

# Burglary Offences

## Response to Consultation



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# Foreword



**O**n behalf of the Sentencing Council, I would like to thank everyone who responded to our consultation on the sentencing guidelines for burglary offences. The volume of responses was very encouraging with a large number of both professionals and members of the public taking time to offer views and share their experience of these offences.

As with the Assault Guideline, we published two consultation documents, one for professionals such as the judiciary, legal practitioners and those involved in the criminal justice system; and a separate version aimed at members of the public with an interest in this issue. I believe this approach has, once again, proved successful and enabled us to elicit a wide range of views. The response to the on-line questionnaire was particularly heartening with over 300 people providing comments. The resulting views and comments have been extremely helpful in assessing whether our proposals strike the right balance.

We followed the approach taken in *Assault: Definitive guideline* in designing the guidelines and we are confident that this will aid practitioners and will build upon the approach that is now in use for assault.

The consultation closed just before the events in August which saw rioting and associated criminal activity in cities across England. This means responses received in relation to burglary of non-domestic premises did not reference these events. What both recent events and the responses we received to the consultation have shown is that, whilst non-domestic burglary may on the surface appear less traumatic than if a home is violated, the damage and consequences especially for small business and shop owners living above or near premises can be equally devastating.

I am pleased that the consultation and draft guideline has been well received and am grateful to all those that have allowed us to share the benefit of their experience; both as practitioners and as members of the public affected by these crimes.

**The Rt Hon Lord Justice Leveson  
Chairman of the Sentencing Council**

# Introduction

**The Sentencing Council, set up in April 2010, is the independent body responsible for developing sentencing guidelines and promoting greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary.**

Section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

“Every court –

- (a) must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender’s case, and
- (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.”

The guideline will apply to all offenders aged 18 and older, who are sentenced on or after 16 January 2012, regardless of the date of the offence. The duty of the court in relation to the guideline differs depending on whether the

offence was committed before or after 6 April 2010. When sentencing offences committed *after* 6 April 2010 the court must follow the guideline unless it is satisfied that it would be contrary to the interests of justice to do so. When sentencing offences committed *prior* to 6 April 2010, the court is to have regard to the guidelines.

In May 2011, in accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council published a consultation on draft guidelines on the sentencing of burglary offences. The Coroners and Justice Act 2009 set out the following matters which the Council must have regard to when preparing sentencing guidelines:

- the sentences imposed by courts in England and Wales for offences;
- the need to promote consistency in sentencing;
- the impact of sentencing decisions on victims of offences;
- the need to promote public confidence in the criminal justice system;
- the cost of different sentences and their relative effectiveness in preventing re-offending; and
- the results of monitoring the operation and effects of its sentencing guidelines.<sup>1</sup>

<sup>1</sup> s 120 (11) Coroners and Justice Act 2009

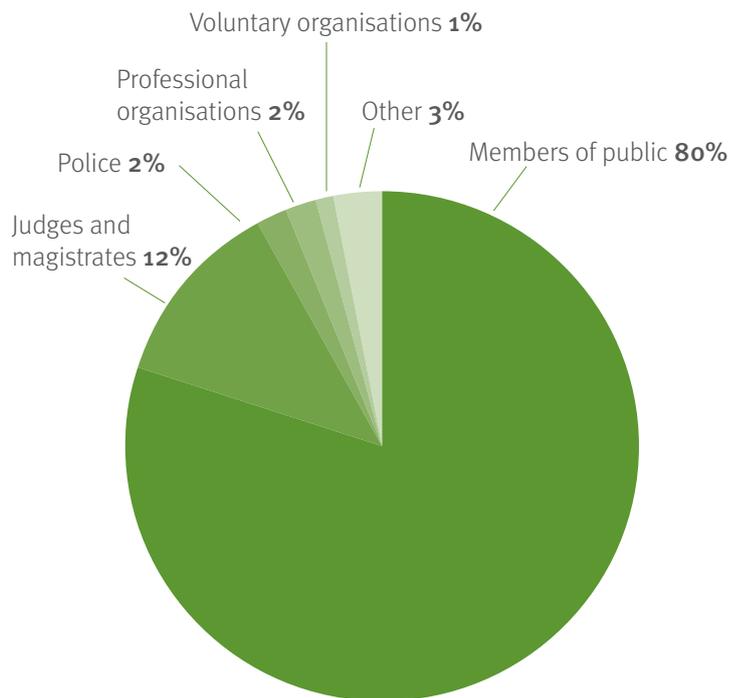
As the guideline will be the principal point of reference in all burglary cases in both the Crown Court and magistrates’ courts, the Council sought views on the draft guidelines from as wide an audience as possible, including members of the judiciary, legal practitioners and individuals and practitioners involved in the criminal justice system. A consultation document was developed specifically for members of the public with an interest in the criminal justice system and sentencing, including victims and their families. An on line questionnaire was also made available. A number of consultation events were arranged between June and August encompassing both professionals and the public.

