

Fraud, bribery and
money laundering
offences
Response to consultation

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Foreword



On behalf of the Sentencing Council I want to thank all those who responded to the consultation on fraud, bribery and money laundering offences and those who attended the consultation events. I would like to make particular mention of the members of the judiciary who gave their time to participate in the extensive research exercise undertaken to inform the development of these guidelines. The views put forward by all of these consultees were, as always with Sentencing Council consultations, given careful consideration and were invaluable in shaping the definitive guidelines. The Council has maintained the general approach proposed in the consultation paper but a number of amendments have been made based upon views put forward by those who responded.

The wider harm that can be caused by what appear at first blush to be predominantly financial offences can often be overlooked. The Council commissioned research into the impact of online fraud during the development of the draft guidelines which found *'A wide range of emotional and psychological impacts*

*were reported including panic, anger, fear, stress, anxiety, self-blame and shame. Self-blame was one of the most pervasive effects of fraud which could damage participants' opinion of themselves as capable people who could protect themselves from harm. There were participants that reported feeling vulnerable, lonely, violated and depressed and in the most extreme cases suicidal as a result of fraud.'*¹ There is no reason to believe such experiences are confined to online victims. The Council therefore took the approach of increasing the emphasis on the effects on victims of fraud by making victim impact a central consideration. The sentence ranges reflect the gravity of this type of offending.

For the first time, guidance is available for sentencing money laundering and bribery offences as well as for sentencing corporate offenders. We hope that these guidelines will improve consistency in approach to sentencing these offences.

Lord Justice Treacy
Chairman, Sentencing Council

¹ Kerr, J., Owen, R., McNaughton Nicholls, C. and Button, M. (2013) *Research on Sentencing Online Fraud Offences*, Sentencing Council Research Series 01/13, London: Sentencing Council.

Introduction

At the outset we would like to pay tribute to the very detailed analysis undertaken by the Sentencing Council that has produced the consultation document.
The Council of HM Circuit Judges

In June 2013 the Sentencing Council published a consultation on draft guidelines on sentencing fraud, bribery and money laundering offences. The consultation contained seven guidelines; six for sentencing individuals and one for sentencing corporate offenders. The Council expedited the analysis of the responses to the corporate offender guideline in order that the guideline would be in place, if not in force, at the time when the first Deferred Prosecution Agreements (DPAs) were expected to be made. The guideline and response paper can be found on the Council's website (www.sentencingcouncil.org.uk). This paper is the Council's response to the guidelines concerning individuals.

The consultation ran for 14 weeks during which time a number of engagement events were held. The events were co-hosted with a cross section of interested parties.

Consultation events

Date	Attendees	Category
31/07/13	British Bankers' Association	Industry
6/08/13	Anawim Womens' Centre; Prison Reform Trust	NGOs and practitioners working with offenders
3/09/13	Kent Magistrates	Magistrates
5/09/13	Prison Reform Trust and Leigh Day	NGOs and practitioners working with offenders
12/09/13	Herbert Smith Freehills LLP	Legal practitioners
24/09/13	Law Society	Legal practitioners
25/09/13	Southampton Magistrates' Court	Court users

These events enabled representatives of key interested parties to consider the proposals that were of particular relevance to them in detail and to provide officials and Council members with their views.

The predecessor body of the Sentencing Council, the Sentencing Guidelines Council (SGC), issued guidance for use in both the magistrates' court and the Crown Court in 2009. It may then seem unusual that the Sentencing Council are issuing a new guideline five years later. The decision to issue new guidelines followed a request by the Ministry of Justice (MoJ) that the Council produce guidance for DPAs which were introduced in the

Crime and Courts Act 2013. The Council’s remit only extends to issuing guidelines on disposals following conviction and so it was agreed that a guideline for sentencing corporate offenders would be produced that could be referred to by judges applying DPAs. When agreeing to revise the Council’s work plan and undertake this corporate work the Council concluded it could not do so without reviewing the guideline for individuals who commit these offences. Additionally, the SGC guideline did not include guidelines on either money laundering or bribery offences so it was an opportune time to provide such guidance.

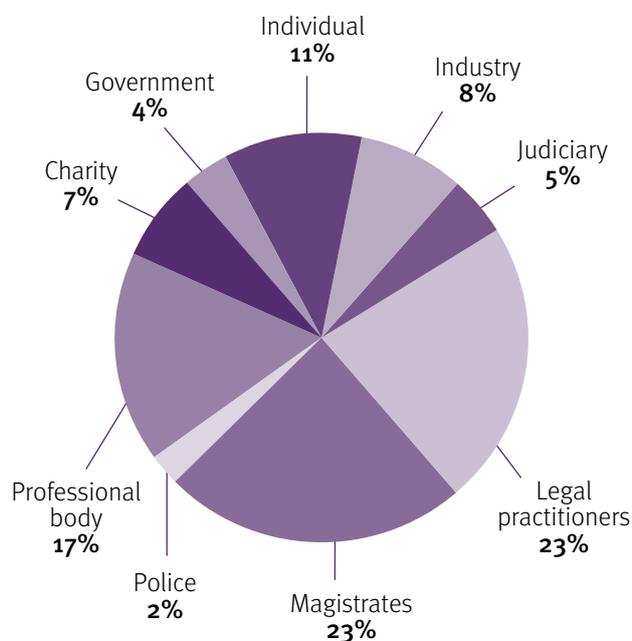
Since the introduction of the Fraud Act 2006, most fraud offences are charged under section 1 of that Act. In producing its guidance, the SGC grouped fraud offences by the type of activity involved, for example, confidence fraud. These groupings have been broadly retained with the exception of confidence fraud and banking and insurance fraud which have been merged; and the inclusion of the common law offences of conspiracy to defraud in all the fraud guidelines and cheating the revenue within the revenue guideline. Also for the first time each of the guidelines applies to sentencing offenders convicted of conspiracy to commit the substantive offence.

The key difference between the approach taken by the SGC and that taken by the Council is the focus has shifted from being solely about financial sums involved to a combined focus on both the amount involved and the effect the offences have on victims. Anecdotally, there was also some concern that the SGC guidelines were not straightforward to interpret.

Overall it is considered that the proposals will greatly assist Benches in determining appropriate disposals and are therefore to be welcomed.

Macclesfield Bench

In total 84 responses were received; 76 of these were sent by e-mail or letter and eight were submitted online.



Breakdown of respondents

Type of respondent	Number
Charity	6
Government	3
Individual	9
Industry	7
Judiciary	4
Legal practitioners	19
Magistrates	20
Police	2
Professional body	14
Total	84

There are six guidelines for individual offenders:

- Fraud
- Possessing, making or supplying articles for use in fraud
- Revenue fraud
- Benefit Fraud
- Money Laundering
- Bribery

Research

Throughout the development and consultation process the Council has used its team of social researchers to commission and conduct detailed research to help inform the proposals including:

- qualitative research with the judiciary to explore sentencers' views on early draft guidelines (prior to the public consultation) and then on the revised guidelines issued for public consultation; for both sets of guidelines to identify any behavioural implications of the proposals. In total 83 interviews were conducted over these two phases of work with Crown Court judges, District judges and magistrates; and
- externally commissioned research (undertaken by Natcen Social Research and published in June 2013) on sentencing online fraud offences: http://sentencingcouncil.judiciary.gov.uk/docs/Research_on_sentencing_online_fraud_offences.pdf

Summary of responses

“Cifas supports wholeheartedly the approach put forward in this consultation. The guidelines are thoughtful and proportionate, and balance effectively the need to punish criminals and limit criminality.”

