

Burglary Offences Guideline

Response to consultation

May 2022

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Foreword



On behalf of the Sentencing Council I would like to thank all those who responded to the consultation on this guideline. I also extend my thanks to the members of the judiciary who gave their time to participate in the research exercise undertaken to test and inform the development of the guideline.

As with all Sentencing Council consultations, the views put forward by all respondents were carefully considered, and the range of views and expertise were of great value in informing the definitive guideline. Because of those views, some changes have been made across the offences particularly to the rewording of a number of harm factors within the guidelines. The Council has also made changes within individual guidelines to address particular issues raised. The detail of those changes is set out within this document.

In developing these guidelines, the Council has considered the varied impact on victims of these offences, often so much more than just a theft of property; some occurring in a victim's home which should be a sanctuary where they are entitled to feel safe. These considerations have led to some of the changes to the harm factors mentioned above.

This set of guidelines will provide vital assistance to sentencers across England and Wales for the sentencing of these common but sometimes very troubling offences.

Lord Justice Holroyde
Chairman, Sentencing Council

Introduction

In June 2021 the Sentencing Council published a consultation on a package of draft guidelines: domestic, non-domestic and aggravated burglary. These were revised versions of existing definitive burglary guidelines.

When the existing guideline came into force in 2012, it was not expected to result in any change in sentencing severity: the resource assessment which had been carried out, using the data and evidence which were available at that time, had concluded that sentencing was likely to stay at the existing levels. However, the evaluations of the impact of the guideline (published in January 2016 and July 2017) found that sentences increased unexpectedly for non-domestic burglary when the guideline came into force. The evaluation also showed that sentencing severity had increased for domestic and aggravated burglary, although this appeared to be part of a longer-term trend. Therefore, the Council decided it was appropriate to revise the original guideline.

The Council's aim throughout has been to ensure that all sentences are proportionate to the offence committed and in relation to other offences.

The reaction to the draft guidelines was broadly positive.

The guideline will apply to all those aged 18 or over who are sentenced on or after 1 July 2022, regardless of the date of the offence.

Summary of analysis and research

Several research exercises were carried out to support the Council in developing the guideline. Content analysis was conducted of judges' sentencing remarks for defendants sentenced for all the offences included within this guideline. This provided valuable information on some of the key factors influencing sentencing decisions for these cases.

During the consultation stage of guideline development, qualitative research was carried out to help gauge how the guideline might work in practice. 21 interviews were conducted, consisting of nine magistrates and 12 Crown Court judges.

Because of this research, in combination with consultation responses, a number of changes were made to the draft guidelines, such as rewording of the '*weapon carried when entering premises*' aggravating factor within the aggravated burglary offence. In this way, analysis and research played an important part in the development of the guideline.

A statistics bulletin and draft resource assessment were published alongside the consultation, and updated data tables and a final resource assessment have been published alongside the definitive guideline and consultation response document.

The Council will be also running a data collection exercise this autumn to include the offences of domestic and non-domestic burglary, once these revised guidelines are in force. Data from this data collection will be considered by the Council in the future.

Summary of responses

The consultation sought views from respondents on the three separate guidelines. In total, 33 responses to the consultation were received.

Breakdown of respondents

Type of respondent	Number
Charity/not for profit organisations	3
Legal professionals	3
Judiciary (2 individual and 2 representative body responses)	4
Other	2
Academics	1
Government	3
Members of the public	1
Magistrates (5 collective and 11 individual responses)	16
Total	33

Feedback received from the Council's consultation and interviews with sentencers during the consultation period is reflected in the text below.

In general, there was a positive response to the proposals. However, the Council was also grateful for constructive criticism and considered suggestions for amending parts of the three draft guidelines.

The substantive themes emerging from the responses to the guidelines included:

- That the wording of some of the harm factors was too subjective and it would be difficult to assess them objectively;
- That there wasn't enough distinction between the wording of some of the harm category one and category two factors;
- That the wording of the 'weapon carried when entering premises' aggravating factor within aggravated burglary had led to confusion as to when it should be applied.

The Council has responded to these comments by:

- Rewording some harm factors in culpability A and B; and
- Rewording the aggravating factor and additional explanation for the '*weapon carried when entering premises*' factor.

In addition, the Council made several changes to each individual guideline. The detailed changes to the individual guidelines are discussed below.