At the same time as publishing its consultation paper containing the draft guidelines, the Council also published a draft resource assessment and an equality impact assessment. The consultation period closed on 4 August. This report summarises the responses to the questions asked in the consultation documents as well as those expressed during the consultation events, and sets out the Sentencing Council’s decisions on key points raised and the next step for the guidelines.

### Summary of Responses

The consultation sought responses to specific questions on the Burglary guidelines and asked about structure, content of the guidelines, the impact on and consideration of victims, equality and diversity matters and the actual sentence ranges and starting points.

A total of 460 responses to the consultation paper were received. Of these 111 were sent in as letters or e-mails whilst 349 were received as responses to the public on-line questionnaire. Respondents were drawn from a variety of backgrounds including the judiciary, the magistracy, practitioners and professional organisations involved in the criminal justice system. The specific sector break down of the responses received is shown here:



Category	Number of Responses
Academics	2
Government	2
Judges	7
Legal professionals	4
Magistrates	46
Members of the public	372
NDPB	1
Parliament	2
Police	7
Probation	4
Professional Organisations	8
Voluntary Organisations	5
<b>Total Responses</b>	<b>460</b>

A further breakdown detailing the responses to the professional consultation paper is found at Annex A.

The responses have given us a strong steer on a number of issues. There was a clear mandate to continue with the three category approach adopted in the *Assault: Definitive Guidelines* with many practitioners finding the consistency of approach helpful. There was also strong support for the harm and culpability factors proposed. We received constructive comments about how some of these factors might be refined, which we have reflected in our proposed response. Aggravating and mitigating factors engendered useful discussions and whilst a large majority of practitioners agreed with those that had been specified in the guidelines, the public were more evenly split and a number of the mitigating factors provoked some strongly held views.

The consultation responses confirm that we have got the guidelines right in terms of ranges and starting points for aggravated and domestic burglary. However, with non-domestic burglary there was some concern from both professionals and the public about the message that might be sent out by reducing sentence ranges. The rationale behind bringing the sentence range down was that the current one to seven year range did not reflect sentencing practice. 99.6 per cent of sentences for over 18s in 2009 for non-domestic burglary were for four years or less. We have re-considered this offence in light of comments received during the consultation which have served to illustrate the impact and effect on individuals and communities that non domestic burglary can have.

The next section discusses the responses to specific questions and sets out in more detail the decisions reached by the Council following views expressed during the consultation.

## Responses to specific questions<sup>2</sup>

### Q1 Do you agree that there should be three offence categories?

The professional consultation paper recommended a three offence category model for burglary, following the approach taken in the *Assault: Definitive Guideline*. The public consultation paper did not ask this question. The Council wanted to ascertain whether respondents found the three offence category model a clear and useful approach.

Eighty-eight per cent of respondents agreed with the approach. Consistency with the recent *Assault: Definitive Guidelines* was welcomed. Some magistrates questioned the approach and anticipated difficulty applying the guidelines in cases where greater or lesser harm or culpability was not obvious. One respondent called for further guidance in these more borderline cases. As with the assault guidelines, if a case is on the cusp of categories, the court has the discretion to choose the category which it feels to be most closely aligned with the case before them, bearing in mind that step two factors should not be considered in making this decision to avoid any potential for double counting. The court may choose to look at the starting points and ranges set out at step two in order to help with an indication of the severity of sentence available within the guideline category ranges.

The guideline offers discretion to the individual sentencer to make a judgement call based on whatever step one factors are present to assist them. Courts should not feel that they must enter a default category only to find themselves unable to adjust the sentence adequately at step two. This is a process that sentencers are becoming more comfortable with as it is used for assault and we do not believe further guidance is necessary.

Given the strength of support for the approach taken the Council will not be altering the three category offence structure.

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<sup>2</sup> The questions follow the order set out in the professional consultation.

## Q2 Do you agree with the harm and culpability factors proposed at step one? If not, please specify which you would add or remove and why.

In order to determine which of the three categories the offence fits into, a list of factors is set out that should be taken into account when assessing harm and culpability. It is only possible to have reference to the factors listed when deciding on harm and culpability. The lists have been tailored to the different offences. The Professional Consultation asked about all three offences whilst the Public Consultation concentrated on **domestic** burglary only. This question appeared as question 1 in the public consultation.

Ninety-three per cent of professional respondents believed that the factors proposed were good. There were, however, a couple of areas where it was believed refinement would be helpful.

