pieces of feedback that require consideration by the Council.

2 RECOMMENDATION

2.1 That the Council considers whether any amendments to the Fraud guideline are required and if so, how this should be approached.

3 CONSIDERATION

The assessment of harm

3.1 The Justice Committee published a report, 'Fraud and the Justice System' in October 2022. This contained the following:

> ### Sentencing Guidelines
>
> 117. Under current sentencing guidelines, fraud crimes carry penalties of up to 10 years imprisonment for the most severe cases. However, for crimes where the financial loss is less than £5,000, the maximum tariff is one year's custody with the majority of those found guilty instead receiving a fine or community order. The City of London Police and other contributors to our inquiry called for these guidelines to be revisited, as the impact of losing £5,000 to one person can be as significant as the impact of losing £50,000 is to another.
>
> 118. The current sentencing guidelines focus on the level of financial loss resulting from a crime rather than the impact on victims. Sentencing guidelines for other crimes, such as assault, take into consideration the psychological distress caused to a victim. As discussed in chapter 2, the impact of fraud crimes can go far beyond

financial loss, with some victims of these crimes experiencing profound emotional and psychological distress. We heard that the focus on financial loss "is based on an out-of-date view that fraud victims only suffer financial harm and only require financial reparations for their harm."

119. In addition to the consideration of the impacts on the victim, the City of London Police also called for other aggravating factors to come into consideration, such as hindering recovery of money to the victims, as well as calling for sentences to be strengthened with maximum sentences brought in line with those for money laundering.

120. The CPS also supported the expansion of sentencing guidelines to consider factors outside of pure financial loss, emphasising the importance of seeing the full context of fraud crimes, outlining that "it is not just the financial effect but the compromising effect on the way we lead our lives."

121. However, not all witnesses to our inquiry felt that the sentencing guidelines required amendment. Mark Fenhalls KC of the Bar Council outlined that he had "no particular complaint about any of them", highlighting instead that the issue was that sentencing guidelines do not act as a deterrent to those committing the crimes as offenders are aware that the chances of being subjected to criminal punishment for fraud crimes are very low.

122. **The loss of a comparatively small amount of money can have a greater impact on one individual than the loss of a greater amount on another. The current sentencing guidelines do not recognise this and therefore overlook the emotional and psychological impact that fraud crimes can have on their victims. Sentencing guidelines should be amended to give greater consideration to the emotional and psychological harms caused by fraud crimes alongside the financial losses incurred.**

3.2 There are several fraud guidelines (including revenue fraud and benefit fraud); the one most relevant to this issue is simply titled Fraud. When developing the guideline the Council took care to ensure that the effect on the victim was taken into account in sentencing and used a two-stage harm model:

Harm

Harm is initially assessed by the actual, intended or risked loss as may arise from the offence.

The values in the table below are to be used for **actual** or **intended** loss only. Intended loss relates to offences where circumstances prevent the actual loss that is intended to be caused by the fraudulent activity.

Risk of loss (for instance in mortgage frauds) involves consideration of both the likelihood of harm occurring and the extent of it if it does. Risk of loss is less serious than actual or intended loss. Where the offence has caused risk of loss but no (or much less) actual loss the normal approach is to move down to the corresponding point in the next category. This may not be appropriate if either the likelihood or extent of risked loss is particularly high.

Harm A – Loss caused or intended		
Category 1	£500,000 or more	Starting point based on £1 million
Category 2	£100,000 – £500,000 **or** Risk of category 1 harm	Starting point based on £300,000
Category 3	£20,000 – £100,000 **or** Risk of category 2 harm	Starting point based on £50,000
Category 4	£5,000 – £20,000 **or** Risk of category 3 harm	Starting point based on £12,500
Category 5	Less than £5,000 **or** Risk of category 4 harm	Starting point based on £2,500
Risk of category 5 harm, move down the range within the category		

Harm B – Victim impact demonstrated by one or more of the following

The court should then take into account the level of harm caused to the victim(s) or others to determine whether it warrants the sentence being moved up to the corresponding point in the next category or further up the range of the initial category.