CIFAS

Approach

Across the six guidelines the same approach has been taken to assessing the culpability of the offender. The court is to assess culpability as high, medium or lesser on the basis of the role of the offender and the level of planning and sophistication of the offence. Harm is assessed in all of the guidelines except possessing making or supplying articles for use in fraud and bribery on the basis of the financial loss caused or intended to be caused. A further assessment of harm is included within the fraud guideline which allows the court to increase the sentence from the starting point as a result of the harm caused to the victim. Within the money laundering guideline the level of harm associated with the underlying offence is to be considered as part of the harm assessment and, similarly to the approach in the fraud guideline this may increase the starting point.

“We welcome the stated intention in these guidelines to concentrate more on the role the offender has played and the impact on the victim.”

South Cambridgeshire Bench

There is considerable overlap in the approach taken in the fraud guideline with the approach to the other offence types included within this set of guidelines. This meant a number of respondents made comments in response to questions in this section that were applicable to guidelines that were discussed later in the consultation.

The first consultation question sought views on whether it was appropriate to produce a single fraud guideline for cases of confidence fraud and banking and insurance fraud. Of 47 responses to this question, 40 agreed. Those who disagreed felt this guideline could apply to a wide range of offending and it is potentially confusing to have a single guideline. The rationale for merging the guideline was that current practice demonstrates broadly similar sentence levels for these offences and that the features of these types of offending are similar. Given the overwhelmingly positive response to merging the guidelines the Council agreed that the approach would be retained.

Culpability

The approach to culpability across all six draft guidelines that were consulted on was to have three levels of culpability at step one – high, medium or lesser – that are assessed on the basis of the role of the offender and the level of planning and sophistication of the offence. The factors are exhaustive. A short narrative directs the court to balance the factors where there are characteristics from different levels of culpability to reach a fair assessment of the offender’s overall culpability.

Respondents were in overwhelming agreement with the approach taken to culpability on all of the draft guidelines. The table below sets out the number of respondents who agreed and those who disagreed by guideline. A small number of respondents gave answers that were ambiguous.

Responses to questions on agreement to approach to assessment of culpability

Guideline	Agree	Disagree
Fraud	29	2
Possessing/Making Articles	39	2
Revenue	27	2
Benefit	21	8
Money Laundering	29	2
Bribery	21	1

Cross-cutting issues

In each section of the consultation a question was asked seeking views on the proposed approach to culpability. Across all of the guidelines a small number of respondents commented that the difference between ‘*a leading role where offending is part of a group activity*’ as a factor indicating high culpability and ‘*a significant role where offending is part of a group activity*’ as a factor indicating medium culpability is unclear.

This language is taken from the Drug Offences Definitive Guideline where it is used to determine the offender’s culpability. Although some respondents did indicate confusion with this terminology the Council concluded that

it would not be amended as it is implied by the hierarchy that ‘*a leading role is the most serious in terms of culpability and a significant role*’ would be demonstrated by the offender playing a major part in the offence short of being a driving force behind it. It is hoped that by using consistent language across guidelines where appropriate, sentencers will become increasingly familiar with how to interpret factors.

There were a small number of respondents who commented that the factor ‘*all other cases where characteristics for categories A or C are not present*’ is either confusing or too open ended. North East Suffolk Bench described it as ‘*a catch all*’; the Criminal Bar Association responded it is ‘*vague*’; and West and Central Hertfordshire Bench thought it ‘*too open ended*.’ This had been included in the guideline partly as a response to some anecdotal concerns in relation to the Assault Definitive Guideline that having two levels of culpability – either the most or the least serious – does not reflect the breadth of offending behaviour. Whilst it is possible to identify factors at the extremes of an offence, it is often more difficult to identify factors representing cases which are more commonplace and thus the middle category is defined by an absence of factors which appear in either A or C.

Other respondents were supportive of having three categories of culpability and particularly of the discretion that they felt ‘*all other cases where characteristics for categories A or C are not present*’ would afford the court.

“The NBCF feels that the new approach is clearer, less confusing and in a court room setting it should be easier to identify the appropriate category for the offence.”
National Bench Chair’s Forum

The Council considered the responses and concluded that their intention was that this category may be used by what some respondents described as a ‘catch all.’ It is a

legitimate assessment to weigh up the factors of the case and conclude that the offender's culpability is neither high nor lesser. The presence of this factor combined with the narrative that directs the court to balance the factors of the offence to reach a fair assessment of the offender's overall culpability will allow the sentencer to assess an offender as displaying neither the most nor the least serious level of culpability.

Some respondents questioned why the sophistication of the offence was considered at step one as an indication of high culpability (*'Sophisticated nature of offence/ significant planning'*) but lack of sophistication is considered at step two as mitigation (*'Lack of sophistication with little or no prospect of success'*). The Council's intention was not that these factors be considered as either side of the same issue; the counter to the step one high culpability factor is *'opportunistic one-off offence; very little or no planning'* which appears in the lesser culpability factor; this appears in all the guidelines other than the benefit fraud guideline. The step two mitigating factor is intended to provide for an event where the intended harm figure is high but the likelihood of the gain being achieved is extremely unlikely, not due to lack of planning or intent but due to the unsophisticated approach of the offender. The Council carefully considered the wording of these factors and amended the mitigating factor which is discussed later in the paper at page 17.

Several respondents felt that *'limited awareness or understanding of fraudulent activity'* as a factor indicating lesser culpability could be interpreted as affording an offender credit for lack of knowledge of the law; others felt it was more appropriate as a step two factor. This factor is to apply where, for example, an offender is convicted of a fraud involving large amounts of money but who was unaware of the scale of the fraudulent activity. The Council considered

the inclusion of *'of fraudulent activity'* makes it clear knowledge of the law is not relevant. The President of the Queen's Bench Division handed down a judgment² last month that set out what is meant by the use of a similar factor, *"very little, if any, awareness or understanding of the scale of the operation"* in the lesser role category of the Drug Offences Definitive Guideline. The judgment stated that without this factor the court would *'find the starting point for the sentence at a level far in excess of that which would be justified for the criminality of which the offender was aware.'* The Council felt the same principle is applicable to these offences and retained the factor.

Respondents commented both for and against the inclusion of *'fraudulent activity conducted over a sustained period of time'* as a step one factor in fraud; possessing, making or supplying articles for use in fraud; money laundering³ and bribery guidelines. During the development of the draft guideline the Council took the view that the length of time over which the offending was conducted must increase seriousness because it demonstrates a course of criminal conduct. Following the consultation it was felt that no persuasive arguments were put forward as to why the length of time should be a step two aggravating feature rather than an indicator of the level of culpability and so the Council retained this as a step one factor. The consultation document referred to this factor as being particularly important in revenue fraud but it was omitted from the draft guideline. This was an error and it has been re-inserted. The Crown Prosecution Service and the government were particularly supportive of this factor being included at step one of the revenue guideline.

The guideline for benefit fraud is the only guideline that does not include a reference to the length of time at step one. The government was strongly of the view that length of time should also be a step one factor in the benefit

² R v Dyer EWCA Crim 2114

³ The factor in the money laundering guideline is 'criminal activity conducted over sustained period of time'

fraud guideline and that all types of fraud must be treated in the same way. The Council did not include length of time in the draft guideline due to concerns that the nature of benefit fraud is such that offences are committed over lengthy periods of time. This raised the possibility of a large proportion of offenders convicted of benefit fraud being placed at the highest level of culpability resulting in current sentencing practice being markedly and disproportionately increased. The Crown Prosecution Service (CPS) supported this conclusion in their response. Post consultation this issue was revisited and recent cases tested against both versions (for instance length of time being a step one or a step two factor) and the concern that if placed at step one sentences would dramatically increase was borne out. In any event, the length of time over which the offending occurred is likely to be reflected by the amount obtained. The length of time over which the offending occurred has therefore not been included in step one but retained at step two.

