

## Research to support the development of revised fraud sentencing guidelines

### 1. Introduction

As part of the process to develop new and revised sentencing guidelines for fraud, bribery and money laundering offences, the Sentencing Council undertook qualitative research with sentencers. This was conducted in two main stages.

The initial stage was conducted prior to draft guidelines<sup>1</sup> being put out to public consultation and aimed to explore:

- factors of importance to sentencers when sentencing particular fraud offences and views on existing Sentencing Guidelines Council (SGC) guidelines;
- views on a draft revised benefit fraud guideline and how the proposals may affect sentencing of certain types of case;
- views on a draft new money laundering guideline and how the proposals may affect sentencing of certain types of case; and
- views on a draft new bribery guideline and how the proposals may affect sentencing of certain types of case.

A second stage was then conducted during the consultation period to explore:

- views on a draft new general fraud guideline<sup>2</sup> and how the proposals may affect sentencing of certain types of case;
- views on an updated benefit fraud guideline and how the proposals may affect sentencing of certain types of case; and,
- views on a draft revenue fraud guideline and how the proposals may affect sentencing of certain types of case.

This work was supplemented by external research undertaken: *Research on Sentencing Online Fraud Offences* (Kerr, Owen, McNaughton Nicholls and Button, 2013).<sup>3</sup>

**Note:** This report makes significant reference to the consultation document on sentencing fraud, bribery and money laundering offences which can be found at: <http://sentencingcouncil.judiciary.gov.uk/get-involved/consultations-closed.htm>. It should also be read alongside the early versions of the pre-consultation guidelines, and the offence scenarios presented in the accompanying annexes to this bulletin.

<sup>1</sup> Please note that the pre-consultation versions of the guidelines are somewhat different to that contained in the consultation document as guidelines were refined, based on the outcomes of this early research, internal discussions and discussions with key stakeholders. These early versions (covering steps 1 and 2 only) can be found in Annex A.

<sup>2</sup> This covers confidence fraud, banking and insurance fraud and any other type of fraud not specifically covered by another guideline.

<sup>3</sup> Available online: [http://sentencingcouncil.judiciary.gov.uk/docs/Research\\_on\\_sentencing\\_online\\_fraud\\_offences.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Research_on_sentencing_online_fraud_offences.pdf)

## 2. Background

Fraud is a hugely diverse area of crime and one that is constantly evolving. At the most serious level of offending the offences are often highly sophisticated and involve very large sums of money being defrauded over long periods, and are therefore sentenced in the Crown Court. However, many offences involve smaller sums of money, and shorter periods of offending and are thus usually sentenced in the magistrates' court. Indeed, 71% of offences sentenced in 2012 were dealt with in magistrates' courts. The bulk of offences sentenced in 2012 were benefit fraud (46% in 2012) followed by confidence, banking and insurance fraud (which together accounted for 41% in 2012).<sup>4</sup>

The National Fraud Authority estimated that fraud related loss to the UK economy was £52 billion for the financial year 2012/13.<sup>5</sup> This figure includes identified fraud loss (£15.5 billion) and estimated hidden (or undetected) fraud loss (£36.5 billion).

The Sentencing Council brought forward its planned work on fraud, bribery and money laundering due to the introduction of Deferred Prosecution Agreements (DPAs)<sup>6</sup> in what is now the Crime and Courts Act 2013. The Council therefore agreed to include guidance for sentencing corporate offenders in its guidelines. The guideline is not applicable to parties entering into a DPA but may be used to inform the level of financial penalty that forms part of a DPA.

Most of the new Sentencing Council guidelines replace previous fraud guidelines published by the predecessor body to the Sentencing Council, the Sentencing Guidelines Council (SGC), in 2009.<sup>7</sup> These guidelines were grouped by type of fraud: (i) confidence fraud; (ii) possessing, making or supplying articles for use in frauds; (iii) banking and insurance fraud, and obtaining credit through fraud; (iv) benefit fraud; and (v) revenue fraud. The new guidelines are grouped broadly under the same types of fraud with the exception of confidence fraud and banking and insurance fraud which have been merged into one combined fraud guideline.<sup>8</sup> There are also completely new guidelines for bribery and money laundering offences and the new revenue fraud guideline now includes the common law offence of cheating the public revenue. In addition, for the first time, the fraud guideline covers the common law offence of conspiracy to defraud and each of the guidelines applies to sentencing offenders convicted of conspiracy to commit the substantive offence.

In developing the guidelines, the Sentencing Council had regard to the purpose of sentencing and its statutory duties. The Council's aim throughout was to ensure that all sentences are proportionate to the offence committed and in relation to other offences. In doing this, the Council considered available statistical data for the offences covered in the guideline and relevant case law. Where no data was available in developing particular guidelines, the Council referred to reported cases.<sup>9</sup>

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<sup>4</sup> Sentencing statistics sourced from the Court Proceedings Database (CPD), maintained by the Ministry of Justice.

<sup>5</sup> National Fraud Authority (June 2013), *Annual Fraud Indicator*, [http://www.google.co.uk/url?q=https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/206552/nfa-annual-fraud-indicator-2013.pdf&sa=U&ei=fbaxUsOFKM-Thgev3YHYCg&ved=0CCCAQFjAA&usq=AFQjCNENzy8EI\\_B9uRXAJANMCvzKHuvDXQ](http://www.google.co.uk/url?q=https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206552/nfa-annual-fraud-indicator-2013.pdf&sa=U&ei=fbaxUsOFKM-Thgev3YHYCg&ved=0CCCAQFjAA&usq=AFQjCNENzy8EI_B9uRXAJANMCvzKHuvDXQ) accessed on 18 December 2013.

<sup>6</sup> A DPA is an agreement made between a prosecutor and an organisation under which a criminal prosecution is deferred pending compliance with terms and conditions that may include payment of substantial financial penalties.