Non-domestic burglary

Culpability factors

Due to concerns about too many cases potentially being captured within high culpability, the consultation version of the non-domestic guideline did not refer to targeting within high culpability. The original guideline had a high culpability factor of deliberate targeting. The consultation version of the aggravated and domestic guidelines had a high culpability factor of *'targeting of a vulnerable victim'*. The reference to a vulnerable victim was moved to step two in non-domestic burglary, and the Council felt that targeting could be captured by the other high culpability factor of significant planning. A number of magistrates and the Magistrates Association (MA) questioned the decision not to retain a high culpability factor relating to targeting, saying they thought the reference to deliberate targeting should be retained, and that this type of offending would not always be captured by the significant degree of planning factor, and that the deliberate nature of offending was key.

West London Magistrates Bench discussed the effect of this type of targeted offending on the local community, with temporary or permanent closure of pharmacies or corner shops as a result. They suggested that a distinction should be made between premises that provide an essential service and those that do not, and that there should be a new medium culpability factor of: *'deliberate targeting of premises providing an essential service'*, thus acknowledging the concern about too many cases going into high culpability by suggesting it goes into medium culpability.

The Justices' Clerks' Society (JCS) argued that targeting of a vulnerable victim should be added to high culpability in non-domestic burglary, that this type of offending goes beyond being an aggravating feature, and that sentencers could be trusted to only use this factor in appropriate cases. The Justice Committee (JC) also thought that targeting of a vulnerable victim should be added to high culpability in non-domestic burglary.

The Council considered these views carefully, but still felt that there was too much of a risk that having a factor relating to targeting within high culpability could capture too many cases within this category, and that high culpability must be reserved for only the most serious cases. Regarding the suggestion that there should be a new medium culpability factor relating to deliberate targeting of premises providing an essential service, the Council felt that it might be difficult to define what was and what was not an essential

service. Therefore, factors relating to targeting have not been added to the culpability factors.

The rest of the responses discussed in this section regarding culpability apply to both the domestic and non-domestic guidelines. The Crown Prosecution Service (CPS) suggested that the wording '*where not charged separately*' is removed from the high culpability factor '*knife or other weapon carried (where not charged separately)*' within both domestic and non-domestic burglary, stating that carrying a weapon or knife may make a burglary more serious, depending on the facts, whether or not possession is charged separately. They said that the appropriate way for any issue of double counting to be addressed is by application of the principles of totality. The Council agreed that this was a good point and so the wording '*where not charged separately*' has been removed, and a new reference of '*see step 6 on totality when sentencing more than one offence*' has been added to this factor.

The Criminal Law Solicitors' Association (CLSA) questioned whether or not to define what should be classed as a weapon (as opposed to a piece of equipment used in order to commit the offence). The JCS also stated that there is potential for inconsistent categorisation of implements, such as Stanley knives and screwdrivers. Some sentencers may see the presence of these as an indication that the offender was equipped for burglary; to strip copper wiring, loosen door hinges, etc., which would fall into medium culpability. However, other sentencers may determine items such as Stanley knives to fall into '*other weapon carried*', so high culpability. The JCS concede however these instances may be rare and in most cases it will be obvious which category the items fall into. The Council considered these views but felt it would not be appropriate to include such definitions, and that as the JCS commented, it should be clear which category the items fall into.

Turning now to the proposed medium culpability factors consulted on, the Prison Reform Trust (PRT) queried the need for '*equipped for burglary*' to be included as a medium culpability factor in non-domestic burglary, stating that it could already be captured within the planning factor, and so potentially could lead to double counting. A couple of magistrates also questioned going equipped, suggesting that most offences needed some form of being equipped, so were likely to be captured within planning. The Council considered this suggestion but felt that the equipped factor needed to be retained, as cases showed that many offenders were equipped for burglary, but offences weren't always planned.

Regarding the lower culpability factors, PRT made a number of suggestions for additions to this category. They suggested that *'severe financial hardship when linked to the commission of the offence'* should be added in recognition that people from lower socio-economic backgrounds are over-represented within the criminal justice system, and with acquisitive crime seen by some as necessary for survival. However, the Council felt it would not be appropriate to add this as a factor.

PRT also felt that age and lack of maturity should be referred to not just at step two, but at culpability at step one, suggesting that where lack of maturity is linked to the commission of the offence, it should be recognised as a factor indicating lower culpability. They pointed out that the factor is a lesser culpability factor in the child cruelty guideline: *'offender's responsibility substantially reduced by mental disorder or learning disability or lack of maturity'*. The Council noted however that the factor was at step one in the child cruelty guideline for specific reasons relating to that offence, and these reasons do not apply in this context.

The rest of the culpability factors remain unchanged from the consultation version of the guideline.

