



Justice Committee

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The Right Honourable Lord Justice Holroyde
The Sentencing Council for England and Wales
The Royal Courts of Justice
East Block, Room EB16
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By email only

Justice Committee response to Sentencing Council consultation: Burglary offences guidelines

Dear Tim,

Thank you very much for giving my Committee the opportunity to respond to the Sentencing Council's consultation on the changes to the burglary guideline. We are grateful also to the Council for sharing the other responses to the consultation with us in advance of our submission.

Burglary offences are high volume offences and the changes proposed to the guideline in this consultation will affect a large number of cases. We are broadly supportive of the approach set out in the consultation, in particular bringing this guideline in line with the stepped approach to sentencing and the inclusion of three harm and culpability categories for each offence. Our response sets out some comments on the Council's overall approach and then details our response to some of the questions in the consultation.

The Council's overall approach

The introduction and section one of the consultation outline some of the findings from the Council's evaluation of the impact of the burglary guideline, introduced in 2012, on sentencing severity. The Council notes that the evaluation showed that the guideline contributed to an unanticipated increase in the sentencing severity for non-domestic and aggravated burglary offences. The introduction explains that the Council's evaluations led to the decision to review the guideline. The Committee welcomes this approach to the Council's work. We would encourage the Council to do more research on the impact of its existing guidelines on sentencing. We recognise that the availability of data on sentencing can inhibit the Council's research work. In our view, the Council should work with the Ministry of Justice to ensure that the Council can access the data it needs to improve its analytical work on sentencing.

The Committee recognises the value of the analytical work undertaken in the resource assessment. In particular, it helpfully highlights those changes in the draft guidelines that could result in a change to sentencing outcomes. The sample size for the analysis of Crown Court sentencing remarks, particularly for domestic burglary (21 transcripts), appears to be relatively small, given the number of adults sentenced for this offence (in 2019 around 4,700 adults sentenced).¹ We acknowledge the

¹ Sentencing Council, Consultation Stage Resource Assessment: Burglary Offences page 8

resource constraints on the Council and the amount of work involved in analysing sentencing remarks, but we would ask whether for high volume offences, it would be beneficial to consider analysing a larger number of transcripts.

We would also raise the issue of the data available on sentencing in the magistrates' court. In this consultation, the Council refers to the need to prompt sentencers on the use of community orders with drug and alcohol rehabilitation requirements for these offences. The Committee welcomes such prompts but is concerned by the lack of empirical evidence on the role that guidelines can play in increasing the use of community orders. It is vital that the Council is able to access information and data on how magistrates' courts use community orders. The Council should be able to assess the extent to which guidelines can influence magistrates' approach to using community orders. We would ask that the Council works with the Ministry of Justice to ensure that it has the data it needs to conduct effective analysis on sentencing in the magistrates' courts.

Section one of the consultation states "the new guideline has been developed so that sentences that the Council considers proportionate are imposed for each type of case".² Section one also states:

This has led the Council to the conclusion that although the aggregate impact of the guideline on sentencing outcomes was not predicted, sentencing practice in individual types of cases is proportionate to the seriousness of the offence. This means that the higher sentences under the existing guideline are expected to be maintained for the more serious offences.³

This is somewhat unclear. The public, and sentencers, will better understand the changes proposed if the Council can explain why it has concluded that existing guideline needing changing in order to provide for more proportionate sentences. We understand that the Council is not seeking to change the existing approach to the severity of sentencing for the most serious offences, but that the changes to the guideline are intended to ensure that some cases will get more proportionate sentences than they would under the existing guideline.