In relation to factors indicating higher culpability there was debate around the utility of the offence being motivated by hostility to the victim based on sexual orientation, disability, age, sex or gender identity. The comment was made by some magistrates and the Criminal Bar Association that it is not the experience of professionals that such features are sufficiently common in burglary to warrant specific inclusion. These factors appeared in the guidelines on assault but it was questioned whether they sit so comfortably when talking about burglary. Instead, a large number of responses suggested that a more important factor when assessing higher culpability was that the victim had been deliberately targeted due to their vulnerability. This view was supported by the public response. Some commented that reference to an offence being motivated by sexual orientation, disability, age, sex and gender identity, was too specific. It was suggested that vulnerability of the victim should increase culpability, for example if the elderly are specifically targeted. The factors indicating higher

culpability had been broken down into these groups in order to reflect statutory aggravating factors. The council had, however, recognised that it needed to be broadened out to include other reasons for targeting the victim.

It was suggested by both the public and professionals that vulnerability should be drawn out further as a factor. It was also suggested that it would be appropriate to have “*the victim or premises being targeted*” as a factor indicating higher culpability in all three types of burglary. We will reword the step one factor so that it reflects the victim or premises being deliberately targeted (for example, targeting motivated by vulnerability or by a specific hostility such as disability, race, sexual orientation). In this way we can combine and reflect all these elements.

“We know from our work with victims that one question many victims have following an offence is ‘why me?’. The perception that they have been deliberately targeted or singled out by an offender can be extremely distressing for victims and the cause of a great deal of additional anxiety...the deliberate targeting of a particular victim because of their actual or perceived vulnerability indicates an increased level of intent and callousness on behalf of the offender” Victim Support

The inclusion of ‘property being of very low value’ in the factors indicating lesser harm for domestic burglary was questioned by a number of professional respondents. Recognition of not just the economic value but also personal and sentimental value was welcomed. The point was made that there is often little correlation between the value of what has been taken and the harm done to the victim. It is the invasion of the sanctity of their home that causes harm rather than specifically what is taken in many cases. Some felt that the fact that little or nothing is stolen should not be allowed to diminish the impact of other factors. This was also borne out in the public response in which many made the point that having something taken that is sentimental or personal to the victim can be far worse than having something of a much higher value stolen.

“Sentimental or personal items, even of a low value, cause harm and trauma to a victim. This could be photos or phone numbers in a stolen phone. A higher value TV or laptop may mean less.” On line public response

Many argued for the removal of “*or only property of a very low value (economic, sentimental or personal) to the victim*” from the factors indicating lesser harm. There seemed to be a little confusion around the wording of this factor with some interpreting it as meaning that an item would always be considered of low value if just sentimental or personal. This was not the intent and we have revised the wording to make more explicit the fact that we are talking about very low economic, very low sentimental and very low personal value.

Two respondents to the professional consultation questioned the wording of “*Knife or other weapon carried (where not charged separately)*” as a factor indicating higher culpability for domestic and non domestic burglary. This culpability factor has been included to reflect the fact there is discretion as to whether to prosecute someone for aggravated or non aggravated burglary. Possession of a weapon can still be taken into account as a culpability factor if it is chosen to prosecute using non aggravated burglary. The wording ‘*where not charged separately*’ is included so that possession of a weapon is not double counted, in cases where it is charged separately.

One respondent questioned “*significant physical or psychological injury or trauma*” being mentioned in aggravated burglary but not in domestic and non domestic burglary where there is no reference to injury but “*trauma to the victim beyond the normal inevitable consequence of intrusion and theft*”. It was felt that even without a weapon there could be GBH so the distinction was questioned. The distinction is included, however, to reflect the fact that aggravated burglary is a more serious offence.

A couple of respondents thought lack of maturity should be included at step 1 to indicate lower culpability, as well as in mitigation at step 2. However, following the assault consultation, the

Council decided to include lack of maturity at step 2 as a matter of personal mitigation which provides context to the commission of the offence and reaffirms that decision in this guideline.

In terms of the public response on step 1 factors in **domestic** burglary 70 per cent of respondents agreed with the factors listed. Of those that disagreed a number of themes emerged which echo the replies of the professionals especially in relation to vulnerability and value. These comments have been reflected above alongside the professional responses. The strongest message this group sent out was that the principal harm caused by a domestic burglary is the violation of the home, and the feelings of fear and vulnerability this creates. The harm to the victim is not necessarily altered by the value of the goods stolen.

A number of respondents also believed that ‘*offence committed on impulse*’ should not be a factor indicating lower culpability. The point was made that many burglaries are opportunistic but to the victim it made no difference whether it was committed on impulse. The level of trauma would be the same. Whilst this rationale is understood, we do believe that there is a distinction between an offence committed on impulse, with **limited** intrusion into the home, from that of a planned burglary that was incredibly intrusive and where damage was done to the property. This distinction will therefore be maintained.