Harm factors

As the majority of the harm factors consulted on were the same within both the domestic and non-domestic burglary guidelines, the responses discussed in this section apply to both of these guidelines. There were a number of comments made by respondents about two of the harm factors, *'much greater emotional impact on the victim than would normally be expected'* in category one, and *'greater emotional impact on the victim than would normally be expected'* in category two. A number of magistrates, two Crown Court Judges, a barrister, CLSA, JC, PRT and JCS all raised concerns about this. The concerns were that the factors were too subjective, and that it would be difficult for courts to assess objectively. The issue was also raised as a concern during road testing, with similar comments made that the terms were highly subjective. Respondents made suggestions for alternative wording.

Firstly, one magistrates bench suggested that instead of the proposed factors, the harm factors from the aggravated burglary guideline should be used instead. The JCS suggested that the factors should be: *'very significant emotional harm based on any factors placed before the court'* in category one, and *'significant emotional harm based on any factors placed before the court'* in category two.

Although the harm factors within the aggravating guidelines are broader than the ones in the non-domestic and domestic burglary guideline, the CPS suggested broadening the revised harm factors even further, to make it clear that emotional impact may be covered even where it does not amount to psychological injury. They suggest rewording to:

Category one harm

- Substantial physical or psychological injury or substantial emotional or other impact on the victim

Category two harm

- Some physical or psychological injury or some emotional or other impact on the victim

Category three harm

- Limited physical or psychological injury or limited emotional or other impact on the victim

Given that so many respondents raised concerns and the issue was highlighted in the testing of the guidelines the Council agreed it was important that the harm factors were reworded, as respondents stressed that all burglaries were distressing for victims, and this was a key factor to get right. The Council felt that the rewording suggested by the CPS was the most appropriate, so the harm factors in the three categories have been changed to the ones suggested by the CPS above, with one slight amendment. In other responses on harm factors respondents suggested that 'moderate' was a better term than 'some' within category two, so this harm factor will now read: *'moderate physical or psychological injury or some emotional or other impact on the victim'*.

A number of concerns were also raised by respondents about the *'soiling of property and/or extensive damage or disturbance to property'* category one harm factor and *'ransacking and vandalism'* factor in category two, stating that there isn't enough distinction between the two. Respondents were clear that soiling must remain in category one.

The CPS suggested that *'ransacking and vandalism'* be changed to *'some degree of damage or disturbance to the property'*, as this would provide a clearer sliding scale between *'limited damage or disturbance'* and *'extensive damage or disturbance'*. They also say that by doing so it would better reflect the level of damage/disturbance intended

for category two harm, as the natural meaning of ransacking/vandalism is arguably closer to *'extensive damage or disturbance'* in category one.

The Council of Her Majesty's District Judges (Magistrates' Courts) (C of HMDJMC) said that the difference between *'extensive damage/disturbance'* and *'ransacking or vandalism'* would not be clear, so the latter should read *'some ransacking and vandalism'* to draw a distinction between that and *'extensive damage/disturbance'*.

Rory Kelly, an academic, also said the factors needed revising to avoid confusion, and proposed:

Category one: Soiling of property and/or extensive damage or disturbance to property

Category two: Moderate damage or disturbance to property

Category three: Limited/no damage or disturbance to property

The JC also proposed that the category two factor should be *'moderate damage or disturbance to property'*. Given the number of comments on these factors the Council agreed that the category two factor should be changed from *'ransacking or vandalism of the property'* to *'moderate damage or disturbance to property'* with the other two factors remaining unchanged.

The Sentencing Academy, the JCS and one magistrate commented on the category two factor of *'theft of/damage to property causing some degree of loss to the victim (whether economic, commercial or personal value'*, stating that 'some' is too loose a description, and that there is not much difference between *'some degree of loss'* and *'property of low value'* in category three. They suggested that 'moderate' instead of 'some' might mark more clearly the difference between *'substantial degree of loss'* in category one, and *'property of low value'* in category three. The Council agreed that rewording 'some' to *'moderate degree of loss'* in category two harm would help with the appropriate categorisation of loss suffered. The category one and three harm factors are unchanged.

Historic England in their response suggested that there should be reference to the loss of cultural or heritage assets resulting from these offences within the harm factors. They state that the harm caused can be high because they are finite, irreplaceable and often unique resources that belong to the community, forming part of the nation's history. They point to the harm factor within the theft guideline of *'damage to heritage assets'* and the aggravating factor within criminal damage of *'damage caused to heritage and/or cultural assets.'* They requested that the guideline specifically includes a harm factor of *'Loss or*

damage caused to heritage and/or cultural assets.' The Council agreed that there should be a reference to loss or damage to cultural assets within the harm factors so has amended the factors to read:

Category one

- Theft of/damage to property causing a substantial degree of loss to the victim (whether economic, commercial, cultural or of personal value)

Category two

- Theft of/damage to property causing a moderate degree of loss to the victim (whether economic, commercial, cultural or of personal value)