<sup>7</sup> See [http://sentencingcouncil.judiciary.gov.uk/docs/web\\_sentencing\\_for\\_fraud\\_statutory\\_offences.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_sentencing_for_fraud_statutory_offences.pdf)

<sup>8</sup> The guideline is simply called 'Fraud'.

<sup>9</sup> These cases may not be wholly representative of all cases sentenced and it should be noted that only a small number of sentences are passed each year for certain types of offence (bribery in particular). These were nonetheless helpful in the absence of existing guidelines.

In developing the new guidelines, the Council generally sought to reflect current sentencing practice and ensure proportionality with other offence types. The Council chose to focus more on the role that the offender played and the impact that the crime had on the victim than in the SGC guidelines. In deciding sentence levels, the Council generally placed greater emphasis on the culpability of the offender as opposed to the financial harm caused.

### 3. Aims and methodology

The research involved seven different phases of in-depth interviews with sentencers, though the sample and precise aims for each stage (and for different phases within each stage) were different. Most involved face-to-face interviews with a combination of magistrates, district judges and Crown Court judges though one phase involved Crown Court judges only<sup>10</sup> and another involved Crown Court judges and one High Court judge.<sup>11</sup> Each phase included respondents from at least four of the seven court regions.<sup>12</sup>

Magistrates and district judges were selected from a 'pool' of potential research participants held by the Office of the Sentencing Council. Crown Court participants were selected using a number of methods: participants that took part in earlier phases of interviews were identified through relevant news stories and contacted directly; those taking part in later stages were identified using a 'snowball' technique (i.e. previous participants were asked to identify colleagues with experience of sentencing particular offences that researchers could then approach for their input). In most phases the aim was to involve sentencers with a range of experience of sentencing a particular offence type (including no experience)<sup>13</sup>; other phases (that concentrated on less frequently-sentenced offences – bribery and revenue fraud) focussed on recruiting sentencers who were experienced (at least to a certain level)<sup>14</sup>.

All phases sought to explore views and sentencing practice relating to particular fraud offences.<sup>15</sup> After the initial phase, all other phases also sought to explore views of draft guidelines including: the potential impact of guidelines on sentencing behaviour (including any potential unintended impacts), any practical issues with the draft guidelines, and any recommendations for improvements. These issues were explored through direct questioning and the use of offence scenarios. For most phases, participants were asked to sentence two offence scenarios, as they currently would (using any existing SGC guidelines where relevant) and then using the draft guidelines.<sup>16</sup> The findings helped to refine draft versions of guidelines prior to consultation and to make revisions post consultation. The scenarios can be found at Annex B.

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<sup>10</sup> Revenue fraud.

<sup>11</sup> Bribery.

<sup>12</sup> Six phases covered five or more court regions. The seven regions are: London, the South East, the South West, the North East, the North West, the Midlands and Wales.

<sup>13</sup> This was important as the guidelines will be used by all magistrates, district judges and Crown Court judges, regardless of experience.

<sup>14</sup> This was important in order to test certain aspects of the guideline that the Council was less certain of, for which at least some experience of sentencing was required.

<sup>15</sup> In phase 1 at least one offence covered by the existing SGC guidelines (i.e. confidence fraud, benefit and revenue fraud, banking fraud or making, possessing and supplying articles for use in fraud) was discussed in each interview. District and Crown Court judges were also asked about how they currently sentence money laundering offences while Crown Court judges also explored the issues around sentencing either defrauding the public revenue offences or conspiracy to defraud cases. Due to limitations on time, not all offence types could be explored in every interview.

<sup>16</sup> In phase 1 a scenario was only covered with participants that were discussing money laundering in detail. Phase 3 and 7 involved one scenario only.

The different phases of the research are summarised below. The first four phases helped to inform versions of the guidelines which were issued for public consultation in June 2013; the final three phases were conducted during the consultation stage to help finalise a definitive guideline.

### **Pre-consultation stage**

- ***Phase 1: factors of importance when sentencing particular fraud offences and views on existing SGC guidelines (November-December 2012).*** This phase aimed to explore sentencers' views of the existing SGC guidelines, in particular which factors were considered to be of importance when sentencing particular fraud offences (including money laundering) and starting points and ranges. Interviews were conducted with 13 participants: five magistrates, three district judges and five Crown Court judges. The research findings provided important background information for the first drafts of the new and revised guidelines.
- ***Phase 2: examining a first draft of the revised benefit fraud guideline (January-February 2013).*** Seventeen interviews were conducted: nine magistrates, three district judges and five Crown Court judges.
- ***Phase 3: examining a draft new money laundering guideline (March 2013).*** Interviews were conducted with nine participants: five Crown Court judges, two district judges and two magistrates.
- ***Phase 4: examining a draft new bribery guideline (May-June 2013).*** This phase involved eight Crown Court judges and one High Court judge.

### **Consultation stage**

- ***Phase 5: examining a draft consultation general fraud guideline (covering confidence, banking and insurance fraud; July-August 2013).*** Interviews were conducted with 13 participants: five magistrates, three district judges, and five Crown Court judges.
- ***Phase 6: examining a draft consultation benefit fraud guideline (July 2013).*** Interviews were conducted with 15 participants: eight magistrates, three district judges, and four Crown Court judges.
- ***Phase 7: examining a draft consultation revenue fraud guideline (September 2013).*** Interviews were conducted with seven Crown Court judges.

### **Limitations of the research**

Due to the limitations outlined below, the research findings presented in this bulletin should only be regarded as **indicative and not conclusive**.

- Small sample sizes: a small number of sentencers took part, thus representing only a small proportion of magistrates, district judges and Crown Court judges. Findings should therefore not be considered as applicable to sentencers in England and Wales as a whole.
- Although some phases sought to involve participants with different levels of experience in sentencing specific offence types, it was not necessarily possible to represent a full range of experience.