Offence specific issues

Benefit fraud

Four of the events held over the consultation period included in depth consideration of the draft benefit fraud guideline. Two of those events were co-hosted with the Prison Reform Trust and attended by practitioners working with female offenders. The Council was particularly keen to engage with this group as 54 per cent of people sentenced for benefit fraud in 2011 were female which is markedly different to the proportion of female offenders convicted for other fraud offences⁴.

There was a strong view amongst this group of consultees that custodial sentences and financial penalties are not appropriate for this type of offending. There was also concern that most offenders would fall into medium culpability as the factors do not reflect their experience that women who commit these

offences are often motivated by need due to poverty. These views were repeated in formal consultation responses from this sector. The Council is grateful for the contributions of all those who attended these events and has deliberated over the issues raised. However, the Council has deliberately included mitigating factors at step two that reflect the personal circumstances of this group of offenders (a discussion of these is at page 17) which in many cases may move a sentence down from a starting point. The Council was not provided with sufficient evidence to persuade it to substantially alter current sentencing practice by completely removing the option of either custodial sentences or financial penalties for this group of offenders.

The two other events that considered the benefit fraud guideline were attended by magistrates. The feedback there was consistent with some consultation responses which strongly disagreed with the Council's proposed approach. The response from the Magistrates' Association was strongly opposed to the approach and, along with a small number of responses from Benches, suggested that the current approach in the SGC guideline where seriousness is assessed according to whether the offence was fraudulent from the outset or not, is the correct approach.

The Council disagreed that the current approach is the right one as it does not take into account all the features of the offending behaviour but after careful consideration decided to include 'Claim not fraudulent from the outset' as a factor that indicates medium culpability. It was felt by the Council that where a fraud against the benefit system is fraudulent from the outset it is likely it will be considered by the court to fall into the highest level of culpability as a result of the planning involved and it may increase the seriousness further at step two as an aggravating factor, (Claim fraudulent from the outset). A discussion of this is at page 16.

4 http://sentencingcouncil.judiciary.gov.uk/docs/Fraud_Statistics_Bulletin.pdf

'Not motivated by personal gain' has been deleted as a factor indicating lesser culpability as some judicial respondents felt they would receive representations that offenders had committed offences for 'need not greed'; for example on the basis that the offender felt they had to commit benefit fraud to support their family. This was not the Council's intention; where this factor appears in the drug offences definitive guideline it is intended to reflect situations where an offender has been coerced into the offending and has not benefited. The Council does recognise that it is important to differentiate between benefit frauds that have been committed in order to fund lavish lifestyle choices and those where the offender is in difficult financial circumstances. This has been addressed at step two within the list of aggravating factors; a discussion of these is at page 16.

Money laundering

The Fraud Lawyers' Association responded that this area of offending is too wide ranging for a guideline to be workable. However, other respondents welcomed this guideline as filling a gap in guidance.

"...we welcome the introduction of guidelines for money laundering which is a frequently encountered offence and one where the circumstances are extremely variable in relation to both the sums involved and the role of the offender."

Council of HM Circuit Judges

Several respondents felt that knowledge of the underlying offence must be added as a factor at step one as increasing culpability. A suggestion made by Peters and Peters was to add a high culpability factor '*seriousness of predicate offence and knowledge of the same*'. The Council disagreed that knowledge of the underlying offence should be included within the assessment of culpability and the seriousness of the underlying offence continues to be addressed as part of the assessment of harm.

Harm

There is somewhat less overlap between guidelines in terms of the approach to harm than in culpability. Two of the draft guidelines (fraud and money laundering) have a two stage assessment of harm. In revenue fraud and benefit fraud the financial value is the only measure of harm. Lastly, the assessment of harm in both the possessing and making articles guideline and the bribery guideline is not linked to financial values.

Fraud

Harm is initially assessed on the basis of '*the actual intended or risked loss that results from the offence*'. There are five categories of harm with values ranging from less than £5,000 to £500,000 or more. Once the appropriate category is established the court is directed to take into account the level of harm (high, medium or lesser) caused to the victim(s) and then to adjust the harm category proportionally.

Consultation question 4 asked if this two stage approach was the correct way to assess the harm caused by these offences.

Forty-two responses were received to this question; 35 (83 per cent) agreed with the approach. Five (11 per cent) made general observations and two (6 per cent) disagreed. Eleven respondents, including the government, specifically commented that they were strongly supportive of the impact on victims being considered at step one.

"this seems particularly inventive Merely to use a financial assessment would be inadequate"
North East Suffolk Bench

"The draft guideline puts greater emphasis on the impact the crime has had on the victim than previous guidelines.... We welcome this approach ... as we are particularly conscious that victims, particularly vulnerable individuals, may suffer significant financial and psychological harm over the loss of relatively small sums."
Justice Select Committee

The Criminal Justice Alliance disagreed with the approach, considering the primary impact to be financial. Peters and Peters thought the approach suggested financial harm was more important than the harm to the victims and the assessment should be re-ordered.

As with other guidelines recently issued by the Council the impact of the offence on the victim was at the forefront of the development of the draft guideline. The Council is pleased that this approach was broadly welcomed and has retained it.

Consultation question 5 asked about the approach to actual and intended loss and risked loss. Thirty-nine respondents answered this question. Thirty-two (82 per cent) agreed, two (5 per cent) disagreed and five (13 per cent) made general observations.

“The new approach is more sophisticated and distinguishing between actual, intended and risked loss is helpful and would work well in practice.”

National Bench Chair’s Forum

Although only two respondents disagreed with the approach, interviews with sentencers during the consultation period highlighted some issues with how risked loss was applied which led to inconsistencies in sentencing a scenario where there was no actual loss. Both within some consultation responses and these interviews it was suggested that more detailed guidance is needed as to how to approach risked loss. The drafting of the narrative preceding the assessment of harm has therefore been amended to give an example of where risked loss might apply.

Forty-one responses were received to consultation question 6 which asked for views on the levels of financial amounts. Thirty six (88 per cent) agreed with the proposals, two (5 per cent) disagreed and three (7 per cent) made general observations. The Council of HM Circuit Judges expressed the view that

where financial values are used across all the guidelines a regular review mechanism needs to be in place. The Council has a programme in place to review guidelines and will ensure this issue is considered at the appropriate time. The Council decided to retain the levels as in the consultation on the basis that no evidence was submitted in support of alternatives.

Views were sought on the approach to the assessment of victim impact (Harm B) and the factors within the three categories. Of twenty-nine responses to consultation question 7 on the approach, twenty-seven (93 per cent) agreed, one (3 per cent) disagreed and one (3 per cent) made a general observation. There were few detailed comments to this question as most respondents expounded on their agreement to the approach when answering consultation question 8 on the factors.

Thirty responses were received to question 8, twenty-six (87 per cent) agreed with the factors, one (3 per cent) disagreed and three (10 per cent) made general observations. Six of those who agreed with the factors felt that ‘*use of another’s identity whether deceased or living*’ should be moved from a factor demonstrating medium impact to high impact. Peters and Peters agreed that use of another’s identity should be taken into consideration but felt it could be high, medium or lesser impact depending on the circumstances.

Several responses were received from insurance companies and insurance industry bodies; these suggested that the impact of ‘crash for cash’ scams was not adequately reflected. Aviva Insurance suggested the risk of physical injury should be added, the Association of British Insurers suggested reference to the impact of insurance frauds on policyholders should be a specific factor.

The Council felt it would be difficult to insert a specific reference to the impact of insurance frauds within the model. Harm B has been drafted to ensure harm to corporations is taken

into account and the impact on policyholders could be assessed in any of the categories under financial impact.

After deliberating as to how to proceed, the Council decided that the factors included within the consultation may not provide sufficiently useful guidance as they are a mixture of the general and the specific. The Council decided to delete the specific examples and leave the general definitions of gradations of harm to give the court discretion to use the most appropriate harm impact category based on an assessment of all of the available information on the impact on the victim(s). The exception to this is the retention of the factor relating to vulnerability in the highest impact category as it was felt important to particularly emphasise the harm that may be caused as a result of vulnerability.