It has also been decided following discussion by the Council that, in order to adequately take account of burglary committed in the context of public disorder, there will be a new factor indicating greater harm. A factor will be added that will be able to accommodate a range of situations in which public disorder will indicate greater harm. The wording is not intended to be specific to the type of riots that were seen in August. It is capable of application in a range of situations where public disorder occurs.

### Q3 Do you agree with the aggravating and mitigating factors proposed at step two? If not, please specify which you would add or remove and why?

Once the category of offence and starting point has been determined, further aggravating and mitigating factors need to be considered to determine where within a category range the sentence should fall. The list of aggravating and mitigating factors in step 2 are non exhaustive and are examples of factual elements which provide context around the offence or offender, that help determine where in the category range a sentence should sit. The Council wanted to ensure that the examples of factors given were useful and to explore whether there were any important examples that had not been included or were not felt to be helpful. Again professionals were asked about all three types of burglary offences whereas the public (at question 2 in the public consultation) were asked to focus on **domestic** burglary.

Eighty-six per cent of professional respondents agreed with the factors listed although had constructive comments to make. A number of people questioned the decision to leave the mitigating feature of financial pressure off the list. One expressed concern that failure to include it might mean it is overlooked as mitigation by sentencers. The Council feels that it is clear this is a non-exhaustive list which allows sufficient flexibility for this, and other factors, to be taken into account in appropriate cases.

A number of respondents commented on the inclusion of remorse as a mitigating factor. It was stressed that remorse had to be genuine and reparation needed to be seen in context. If the offender returns items not out of a genuine sense of remorse but in a cynical attempt to lessen the sentence this is not good enough. The Council

agree, but the genuineness of remorse is a factual issue for the judge or magistrate to assess and look at in context before it is decided whether it is a relevant factor. A number of people also questioned the advisability of lapse of time as mitigation; they felt a crime was no less serious because it had happened some time ago. Some questioned the inclusion of sole or primary carer being included under factors reducing seriousness and felt this factor did not sit comfortably with the other factors. Others queried the inclusion of *injury being caused recklessly* in mitigation for aggravated burglary and felt that injury, whether intended or not, should be an aggravating factor. Injury is a factor indicating greater harm at step 1 but the inclusion at step two of recklessness is intended to provide context and distinguish such injuries from deliberate, intentional injury, which the Council feels to be more serious. A few were concerned at the practicalities surrounding establishing evidence of community impact and questioned how this was to be done.

The public responses were fairly evenly split between those who agreed and those who disagreed with the aggravating and mitigating factors. 55 per cent of respondents agreed. Of those that disagreed the vast majority commented on factors they thought should **not** be taken into account when assessing reduced seriousness or personal mitigation. The most controversial was being a sole or primary carer for dependant relatives. This received very little sympathy from a large number of respondents. There was also suspicion around remorse being used in mitigation. It was felt that it was far too easy to fake remorse and that it could be used to “work the system”. Lapse of time was largely seen as irrelevant and a subordinate role in a group or gang also received little sympathy.

Mental disorder or learning disability was seen as a genuine example of personal mitigation and received some support even amongst those that disagreed with other factors. Some expressed the view that there should be no mitigation at all.

As the step two factors for aggravation and mitigation are non exhaustive, and are illustrative, they do not preclude the inclusion of other factors which the judge may feel relevant to a particular case. Following the responses received we are satisfied that the main examples are included. Although there was some opposition to the sole or primary carer for a dependant relative being on the list it is not mandatory to take this into account and would be at the discretion of the judge. It will therefore be kept on the list as there are some instances where this is an important consideration.

“The aggravating and mitigating factors at step two – as a non-exhaustive list- seem to cover most ground. There should always be the opportunity to consider other factors”  
Magistrate

#### Q4 Are there any further ways in which you think victims can and/or should be considered?

The Council recognises that burglary is a serious offence that can have a significant impact on victims. In the draft guideline it sought to give full regard to the impact of burglary on victims in all three offences but was interested whether there were further ways the victim should be considered. This question appeared as question 7 in the public consultation.

“Burglary can be a highly traumatic violation of privacy, and often causes extreme anguish and distress to victims. So a shift towards the explicit consideration of that effect, and of a greater flexibility to recognise the various harms that burglary can cause, is to be welcomed.” Commission for Victims and Witnesses

Seventy-nine per cent of professional respondents said there were further ways the victim should be considered. A strong message was sent out that the way victims should be considered is through greater and more consistent use of victim impact statements. Many suggested there should be reference to the statements in the guidelines to encourage their use. The impression given by the responses is that the use of victim impact statements throughout the country is variable and a specific reference to victim impact statements in the guidelines would be a positive step to promoting the interests of victims and witnesses in the criminal justice system. Some respondents hoped that such a prompt in the guidelines would encourage sentencers to request the statements.