- Due to time constraints it was not always possible to cover two offence scenarios with individual participants and not all general questions were asked. This means that some scenarios were covered with more participants than others, as were some of the general questions.
- The research concentrated on a small subset of offences contained within the guidelines and on specific issues associated with these offences that were of interest.
- Often only a small subset of participants mentioned some issues. In addition, issues that were raised were likely to be partly attributable to the scenarios that were chosen and the types of factors participants were drawn to consider. Where issues were only raised by one participant they have not been reported here.

## 4. Key findings

### 4.1 Views on the existing SGC guidelines

An early part of the initial phase of research included a number of questions in relation to the existing SGC guidelines including how often they were referred to, how useful they were in general, and views on specific factors included within the guidelines that sentencers might consider.

Feedback from participants tended to focus on sentence levels, with most saying that sentences arrived at when following the existing guideline were too low. Some magistrates also wanted to have a wider range of sentencing options available; they mentioned that their sentencing options were generally too limited and often lacked a punitive element. These participants wanted to be able to give sentences other than the typical fines (as these may not be paid by the offender), custody or community orders<sup>17</sup> (as in many cases there would be reasons why the defendant could not be given such sentences, e.g. being the carer for young children). Some Crown Court judges felt that certain fraud cases<sup>18</sup> did not fit anywhere within the specific guidelines and hoped the new guidelines would address this issue.

In terms of the approach taken in the existing guidelines, Crown Court judges and district judges tended to support the current value led approach as they felt the value involved was a very important factor when sentencing a financial crime like fraud. Magistrates were less convinced; many highlighted the fact that issues such as the impact on the victim should have a greater influence on sentence (particularly for confidence fraud offences).<sup>19</sup>

Participants in almost all phases were asked their views on what the most important factors were in assessing the initial seriousness of fraud (at step 1).<sup>20</sup> There were large overlaps, with the same issues being raised across a number of different

<sup>17</sup> For example disqualifying a defendant from driving even if the crime was unrelated to driving.

<sup>18</sup> Such as offences involving employees defrauding their employer.

<sup>19</sup> The external research commissioned by the Sentencing Council supported this view (*Kerr et al., 2013*). Research participants (key stakeholders and members of the public who had been victims of online fraud) felt that the actual impact on victims should be taken into account when it was clear that a negative impact had taken place (and there was evidence to demonstrate this). Examples included a victim being accused by police of accessing illegal web content; this had been triggered by a virus on his computer when he had opened a fraudulent email.

<sup>20</sup> Only participants from phase 5 (general fraud) were not asked this as it was thought that sufficient views had been captured on general fraud offences in phase 1 of the research.

interviews covering different fraud offences; some issues were also interlinked and had an effect on each other.

- **Extent of planning and/or organisation (including whether the offence was fraudulent from outset):** The extent of planning and/or organisation was mentioned as an important factor in assessing the initial seriousness of fraud offences across almost all offence types (including conspiracy offences).<sup>21</sup> Bribery was the only offence where this factor was not mentioned by participants. When considering planning/organisation, some would include whether an offence was fraudulent from the outset.<sup>22</sup> Benefit fraud participants most commonly cited 'fraudulent from the outset' rather than 'planning and/or organisation', with many considering this factor as being important enough to be considered a step 1 issue in its own right. This was because they felt they needed to differentiate between an offence that started off as being fraudulent (i.e. the original application was fraudulent) and benefit frauds that had become fraudulent (for example due to a change in the claimant's circumstances), the former action being more serious than the latter.
- **Value defrauded/value of loss:** The value defrauded or value of loss was another commonly cited factor across all offence types. Some participants saw it as the main consideration when sentencing financial crime although others, whilst agreeing that it was a key factor, did not consider it to hold quite as much weight. Some participants asked about confidence fraud offences tended to emphasise that the value defrauded must be considered relative to the victim's financial circumstances in order to consider the impact on the victim.<sup>23</sup>

Some participants said that they would consider the value of the loss to include indirect costs as well as the direct loss.<sup>24</sup> Some also said that they would bear in mind the intended rather than actual loss, particularly if there was sufficient evidence for this being greater (the intended loss was likely to be greater as, in the view of most participants, it covered money the offender intended to defraud before they were apprehended).

Some participants in the money laundering and bribery phases mentioned that the level of the offender's personal gain would also be a key factor. Some explained that larger personal gains made the offence more serious.

- **Length of time over which the offence was committed:** The length of time over which the offence was committed was another commonly cited factor by participants in almost all phases. Bribery was the only offence where this was not mentioned by participants. In some phases it was not mentioned with the same level of frequency as the level of planning and organisation and the value defrauded.

In terms of reasons why this was regarded as a step 1 factor, some participants mentioned that longer periods of offending increased the harm of the offence while some others highlighted the impact on the offender's culpability:

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<sup>21</sup> Although the frequency with which it was mentioned varied somewhat between offence types.

<sup>22</sup> A factor included in the existing SGC guidelines.

<sup>23</sup> Hence, a fraud where £1,000 was defrauded from someone of limited means was considered as serious as a crime involving £1 million defrauded from a large corporation. The external research commissioned further evidenced this view as participants felt that rather than judging the seriousness of an offence based on the amount of money involved, it may be more appropriate to consider the relative impact of the financial loss on the victim (determined by their financial circumstances).

<sup>24</sup> For example if a victim had to spend money restoring their internet security this should be considered when calculating the loss they incurred.

- The greater the period of offending, generally the higher the value defrauded hence the greater the harm.
- Longer periods of offending were associated with increased levels of deception by the offender, hence higher culpability. This was particularly felt to apply to benefit fraud where the behaviour may not have been fraudulent from the outset but resulted from failing to report a change in income or other circumstances (perhaps on multiple occasions).
- **Role of the offender:** There was less consensus with regard to this factor. It was generally considered to be step 1 for frauds which had been organised and involved more than one offender. Hence it was more frequently identified as a step 1 factor in relation to banking fraud, conspiracy to defraud, defrauding the public revenue and money laundering as these offences tended to be larger, more organised and involve more than one offender. It was also more likely to be mentioned as a step 1 factor by Crown Court judges (who tend to sentence larger and more organised fraud cases).