Possessing, making or supplying articles for fraud

Harm is assessed as either greater or lesser, based on the harm that the articles could cause should they be successfully deployed. The factors that indicate *'greater harm'* relates to the potential financial loss (described as significant rather than in monetary values) informed by factors such as the number of articles or the potential of the articles to affect a large number of victims and by the impact the articles may have through the use of third party identities.

Lesser harm does not contain any factors as it is to be used where none of the factors indicating greater harm are present.

Consultation question 18 asked for views on this approach to the assessment of harm. Thirty-two responses were received to this question, twenty-nine (91 per cent) agreed, three (9 per cent) disagreed.

Thirty-one respondents answered question 19 which sought views on the factors in greater harm. Twenty-five respondents (81 per cent) agreed, six disagreed. The CPS suggested additional harm factors of *'offender making*

considerable gain as result of offence' and *'articles have potential to have a significant impact whether financial or otherwise'*. The Council felt that the second of these CPS proposals was already incorporated by *'article(s) have potential to facilitate fraudulent acts affecting large number of victims'* and *'article(s) have potential to facilitate fraudulent acts involving significant sums'* but agreed there was merit in the addition of *'offender making considerable gain as result of offence'* to cater for scenarios where the offender has profited from the supply of articles, regardless of their potential to cause harm. This factor has been added.

South East London Bench was of the view that victim vulnerability should be included as a factor in either culpability or harm; this was supported by several other responses. As a preparatory offence, there will not generally be an identified victim in these cases and so this proposal has not been adopted.

Revenue fraud

In the consultation the assessment of harm referred to *'the amount/relief obtained or intended to be obtained from Her Majesty's Revenue and Customs'*. The CPS suggested that the assessment of harm should be based on either the gain or intended gain to the offender or the loss or intended loss to Her Majesty's Revenue and Customs or the risked loss. The Council agreed that this better described the harm and has therefore included this wording. There is no assessment of victim impact in this model as the victim is the state and the harm caused in this regard will therefore not be a variable. The starting points and sentence ranges reflect the harm caused to the state.

Consultation question 24 asked for views on the approach to the assessment of harm. Twenty-three responses were received to this question. Twenty (87 per cent) agreed, three (13 per cent) disagreed or made general remarks.

Consultation question 25 sought views on whether the proposed financial ranges were set

at appropriate levels for revenue fraud. Twenty-two respondents answered question 25 on the financial levels. Eighteen respondents (82 per cent) agreed with the proposals, four (18 per cent) disagreed.

The Fraud Lawyers' Association felt that the financial levels should correspond with those used in the assessment of harm in money laundering cases. Several respondents including the government thought the lowest category (less than £20,000, starting point £12,500) was too narrow and should be merged with the next category or that the two lowest categories should remain separate but be more evenly spread. The Council considered these proposals but concluded that in order to achieve consistency across the different fraud guidelines and to provide guidance in lower value cases the financial levels would remain unaltered.

Benefit fraud

As with revenue fraud harm is assessed solely on financial values. The starting points and sentence ranges reflect the harm caused to the state. In this guideline the values are based on the amount obtained or intended to be obtained. There are four categories of financial ranges that start much lower in value than in the other guidelines to reflect the amounts that are commonly defrauded in this type of offending.

Thirty-three responses were received to question 31 which sought views on the approach to the assessment of harm. Twenty-nine (88 per cent) agreed, one (3 per cent) disagreed and three (9 per cent) made general observations.

Both the CPS and the government suggested the financial amount should be described as '*amount overpaid*'. The Council gave this suggestion detailed consideration and liaised with both the CPS and the DWP in relation to it. The Council understands that the CPS and the Department for Work and Pensions define 'overpayment' as the whole amount paid to the offender rather than the difference in amount between what the offender may be entitled to

and what was obtained fraudulently. This interpretation of overpayment does not seem to be the common understanding amongst sentencers. On the basis that the phrase is clearly understood by sentencers, the Council decided to retain the original description of harm.

Consultation question 32 asked for views on the financial levels of harm. Twenty five responses were received. Nineteen (76 per cent) agreed with the proposals, 4 (16 per cent) disagreed and two (8 per cent) made general observations.

Three respondents felt the proposed levels were too high and would not provide sufficient assistance to magistrates. The Magistrates' Association responded that a starting point of £1,000 (category 4, less than £2,500) is too low as they would not expect the CPS to bring prosecutions at this level. The Council considered both sides of this argument and concluded that while prosecutions are relatively rare for very small amounts, they are brought, particularly if an administrative penalty has not been accepted, and guidance should be available. The CPS agreed with the financial levels. With regards to the levels being too high, it was felt that any further nuance would lead to the guidelines being too prescriptive as the ranges would be drawn very tightly restricting the discretion available to sentencers.

Money laundering

The assessment of harm follows a similar format to that in the fraud guideline. The first stage of the assessment is to determine which of the six levels of financial values the offence falls in. The court is then directed to take account of the harm associated with the underlying offence where it is known and then, if it is a case involving 'greater harm', whether it warrants the sentence being moved up to the corresponding point in the next higher category or to the top of the range in the initial category.

Consultation Question 41 sought views on the two stage assessment. Thirty responses were

received to this question. Twenty-seven (90 per cent) agreed with the approach and three (10 per cent) disagreed. The overwhelming majority of responses welcomed the approach and a large number particularly commented on the importance of the underlying offence in the assessment of harm.

“We thoroughly welcome this standardised approach to sentencing.”

Crown Prosecution Service

The Criminal Bar Association disagreed with the two stage approach commenting it would elevate the harm category for almost all offenders.

Several suggestions were made for additional crime types to be included to indicate greater harm as well as suggestions that examples should be removed. The only suggestion mentioned by more than one respondent was that tax evasion should not be considered as serious criminality as it may not be in all cases. The Council reviewed the crime types that were listed as indicators of greater harm and decided to remove all of the references to specific crimes in order that the court has sufficient flexibility to assess greater harm. The narrative has been rephrased to direct the court to have regard to the relevant sentence levels for the underlying offence. It now reads: *‘Money laundering is an integral component of much serious criminality. To complete the assessment of harm, the court should take into account the level of harm associated with the underlying offence to determine whether it warrants upward adjustment of the starting point within the range, or in appropriate cases, outside the range. Where it is possible to identify the underlying offence, regard should be given to the relevant sentencing levels for that offence.’*

Bribery

The Council considered that in bribery cases it will often be difficult to put a financial figure on the harm caused and proposed that harm should be assessed in relation to any impact caused by the offending (whether to identifiable victims or in a wider context) and the actual or intended gain to the offender. Question 45 sought views on this approach and whether the harm factors are clear whilst also providing the courts with flexibility, as it is recognised the harm caused by bribery can be wide ranging. Due to the way this question was phrased it is not possible to quantify how many respondents supported the approach.

“The Committee agrees with the harm factors identified and believes that they are clearly explained in the proposed guidance.”

City of London Law Society, Corporate Crime & Corruption Committee

Transparency International disagreed with risk of category 1, 2 or 3 factors as they felt risk should not be treated less seriously than actual harm. This approach mirrors that taken to risked loss in the assessment of harm in the fraud guideline. The Council was not persuaded that risk of harm should be treated as seriously as actual harm within this guideline.

The Council of HM Circuit Judges proposed a factor should be added to explicitly refer to endangering public health and safety. The Criminal Bar Association suggested the addition of ‘serious detrimental effect on investors’ in category 1 and ‘serious detrimental effect on market confidence’ in category 2. The Council concluded that both of these manifestations of harm could be considered by factors already included within the proposed guideline.