In the *Assault Definitive Guidelines* the Council decided not to include guidance on victim impact statements as it was considered that the existing guidance in part III.28 of the Consolidated Criminal Practice Direction and the decision of the Court of Appeal in *Perks*<sup>3</sup> covers the use of these statements in court. The Council believes

that, for the same reasons, it is unnecessary to repeat this guidance in the burglary guidelines. In addition the Council are satisfied that the impact on the victim is also reflected in the factors to be taken into account at step one and step two of the guidelines. The consultation responses do highlight a wider issue of the inconsistent use of victim impact statements. This is an issue that should be looked at in the context of the police and prosecutors, rather than something that is properly addressed in the Sentencing Guidelines.

The Crown Prosecution Service questioned victims being forced to leave their home only being an aggravating factor in domestic violence cases. We have decided to take on board the fact that there may be instances outside of domestic violence in which an individual is forced to leave their home and have reworded the aggravating factor to widen it and include other victims forced to leave their home. The CPS also asked whether this aggravating factor should apply to a victim of domestic violence forced to move out of non-domestic premises as a result of (say) targeted burglaries? The step two factors are a non exhaustive list and so being forced to leave premises could be taken into account if pertinent but is far less likely to come up in a non-domestic situation, and so specific reference has not been added to non-domestic burglary.

The public responses were also focused on giving the victim a voice in proceedings. 64 per cent felt more could be done and whilst some referred specifically to victim impact statements, a larger number mentioned allowing victims to have a voice about impact in more general terms. A few people felt that it was a good idea for the victim and perpetrator to meet so that the victim could tell the offender directly the impact the burglary had.

A number of respondents focused on the fact that reparation should be made to the victim by the offender through some sort of financial compensation. It was suggested that the impact on insurance values in an area should be looked at when considering the victim and compensation. Some respondents called for more information throughout the proceedings so that they would know about an arrest and sentence as this would reassure them.

## Q5 Do you agree with the proposed approach to previous convictions?

There is a statutory requirement for sentencers to take account of previous convictions when assessing seriousness. The consultation proposed that this is done by inserting in the text of the guidelines specific reference to the fact that relevant recent convictions may result in an upward adjustment and also by highlighting the relevant section of legislation that sets out the duty to take into account previous convictions. It was felt including any more than this would be overly prescriptive. The Council was interested in whether this was also the view of others and it was asked as question 6 in the Public document. Nine

Ninety-four per cent of professionals who responded to the paper agreed with the approach taken to previous convictions. Of those that disagreed, or qualified their agreement, comments were split between those who felt no reference is needed to recent convictions as this is known by sentencers, and those who felt more detail was needed to aid sentencers.

A couple of respondents felt that previous convictions were such a material factor, it merited a step on its own.

Seventy-three per cent of the public agreed with the approach taken to previous convictions. Of those that disagreed nearly everyone cited the fact that they felt a minimum of 3 years for a third domestic burglary was too low. Some felt that there should never be exceptions to this minimum and a few felt that a statutory minimum should be triggered at the second offence. The statutory minimum of three years, and the fact that it is triggered by a qualifying third domestic burglary, are both factors set out in the Criminal Courts (sentencing) Act 2000 and are not something that the Sentencing Council would have the power to alter.

Given the strength of support for the approach to previous convictions in the guidelines, the Council will not be making any alterations to the proposals in the consultation.

## **Q6 What further guidance might be included in relation to the sentencing of dependant offenders?**

The view was taken by the Council in consultation that, whilst many burglary offenders may be motivated by a dependency or addiction to, for example, drugs, alcohol or gambling, no further information was required in the guidelines and that considerations of dependency are well understood by sentencers. The consultation wanted to ascertain whether sentencers themselves felt that this was the right approach or whether further guidance would be useful. This question was only asked in the professional consultation.

There were some that questioned the assertion in the consultation that considerations of dependency are well understood by sentencers and thought that as many offenders convicted of acquisitive crimes are motivated by an addiction, guidance would be relevant and valuable. The Justice Select Committee felt that further guidance on the sentencing of dependent offenders and the appropriate relationship between the custody threshold and community sentences with a treatment requirement would assist sentencers. The point was made by one respondent that further guidance on dependency would make the guidelines more transparent and could aid public understanding of sentencing decisions.

The Criminal Justice Alliance and the Transition to Adulthood Alliance said that they would recommend additional guidance on the selection of sentences for dependent offenders.