A few participants in the bribery phase specifically explained that a bribery offence was more serious if a public official was involved (as opposed to bribery between two commercial institutions or two private individuals). This may explain why many participants in this phase focussed on the effect on public sector institutions and why some didn't even mention commercial bribery or bribery between private individuals. Some benefit fraud participants mentioned that they would consider whether the offence had been conducted as part of a group, although did not mention specifically that they would consider the role of the offender.

- **Abuse of trust:** Amongst participants in the first set of interviews, abuse of trust was raised most frequently as a step 1 factor when sentencing confidence fraud; some participants gave examples of cases where care home staff or solicitors had been offenders, or banking fraud where the fraudster was the bank employee.<sup>25</sup> This issue was also raised in interviews that covered money laundering and bribery offences. Participants viewed offences where abuse of trust had occurred as being more serious than those without the presence of this factor.
- **Other factors:** A few other factors were commonly mentioned, but only by participants in specific phases – these included: whether an offence was single or consisted of multiple offences for benefit fraud participants; the nature of the earlier offence and the offender's knowledge of that offence were mentioned by some money laundering participants;<sup>26</sup> and the vulnerability of the victim (incorporating who the offence was committed against), which was mentioned as a factor by those participants in the first interviews who were directly questioned on this.<sup>27</sup>

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<sup>25</sup> It tended to be a step 2 factor for other offence types covered in this phase.

<sup>26</sup> Some explained that the money laundering offence would be more serious if the money had originated from a more serious earlier offence.

<sup>27</sup> It was only identified as important for assessing seriousness in cases where the victim was likely to be an individual, and hence was not mentioned in relation to benefit fraud, defrauding the public revenue or money laundering. Most commonly it was mentioned in relation to confidence fraud, where participants highlighted the deliberate targeting of vulnerable people as something that particularly increased the harm of the offence, even where the values involved could be relatively small.

## 4.2 General views on the draft guidelines

The general view provided by the majority of participants was that they supported the overall approach presented in the draft guidelines. Most welcomed the inclusion of offences not covered by the existing SGC guidelines, namely bribery, money laundering, cheating the public revenue and conspiracy to defraud. Most participants also agreed that they were content with the basic structure and layout of the guidelines.<sup>28</sup>

Of those who did support the general approach, most however provided feedback on specific elements of the guidelines, asking for improvements to be made. Most feedback concentrated on step 1 and there were more requests for clarity/improvement relating to culpability rather than harm. Feedback was also provided on the starting points and ranges under step 2; however these were generally less problematic for participants. The findings are presented under each step below.

### 4.2.1 Step 1 culpability

Participants offered quite mixed views on the assessment of culpability at step 1 – in relation to both the pre-consultation and consultation versions of the guidelines. Some were happy with the categories as drafted but many had suggestions for improvement or clarifications that they felt would be required to enhance understanding of the guideline or comments on where specific factors had been placed in the guideline. The key issues raised were in relation to the following aspects of culpability:<sup>29</sup>

- **Not fraudulent from the outset:** This issue was raised in interviews exploring an early pre-consultation draft of the benefit fraud guideline (phase 2), specifically how the factor was reflected at step 1. Under this early draft of the guideline ‘*not fraudulent from the outset*’ was included as a factor under lesser culpability, ‘*fraudulent from the outset*’ was included under medium and high culpability.<sup>30</sup> Many felt that higher level offences (i.e. those falling under medium and high culpability) could also be not fraudulent from the outset and suggested that the culpability table should be refined to better reflect this. They felt that there would be cases which would begin as a genuine benefit fraud, but may eventually lie within medium or perhaps even higher culpability if, for example, it went on to involve fraudulent activity over a long time, deception or deliberate action, or large sums of money.<sup>31</sup>

In the later interviews (covering benefit and revenue frauds and focusing on this factor which was moved to step 2 in the consultation guideline) participants were asked whether the factor should be moved back to step 1 or whether they agreed with its inclusion under mitigation.<sup>32</sup> About half of those discussing benefit fraud, and one participant discussing revenue fraud, suggested that their preference would be for this to be included under step 1 rather than step 2. It was not always clear why, other than that was how it was considered under current practice. Other participants agreed with the position of this factor in step 2. Some stated they

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<sup>28</sup> A small minority did not agree that there was a need for the revised/new guidelines. Some of these commented that they thought that the new guidelines were overly prescriptive and long.

<sup>29</sup> There was little consensus between views on the assessment of culpability amongst participants in this phase. Those issues raised by only one or two participants have not been included here.

<sup>30</sup> With the offender as an individual alone or playing a middle role in organised fraud.

<sup>31</sup> Whether an activity was fraudulent from the outset was moved from step 1 to 2 in the consultation version of the benefit fraud guideline but phrased as ‘*claim originally legitimate but ceases to be so*’.