Level of harm: victim impact

High impact – move up a category; if in category 1 move up the range

- Serious detrimental effect on the victim whether financial or otherwise, for example substantial damage to credit rating
- Victim particularly vulnerable (due to factors including but not limited to their age, financial circumstances, mental capacity)

Medium impact – move upwards within the category range

- Considerable detrimental effect on the victim whether financial or otherwise

Lesser impact – no adjustment

- Some detrimental impact on victim, whether financial or otherwise

3.3 The Chairman wrote to the Justice Committee pointing out that their report failed to note that the guideline does, in fact, take account of harm other than financial harm. The Committee responded:

> The committee acknowledges that the current sentencing guidelines do create scope for factors other than financial loss to be taken into account when sentencing. However, we heard from many contributors to our inquiry that the wording in the guidelines of harm as “financial or otherwise” is not considered to give sufficient weight to these other factors, particularly emotional and psychological harms. We heard throughout our inquiry that the impact of a fraud crime on an individual can be severe regardless of the financial loss incurred, which is why we made our recommendation that the guidelines should be made clearer by making explicit reference to emotional and psychological harms instead of these being implicitly referred to as other harms that could result in an offence being moved up the category range.

We welcome the work the Sentencing Council does in promoting consistency in sentencing and believe that a change to the fraud guidelines to ensure that non-financial harms are more clearly set out would help the judiciary ensure that sentences passed for fraud crimes reflect the harm that they cause.

3.4 An issue has also arisen in the case of R v Alexander [2022] EWCA Crim 1868 which came before the CACD in September 2022. The issue for the court has been summarised as follows:

1. The fraud consisted of the offender posing on-line as two different people, including as a model agency. As a result of fake websites and other aspects of deception, he persuaded a young woman (whom he knew already from school) to send increasingly explicit photographs, moving from bikini to lingerie shots, and then to full nude photographs which he kept.
2. Accordingly, there was no financial harm in the sense of a money equivalent for the fraud. The Guidelines for "Harm A – loss caused or intended" are entirely financial. They only have money brackets, with Categories 1 to 5.
3. Non-financial impact on a victim comes to be considered at Harm B stage, which states "**Harm B – Victim impact demonstrated by one or more of the following:**
The court should then take into account the level of harm caused to the victim(s) or others to determine whether it warrants the sentence being moved up to the corresponding point in the next category or further up the range of the initial category."
4. For High Impact, which justifies moving up a category, the following is stated:
"Serious detrimental effect on the victim whether financial or otherwise, for example substantial damage to credit rating."
5. Sending nude photographs of oneself as a result of a fraud was assessed as high impact. The point which arose, is the argument that an offence such as this one – with financial loss being less than £5,000 – would start at the lowest of categories 1 to 5 (namely category 5), with the consideration at Harm B stage being only whether to move up from that, and only moving up one category.
6. In a case such as this one (which with online deception might become increasingly prevalent) a sentencer might conclude that they should usually start at category 5 given the way the Harm A table is set out with financial loss as the primary category. When coming to Harm B, even moving up a category for High Impact would still keep the offence within a fairly low category.
7. In a non-financial case such as this one, the way that the Harm A table is worded might point a sentencer to start too low, with limited ability to move up more than a category where the object of the fraud was (for example) highly intimate photographs that do not readily equate to a financial loss.

3.5 The suggestion is that the Council should consider adding some wording to the guideline to cater for cases where there is no pecuniary loss.