Category three

- Nothing stolen or only property of low value to the victim (whether economic, commercial, cultural or of personal value)

PRT raised a concern in their response that the draft guideline does not distinguish between when violence is used or threatened against the victim - they are both in category one harm. They suggest that '*violence used against the victim*' remains in category one, but '*violence threatened but not used against the victim*' goes to category two. The Council considered these concerns in some depth, and decided to amend the category one factor and add a new category two factor as follows:

Category one

- Violence used/serious violence threatened against the victim

Category two

- Violence threatened but not used against the victim (where not at category one)

PRT also suggested that the category one factor of '*context of public disorder*' is amended to '*context of public disorder (when linked to the commission of the offence)*'. They said without this addition it is unclear what 'context' may be relevant. The Council agreed that it would be helpful to amend the factor slightly so it reads: '*offence committed in the context of public disorder*'.

The CPS commented on the '*victim on the premises (or returns) while offender present*' category one harm factor. They suggest that it should be reworded to '*victim on the premises (or returns or otherwise attends) while offender present*'. They state that this

would better capture situations where a security guard who would not normally be present attends a warehouse after an alarm was triggered, for example. The Council agreed that it would be helpful to reword this factor, so it has been reworded to: '*Person(s) on premises or returns or attends while offender present*'.

The Chief Magistrate commented that violence or confrontation with the occupier should be the first item within the list of harm factors. The Council agreed and the list of harm factors has been reordered so that the 'violence used' factor appears first in the list.

Wording on Drug Rehabilitation Requirements (DRRs) and Alcohol Treatment Requirements (ATRs)

The non-domestic and domestic burglary guidelines contained wording above the sentence table stating that DRRs/ATRs may be a proper alternative to a short or moderate custodial sentence. The original guideline just referenced DRRs, so the Council has added in ATRs in recognition of the proportion of offences where alcohol is a factor. In testing of the draft guidelines with sentencers, the wording was found to be clear and useable. The additional wording on ATRs was not opposed to but some judges stated they would need to be persuaded to apply this in domestic burglary cases or would need evidence that addiction was the root cause of the offending.

Just over half of the respondents that answered the question agreed with this proposed wording. These respondents included the CPS, Council of Her Majesty's Circuit Judges (C of HMCJ) and C of HMDJMC. The JC agreed with the wording but suggested that the Council undertakes research to determine the extent that the inclusion of such wording changes the approach of sentencers. The rest offered a mixed response; one magistrate said the wording was patronising and over-prescriptive, another thought the wording was too vague. The Chief Magistrate and MA thought there should be a link to the Imposition guideline instead. Given that there was general approval for the inclusion of the wording, the Council decided it should remain unaltered in the guideline.

Sentence levels

The sentence levels consulted on were based on current sentencing practice. The proposals were met generally with broad approval. Of those that questioned the ranges, two magistrates thought they were too low, and two Crown Court Judges thought sentencing for more serious cases should be closer to the maximum of 10 years, for example six years instead of five in A1, and that the starting point did not have to be in the middle of the range. The Chief Magistrate queried having discharge at the bottom of the

range in C3, stating that it should remain a requirement that reasons are given for passing such a lenient sentence for a serious offence. Also, that when compared to the sentences for going equipped, a preparatory offence, the sentences in this guideline are too low. The lowest starting point in going equipped is a Band C fine, compared to a Band B fine in this guideline.

The MA by contrast thought the ranges were an increase on the levels in the existing guideline and queried whether this was intentional. Both the JC and JCS commented on the gap between the starting points of C1 and C2, saying there was too big a gap between a medium level community order and 6 months' custody, and suggested that the top of the range in C2 should be a high-level community order instead. Changing this would necessitate increasing the top of the range to 6 months' custody and making the same changes to B3.

The Council considered all these views carefully. In deciding whether to make any changes or not the Council also reflected on current (2020) sentencing data for this offence, which shows that the average custodial sentence length (ACSL) is 10.6 months, 74 per cent of offenders receive sentences of one year or less, and only 1 per cent receive sentences above five years, the top of the range. Given this data, the Council decided against increasing the range in A1.

At the bottom of the range, the Council also decided to keep the levels as consulted on. Regarding the Chief Magistrate's comparison with the sentence ranges in going equipped, the Council was of the view that going equipped offences require some planning to take place, whereas non-domestic burglary cases could be committed on impulse, so the consultation ranges for this offence were appropriate. On the point raised about the gap between C1 and C2, the Council again decided to leave the levels as consulted on.