The consultation states that the introduction of three levels of culpability and harm for domestic, non-domestic and aggravated burglary is designed to ensure that "only the most serious cases fall into the top categories of harm and culpability".⁴ This suggests that the Council is concerned that too many sentences under the existing guideline fall into the top category. If this is the case, it would be helpful to state this more clearly. It would also be helpful to explain why the Council has concluded that the existing approach is "proportionate to the seriousness of the offence".⁵

The Committee would also like to make the general point that for some of the changes suggested in this guideline, for example the reminder on alcohol treatment requirements or the text on sentences above the range for the gravest cases, it is important that the Council explains why such changes are only being suggested for a particular offence. In the absence of any explanation it is unclear why these reminders shouldn't be included as standard in the guidelines for all offences to improve the consistency of sentencing.

Culpability factors: question 1 on non-domestic burglary, question 7 on domestic burglary and question 14 on aggravated burglary

² Sentencing Council, Burglary Offences Guideline Consultation, page 4

³ Sentencing Council, Burglary Offences Guideline Consultation, page 4

⁴ Sentencing Council, Burglary Offences Guideline Consultation, pages 7, 17 and 25

⁵ Sentencing Council, Burglary Offences Guideline Consultation, page 4

We support the creation of a medium culpability category to ensure that only the most serious offenders are placed in the high culpability category for all three offences.

For each of these offences, significant weight will be placed on the distinction between the high culpability factor of a “significant degree of planning or organisation” and the medium culpability factor of “some degree of planning or organisation”. It may also be difficult to distinguish between cases involving “some degree of planning or organisation” and those “committed on impulse”, which is the lower culpability factor. There is at least a possibility that very few cases will be captured by the factors in the lowest category because “some degree of planning or organisation” will capture a large proportion of cases. The Council should consider whether the inclusion of some non-exhaustive examples that illustrate the types of cases that these factors are designed to cover would assist sentencers.

More broadly we would ask that the Council consider whether the emphasis placed upon planning in the culpability factors is sufficiently nuanced. The concept of “planning” in relation to domestic burglary is not straightforward and the nature of it will vary from case to case. For example, it could be thought perverse if an offender who deliberately plans a burglary in such a way as to minimise the risk of encountering an occupier automatically received a higher sentence than an offender whose lack of planning increased that risk. Planning in the form of targeting vulnerable victims is already included as a separate additional factor. Whilst the planning associated with organised criminality should necessarily be reflected in sentencing as in any other guideline, we should avoid penalising genuine efforts to minimise harm and give adequate weight to the unique risks associated with burglary offences if undertaken without prior knowledge of possible vulnerable victims. The usual culpability for planning must be weighed against the fact impulsive offences may mean an offender entering a home without any prior knowledge of the likelihood of whether someone is residing there and whether they may be vulnerable. Sentencing should reflect this in addition to taking into account when such victims are actually affected.

We support the retention of the “targeting of vulnerable victim” in the high culpability category for domestic and aggravated burglary. We would ask the Council to consider whether it should also be included as a high culpability factor for non-domestic burglary.

Harm factors: question 2 on non-domestic burglary, question 8 on domestic burglary and question 15 on aggravated burglary

In relation to the harm factor of “emotional impact” for non-domestic and domestic burglary, we are unclear as to how sentencers will be able to evaluate and distinguish between “much greater emotional impact” and “greater emotional impact” on the victim. Could the Council clarify how sentencers will be expected to distinguish between the two? It may be necessary to provide sentencers with some non-exhaustive examples of emotional harm and guidance on how sentencers will be able to establish, and distinguish between, different levels of emotional harm. Especially as this is always going to be a subjective judgment.

In relation to the category 1 harm factor of “soiling of property and/or extensive damage or disturbance to property” and category 2 harm factor of “ransacking or vandalism of the property” (which apply to all three offences), the consultation explains that “the Council felt that soiling and extensive damage caused are more serious than vandalism or ransacking”.⁶ The Committee is not entirely persuaded and would suggest that the effect on the victim is the most important factor. It

⁶ Sentencing Council, Burglary Offences Guideline Consultation, page 10

might be clearer to distinguish the two categories by reference to the level of damage, “extensive damage” for category 1 and “moderate damage” for category 2.