3.6 We sought the views of the CPS as to whether the case of Alexander was an outlier (the facts seemed closer to blackmail or threats to disclose private images than to fraud) and whether there were any trends in fraud prosecutions that the Council should be aware of. The initial response from the CPS was that the case did appear to be an outlier. However, subsequently a different view was put forward from one individual in the CPS:

On the question of whether the attached case of Alexander is an outlier, I don't believe it is, and I think that fraud by false representation was the best fit for at least part of the offending:

- This offending in the attached case involved two stages: (i) Obtaining intimate photographs by means of various false representations; and (ii) threatening to distribute those photographs unless the victim sent the offender more intimate photographs. There were charges of fraud and blackmail, presumably with the intention that the fraud covered the first part of the offending and the blackmail covered the second part. We accepted a plea to the fraud alone, but the basis of plea stated that the offender accepted the facts of the blackmail (para 11 of the judgment). This is an unusual approach, and we perhaps should have insisted on a plea to the blackmail as well, but it provided the court with adequate sentencing powers.

- Regarding the need for an intention to make a gain or cause a loss for fraud: S5 of the Fraud Act 2006 provides that the gain/loss must relate to property but that property means "any property whether real or personal (including things in action and other intangible property)". It therefore seems that it would apply to digital photographs, a conclusion supported by the plea in this case and the fact that the CA appeared happy to proceed on that basis (although it was not an issue they were asked decide). Blackmail also requires an intention to make a gain or cause a loss.

- Regarding whether we could now charge threats to disclose private sexual images (s33 of the Criminal Justice and Courts Act 2015): This offence would not apply to the first part of the offending in this case, so could not supplant the fraud charge. In respect of the second part of the offending, this offence requires an intention to cause distress, and s33(8) provides that "A person charged with an offence under this section is not to be taken to have intended to cause distress by disclosing, or threatening to disclose, a photograph or film merely because that was a natural and probable consequence of the disclosure or threat." Accordingly, it could be difficult to prove an intention to cause distress where the intention is to obtain further images or money; blackmail would seem to be the better choice.

Crucially, if the offending had stopped at the stage of obtaining intimate photographs by false representations, we would only have been able to charge fraud. Accordingly, it seems to me that the fraud guideline should be amended to take more account of harm besides simply financial harm. One possible approach is that taken by the burglary guideline, which refers to "economic, commercial, cultural or of personal value".

Separately, even in cases of purely economic loss I think we should move away from the approach to harm taken in the current fraud guideline, which is based primarily on the financial value of the fraud, and towards an approach based equally on the impact on the victim: a loss of £2,500 (the starting point for the lowest category of harm) may be devastating for some people. This is currently reflected in the second stage of the harm assessment, but I feel it should be a more primary factor. There will be some difficulties with this, for example, it may be difficult to establish the extent of the impact where there have been a large number of victims and some cannot be identified, but impact could feature alongside financial value as part of a single stage approach to harm, again like the burglary guideline, where impact is given equal prominence as the degree of loss.

3.7 The CPS also drew attention to police interest in, and emphasis on, suicide following from being a victim of fraud.

3.8 It seems that there are several possible courses of action:

1. Do nothing – there is no evidence that the guideline is not working well in the majority of cases. A review of a small number of recent CACD cases suggests that courts are generally taking into account the impact on victims appropriately.
2. Keep the structure of the guideline as it is but amend the wording of the Harm B assessment – perhaps by giving further examples (such as those in the Theft guideline) of what could amount to 'serious detrimental effect' or by simply removing the current example 'substantial damage to credit rating' which may give the impression that emotional and psychological harms are not in scope.
3. (Possibly in addition to 2.) Add some wording to the harm assessment for situations where there is no pecuniary loss and the fraud may not be capable of being translated directly into a financial sum. Though it may be difficult to say much more than something along the lines of: 'If there is no pecuniary loss the court should use its judgment to assess the level of harm'.
4. Restructure the harm assessment completely to put consideration of the emotional and psychological impact on the victim as a primary consideration on a par with the level of financial loss.

3.9 The fourth option is not recommended – but if the Council wished to explore it, work could be done to look at how this could be achieved. Options 2 and 3 could be consulted on as part of the miscellaneous amendments consultation in September. If the Council wished to pursue one or both of 2 and 3, suggestions are sought as to how this should be worded.