Raising the top of the range in C2 to a high-level community order would necessitate increasing the top of the range to 6 months custody (and doing the same in B3). The Council was not in favour of doing this as it was mindful about concerns of sentence inflation. The Council was very conscious in these considerations of the findings of the evaluation of the original guideline, that there had been an unexpected rise in sentence severity for this offence after the guideline came into effect. Also, non-domestic burglary is a high-volume offence, so any increases could have a real impact. Therefore, the Council felt it was appropriate on balance to retain the sentence ranges consulted on and not make any increases.

Aggravating and mitigating factors

Aggravating factors

Three magistrates' benches asked for '*offence committed at night*' to be included within the non-domestic burglary guideline. In the consultation it was an aggravating factor within both aggravated and domestic burglary, but not non-domestic burglary. In the original guideline there was an aggravating factor of '*offence committed at night especially where staff present or likely to be present*'. This factor was not included at consultation as there was a reference at step one of '*victim on the premises (or returns) while offender present*.' The Council is still of the view that it is not necessary to include this as an aggravating factor for the reason outlined at consultation. In addition, as the list is non-exhaustive, courts could still take it into account in appropriate cases if warranted.

The Justice Committee (JC) questioned why '*use of a face covering or disguise*' was only an aggravating factor in aggravated burglary, and not in the other two guidelines. The Council considered whether this factor should be added but decided against it as it could cause sentence inflation.

The JCS suggested that there should be an additional aggravating factor of '*presence of a child, especially where used to facilitate the commission of an offence*', in relation to distraction burglaries. The Council was not sure how often this factor might apply so decided not to include it as an additional factor. Rory Kelly, an academic, suggested a number of additional aggravating factors, '*stealing, attempting or intending to steal goods to order*,' '*attempts to conceal/dispose of evidence*' and '*offender motivated by revenge*'. The Council was not minded to add these as additional factors, as the list is non-exhaustive so courts could take them into account if appropriate.

Mitigating factors

The Chief Magistrate and C of HMCJ questioned the inclusion of '*delay since apprehension*' as a mitigating factor, stating they did not think this was an appropriate factor to include. This was a mitigating factor in the original guideline, although it was '*lapse of time since the offence where this is not the fault of the offender*'. The Council considered this, and mindful of the current situation in the courts, decided that it should be removed from the guideline.

Rory Kelly suggested two additional mitigating factors, '*self-reporting*' and '*co-operation with the investigation/early admissions*'. The Council considered these but was not persuaded that they should be included.

Domestic burglary

Culpability factors

The majority of responses received relating to the culpability factors applied to both non-domestic and domestic burglary. For a full discussion of these please see the discussion within non-domestic burglary on pages 8-10. To summarise, the only change to the culpability factors from these responses for domestic burglary is from '*knife or other weapon carried (where not charged separately)*' to '*knife or other weapon carried (see step six on totality when sentencing more than one offence)*'.

A specific response relating to culpability within domestic burglary is as follows. One magistrates' bench suggested that there should be an additional high culpability factor related to repeat deliberate targeting, of the same premises by the same offender, within domestic burglary. This is done after a short space of time, often with elderly victims, but after having allowed sufficient time to pass so that the victim has replaced the stolen items. The Council gave careful thought to this suggestion but decided it would not be appropriate to add this factor, and that the existing high culpability factor of '*a significant degree of planning or organisation*' would capture this situation.

Harm factors

As with culpability, the majority of responses received relating to the harm factors applied to both non-domestic and domestic burglary. For a full discussion on these factors please see the discussion within non-domestic burglary on pages 10-13. From the discussion on these pages it can be seen that the harm factors have been extensively revised to take into account the different types of harm that can be caused by what can be a very serious offence.

A few consultation responses commented specifically on the proposed harm factors within domestic burglary. The C of HMDJMC commented on the '*occupier at home (or returns home) while offender present*' factor in domestic burglary, asking if the person returning home has to be the occupier, as opposed to anyone else who had legitimate access to the property, such as a babysitter, cleaner, etc. This was the only harm factor that was different from the ones consulted on in non-domestic burglary. As detailed on page 13 this factor has been revised to read '*Person(s) on premises or returns or attends while offender*

present' for non-domestic burglary. The Council decided that this revised factor should also be used within domestic burglary, and so will address the point raised by C of HMDJMC, by changing to '*person(s)*' rather than '*occupier*'.

The Howard League raised a different concern about the '*occupier at home (or returns home)*' *while offender present* factor in domestic burglary. They point to the evaluation of the original guideline which found that this was the most common step one factor. They argue that whilst it is obviously very frightening to be present during such an incident, the presence of the occupier should not be in the same harm category as actual violence against a victim, so should be a step two factor. The Council considered this point very carefully but on balance felt it should remain a step one factor.