<sup>32</sup> Factor ‘*activity originally legitimate*’ under draft general fraud guideline and ‘*claim originally legitimate but ceases to be so*’ under benefit fraud guideline.

thought it was more logical to place it as mitigating factor and that this would be consistent with other Sentencing Council guidelines.<sup>33</sup>

- **Group activity and role of the offender:** In the pre-consultation interviews on benefit fraud (phase 2), some participants were of the opinion that the guideline should include group activity under step 1 due to the link between this and the role of the offender (and therefore the level of culpability).<sup>34</sup> Most participants agreed that the organiser of a group offence (who had a 'leading' role) should be classified in higher culpability.<sup>35</sup> However to assist in assessing the seriousness of offending involving a group, quite a few participants felt that more guidance was required as to how to define the role of the offender. In particular, many found the term 'middle role' problematic as it was not clear what would place an offender under this factor.<sup>36</sup>

Following this feedback from phase 2, group activity was added to the assessment of culpability under step 1 in all three guidelines covered by the consultation phase interviews.<sup>37</sup> A small proportion of participants in the benefit and general fraud consultation phases were surprised at the apparent emphasis on group offending because they felt most benefit frauds were committed either as single enterprises or involved a couple.<sup>38</sup> Some also felt that group offending needed to be better defined, for example it should be stated that group offending was an offence conducted by two or more offenders (this had also been raised by participants in the pre-consultation interviews on benefit fraud).

- **Not motivated by personal gain:** This factor featured under lesser culpability in pre-consultation drafts of the bribery and money laundering guidelines, and in all three guidelines covered in the consultation phases. Several participants from the benefit fraud phase flagged issues in relation to the consideration of whether an offence was '*not motivated by personal gain*' and a few questioned whether this would apply due to the fact that most fraud offences are inherently motivated by personal gain.<sup>39</sup> Some participants mentioned that the presence of this factor may force cases (incorrectly in their view) into category B (and out of category C).
- **'All other cases where characteristics for categories A or C are not present':** Participants commenting on consultation versions of the guidelines had views on the factor '*all other cases where characteristics for categories A or C are not present*' (under medium culpability), and the guidance in the box above the culpability table on taking a balanced assessment where the characteristics of the offence fall under different culpability levels. Some mentioned liking the factor and the general approach to assessing medium culpability, and specifically the flexibility afforded by this factor.<sup>40</sup> However, some participants

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<sup>33</sup> Consideration of whether the offence was fraudulent from the outset has been moved back to step 1, under the assessment of culpability, in the definitive version of the benefit fraud guideline.

<sup>34</sup> Group activity was included under step 1 in the pre-consultation versions of the bribery and money laundering guidelines.

<sup>35</sup> The first draft of the benefit fraud guideline included the terms 'leading', 'middle' and 'minor' role for organised frauds under the assessment of culpability.

<sup>36</sup> This factor was revised to '*significant role where offending is part of a group activity*' in the consultation version of the benefit fraud guideline.

<sup>37</sup> Benefit fraud, general fraud and revenue fraud.

<sup>38</sup> The ordering of factors under medium culpability was reviewed following the consultation stage research and the ordering has been changed in the definitive guideline. The factor '*significant role where offending is part of a group activity*' has been moved below the other factor in this category so as to reduce the perceived emphasis on this factor. This change was made across all the fraud guidelines.

<sup>39</sup> Also mentioned by one phase 4 (bribery) participant.

<sup>40</sup> A smaller proportion of participants taking part in the benefit fraud and general fraud phases alongside three participants from the revenue fraud phase disagreed with this view and were positive about the use of the factor '*all*

disliked this factor and had concerns about the definition – the fact that for them it was too open.<sup>41</sup> As a result of this open definition, some were concerned that they would feel ‘pushed in to’ using category B as a default option. Although these participants appeared to want a more detailed definition for medium culpability, very few suggested other factors that could be added for consideration.

In addition to the above issues, several participants from both the general fraud and benefit fraud phases also voiced concern over how they would use the guideline with some considering the boundaries between the different categories as ‘blurred’ and others finding the approach to classifying culpability inflexible. Some of the magistrates indicated confusion regarding situations where a case did not easily fit into one culpability level, particularly if factors relating to more than one level applied to the offence. A few participants from the benefit fraud phase commented (or implied) that the categorisation of culpability did not really reflect the ‘true nature’ of benefit fraud offences.

#### 4.2.2 Step 1 harm

The approach to harm varied in the draft guidelines that were included for discussion in the research. The benefit fraud and revenue fraud guidelines included an assessment of harm that was solely based on the value involved in the offence (and gave different categories linked to this). In the draft bribery guideline the proposed approach involved four categories and included an assessment of whether the harm was ‘serious’, ‘substantial’ or ‘limited’ in relation to a number of factors and included ‘risk’ of harm. This included an assessment of the ‘actual or intended financial gain to offender or another, or loss caused to others’ but was not an assessment made purely in relation to value, as in most of the other draft guidelines. In the general fraud guideline, step 1 contained two levels of harm: ‘harm A’ which involved an initial assessment based on the actual, intended or risk of loss that results from the offence, and ‘harm B’ which involved considering the level of harm caused to the victim(s) or others. Finally, in the money laundering guideline, harm involved an initial assessment of harm based on the amount of money laundered, and then an assessment of whether ‘greater harm’ was demonstrated based on the origins of the money (i.e. the underlying offence) and whether this was from ‘serious criminality, which included, but was not limited to drug offences, terrorism, tax evasion and robbery’.

When compared to culpability, fewer issues were raised in relation to the assessment of harm using the draft guidelines. This was partly due to the fact that some guidelines involved a basic assessment of harm (based solely on value) and for some this was sufficient (indeed, some participants commenting on the existing SGC guidelines liked the approach based on financial values). Most participants agreed with this proposed approach to assessing harm and said that it was straightforward and easy to use.

However there was some feedback on the assessment of harm in the two guidelines that involved a slightly more complex (or two-stage) assessment of harm (i.e. not solely based on value). These issues are described by guideline below.

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*other cases where characteristics for categories A and C are not present’ in category B as they liked the discretion afforded to the sentencer.*

<sup>41</sup> This was also mentioned by one participant from phase 4 (bribery).