Aggravating factors

Cross-cutting issues

The proposed aggravating factors in general fraud, possessing, making or supplying articles for use in frauds and money laundering are identical.

Where comments were made on identical factors they are set out in the fraud section and not repeated in the sections dealing with each subsequent guideline.

A small number of respondents proposed a factor relating to breach of trust be added; a further respondent proposed *'involving others'* should be added. Both of these are factors that are included at step one.

Both Victim Support and the government commented they were particularly supportive of the inclusion of *'steps taken to prevent the victim reporting or obtaining assistance and/or from assisting or supporting the prosecution'*.

"We particularly welcome the factor of *'steps taken to prevent the victim reporting or obtaining assistance and/or from assisting or supporting the prosecution'*. We believe that witness intimidation is very serious and can have devastating effects on victims and witnesses."

Victim Support

The Criminal Justice Alliance and Gwent magistrates commented that *'Established evidence of community/wider impact'* may not be representative of the effect the offence has had and that the factors relating to victims at step one are sufficient. Keoghs suggested the factor be broadened to include reference to the impact including *'consequential public loss'*. The Council considered these proposals and concluded that as this factor is included in several definitive guidelines and as the principle is sound it should remain within these guidelines. As with all factors it is for the sentencer to ascribe weight as appropriate.

Three respondents questioned the inclusion of *'offences committed across borders.'* The argument against its inclusion was that where in the world a fraud takes place is not aggravating unless it is in a deliberate attempt to thwart either detection or investigation. It was suggested that if this was the case it would be considered as part of the assessment of culpability. The Council was not persuaded by this argument and retained the factor.

The CPS proposed two additional factors. Firstly, *'fraud as part of a cyber attack'* and secondly *'use of a false identity or false documents to commit fraud'*. The first proposal was also suggested as an additional culpability factor; the Council considered the suggestion and concluded the sophistication of the offence as a culpability factor is sufficient to encompass the seriousness of cyber attacks. It also considered that the planning involved in using another's identity and the harm it may cause would be taken into account when assessing both culpability and harm and therefore the second proposal is not necessary.

Revenue fraud

The factors are the same as in general fraud with the exception of those listed below.

- Involves multiple frauds.
- Number of false declarations.
- Damage to third party (for example as a result of identity theft).
- Dealing with goods with an additional health risk.
- Disposing of goods to under age purchasers.

Thirty responses were received to consultation question 26 which sought views on the aggravating and mitigating factors. Twenty-three (76 per cent) agreed with the proposed factors; 24 per cent (7) either disagreed or made general observations. Most of these observations have been discussed earlier in this paper. Several respondents commented that the length of time over which the offending was committed should be considered as part of the assessment of culpability not as an aggravating factor; this was

the Council's intention and it was an error in the draft guideline that this was included as a step two factor.

The Criminal Bar Association commented that the inclusion of *'Dealing with goods with an additional health risk'* may risk an escalation in sentencing for tobacco offences. This factor is included as an aggravating factor in the SGC revenue fraud guideline, therefore the Council was not persuaded it would increase sentencing in this area.

Benefit fraud

The factors are the same as in general fraud with the exception of those listed below.

- Involves multiple frauds.
- Length of time over which the offence was committed.
- Number of false declarations.

The sentencing exercise for benefit fraud is often far more heavily focused on factors that reflect personal mitigation than in other offences within this guideline. The proposed factors were drafted to reflect the circumstances that may apply to these offenders.

Twenty-nine responses were received to question 27 which sought views on the aggravating and mitigating factors. Seventy per cent (21) agreed with the proposals, 30 per cent (8) either disagreed or made general observations. As with revenue fraud, most of the comments related to factors present in earlier guidelines. Several respondents questioned the difference between the three guideline specific factors. The Council re-considered the proposed factors and agreed that there was overlap within these factors and deleted *'Involves multiple frauds'*.

The Magistrates' Association, the government, CPS and the Council of HM Circuit Judges all proposed an aggravating factor should be included that reflects the fraud has been perpetrated in order to lead a lavish lifestyle. The Council agreed that this is an important factor for the courts to consider and have added *'Proceeds of fraud funded lavish lifestyle'*.

Bribery

The proposed aggravating factors are the same as in general fraud with the exception of those listed below.

- Pressure exerted on another party.
- Offence committed to facilitate other criminal activity.

Nineteen responses were received to question 46 which sought views on both the aggravating and mitigating factors. Sixty-three per cent (12) agreed; 37 per cent (7) disagreed or made general observations.

Two respondents, including Transparency International, proposed an additional aggravating feature that would cover circumstances where the offender subjected an individual to threats relating to the safety of their family in order that they were compelled to commit the offence. The Council felt that this is covered by *'involvement of others through pressure/influence'* at step one.

Mitigating factors

As with the aggravating factors, the proposed mitigating factors in fraud, possessing, making or supplying articles for use in frauds and money laundering are identical. The factors in revenue fraud are also identical. The factors within the bribery guideline are identical other than where factors within fraud are not relevant to bribery offences. Where comments were made on identical factors they are set out in the fraud section and not repeated in the sections dealing with each subsequent guideline.

Consultation question 10 asked for views on the inclusion of ‘early active co-operation particularly in complex cases’ and particularly whether this factor may create a risk of double counting with a guilty plea discount which was not the Council’s intention. Forty-one responses were received to this question. Forty-four per cent (18) respondents did not think the inclusion of this factor would create a risk of double credit for a guilty plea.

“We submit that the proposed formulation is pragmatic and is not contrary to principle ... active assistance may not be adequately recognised by means of credit for plea alone.”
The Council of HM District Judges

Twenty-nine per cent (12) felt that this would present a risk of double credit, Liverpool Crown Court Judges considered the inclusion unnecessary following *R v Caley*⁵. Twenty-seven per cent (11) respondents did not agree or disagree but made general observations including that further guidance may be of assistance.

This factor was deleted from the guideline for corporate offenders post consultation because the Council agreed with respondents who suggested it was dealt with within a separate mitigating factor: ‘*Corporation co-operated with investigation, made early admissions and/or voluntarily reported offending*’.

The principle behind this factor, that additional mitigation should be available in appropriate cases to offenders who co-operate, is consistent with the approach that was taken in *R v Caley*. It is particularly relevant in complex fraud cases where investigations can be lengthy and hugely costly to the public purse. The Council considered that the principle of the factor is sound but amended the wording to be in closer alignment with the guideline for corporate offenders. It now reads: ‘Offender co-operated with investigation, made early admissions and/or voluntarily reported offending.’

Seven respondents felt ‘*lack of sophistication with little or no prospect of success*’ should be deleted. The Council considered this factor post consultation when deciding culpability factors (discussed at page 8). The factor has been amended to ‘*little or no prospect of success*’ in order to be clear it is not the converse of ‘*Sophisticated nature of offence/ significant planning*’ at step one.

Two respondents made general comments that there were too many factors relating to personal circumstances. Five respondents suggested ‘*serious medical condition requiring urgent, intensive or long term treatment*’ and ‘*sole or primary carer for dependent relatives*’ should be deleted. The consultation paper explained that these factors are to be considered when the court is weighing up whether to suspend a custodial sentence or whether a community order is appropriate but respondents argued these factors do not reduce the seriousness of the offence. These are factors that appear in most definitive guidelines and are properly taken into account by sentencers. They have therefore been retained.

The Prison Reform Trust proposed ‘*involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one*’ should be

5 *R v Caley* [2012] EWCA Crim 2821

added. This factor is taken from the definitive drugs guideline. The Council felt that such circumstances would be considered at step one but, as the factors are non exhaustive, further mitigation could be applied in appropriate cases. The rationale for the inclusion within the definitive drugs guideline is that it is a common feature of some drugs offences to be committed as a result of the offender's addiction.