Wording on Drug Rehabilitation Requirements (DRRs) and Alcohol Treatment Requirements (ATRs)

For a full discussion on this wording please see page 14. To summarise, the Council has decided to retain the wording consulted on.

Sentence levels

The consultation asked for views on the wording '*for cases of particular gravity, sentences above the top of the range may be appropriate*', which appeared directly above the sentence table. Of those that responded, most agreed with the proposed wording. Of those that disagreed, one Judge and one magistrate said it was no substitute for increasing the starting points/ranges. The CPS pointed out that Judges can already depart from guidelines if necessary, and that either the wording should be included in all guidelines, or not at all, to avoid a suggestion that some sentences above the ranges are more appropriate for some offences than others. This view was also echoed by a magistrate. This wording was found to be clear and useable during road testing.

PRT said that it would be necessary to explicitly outline what '*particular gravity*' meant or reword to '*cases of exceptional gravity*'. One Judge said it should be reworded to say that '*where multiple features of harm/culpability are present, it is likely that a sentence outside of the range will be appropriate*'.

The Sentencing Academy did not agree with including this wording, saying that courts could already go above the top of the range if necessary, that it risked sentence inflation, and that it singled out domestic burglary for special treatment. Further, that there is no reference to the statutory test for departing from the range as laid down by s.59 of the

Sentencing Act 2020, which is much tighter than the proposed wording of 'may be appropriate', so is directing courts to ignore the statute. The JC also made the same point and said that the wording should refer to the statutory test. The Council considered these views carefully and decided there was merit in the criticism regarding the wording and so the wording has been removed from the final guideline.

The proposed sentence levels were based on current sentencing practice. In 2020, the mean ACSL was two years four months, 91 per cent of offenders received a sentence of four years or less, and 2 per cent received sentences above six years, the top of the range consulted on. Most respondents generally agreed with the proposals, with a small number saying they thought the levels were too low. One Judge commented that all the starting points and ranges were too low, and that he believed most Judges thought this. Another judge and a magistrate bench thought the starting point for A1 was far too low, and that it should be far closer to the statutory maximum. The JC also queried the large gap between the top of the range and the statutory maximum. The Judge thought the starting point should be nearer six years in a range of three - nine years. A barrister also said that the starting point in A1 was too low at three years, and that it would lead to too many suspended sentences being given.

Another magistrate thought that all the sentences should be increased by one level. The JC thought the gap between the starting points in C2 and C3 was too great, at 1 years' custody and a high-level community order. They suggested that the starting point in C3 should be six months' custody to reflect the seriousness of domestic burglary. The C of HMCJ thought the ranges were too low, but with the additional wording above the table 'for cases of particular gravity' etc., that it worked. In contrast, PRT thought there should be more community orders available within the table, and the MA queried the ranges in A3/B2/C1, saying that they were higher than the equivalent guideline.

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

Clearly these responses reflect different but strongly held views on this important issue. The Council considered the responses at length and considered the potential implications of increasing the sentence levels, particularly at A1. The Council was very mindful of the findings of the evaluation of the original guideline, which found that the guideline may have had a slight effect on increasing sentence severity for these offences. The Council also

noted that the sentence levels from the original guideline had been maintained at consultation, and not decreased, even after considering the findings of the evaluation. Taking all this into account, particularly the risk of sentence inflation, and the fact that this offence again is a reasonably high volume offence, the Council felt it would not be appropriate to increase sentence levels from those consulted on.

Aggravating and mitigating factors

The majority of the consultation responses on the mitigating and aggravating factors applied across all the three guidelines; for a full discussion on these please see pages 15-16. There were no specific responses relating just to domestic burglary.

Aggravated burglary

Culpability factors

There were only a small number of responses made in relation to the proposed culpability factors for this offence, the majority of which were supportive of the proposed factors. In particular, respondents agreed with the proposal to move the '*weapon present on entry*' factor which was a high culpability factor in the original guideline, to become a step two aggravating factor. This factor is discussed further in the section on aggravating factors below. Therefore, the culpability factors proposed at the consultation stage remain unchanged in the definitive guideline.

Harm factors

Again there were relatively few responses received on the proposed harm factors, with the majority of those that did comment in favour of the proposals. As noted in the discussion on the harm factors on page 12, the revised harm factors for domestic and non-domestic burglary are based on the aggravated burglary harm factors. In turn, the harm factors within aggravated burglary have been slightly amended to incorporate the slightly broader factors agreed within domestic and non-domestic burglary. Also, the references to weapons have been removed from the harm factors for this guideline in response to issues with the '*weapon carried when entering premises*' aggravating factor, which is discussed below in the aggravating factors section.