Some took the contrary view and the point was made that dependency is not an issue unique to burglary and it can be taken into account without a guideline definition. One respondent felt dependency was a subject of its own which should be addressed in a separate specific, not offence related, guideline. The Magistrates' Association were of the opinion that no further guidance was necessary.

In light of the responses received the council are persuaded that there is merit in putting in additional text around the sentencing of dependant offenders.

## **Q7 Are there any equality or diversity matters that the Council should specifically consider (please provide evidence where possible)?**

The Council published an equality impact assessment to accompany the consultation but did not identify any equality matters.

Of the professional respondents 85 per cent felt that there were no equality or diversity matters that needed to be specifically considered. Some felt further data would be useful on the sentences given to black and minority ethnic offenders and also to female offenders to see if these sentences were higher compared to others. A couple of respondents made the point that in some households if a religious item is defiled then this might have an impact.

The public were asked about equality and diversity at question 8 of their consultation). In terms of the public responses 76 per cent of respondents did not think there were other ways equality and diversity should be considered. Nearly all respondents that commented said that equality and diversity matters were irrelevant in terms of how an offender should be sentenced. A number did, however, comment that in relation to victims equality and diversity might be relevant if, for example, the victim was subject to a hate crime or if they had been targeted because they were vulnerable; for example because they were disabled.

The Council is satisfied that there are no further equality or diversity issues it needs to specifically consider in relation to this consultation.

## Q8 Do you agree with the proposed offence range, category ranges and starting points for aggravated burglary?

The offence range proposed in the consultation is wholly custodial to reflect the seriousness of aggravated burglary; the starting points and category ranges are designed to reflect this seriousness. They are slightly higher than the starting points and ranges in the Robbery guidelines.

Both the public and professional consultations sought views on whether people agreed with the ranges and starting points (question 5 in the public consultation).

Of the professionals that responded 92 per cent agreed. Some people commented that they felt the starting point for category 3 was too low. One said that it was hard to imagine a scenario where an aggravated burglary was not planned whilst another believed that category 3 of aggravated burglary should be aligned with category 1 of domestic burglary given the gravity of the offence. A couple of people commented that the guidelines should make it clearer that it might be appropriate to increase the sentence in extreme cases.

In the public consultation 67 per cent agreed with the ranges and starting points. A number of people did, however, state that they were only in agreement if the offender actually served the sentence specified and was not released from prison before the expiry of this term. Of those that disagreed the majority were concerned about category 3. They felt that this was too low given that the offender will have had some sort of weapon. Some questioned whether a category 3 offence could ever be appropriate given the nature of the offence. Some felt that the sentences generally were too lenient.

The Council believe that the sentencing ranges achieve a proportionate approach between robbery and aggravated burglary, given that aggravated burglary is a more serious offence and trespass and possession of a weapon are always features. Given that the vast majority agree with the ranges and starting points the Council plans to adopt these as set out in the consultation.

## Q9 Do you agree with the proposed offence range, category ranges and starting points for domestic burglary?

The Council is proposing category ranges that reflect current sentencing practices. The Council felt that current ranges were set at the right level but the views of the public and professionals were sought on this.

Seventy-six per cent of the professionals that responded agreed with the ranges and starting points for domestic burglary. Of those that disagreed a number said that the starting point should always be custody. Some others said that they could not conceive when a low level community order would be appropriate and thought that medium level was more appropriate as the start of the category 3 range. There were others, however, who felt that the category 3 should be lowered so that custody was not an option. They felt that this would help minimise the use of short prison sentences. One respondent felt that by lowering the ranges and placing greater emphasis on community sentences it would help ensure resources are focused on efficient and effective responses to offending.

The public were also asked about ranges and starting points in their consultation (question 3) and were evenly split on this issue with 51 per cent agreeing with the ranges and starting points and 49 per cent disagreeing. A large number of those that disagreed had reservations about the use of community orders. Many believed the starting point should always be custody and that community orders were ineffective as a deterrent. It was commented that a community sentence would not give the victim peace of mind. As with other questions on the starting points and ranges some people made the point that the sentence should reflect the actual time spent in jail. Nearly all those that disagreed felt that the ranges could be higher.

Despite the split in the public responses, the Council agrees with the majority of respondents that the range is correct. There will be instances as set out in *Saw<sup>4</sup>* where there will be low level burglaries with minimal loss and damage, for example cases of unforced entry and low value theft with no aggravating features, where a community order is appropriate. Likewise there will be some category 3 offences where custody is the right approach and the sentencing range provides this flexibility. The Council will keep the proposed ranges and starting points for domestic burglary.