Eight respondents including the government, the CPS and the National Bench Chairs Forum suggested '*lapse of time since apprehension where this does not arise from the conduct of the offender*' should be removed. This was included to reflect the impact of procedural or other delays on an offender. The Council was strongly of the view that such delays have an impact on the offender and the court must weigh that impact and the extent of the mitigation.

Benefit fraud

The factors listed below are unique to this guideline.

- Legitimate entitlement to other benefits.
- Claim originally legitimate but ceases to be so.
- Content of original application accurate [not applicable to section 112 offences].
- Offender experiencing significant financial hardship or pressure at time fraud was committed due to **exceptional** circumstances.

Twenty-two responses were received to consultation question 34 which sought views on the proposed mitigating factors. Sixty-three per cent (14) agreed with the proposals, 37 per cent (8) disagreed or made general observations.

Three respondents, including the government and the CPS, felt very strongly that '*legitimate entitlement to other benefits*' was not an appropriate mitigating factor. The rationale for their argument is there is no legitimate entitlement to benefits unless a formal claim has been made in accordance with legislative requirements and that claim has been assessed and approved. The DWP (within the government response) felt that the inclusion of this factor

would provide 'real and significant practical obstacles' with regards to trying to establish other benefits that the offender may have been able to claim. The submission continued that 'it is the responsibility of the claimant to submit a claim for the benefits that they may be entitled to'.

This factor was the source of much debate within the Council. After detailed consideration, the Council concluded that courts do take into account the offender's financial circumstances and particularly whether they may have been able to claim other or additional benefits legitimately. The factor has been amended to '*legitimate entitlement to benefits not claimed*'.

'Remorse, particularly where evidenced by voluntary repayment' was a common factor across the draft guidelines. The Prison Reform Trust, Clinks and the CPS disagreed with this factor being included within the benefit fraud guideline arguing that if the offender is continuing to receive benefits, any amount that was fraudulently obtained will be incrementally deducted by DWP and would therefore not be 'voluntary'. The NGOs who responded commented many of these offenders are likely to be in difficult financial circumstances so may be genuinely remorseful but unable to make repayments beyond those that are enforced by DWP. The Council agreed with the rationale for deleting '*particularly where evidenced by voluntary repayment*' and have done so leaving the factor to simply state '*remorse*'.

Consultation question 35 sought views on the inclusion of '*Offender experiencing significant financial hardship or pressure at time fraud was committed due to **exceptional** circumstances*' as a mitigating factor. Twenty-five responses were received to this question. Forty-four per cent (11) agreed with this factor; 66 per cent (14) disagreed or made general observations.

The CPS and government responses strongly disagreed with this factor. They felt it lessens the seriousness of the offence and could lead to the benefit system being perceived as a 'soft target'.

The government also made the point that the welfare system provides adequate financial support and this factor suggests this is not the case.

Several respondents agreed with the principle behind this factor but not with the proposed formulation.

The Criminal Justice Alliance, Prison Reform Trust and Clinks were very supportive of this factor but all made observations about further clarification being necessary. Several other respondents commented defining '**exceptional circumstances**' would be difficult.

The Council recognised that this is a particularly contentious factor and gave it careful consideration. The conclusion was that in this type of offending there may be exceptional circumstances that should properly be considered by the court and that the court will be able to weight the extent of mitigation.

'Content of original application accurate [not applicable to section 112 offences]' has been deleted as this is now incorporated in 'claim not fraudulent from the outset' at step one.

Sentence levels

Scenarios were included in each of the guidelines in the consultation to illustrate how the Council intended the guidelines to be used and to enable consultees to consider the sentence levels in a less abstract way than simply by asking for views on the starting points and ranges within the tables.

The levels that were consulted on were developed based on MoJ data on current practice that was then tested against case law and in road testing interviews. Where offences with different statutory maxima are included within a guideline the Council took the decision the sentence levels should be scaled proportionately downwards as appropriate. The levels were also compared across the guidelines to ensure proportionality.

Fraud

There were forty-four responses to consultation question 12 which asked for views on the proposed sentence levels. Five respondents questioned why the ranges do not reach the statutory maximum term; this comment was repeated across the guidelines. The Council has always been clear that guidelines are not designed to deal with every type of case that appears before the courts and therefore a gap is normally left between the top of the sentence range and the statutory maximum to allow judges the flexibility to deal with those exceptional cases.

Three respondents, including the Council of HM District Judges, specifically stated the sentence levels are appropriate. There was no consensus within the responses as to whether the levels were too high or too low, with only small numbers making comments on specific category ranges.

Thirty-one responses were received to consultation question 13. Ninety per cent (28) agreed the sentence is proportionate. Ten per cent (3) disagreed; one respondent felt the sentence should be within magistrates'

powers of six months imprisonment; two felt the sentence range should be amended to be nearer to the top of the range and the victim harm should be the key consideration.

Thirty-three responses were received to consultation question 14 which sought feedback on the proposed sentence range for scenario A.

Scenario A

Section 1 Fraud Act 2006

F approached Mrs V (aged 85 and frail) and offered to clear her gutters for £75, which he did. He told her that there were problems with her roof which he could repair for £2,000. He convinced her that the roof needed to be repaired urgently and she used nearly all her savings to pay him. A surveyor valued the work on the roof at less than £100. F was convicted at trial. Mrs V's confidence was severely affected and she was unable to continue to live independently.

F had targeted a vulnerable victim which would put him into culpability A with harm of £2,000 which falls into category 5 but would be moved up to category 4 to take account of the victim impact. The likely sentence would therefore be in the range of 26 weeks to 2 years' custody.

Eighty-five per cent (28) of respondents agreed the sentence is appropriate. Fifteen per cent (5) disagreed. Of those, four respondents felt the sentence range should be increased. Two respondents including the Council HM District Judges commented the sentence ranges are more appropriate than those in the SGC. The Council undertook further analysis of Court of Appeal cases and took the decision to increase this range from 26 weeks' – 21 months' custody to 26 weeks' – 3 years' custody. Overall, most of the ranges within this guideline have been marginally increased to reflect the findings of further analysis.

Consultation question 15 sought views on the sentence in scenario B.

Scenario B

Section 1 Fraud Act 2006

G obtained a mortgage of £250,000 to buy a house by grossly inflating his income and falsifying a letter from his employer. He had intended to keep up the repayments but was unable to do so. The house was repossessed and the actual loss to the lender was under £5,000.

These facts suggest culpability B with a risk of category 2 harm which would place it in category 3. The likely sentence (before any reduction for the guilty plea) would therefore be in the range of 26 weeks to 2 years' custody.

Twenty-nine responses were received. Seventy-two per cent (21) agreed the sentence is proportionate. Twenty-eight per cent (8) felt the sentence was disproportionately high; both the Magistrates' Association and two Benches commented a non custodial sentence would be appropriate. The Council disagreed that this offence would not pass the custody threshold.

Possessing, making or supplying articles

Two scenarios were included within the consultation to illustrate how the guideline should be applied.

Scenario C

Section 6 Fraud Act 2006

D placed a device in a cash machine. A member of the public attempted to use the machine but her card was retained by the device. D returned to the machine, removed the device and was arrested. He was in possession of the card and the device which contained a false card slot and a stripped down mobile phone that had been used to video record the customer putting in her PIN number. It was accepted that D was not the organiser of the attempted fraud. His conduct would be likely to fall into culpability B and greater harm which has a starting point of 36 weeks' custody and a range of high level community order to two years' custody before any reduction for a guilty plea.

Scenario D

Section 7 Fraud Act 2006

E, a Chinese student, made forged certificates in Chinese for fellow students which purported to show that they had obtained degrees from British universities and purported to be verified by the Chinese Embassy. He was paid £2,000 for each document and had received a total of £180,000. This conduct would place him in culpability A and greater harm which has a starting point of four and a half years' custody with a range of three to seven years before any discount for a guilty plea.