3.10 One further thing to consider is the recently published Home Office fraud strategy which states (at paragraph 67):

> **Proportionate punishment and reoffending**
>
> 67. A post-legislative review of the Fraud Act 2006 found that it remains a sound piece of legislation. Some useful suggestions were made on how the wider fraud framework could be improved. Recent reports produced by the House of Lords and House of Commons noted that there are aspects of the Fraud Act 2006 that merit rethinking. Therefore, the second phase of the independent review of fraud will assess the effectiveness of fraud offences to understand whether they meet the challenges of modern fraud, ensuring the penalties for fraud match the severity of the crime, and its financial and emotional impact on victims.

3.11 Any changes to the 2006 Fraud Act may necessitate changes to the guidelines. The recommendation would be to wait and see what (if any) changes are made to legislation before making substantive changes to guidelines.

Question 1: What changes, if any, does the Council wish to make to the Fraud guideline?

Question 2: Should these be consulted on as part of miscellaneous amendments?

4 IMPACT AND RISKS

4.1 Only a very small proportion of frauds result in a prosecution. The Justice Committee report states at paragraph 88: "In the year ending September 2021, the Crown Prosecution Service (CPS) prosecuted 7,609 defendants where fraud and forgery were the principal offence, with a conviction rate of 84.9%. Whilst this is a relatively high success rate, the level of prosecutions represents only about 0.75% of fraud crimes reported in the year."

4.2 The various fraud guidelines overlap in terms of the offences covered (which include false accounting and conspiracy to defraud as well as the s1 Fraud Act offence), and so it is not possible to single out the volumes for the Fraud guideline discussed in this paper. However, it is reasonable to assume that the volume of offenders sentenced using the Fraud guideline is fairly high and that therefore any substantive changes to the guideline would have the potential to have an impact on prison and probation resources.

4.3 The number of offenders sentenced in 2022 for offences contrary to section 1 of the Fraud Act 2006 is lower than in the previous four years but the average custodial sentence length is higher for 2021 and 2022 when compared with previous years. This may indicate that more serious cases are being prioritised by the courts, or may reflect the nature of the offences being investigated and prosecuted.

Number of adult offenders sentenced for offences covered by Section 1 of the Fraud Act 2006, 2018-2022[1]

	2018	2019	2020	2021	2022
Magistrates' courts	2,840	2,510	1,495	1,390	1,207
Crown Court	1,937	2,053	1,610	1,736	1,564
Total	**4,777**	**4,563**	**3,105**	**3,126**	**2,771**

Number and proportion of adult offenders sentenced for Section 1 of the Fraud Act 2006, by sentence outcome, 2018-2022[1,2]

	2018	2019	2020	2021	2022
Absolute discharge	2	4	3	2	2

Conditional discharge	421	349	211	205	164
Fine	465	461	266	295	226
Community sentence	1,219	1,148	630	605	479
Suspended sentence	1,222	1,173	934	988	816
Immediate custody	1,298	1,283	937	932	969
Otherwise dealt with	150	145	124	99	115
Total	**4,777**	**4,563**	**3,105**	**3,126**	**2,771**

	2018	**2019**	**2020**	**2021**	**2022**
Absolute discharge	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%
Conditional discharge	9%	8%	7%	7%	6%
Fine	10%	10%	9%	9%	8%
Community sentence	26%	25%	20%	19%	17%
Suspended sentence	26%	26%	30%	32%	29%
Immediate custody	27%	28%	30%	30%	35%
Otherwise dealt with	3%	3%	4%	3%	4%
Total	**100%**	**100%**	**100%**	**100%**	**100%**

Average custodial sentence lengths (ACSL) received by adult offenders sentenced to immediate custody for Section 1 of the Fraud Act 2006, 2018-2022[1]

ACSL (months)	**2018**	**2019**	**2020**	**2021**	**2022**
Mean	17.1	21.0	19.9	23.8	23.8
Median	9.0	15.0	14.0	20.0	19.0

Table notes

1) Figures presented include the time period from March 2020 in which restrictions were initially placed on the criminal justice system due to the COVID-19 pandemic, and the ongoing courts' recovery since. It is therefore possible that these figures may reflect the impact of the pandemic on court processes and prioritisation and the subsequent recovery, rather than a continuation of the longer-term series, so care should be taken when interpreting these figures.