### **Q10 Do you agree with the proposed offence range, category ranges and starting points for non-domestic burglary?**

The offence range for non domestic burglary was proposed to directly reflect current sentencing practice and to be proportionate to the ranges proposed for aggravated and domestic burglary. The main change the guidelines envisaged was for the most serious category 1 offences, changing the category range from one to seven years to one to four years. This was to reflect current sentencing practice under which 99.6 per cent of sentences for over 18s in 2009 for non domestic burglary were for four years or less.

Unlike the ranges and starting points for aggravated and domestic burglary, where a clear majority of professionals were content with the approach taken in consultation, 53 per cent of professionals disagreed with the ranges and starting points for non domestic burglary.

The main criticism levelled was that the reductions in the ranges suggested were not appropriate and that this sent out the wrong message. The point was made that the shortened category 1 range would not give the court adequate scope to impose a proportionate sentence in more serious cases of non-domestic burglary. It could encourage sentencers to set a much lower level than four years (however, as set out above nearly all cases currently are given a sentence of four years or less).

The point was also made by professionals in the retail industry that, although it is stated in the public consultation that non-domestic burglary is regarded by the law as less serious than a domestic burglary of a home, the distinction is not always as clear cut in practice. This is especially the case when small independent traders are involved and live above or nearby the premises. Emotional harm or monetary loss can be equal to or greater than domestic burglary in some cases.

The public response (question 4 of the public consultation) was identical to that of the professionals with 53 per cent of respondents disagreeing with the ranges and starting points for non-domestic burglary. The main concern was that they believed the ranges were too lenient. A number of people expressed the view that burglary was burglary whether on domestic or non-domestic premises. Others acknowledged that there may be less emotional distress if a burglary happened on commercial premises but many were keen to stress that the consequences for people's livelihoods and the knock on effect in terms of employees, increased insurance, loss of business can mean a great deal of harm especially for small businesses.

“We are aware that NHS property and assets have been targeted by thieves with reports of items ranging from autopsy tables, defibrillators, laptops and lead from hospital roofs amongst the items stolen...the results are that the organisation’s ability to deliver care is compromised.” NHS

As with the answers to other questions a number of people questioned whether fines or community orders would actually act as a deterrent and were concerned about this.

An issue that occurred after the close of consultation, and is therefore not reflected in any of the responses, is the riots in England during August 2011. These riots have resulted in a large number of people being charged with non-domestic burglary, commonly referred to as ‘looting’. These events have shown that non-domestic burglary has the potential to cause harm and trauma to both individuals and communities. The events in August 2011 were arguably exceptional and may, in the opinion of the sentencer in individual cases, fall outside any guidelines and within ‘the interests of justice’ exception.<sup>5</sup>

In addition, in cases of particular gravity, the guidelines replicate wording that appears in the *Assault Definitive Guidelines* which states:

“A case of particular gravity, reflected by multiple features of culpability and harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features set out below”

In accordance with the responses received, the Council has looked again at the proposed category ranges. An argument can be made that the range for category 1 offences should be slightly wider, but at the same time non-domestic burglary has to be considered alongside domestic and aggravated burglary to ensure that the sentence ranges and starting points are proportionate. In light of this the Council proposes a widening of the range to one to five years. This reinforces the message about the harm and trauma that can result from non-domestic burglary and that such harm is not the exclusive preserve of domestic burglary. In exceptional circumstances, such as non-domestic burglary in the context of rioting, sentencers have the flexibility to move outside these ranges; it is the Council’s belief that the range should not be altered just to accommodate what are exceptional and rare circumstances.

5 S125 Coroners and Justice Act 2009 “(1) Every court (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offenders case, and (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so.”

## **Q11 Are there any further comments you wish to make?**

This question elicited a wide range of different comments from both professionals and the public (question 9 in the public consultation).

The majority of comments from professionals were positive and welcomed the guidelines. A couple of comments called for a formatting change so that the relevant offence was shown at the top of the page. The type of offence is, however, set out clearly in a tab at the side of the page and to ensure consistency with the assault guidelines we propose to stick with this format.

Some were worried that there was too much discretion in the guidelines especially in cases that did not fit neatly into greater or lesser harm or higher and lower culpability. The comment was also made that having an increasing number of mitigating and aggravating factors to take into account could result in more inconsistent sentencing.

A couple of people took the opportunity to reiterate the fact that they had concerns about sole or primary carer being used for factors reducing seriousness or personal mitigation.

The public responses in the main took this opportunity to relate their own experiences of having been victims of burglary, and to stress the fact that the consequences and effects of burglary are often ongoing, making people feel less secure and impacting on their everyday lives.

## Conclusion and next steps

**T**he consultation has been an important exercise in gathering informed and considered views from both professionals and the public. It highlighted a number of key issues and gave the Council an insight into the main issues arising both for practitioners and for members of the public who have direct experience of the effect of these crimes.