Consultation question 21 sought views on the proposed sentence levels. Twenty-five responses were received to this question. Seventy-six per cent (16) commented the levels were proportionate; 24 per cent (9) either disagreed or made general comments including suggestions that the range should extend to the statutory maximum.

No compelling evidence was offered to support any amendment to the sentence levels which have been maintained as in the consultation.

Revenue fraud

One scenario including three offenders at different culpability and harm levels was included in the consultation.

Scenario E

Conspiring to cheat the Revenue and section 72 Customs and Excise Management Act 1979

X was the main organiser of a large scale VAT fraud which defrauded the revenue of £60 million over a period of four years. Y also played a leading role. Z was employed by Y and completed VAT returns which he knew to be inaccurate. X and Y were convicted of conspiring to cheat the public revenue. Z was convicted of four counts of fraudulent evasion of VAT amounting to £1.5 million. X and Y would fall into culpability A, harm category 1 and would receive sentences in the range of 10 to 17 years. Z would fall into culpability B, harm category 4 and would receive a sentence in the range of two and a half to five years' custody.

Consultation Question 27 asked if the proposed sentences were proportionate in relation to their roles. Twenty-two responses were received to this question. Eighty-six per cent (19), including the government, agreed the sentences were proportionate. Thirteen per cent (3) disagreed or made general observations stating the sentence levels for cheat the revenue and for the statutory offence are not closely aligned and will lead to discrepancies as a result of charging decisions and that including that it should be made clear that conspiracy is more serious.

Consultation question 28 sought views about the sentence levels as a whole. Twenty responses were received to this question. Eighty-five per cent agreed with the proposed levels.

“The proposed sentence levels seem to be broadly in line with existing authorities”

The Fraud Lawyers' Association

Fifteen per cent (3) either disagreed or made general observations. The CPS disagreed with the difference in levels between Table 1 (s1 Fraud – 10 years' statutory maximum and conspiracy to defraud – common law) and Table 2 (all other offences within the guideline – 7 years statutory maximum.) The argument put forward was that charging decisions could lead to essentially the same conduct receiving different sentences; while this is a consideration the different statutory maxima warrant a difference in sentence levels.

The levels within the revenue fraud guideline have been marginally uplifted in order to be aligned to those in the fraud guideline.

Benefit fraud

Two scenarios were included in the consultation, these were designed to demonstrate how particularly in benefit fraud cases personal mitigation has a profound effect on the sentence passed.

Scenario F**Section 111A Social Security Administration Act 1992**

S was legitimately claiming state benefits for herself and her two children. She then received an inheritance of £150,000 but continued to claim benefits despite knowing that savings in excess of £16,000 disqualified her from claiming. She spent money on clothes, holidays and gifts and treats for her children. She claimed £30,000 to which she was not entitled over two years.

Scenario G**Section 111A Social Security Administration Act 1992**

T was legitimately claiming state benefits for herself and her two children. She then took a part time job but failed to declare her change of circumstances and continued to receive benefits. She did not have a lavish lifestyle and was paying back rent arrears which dated from a time when her abusive ex-partner lived with her. She claimed £30,000 to which she was not entitled over two years, but could have legitimately claimed £20,000 in other benefits if she had notified the change.

Both cases would fall into culpability B, harm category 2 which has a range of high level community order to 18 months' custody. The amount obtained would put them both at around the suggested starting point of 36 weeks' custody before any adjustment for aggravating and mitigating factors and reduction for a guilty plea.

Thirty-one responses were received to consultation question 36 which asked if adjustment for aggravating and mitigating factors in scenarios F and G would lead to proportionate sentences. Sixty-eight per cent (21) agreed that the sentences reached would be proportionate. Sixteen per cent (4) respondents disagreed and Sixteen per cent (4) respondents made general observations.

Those that disagreed included the Prison Reform Trust and the Criminal Justice Alliance, both of whom consider custodial sentences (are always) inappropriate for this type of offending. The government disagreed that personal circumstances should affect the sentence on the basis adequate benefits are available. Three of those who made general observations referred to it being essential that mitigation is available for offenders who used the benefit for essentials.

The converse of this (funding a lavish lifestyle) has been added as an aggravating factor.

The draft guideline directed the court to refer to the revenue fraud guideline where the value of the fraud is over £100,000 or the offending has been charged under section 1 Fraud Act 2006. Consultation question 37 asked if this guidance is sufficiently clear. Twenty-six responses were received to this question. Eighty per cent (21) felt the guidance is clear. Twelve per cent (3), including the government and the CPS did not think it was clear, and the remainder felt it was clear but for the sake of doubt the tables should be reproduced within the benefit guideline. The Council agreed with the latter suggestion. The benefit fraud guideline has been amended to be self contained.

Twenty-eight responses were received to consultation question 38 which asked for general views on the proposed levels. Fifty per cent (14) agreed; 29 per cent (6) disagreed and 21 per cent (8) made general observations. The Council of HM Circuit Judges and the Council of HM District Judges were among those who agreed.

Clinks suggested the option of a discharge should be included. There was no consensus among the respondents who disagreed, two felt the sentences should be identical to those in the general fraud guideline, one thought the ranges in lesser culpability should be lowered, another felt they should be increased. At the bottom of the range in each of the benefit fraud sentence tables the Council decided to lower the levels to a discharge which more accurately reflects current sentencing practice.

Money laundering

One scenario with two offenders, at different levels of culpability, was included in the consultation.

Scenario H

Money laundering

J ran a travel agency and bureau de change. Over a period of two years he allowed £1.2 million of drugs money to be laundered through his business. He retained about £70,000 of that money as commission. K worked for J and was responsible for banking the money which he suspected was not legitimate. K received no reward aside from his salary. They were convicted after a trial.

J's conduct would place him in culpability A, harm category 3 with a range of five to eight years' custody. The amount laundered would place him at around the starting point of seven years, but the source of the money could justify raising the sentence towards the top of the range.

K's conduct would place him in culpability C, harm category 3 with a range of 18 months to three years' custody.

Twenty-nine responses were received to consultation question 42 which sought views on whether the proposed sentences for the offenders in scenario h are appropriate. Forty-eight per cent (14) agreed the sentences are proportionate. Fifty-two per cent (15) disagreed; all of these respondents felt the sentence for 'K', the offender in lesser culpability, was disproportionately harsh.

Consultation question 43 sought general comments on the proposed levels. Twenty-two responses were received. Fifty-five per cent (12) agreed the levels are set at appropriate levels; 45 per cent (10) disagreed with the levels reiterating that the ranges in culpability C are harsh. The CPS and the Council of HM Circuit Judges agreed with the proposed levels.

The Council undertook further analysis of recent Crown Court and Court of Appeal cases and concluded the proposed levels were not out of step with current sentencing practice. Some small amendments have been made to ensure proportionality across the guidelines.

Bribery

Consultation question 47 sought views on the proposed sentencing levels for Bribery Act offences. Twenty responses were received to this question. Ninety per cent (18) agreed with the proposed levels; 10 per cent (2) disagreed or made other comments. Transparency International felt the levels should be increased; North East Sussex Bench felt the levels should be the same as in general fraud. Given the very small number of cases sentenced under this legislation the Council took the view that the sentence levels should be the same as those within the fraud guideline as they carry the same statutory maximum term.

Next steps

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

The definitive guideline will apply to all individual offenders aged 18 and older and organisations who are sentenced on or after 1 October 2014, regardless of the date of the offence.

An update will be provided for the Magistrates' Court Sentencing Guidelines, which will be update 12.

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 would have any adverse impact on equalities issues which would warrant a full Equality Impact Assessment. Following the implementation of the definitive guideline, the Council will monitor the impact of the guideline.