- **Assessment of harm (bribery):** The proposed approach involved four categories and included an assessment of whether the harm was ‘serious’, ‘substantial’ or ‘limited’ in relation to a number of factors and included ‘risk’ of harm. This included an assessment of the ‘actual or intended financial gain to offender or another, or loss caused to others’ but was not an assessment made purely in relation to value, as in most of the other draft guidelines. Participants providing views on the bribery guideline gave strong feedback that assessing the harm involved in an offence using this draft guideline was a challenge. For some this was due to issues with interpreting the difference between the terms ‘serious’ (associated with category 1) and ‘significant’ (associated with category 2). A majority (two thirds of participants) also commented that having four harm categories was too many; for some, this made the guideline overly complex (especially given that the maximum sentence is 10 years’ custody) and the fact that cases in the lower harm categories (3 and 4) would rarely be prosecuted.
- **Considering harm caused to others (general fraud):** In the general fraud guideline, step 1 contained two levels of harm: Harm A which involved the initial assessment based on the actual, intended or risk of loss that results from the offence, and Harm B which involved considering the level of harm caused to the victim(s) or others. Most participants were supportive of the two tier approach to assessing harm in this way (indeed some participants in the first phase had mentioned that harm other than value alone should be assessed in the sentencing process). They found the initial assessment of harm (Harm A) unproblematic (most found it straightforward to select the relevant category here when working through the sentencing scenarios). Most participants also appeared supportive of the principle of an assessment of victim impact under harm B.<sup>42</sup>

It was evident, however, that the assessment of victim impact in practice led to some variation in approach to sentencing the scenarios - this was seen in all of the scenarios and affected how movement from the initial starting point was considered for medium and high impact offences.<sup>43</sup> The reasons for this variation were not always clear<sup>44</sup> (see ‘Differing interpretation of some issues in harm B’ under section 4.3 for further detail on this issue).

- **Considering intended harm or risk of harm as well as actual harm (general fraud):** Again, most participants were not opposed to the principle/concept of assessing whether there was either intended loss or risk of loss,<sup>45</sup> although there were some issues and inconsistencies in relation to how they dealt with this for a sentencing scenario where there was no actual loss (magistrates’ court scenario 2 – see Annex B). For this scenario, some classified the offence as involving intended loss whereas others classified it as risk of loss; if participants followed instructions in the guideline, this may have affected the sentence they gave leading to inconsistencies.

When specifically probed on this, most participants voiced some concerns with the guidance around risk of loss, largely related to the need for further explanation/clarity on this issue. A small number of participants had more

<sup>42</sup> Some participants particularly praised it as a welcome addition to the draft guideline.

<sup>43</sup> Some participants moved within the category range for offences with a medium impact and some did not. Similarly, some moved up a harm category for offences with a high impact and some did not.

<sup>44</sup> For one scenario (Crown Court scenario 1) the main reason participants did not move within the range or up a category was due to the amount involved which was towards the bottom of the category value range. For another scenario (Crown Court scenario 2) participants did follow the guideline suggestion to move up a category for high impact but one participant selecting medium impact did not move within the category range.

<sup>45</sup> If the harm is perceived as ‘risked’ rather than ‘intended’ it is placed in a lower harm category in the guideline.

fundamental disagreements with the approach, seeing the inclusion of risk of loss as unnecessary.

- **Considering the harm associated with the underlying offence (money laundering):** The money laundering draft guideline directed participants to consider the harm associated with the earlier (underlying) offence and suggested that the category should be increased (or the sentence moved up in the range if already in category 1) if the money laundered was the proceeds from ‘*serious criminality, which included, but was not limited to drug offences, terrorism, tax evasion and robbery*’. Participants were generally comfortable with the instruction to move up a category (or for category 1, within the range) in such cases, however, a few also questioned why other offences were not included,<sup>46</sup> suggesting that it needed to be made clearer that the list of offences was not exhaustive. Some participants also questioned how to deal with more low value underlying offences when these had a particularly detrimental impact on their victims. Examples included low level thefts from vulnerable elderly people, and sexual offences against children.<sup>47</sup> They also suggested including guidance on which specific drug offences should result in an increase in the harm category or movement within the range. Several participants also questioned how the sentencer should deal with an antecedent offence where the offender had little or no connection with it and asked for some guidance to clarify this.

#### 4.2.3 Step 2 Starting points and ranges

Participants in all phases gave views on the starting points and ranges presented in the draft guidelines they were considering. These views were mixed and separated between those that thought that these were acceptable as drafted, those that thought that some starting points may be too high or low<sup>48</sup> and those that felt that they could not provide a view on this. The majority of comments tended to be in relation to the pre-consultation benefit fraud and consultation revenue fraud guidelines where some starting points were thought to be too low.

- **Benefit fraud (phase 2):** Current sentencing levels (i.e. under SGC guidelines) were seen to be too low for such offences. Some participants felt that benefit frauds involving a level of organisation, in particular the use of false identities, and which were clearly motivated by greed, should receive tougher sentences given the level of public concern about such crimes. Responses to Crown Court scenario 1 also indicated that participants generally felt that the sentences arrived at using the early draft guideline were too low.<sup>49</sup>
- **Revenue fraud (phase 7):** Approximately half of the participants commented that they thought that some sentences may be too low if the guideline was used as currently drafted. This was further evidenced by the results from the scenario for the offender charged with fraudulent evasion of VAT, where six of the seven sentences arrived at under the draft guideline were lower than sentences under

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<sup>46</sup> Some had earlier described dealing with money laundering cases where the money came from drug offences, cigarette smuggling and confidence fraud offences.

<sup>47</sup> In particular they highlighted indecent photographs of children.

<sup>48</sup> Findings from the offence scenarios also sometimes indicated that some sentencers found starting points/ranges too high and others found them too low for the same offences. This was often explained by participants having made different assessments of culpability and harm (and therefore using different starting points/ranges) or not behaving in the same way in relation to movement within (or out of) categories based on a secondary assessment of harm or aggravating/mitigating factors.