These views will be incorporated into the definitive burglary guideline which will be published on 13 October 2011 and implemented on 16 January 2012. A full implementation plan is being worked on to ensure that those who will have to use the new guidelines are fully involved and prepared for implementation, including the delivery of training.

The Equality impact assessment initial screening is available on the Sentencing Council website. No evidence was provided during the consultation period which suggested that the guideline will have any adverse impact on equalities issues warranting a full Equality Impact Assessment. Following the implementation of the definitive guideline, the council will monitor the impact of the guideline.

# Annex A

## Professional Consultation Responses

The following professional organisations provided hard copy responses:-

Association of Convenience Stores  
Bexley Magistrates  
Birmingham and Sutton Coldfield Magistrates  
Bradford Magistrates  
British Retail Consortium  
Cambridge Magistrates  
Central Devon Magistrates  
Central Kent Magistrates  
Commission for Victims and Witnesses  
Council of Her Majesty's Circuit Judges  
Coventry Magistrates  
Criminal Bar Association  
Criminal Justice Alliance  
Crown Prosecution Service  
Croydon Magistrates' Court  
Derbyshire Constabulary  
East Cornwall Magistrates  
East Dorset Magistrates  
Essex Police Chief Officers and Criminal Justice Department  
Government Response (Joint Ministry of Justice, Home Office and Attorney General)  
Greater Manchester Probation Trust  
Grimsby Cleethorpes Magistrates  
Hampshire Constabulary  
Howard League for Penal Reform  
Hull & Holderness Magistrates  
Isle of Wight Magistrates  
Justices' Clerks' Society  
Justice Committee  
Lancashire Constabulary  
Law Society  
Legal Committee of Her Majesty's District Judges (Magistrates' Courts)

Leicester Magistrates  
London Criminal Courts Solicitors Association  
Macclesfield Magistrates  
Magistrates' Association  
Magistrates' Association North Yorkshire Branch  
Market Bosworth Magistrates  
Milton Keynes Magistrates  
Minshull Street Crown Court  
National Bench Chairmen's Forum  
National Policing Improvement Agency  
New Forest Magistrates  
NHS Protect  
Norfolk and Suffolk Probation Trust  
Northamptonshire Police  
Northumbria Magistrates  
North East Suffolk Magistrates  
North Lincolnshire Magistrates  
North Sefton Magistrates  
North West Essex Magistrates  
North West Hampshire Magistrates  
North Yorkshire Magistrates  
Oxford Magistrates  
Peterborough Magistrates  
Prison Reform Trust  
Probation Association  
Sandwell Magistrates  
Sedgemoor Magistrates  
Solihull Magistrates  
Sussex Central Magistrates  
Teesside Magistrates  
Towcester Magistrates  
Trafford Magistrates  
Transition to Adulthood Alliance  
Tynedale Magistrates  
Victim Support  
Warwickshire Police  
West Berkshire Magistrates  
West Hertfordshire Magistrates  
West Yorkshire Probation Trust

Responses to the professional consultation from the following individuals:

His Honour Judge Michael Baker QC, Luton Crown Court  
 His Honour Julian Lambert, Bristol Crown Court  
 His Honour Peter Moss, Guildford Crown Court  
 His Honour James Stewart QC, The Honorary Recorder of Bradford  
 His Honour Simon Tonking, Stafford Combined Court  
 Mr Philip Davies MP, Member of Parliament  
 Mr George Tranter, Magistrate  
 Mr Nicholas Moss, Magistrate  
 Mr Douglas Parish, Magistrate  
 Ms Susan Mitchell, Magistrate  
 Mr Robert Banks, Barrister  
 Mr Timothy Fancourt QC, Barrister  
 Mr David Hughes, Solicitor  
 Mr Christopher Jones, Solicitor  
 Mr Alesdair King, Solicitor  
 Mr Julian Mahy, Deputy Clerk to the Justices – Magistrates’ Court Llandudno  
 Professor Andrew Ashworth, University of Oxford  
 Professor Neil Hutton, University of Strathclyde

We have not listed the members of the public given the volume of people that responded and the fact that some wished to retain their privacy. However, a breakdown of the number of responses is below:

Public On line Responses	349
Public Written Responses	23
<b>Total Responses</b>	<b>372</b>

**Consultation Co-ordinator contact details**

If you have any comments about the way this consultation was conducted you should contact the Sentencing Council Consultation Co-ordinator at: [consultation@sentencingcouncil.gsi.gov.uk](mailto:consultation@sentencingcouncil.gsi.gov.uk)

Alternatively you may wish to write to:  
Vanessa Watling  
Office of the Sentencing Council  
Steel House  
11 Tothill Street  
London  
SW1H 9LJ