2) The category 'Otherwise dealt with' covers miscellaneous disposals. Please note that due to a data issue currently under investigation, there are a number of cases which are incorrectly categorised in the Court Proceedings Database (CPD) as 'Otherwise dealt with'. Therefore, these volumes and proportions should be treated with caution.

Sentencing Council

Sentencing Council meeting:	**16 June 2023**
Paper number:	**SC(23)JUN08 – Guideline priorities**
Lead Council member:	**N/A**
Lead official:	**Steve Wade** **steve.wade@sentencingcouncil.gov.uk**

1 ISSUE

1.1 To update Council on the existing current and planned programme of guideline work and seek decisions on the next pieces of work to be picked up. Also, to make Council aware of the range of further guidelines currently on the long list of areas for possible consideration and seek views on whether there are any additional guidelines and/or other areas of work that Council wishes to be considered.

2 RECOMMENDATIONS

2.1 That the Council:

- agrees the next set of guideline priorities
- indicates which areas it next wishes to focus on in the short-to-medium term
- notes that agendas may be slightly shorter for a brief period in coming months

3 CONSIDERATION

Current Position

3.1 We are going through a period where we have published a reasonable number of definitive guidelines very recently with a couple more due to be published imminently. We published the revisions to the Totality guideline on 2 June and before that published the animal cruelty revisions on 10 May and this year's miscellaneous amendments on 9 March. We are next due (at the time of writing) to publish the definitive guidelines for the main batch of motoring offences on 15 June and the Perverting the course of justice and witness intimidation definitive guidelines on 12 July.

3.2 That will leave a small number of guidelines still at some stage of active development. Assuming sign-off today, we plan to publish the Blackmail, threats to disclose, kidnap, and false imprisonment draft guidelines for consultation shortly after the summer

break. On our current timetable, we are then planning for sign-off of the draft Imposition guideline in September for consultation from November onwards. This year's miscellaneous amendments are due for publication in draft for consultation in September. That then leaves the various immigration offences that are at an early stage of Council's consideration and which are likely to be published in draft in early 2024 under current plans.

3.3 There are two pieces of work that we already have scheduled in to be started once policy team members become free. These are: the second (much smaller) batch of motoring related offences, which Ollie is due to start once the first batch have been published, and non-fatal strangulation, which Mandy is due to pick up once blackmail etc. is published. Finally, there are a small number of potential additional areas of work which, subject to decisions today or at the July meeting, Council may wish to pick up. These include: possible work arising from the discussion on fraud at today's meeting; work arising from the domestic homicide review, which was discussed last month and which we agreed to hold back further discussion upon until we had seen the direction of travel of potential MoJ legislative changes; and possible work arising from a discussion scheduled for July on guidance relating to 'assistance given to the prosecution'. Whether these areas are taken forward, and what the size of any work might be, is dependent on the decisions Council takes but it is assumed that any areas identified would be picked up as a priority as soon as time and resources allow.

Next immediate priorities

3.4 Annex A includes a list of possible guidelines that have been previously flagged to the Council as areas for consideration. Policy team members have conducted a very brief scoping exercise for each and the rough ranking indicates their views as to the relative merit of each guideline in terms of if and when it should be picked up. Broadly speaking there are two categories: high and low priority.

3.5 You will see that there is also one area – that of protest offences – which is identified as very high priority. Council will be aware that new offences recently came on to the statute book (so called 'locking on' and 'tunnelling') just prior to the Coronation and we had previously indicated that, once on the statute book, this was an area we wanted to pick up once it was clearer what cases were being prosecuted and what the various salient factors were. This therefore remains a priority but currently we would propose picking this up in 2024 once we have a chance to see what cases are coming before the courts. That 'pause' period aside, this area is probably then the highest priority currently on the list.