<sup>49</sup> As the approach changed in between the two research phases on benefit fraud in terms of culpability factors, the levels in the early (pre-consultation) draft and the definitive guideline are not directly comparable.

current practice.<sup>50</sup> Some of these participants specifically mentioned that current sentencing levels for revenue offences were too low and that they would (strongly) support an increase in these levels.<sup>51</sup>

#### 4.2.4 Aggravating and mitigating factors

Across all phases of the research, and in relation to the draft guidelines before the consultation as well as during it, participants were asked their views on the aggravating and mitigating factors contained at step 2. They generally responded that they were content with the lists as drafted. However, a small number of participants commented that they thought the lists were too long with some saying they may be too long to go through when in court. When feedback was provided on specific factors, comments were generally only made by one or two participants and therefore details of this feedback has not been included in the report.<sup>52</sup>

#### 4.3 Findings from the sentencing scenarios

Findings from the sentencing scenarios were used to gauge participants' understanding and interpretation of the guidelines, indicate how sentencers' behaviour may change (if at all) and assess whether any unintended consequences may arise as a result of the guidelines.

It was found that, overall, just over a third of sentences (35%) stayed the same when using both the existing and draft guidelines. A further third (33%) potentially increased using the draft guideline and just under a quarter (23%) potentially decreased (the remaining sentences were missing – 8%).<sup>53</sup> All guidelines tended to produce a mixture of sentences, with no clear trends in any direction when they were examined overall. When examined individually, however, some trends emerged for specific scenarios<sup>54</sup>. The scenarios concerned are listed below:

- The first magistrates scenario used in the **benefit fraud** guideline<sup>55</sup> tended to result in sentences that were the same under the existing guideline and when using the draft guideline.
- The second bribery scenario<sup>56</sup>, tended to result in increases to sentences from current practice, attributable to most participants choosing a draft guideline starting point that was higher than the starting point used for their original sentence.
- The revenue fraud scenario<sup>57</sup> tended to result in lower sentences under the draft guideline compared to under the existing guideline for the offender charged with fraudulent evasion of VAT, attributable to most participants choosing a draft guideline starting point that was lower than the starting point used for their original sentence.

The remainder of this section will concentrate on the potential reasons for variation and changes to sentences where they were observed.

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<sup>50</sup> It should be noted however that sentences for the two defendants charged with conspiracy to cheat the public revenue were inconclusive, with some sentences staying the same and others either increasing or decreasing.

<sup>51</sup> Of the other half of participants, two thought that the guideline would push sentences up from current practice and the others either thought they would stay the same or did not offer a view.

<sup>52</sup> Following feedback from the research some aggravating and mitigating factors have been amended, added or removed in the definitive version of the fraud guideline.

<sup>53</sup> Percentages may not add up to 100 due to rounding.

<sup>54</sup> Readers are reminded of the limitations of this study, outlined in section 3, in particular the small overall sample samples and even smaller sub samples.

<sup>55</sup> This was used in both phases 2 and 6.

<sup>56</sup> This involved Crown Court judges.

<sup>57</sup> This involved Crown Court judges.

- Differing interpretations of some issues in culpability:** At least some of the variation in sentences was explained by differences in assessments of culpability. For example, in the **revenue fraud** research exercise, the scenario involved three defendants, two of whom were charged with 'conspiracy to cheat the public revenue'. Participants were split on which culpability category to place one offender (X) in, with just under half choosing medium culpability and just over half high culpability.<sup>58</sup> Given that the starting points and ranges for high and medium culpability vary by one to two years depending on the harm category involved, this would explain some of the variation in sentences between participants. Likewise, Crown Court scenario 2 in **benefit fraud**<sup>59</sup> produced some variation in sentences due to one participant categorising the offence under high culpability as a result of deciding that falsification of documents constituted sophistication and planning. Other participants placed the offence under medium culpability as they felt that none of the factors in high culpability applied. The higher starting point under high culpability led to an immediate custodial sentence that was around 16 weeks longer than those categorising this as medium culpability.
- Differing interpretations of some issues in harm A:** Again, where issues of interpretation of harm arose and these led to choosing categories in the proposed guideline with different starting points, it could contribute to differences in the sentences given. In the first **bribery** scenario considered (Crown Court scenario 1), most participants placed the offender in category A1 (with a starting point of 7 years' custody), two placed him in category A2 (with a starting point of 5 years) and one was undecided between categories A1 and A2. It seemed that this split was related to the ease of deciding on a harm category: those choosing category 1 had specific reasons for this, including the fact that there was substantial financial gain to the offender or that the offence seriously undermined the proper function of government. In contrast, those choosing category 2 indicated that they found it difficult to choose the harm category.<sup>60</sup> They also added that they did not want to double count any issues that were already covered by higher culpability, in particular the substantial gain to the offender. As would be expected, those participants choosing the category with the lower starting points tended to give sentences that were lower than others.
- Differing interpretations of some issues in harm B:** The **general fraud** guideline also included a further assessment of harm to take into account the victim impact caused by the offence.<sup>61</sup> Although many participants, on balance, appeared supportive of this as a principle, it was also evident that the assessment in practice led to some variation in sentences. This variation was seen in all of the scenarios and affected how movement from the initial starting point was considered for medium and high impact offences. Some participants moved within the category range for offences with a medium impact and some did not. Similarly, some moved up a harm category for offences with a high impact and

<sup>58</sup> Those participants placing both defendants in high culpability, gave offender X a lower sentence.

<sup>59</sup> Phase 6 - discussed by Crown Court judges only.

<sup>60</sup> This difficulty was also shown by the fact one participant remained undecided between categories 1 and 2.

<sup>61</sup> This allowed participants to move the offence up a category or upwards within the range depending on the assessment at Harm B.

some did not. This, again, would have contributed to variation in sentences between participants.