Sentence levels

The proposed sentence levels were again based on current sentencing practice. In 2020, the ACSL was seven years two months, 89 per cent of offenders received sentences of ten years or less, and only 2 per cent received a sentence above 12 years. Of those that answered the question, the vast majority of respondents agreed with the proposals, with just one Judge saying he thought the levels were too low and the starting point should be closer to the top of the range. In road testing, the majority of the Judges were comfortable with the proposed sentence levels. The Council considered whether any changes to the sentence levels were necessary. However, after considering carefully all the relevant information, the positive consultation responses, current sentencing data and the findings of the evaluation, the Council has decided that the ranges should remain unchanged.

Aggravating and mitigating factors

In the consultation it was proposed to move the '*weapon present on entry*' factor in culpability to become an aggravating factor. This was due to concerns around double counting, following *R v Sage*¹. To assist sentencers to decide whether or not the factor applied, additional text was provided in a drop-down box. This movement of the factor and additional guidance was supported by consultation respondents, including CPS, CLSA, JCS, and C of HMDJMC. The C of HMCJ also agreed but commented that where a particularly dangerous weapon is used/carried to the property, then this should be a further aggravating factor

However, the results from the testing of this guideline with sentencers indicated that the additional guidance in the drop down box was misunderstood, and did not help sentencers decide when the factor applied. Therefore, the Council have decided to simplify the wording proposed at consultation. The aggravating factor will now become: '*In a s.9(1)(b) offence, weapon carried when entering premises*'. Then in a drop down box the additional information would read:

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

It is also proposed to remove the reference to weapons within the harm factors, as this had also caused confusion. The factor '*violence used or threatened against the victim, particularly involving a weapon*', now reads: '*violence used or threatened against the victim*', and '*no violence used or threatened and a weapon is not produced*' will read '*no violence used or threatened*'. The dangerousness of the weapon used was raised by some Judges in road testing and by the C of HMCJ, however it was suggested that the aggravating factors do not reference this, as it may over complicate the issue. As the list of aggravating factors is not exhaustive, sentencers could take the dangerousness of a weapon into account where relevant.

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

There were no further consultation responses specifically on the aggravated burglary aggravating and mitigating factors. For a general discussion on the aggravated and mitigating factors please see pages 16-17.

Aggravated burglary and the minimum term

The Council has decided that it would be helpful to add to the guideline some wording on the minimum term, which applies to an aggravated burglary committed in a dwelling. The wording added is as follows:

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

Section 10 of the Theft Act 1968 defines the aggravated offence in the following terms:

- (1) A person is guilty of aggravated burglary if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon of offence, or any explosive; etc...

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

314 Minimum sentence of 3 years for third domestic burglary

- (1) This section applies where—

- (a) a person is convicted of a domestic burglary (“the index offence”) committed on or after 1 December 1999,

.....

- (5) In this section “domestic burglary” means a burglary committed in respect of a building or part of a building which is a dwelling.

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

Link to the Imposition guideline

As all guidelines that contain custodial ranges in them have a link to the Imposition guideline, the Council has removed the link to this guideline that was immediately underneath the sentence table.

Equality and Diversity issues

At the consultation stage, the Council presented the latest available demographic data which showed that Black offenders seemed to represent a larger proportion of those sentenced for burglary offences than the general population, with aggravated burglary having the highest proportion of Black offenders sentenced of all burglary offences (15 per cent of offenders sentenced in 2019). In their consultation response, the Howard League commented that the whilst the over representation of certain groups of offenders may be occurring 'upstream' from sentencing, nothing was being suggested to remedy the over representation at the point of sentencing. They suggested that the aggravated burglary guideline should expressly remind sentencers that Black people are disproportionately charged with aggravated burglary offences and sentencers should take this into account. They also suggested that the Council carry out further analysis to analyse sentencing outcomes for aggravated burglary over a longer time period, to examine if there was any evidence of disparities at the point of sentencing by ethnic group, which the Council has now done.

The Council considered a further year of data from 2020, which was not available at the draft consultation stage. Due to the low volume of offenders sentenced for aggravated burglary offences, the analysis also considered five years of data grouped together from 2016 to 2020 to accurately examine if there were any disparities between sentence outcomes, ACSL and the distribution of sentence lengths by the offenders' self-reported ethnicity. Despite this, volumes remained relatively low and given that the ethnicity was also not recorded or not known for around one fifth of the offenders sentenced across all burglary offences, differences in proportions between groups were treated with caution.