In relation to the category 2 harm factor of “theft of/damage to property causing some degree of loss to the victim (whether economic, commercial or personal value” and the category 3 harm factor of “nothing stolen or only property of low value to the victim (whether economic, commercial or personal value)”, we are unclear how sentencers will distinguish between “some degree of loss” and the loss of “property of low value”. It might be clearer to replace “some” with a word that cannot be interpreted to mean “any” loss. If “some degree of loss” is used, examples may be helpful to distinguish between the two.

In relation to non-domestic burglary, the Council should consider the case for a category harm 1 factor of “significant impact on the community” to capture the effect of a burglary on a location that serves the public, such as a pharmacy, doctor’s surgery or school.

Do you agree with the additional wording relating to consideration of a community order with an alcohol treatment requirement order? Question 3 on non-domestic burglary and question 9 on domestic burglary

We do. However, we would like to know if there is any evidence that the inclusion of this reminder in the guideline will change the approach of sentencers. We ask that the Sentencing Council consider undertaking research to determine the extent that the inclusion of such wording on community sentences in the guideline changes the approach of sentencers. We also suggest that it is important that sentencers consider an alternative community order in every case where it might be appropriate and not only those where drugs and alcohol are a factor. The Council should consider what other reminders could be usefully included so that sentencers are aware of how they can be used for each of these offences.

Do you agree with the proposed sentence tables for these offences? Question 4 on non-domestic burglary, question 10 on domestic burglary and question 17 for aggravated burglary

We note that for non-domestic burglary there is a significant gap between the starting point of a C1 offence, 6 months custody, and a C2 offence of a medium level community order.

We also note that for domestic burglary there is a significant gap between the starting point of a C2 offence, 1 year custody, and a C3 offence, a high-level community order.⁷ We would ask the Council to consider whether the seriousness of domestic burglary, and particularly its impact on its victims, should mean that the appropriate starting point for a C3 offence should be 6 months’ custody rather than a high-level community order.

Do you agree with the proposed aggravating and mitigating factors? Question 5 on non-domestic burglary, question 12 on domestic burglary and questions 18 and 19 for aggravated burglary

We would welcome clarification as to why “use of a face covering or disguise” should only be an aggravating factor for aggravated burglary and not for the other two burglary offences covered in the guideline.

Question 11: Do you agree with the inclusion of wording regarding cases of particular gravity above the sentence table? If not, please tell us why

⁷ Please note that on page 21 of the consultation the table states that the starting point is a Band B fine, which is incorrect and we have contacted the Council and have notified them of the error

The Committee supports the inclusion of a reminder about cases of particular gravity and the ability of sentencers to go above the top of the range in cases that meet the relevant statutory test. It is important that sentences above the top of the category range but below the statutory maximum of 14 years are available, as intended by Parliament, for cases of particular gravity. The Committee would like to know why this wording is proposed only to be included for the domestic burglary sentence table and not for the other offences in this guideline.

The wording should refer to the statutory test for departing from the guidelines as provided by section 59 (1) of the Sentencing Act 2020. The proposed wording states that sentences above the top of the range “may be appropriate”, however, that is a different test from that set out in section 59(1): “Every court must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case [...] unless the court is satisfied that it would be contrary to the interests of justice to do so”.

For domestic burglary we note that the top of the category range is 6 years’ custody and the statutory maximum is 14 years. Given the proposal to include the wording that sentencers can go above the range in cases of particular gravity, the Committee would like to ask for a more detailed explanation of the reasoning as to why the gap between the top of the normal range and the statutory maximum is so great. We would be concerned by any perception that the penalties that Parliament has provided differ substantially from the penalties that the courts apply. We would appreciate further information on whether similar gaps apply in relation to offences contained in other guidelines.

We look forward to working with the Council on future guidelines.

A handwritten signature in black ink, appearing to read 'Rob Neill', with a stylized flourish at the end.

Sir Robert Neill MP

Chair
Justice Committee