Question 1 – Does Council agree that protest offences ought to be prioritised and, if so, do you agree that we should still wait until 2024 in order to see what types of case are coming to court?

3.6 There are then a number of other areas that have been identified as next highest in priority, some of which are bracketed together. First, there is cyber-crime. This has been an area that we have often circled and agreed it should be an area that the Council should pick up but there have always been more pressing areas that have taken precedence. When we have looked at this area previously it has often been difficult to identify precisely what offences might be covered by such a guideline – in particular given that many activities that one might consider to be a cyber-crime are in practice covered by existing guidelines (e.g. fraud committed in a digital setting). The most obvious area that has been identified are those offences involving 'hacking' under the Computer Misuse Act 1990 (CMA) although there are others. In 2017, we received a paper from the then HHJ Michael Topolski QC (since, I believe, retired), which he produced at our request, outlining a range of offences that could be captured. In addition to the range of CMA offences, he also suggested some offences under the Communications Act 2003, Section 1 of the Malicious Communications Act 1998 and various offences under the Copyright, Designs and Patents Act 1988 and the Video Recordings Act 2010 which may be worthy of consideration in any cyber-crime guideline. We could also add data protection offences to this long potential list.

3.7 One potential caveat is that there have been noises from the Home Office at points about possible changes to the CMA or other digitally-committed offences but at present things seem to have gone quiet. But generally speaking, this is a broad area of offending that continues to increase year-on-year and will only continue to do so. It is also an area that we have long said we intend to look at although, it would be fair to say, we have not received any representations urging us to look at this for some time now. But, on balance, and subject to a fuller scoping paper to nail down the precise range of offences with a clearer idea of current and projected volumes, we would consider the time to be right to pick this guideline up.

3.8 The second area that has been identified is that of wildlife offences. There are a range of offences that could be covered by a guideline in this area and it is one on which we are often lobbied, receiving correspondence over many years. Potentially this is high volume – possibly in the 100s of cases per year although this is not clear – and this would be an opportunity to provide a unified approach to sentencing different types of offending across a range of offences. The UN Office on Drugs and Crime also issued a report in August 2021, 'Wildlife and Forest Crime Analytic Toolkit Report', relating specifically to the position

in the UK. The report reflected that many stakeholders interviewed discussed the benefit and importance of guidelines being produced in this area, and the report inter alia does suggest that the authors see some merit in this. That said, the final report does suggest that in England and Wales the lack of much caselaw in this area could make the production of guidelines difficult and it made no firm recommendations in this area. One further point worth mentioning is that, in the course of the discussions with Council members in advance of us kicking off the consultation on our 5-year strategy, wildlife offences (along with animal cruelty offences) were cited as the type of guideline that would probably be a good opportunity to demonstrate the Council's responsiveness to addressing areas that many members of the public feel strongly about.

3.9 The third area identified as reasonably high priority is that of a variety of offences connected with housing matters. Again, these are reasonably high volume and are areas on which we have received correspondence in the past. Offences could cover those relating to so-called rogue landlords or relating to houses of multiple occupation and could potentially include offences related to evictions or breaches of planning law. It is an area which, anecdotally, some sentencers have suggested would be helpful to have guidelines on and the relatively high volumes would mean there would be value in picking it up.

3.10 All these areas appear to have merit in being taken forward and are areas on which we have had a number of representations over the years and so our recommendation is that we pick up these three areas as the next priorities. The precise orderings are likely to be broadly as ordered above but will also be dependent on the relative size of the projects as they are scoped and the capacity of team members as they become free to pick up new pieces of work.

Question 2 – Does Council agree that the three offence areas above ought to be those that are next picked up?

Future work

3.11 As members will see from the annex there are a number of areas that have been identified as low priority and which are listed with no further prioritisation among them. Some of these may be areas that we have had raised with us but only once or twice (and that some time ago). Some will be because they were considered briefly as part of the scope of, or otherwise arose during the course of, another guideline and that we agreed not to include at the time but might possibly consider them in the future. And others will simply be offences that we are otherwise aware of, which have a reasonable volume but for which we have not really spotted a significant demand.