In summary the results of this analysis showed:

- No conclusive evidence was found of disparities in either sentence outcome or ACSL by self-reported ethnicity, for 2020 alone or for 2016-2020 combined, across all three burglary offences.
- For aggravated burglary, a larger proportion of Black adults seem to be getting custodial sentences over 10 years when compared to White adults between 2016 and 2020 (20 per cent of Black offenders versus 14 per cent of White offenders sentenced). As stated, despite grouping five years of data, the volumes involved are still very low

(the 20 per cent equates to fewer than 20 Black adults and the 14 per cent equates to around 80 White adults) so this difference should be interpreted with caution.

These breakdowns of sentence outcome, ACSLs and sentence length distribution by self-reported ethnicity, alongside breakdowns by offender age group and sex for 2010-2020 can be found in the updated data tables published alongside the definitive guidelines.

The Council considered this further analysis carefully. Within the limits of this analysis, it was decided no conclusive evidence was found to suggest the burglary guideline was contributing to disparity in sentencing for different ethnic groups. As a result, the Council believes it will not be necessary to include any text within the guidelines. Where evidence of disparities at the point of sentencing has been found in the past, the Council has taken action to add wording to these relevant guidelines. However, the Council felt it would not be appropriate within the burglary guidelines.

The Howard League also suggested that the guideline reminds sentencers of the accumulated disadvantage that Black defendants may have faced which should be explored and factored in as a mitigating factor. This suggestion needs careful consideration as well as consideration in relation to the recommendations proposed by independent research that the Council has commissioned to review its work for any potential to cause disparity in sentencing across demographic groups. The work has included looking at the structure of selected guidelines, the language and factors used (included aggravating and mitigating factors) and the expanded explanations. The work has also considered whether any aspects of our processes of guideline development and revision have any implications for equalities and disparity in sentencing.

The contractor is due to deliver its findings and recommendations to the Council shortly. The Council will consider these alongside the recommendations from the Howard League and will, in due course, publish information of the actions it intends to take forward as a consequence of these.

Additionally in relation to equality and diversity issues, PRT suggested that the Council seeks to ensure that its own procedures for recording and analysing data meet the standards set by the Lammy Review. The Lammy Review made a number of recommendations for the CJS, including around collecting and publishing data on all protected characteristics. The Council does not have control over the variables recorded in the CPD and is limited by the data that is collected at the police station, which covers just

age, sex and ethnicity. The Council has committed to an action on equality and diversity in the five year strategy around collecting, analysing and publishing data, where this is available, and undertaking more in-depth analytical work where resources permit, as was done with drugs offences.

PRT also commented that they were concerned about the lack of consistent and reliable data on disability, particularly with regards to mental health and learning disability. There is a lack of data on this issue as this information is not recorded at the police station, so it is not available in the CPD dataset for the Council to analyse. However, the Council is running a data collection exercise this autumn covering the offences of domestic and non-domestic burglary which asks sentencers to indicate where the mitigating factor of “*Mental disorder or learning disability, where not linked to the commission of the offence*” was relevant in their sentencing decision. Data from this data collection will be considered by the Council in the future.

The Council is grateful to the Howard League and PRT for their comments on this area within their consultation responses.

The Council considers matters relating to equality and diversity to be important in its work. The Council is always concerned if it appears that the guidelines have different outcomes for different groups. It takes care to ensure that the guidelines operate fairly and includes reference to the Equal Treatment Bench Book in all its guidelines, which states:

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

Conclusion and next steps

The consultation has been an important part of the Council's consideration of this guideline. Responses received from a variety of sources informed changes made to the definitive guideline.

The guideline will apply to all adults aged 18 or over sentenced on or after 1 July 2022, regardless of the date of the offence.

Following the implementation of the definitive guideline, the Council will monitor its impact.

Annex A: consultation respondents

1. Anon (member of the public)
2. Suffolk Magistrates Bench
3. Sentencing Academy
4. Prison Reform Trust
5. Justices' Legal Advisers
6. Council of Her Majesty's District Judges (Magistrates' Courts)
7. Rory Kelly
8. Chief Magistrate
9. West London Magistrates Bench
10. Criminal Law Solicitors' Association (CLSA))
11. Council of Her Majesty's Circuit Judges
12. Magistrates Association (MA)
13. Association of Convenience Stores
14. Crown Prosecution Service (CPS)
15. Howard League for Penal Reform
16. Historic England
17. North London Bench
18. East Kent Bench
19. Fiona Levack JP
20. Alan Atkinson JP
21. Emir Felsal JP
22. HHJ Mark Weekes
23. Kyle Brown JP
24. Benjamyn Damazer JP
25. John Marr JP
26. Nargis Alsadiq
27. Guy Cecil JP
28. Neil King
29. Janet Kemp JP
30. Martin Alderman JP
31. HHJ Rupert Lowe
32. Justice Committee
33. Ministry of Justice (MoJ)