Annex A

Consultation questions

Section three: Fraud

- Q1** Do you agree that a single fraud guideline is appropriate for cases of confidence fraud and banking and insurance fraud?
- Q2** Do you agree with the proposed approach to the assessment of culpability for fraud?
- Q3** Are there culpability factors included that should be considered at step two rather than step one? If so, which factors?
- Q4** Is the proposed two stage approach to harm assessment the correct way to assess the harm caused by fraud?
- Q5** Do you agree with the approach to actual and intended loss and risked loss?
- Q6** Are the financial amounts in the five categories set at appropriate levels?
- Q7** Do you agree with the approach to the assessment of victim impact (Harm B)?
- Q8** Are the factors in the three categories (of high, medium and lesser victim impact) the right ones?

- Q9** Do you agree with the proposed aggravating factors for fraud? If not, please specify which you would add or remove and why.
- Q10** Does the inclusion of ‘*early active co-operation particularly in complex cases*’ present a risk that the offender may be given double credit for a guilty plea? Is there another formulation that would better reflect the intended application of this factor?
- Q11** Do you agree with the proposed mitigating factors for fraud? If not please specify which you would add or remove and why.
- Q12** Please give your views on the proposed sentence levels for fraud offences.
- Q13** Do you consider that the mechanism to move to the next category up in Scenario A leads to a proportionate sentence?
- Q14** Under the existing SGC guidelines the likely sentence range for Scenario A (single fraudulent transaction confidence fraud involving targeting of a vulnerable victim, loss less than £20,000) would be medium community order to 26 week’s custody. Do you consider the proposed sentence range for this scenario (of 26 weeks to two years’ custody) is appropriate?
- Q15** In Scenario B, the risked loss moves the offence down a harm category. Does this lead to a proportionate sentence?

Section four: Possessing, making or supplying articles for use in fraud

- Q16** Do you agree with the proposed approach to the assessment of culpability for possessing, making or supplying articles for use in frauds?
- Q17** Are there culpability factors included that should be considered at step two rather than step one? If so, which factors?
- Q18** Do you agree with the approach to the assessment of harm?

Q19 Are the factors in greater harm the right ones?

Q20 Do you agree with the proposed aggravating and mitigating factors? If not, please specify which you would add or remove and why.

Q21 Please give your views on the proposed sentence levels for offences of possessing, making or supplying articles for use in fraud.

Section five: Revenue fraud

Q22 Do you agree with the approach to the assessment of culpability for revenue fraud?

Q23 Are there culpability factors included that should be considered at step two rather than step one? If so, which factors?

Q24 Do you agree with the approach to the assessment of harm in the context of revenue fraud?

Q25 Are the financial ranges set at the appropriate levels for revenue fraud?

Q26 Do you agree with the proposed aggravating and mitigating factors for revenue fraud? If not, please specify which you would add or remove and why.

Q27 In scenario E three offenders are sentenced. Is the draft revenue fraud guideline workable for offences charged as conspiracies? Are the sentences in scenario E proportionate in relation to the roles of the offenders?

Q28 Please give your views on the proposed sentence levels for revenue fraud offences.

Section six: Benefit fraud

- Q29 Do you agree with the proposed approach to the assessment of culpability for benefit fraud?
- Q30 Are there culpability factors included that should be considered at step two rather than step one? If so, which factors?
- Q31 Do you agree with the approach to the assessment of harm in the context of benefit fraud?
- Q32 Are the financial ranges set at the appropriate levels for benefit fraud?
- Q33 Do you agree with the proposed aggravating factors for benefit fraud? If not, please specify which you would add or remove and why.
- Q34 Do you agree with the proposed mitigating factors? If not please specify which you would add or remove and why.
- Q35 Please provide your views on the inclusion of 'Offender experiencing significant financial hardship or pressure at time fraud was committed due to **exceptional** circumstances' as a mitigating factor.
- Q36 Would adjustment for aggravating and mitigating factors in scenarios F and G lead to proportionate sentences?
- Q37 Is the guidance for sentencing benefit fraud cases involving amounts in excess of £100,000 sufficiently clear?
- Q38 Please give your views on the proposed sentence levels for benefit fraud offences.

Section seven: Money laundering

- Q39** Do you agree with the proposed approach to the assessment of culpability for money laundering offences?
- Q40** Are there culpability factors included that should be considered at step two rather than step one? If so, which factors?
- Q41** Is the proposed two stage approach to harm assessment the correct way to assess the harm caused by money laundering?
- Q42** In scenario H two offenders are sentenced. Are their sentences proportionate in relation to their roles?
- Q43** Please give your views on the proposed sentence levels for money laundering offences.

Section eight: Bribery

- Q44** Do the factors outlined above clearly reflect the levels of culpability involved in offences of bribery? Please say what you would change and why.
- Q45** Do you agree with the approach to assessing harm as outlined above? Are the harm factors identified sufficiently clear whilst providing courts with the flexibility to reflect the widely different types of harm that could result from offences of bribery? Please say what you would change and why.
- Q46** Do you agree with the aggravating and mitigating factors for bribery proposed at step two? If not, please specify what you would change and why.
- Q47** Please give your views on the proposed sentencing levels for Bribery Act offences. Please specify what you would change and why.

Annex B

List of respondents

Responses were received from the following organisations:

- Association of British Insurers
- AVIVA UK
- Baker & McKenzie LLP
- Bedfordshire Magistrates
- Birmingham Magistrates
- British Bankers' Association
- Central and South West Staffordshire Magistrates
- CIFAS
- City of London Law Society's Corporate Crime & Corruption Committee
- Clifford Chance LLP
- Clinks
- Committee of the Anti-Fraud Special Interest Group of The Chartered Institute of Loss Adjusters
- Corker Binning
- Council of HM Circuit Judges
- Council of Her Majesty's District Judges (Magistrates' Courts)
- Criminal Bar Association
- Criminal Justice Alliance
- Crown Prosecution Service
- Dechert LLP
- East Kent Magistrates
- Essex Magistrates
- FFAUK & The UK Cards Association
- The Forum of Insurance Lawyers (FOIL)
- Fraud Advisory Panel
- Fraud Lawyers' Association
- Freshfields Bruckhaus Deringer LLP
- GC100
- Gwent Magistrates
- Hartlepool and Teesside Magistrates
- Herbert Smith Freehills LLP
- HM Government
- The Howard League for Penal Reform
- INQUEST
- Justice Select Committee
- Justices' Clerks' Society
- Keoghs
- Kingsley Napley LLP
- Law Society
- Liverpool Crown Court Judges
- London Criminal Courts Solicitors Association (LCCSA)
- Macclesfield Magistrates
- Magistrates' Association
- Mid and South East Northumberland Magistrates
- National Bench Chairman Forum (NBCF)
- NHS Protect
- North East Suffolk Magistrates
- North London Local Justice Area
- Oxfordshire Magistrates
- Peters & Peters Solicitors LLP
- Prison Reform Trust
- Probation Chiefs' Association
- Proceeds of Crime Lawyers' Association
- QEB Hollis Whiteman Chambers
- SAB Miller Plc
- Simmons & Simmons LLP
- Somerset Magistrates
- South Cambridgeshire Magistrates
- South East London Magistrates
- Swansea County Magistrates

- Thinking About Crime Ltd
- Trading Standards Institute
- Transparency International UK
- TrustMark
- UK chapter of the International Chamber of Commerce (ICC UK)
- Victim Support
- West and Central Hertfordshire Magistrates
- Wiltshire Police and Crime Commissioner
- Wolverhampton Magistrates
- Zurich Insurance

Responses were also received from the following individuals:

- Professor Andrew Ashworth
- David Brancher
- Claire Cooper
- Alured Darlington
- Robert Della-Sala
- Rona Epstein
- Terry Everett
- Mark Hodson
- Ryan Mackenzie
- Mira Maker
- Vivienne Orr