3.12 We have not provided a full analysis of these guidelines but some are worthy of at least brief mention. Female genital mutilation offences were briefly explored for inclusion in the child cruelty guidelines when we covered the failure to protect offence but it was decided that it was not sufficiently similar to the rest of the range of offences covered to count as part of the core scope and it was not included. Neglect of vulnerable adults was also briefly discussed as part of the conversations around child cruelty given some of the issues around vulnerability were not dissimilar but, again, was not included as it was felt better to keep the scope around child cruelty offences tight. Fire safety offences are low volume and were not included in the health and safety guidelines but in the response to that consultation it was suggested we may consider doing a guideline for these offences at some point in time. Finally, when the terrorism guidelines were developed there was some discussion about whether it might be useful at some point in the future to pick up a guideline for terrorism offences committed by those under 18.

3.13 Of all of those in the paragraph above, FGM offences are very low volume indeed (only one case could be found in the brief trawl to prepare for this paper) and there are likely to be sensitivities in producing a guideline for terrorism offences relating to offenders under the age of 18. Certainly in the past, although our Children and young persons' guideline was very well received, there was some concern from campaign organisations at the prospect that we would produce too many more offence specific guidelines for sentencing children (such as the under 18s bladed articles guideline). Rightly or wrongly they believe such guidelines would remove some of the flexibility that currently sentencers have when sentencing these age groups with a risk that, if anything, sentences might become more severe. Given that these offences have very low volumes and absent any strong apparent need for guidelines, we would suggest both of these are placed low on the list of priorities for now.

3.14 Most of the other suggestions are relatively low volume and with no pressing need for a guideline. Those offences relating to the neglect of vulnerable adults have a reasonable volume of cases, and there are a variety of different offences. This area therefore might most merit a guideline being considered. There was also a reasonable appetite during the discussion of the Child cruelty guidelines for revisiting these offences at some point but the make-up of the Council will have changed considerably since then as will the legislative and regulatory environment.

3.15 Finally, we do have a number of ongoing evaluations of existing guidelines currently planned or underway and these may of course identify existing guidelines that may merit revision either to a greater or lesser extent but none stand out at present as being particularly likely to show an issue.

3.16 As part of this preparation for this paper we also asked Council members if there were any existing or potential guidelines from your perspective that could usefully be considered for inclusion on our work programme. To date no areas have been identified but some further options may occur to members when considering this paper.

Question 3 – Which, if any of the low priority offences do members consider ought to be next picked up after the high priority cases above? Are there any areas that should definitely *not* be picked up in the short to medium term? Are there any other areas not listed that members feel warrant inclusion?

Longer term

3,17 It will not have escaped members attention that many of the low priority guidelines are relatively low volume, low profile, and do not have an immediately pressing need for a guideline. This is a natural consequence of us having now produced guidelines for most – if not all – of the high-volume offences and those lower volume offences that particularly required a guideline. That is not to say that there is no merit in producing guidelines for those offences and which would be of use to those sentencing them even if they lack the gravity of some of the guidelines that we have worked on more recently. In addition, many of our existing guidelines are now relatively old and may, whether as a result of our evaluations or otherwise, need to be looked at again over the next few years to see if they need amendment or updating. Finally, changes to legislation – whether to existing offences or creating new offences – will require work. So there is plenty of guideline development work still to be done.

3.18 Nonetheless it is also worth pointing out that, given the number of guidelines produced to date, the evaluations are starting to stack up a little. Now would seem to be a good time for some of the policy team to provide a little more support to the analytical team in carrying out those evaluations and helping them draw conclusions as to what may be required in terms of guideline revision as a result. It is possible therefore, that over the coming months some Council meetings may run shorter or there may be a slight shift in emphasis to bringing evaluations to meetings for discussion of whether, and in what way, existing guidelines may require revision.

Question 4 – Do Council members have any final comments or thoughts on priorities going forward?