- **Changes in starting points between the existing and draft guidelines:** For some scenarios it would also appear that differences in starting points between existing and draft guidelines may explain some of the differences between sentences. For example, when looking at Crown Court scenario 1 in the draft **general fraud** guideline, it can be seen that participants opted for either category A4 or B4, with starting points of 52 weeks' (12 months') custody and high level community order respectively. The same participants, assessing the same facts of the scenario, opted for a category in the existing guideline with a starting point of 18 months. This would help explain why most of these participants gave sentences that were three to four months shorter with the draft guideline or encompassed a lesser disposal. Similarly, with **revenue fraud**, some of the shorter sentences observed<sup>62</sup> can be accounted for by adopting a category with a lower starting point in the draft guideline (e.g. B4 with a starting point of 3 years 6 months as opposed to a category with a starting point of 5 years' custody).
- **Variations in starting points adopted by participants:** In some cases, participants also adopted different initial starting points to those specified in the guidelines. The reason for this was often because the amount of money defrauded in the scenario was different to that on which the guideline starting point was based. Whilst the guideline directed sentencers to make an adjustment 'as appropriate', participants differed in how much they moved away from the guideline starting point to account for this, leading to variation in sentences from the outset. For example, in one of the scenarios explored with magistrates on **benefit fraud**, most (although not all) participants made a downward adjustment from the starting point in the draft guideline due to the value involved in the offence (£20,000 as opposed to the £30,000 that the guideline starting point was based on). For those opting for a B2 category, the downward adjustment in the starting point varied, from zero weeks to 18 weeks. In addition, for **revenue fraud** and offender Z, only three of seven participants made an upward adjustment from the starting point due to the amount (one regarded this as an aggravating factor).
- **Variations in aggravating and mitigating factors thought to be applicable to the scenarios:** Participants also differed in the aggravating and mitigating factors thought to be applicable to the offence scenario and how they applied this to the sentence at step 2. For example, for one of the **bribery** scenarios, two of the participants felt the aggravating factor of '*attempts to conceal/dispose of evidence*' applied and increased the sentence accordingly; the remaining seven did not apply this factor. For **revenue fraud** and offender Z, five of seven participants reduced the sentence at step 2 due to a variety of different mitigating factors (different numbers and types of factors in each case), whereas one participant increased their sentence due to aggravation and one did not change their sentence at all from the starting point.

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<sup>62</sup> Particularly for offender Z charged with fraudulent evasion of VAT.

## 5. Conclusion

Along with other information gathered as part of the guideline development process, these interviews particularly helped to shape the consultation versions of specific guidelines and to refine the approach and factors relevant to culpability and harm in step 1 of the definitive guidelines issued in May 2014. The research also helped inform the Council's understanding of how the draft guidelines may affect sentencing practice for certain fraud offences. This understanding has been fed into the Council's resource assessment accompanying the definitive guideline, which can be found at: <http://sentencingcouncil.judiciary.gov.uk/facts/research-and-analysis-publications.htm>

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**Karen Moreton and Catherine Mottram**

**Annex A – Pre-consultation versions of benefit fraud, money laundering and bribery draft guidelines (steps 1 and 2)**

**Benefit fraud**

**Section 1 Fraud Act 2006**

Triable either way

Maximum when tried summarily: 26 weeks' custody  
Maximum when tried on indictment: 10 years' custody

**Section 17 Theft Act 1968: False Accounting**

Triable either way

Maximum when tried summarily: 26 weeks' custody  
Maximum when tried on indictment: 7 years' custody

**Section 111A(1) Social Security Administration Act 1992: False representation to obtain benefit**

Triable either way

Maximum when tried on summarily: 26 weeks' custody  
Maximum when tried on indictment: 7 years' custody

**Section 11A(1A), (1B), (1D), (1E) Social Security Administration Act 1992: Failing to disclose a change in circumstances**

Triable either way

Maximum when tried on summarily: 26 weeks' custody  
Maximum when tried on indictment: 7 years' custody

**Section 112 Social Security Administration Act 1992: Makes statement/representation known to be false**

Triable only summarily

Maximum: Level 5 fine and/or 3 months' custody

**Section 35 Tax Credits Act 2002: Tax Credit Fraud**

Triable either way

Maximum when tried on summarily: 26 weeks' custody  
Maximum when tried on indictment: 7 years' custody

**Step one – Determining the offence category**

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories, the court should balance these characteristics to reach a fair assessment of the offender’s culpability.

In terms of harm, benefit fraud is a crime against the state that undermines public confidence in the benefits system, making it more difficult for genuine claimants, and affects wider society through increased taxes and impact on public services. Offences that are fraudulent from the outset and involve a high degree of sophistication and planning are particularly corrosive in terms of public support for the benefits system. The factors associated with this type of offence are therefore reflected in the higher culpability category.

|   |
|---|
| <b>CULPABILITY</b> demonstrated by the offender’s role and motivation. May be demonstrated by one or more of the following characteristics.   |
| <b><u>A – High Culpability</u></b>  |
| <ul style="list-style-type: none"> <li>• <i>A leading role in organised, planned multiple claims (to include those using false IDs), fraudulent from the outset</i></li> <li>• <i>Abuse of position of power or trust or responsibility (e.g. the individual is working for a Government Agency), fraudulent from the outset</i></li> </ul> |
| <b><u>B – Medium Culpability</u></b>  |
| <ul style="list-style-type: none"> <li>• <i>Fraudulent from the outset, individual acting alone</i></li> <li>• <i>Fraudulent from the outset, individual played a middle role in organised fraud</i></li> </ul>   |
| <b><u>C – Lesser Culpability</u></b>  |
| <ul style="list-style-type: none"> <li>• <i>Not fraudulent from the outset but subsequently becomes so due to failure to notify or disclose a change of circumstances</i></li> <li>• <i>Claim made on the basis of misleading and incomplete advice</i></li> <li>• <i>Minor, peripheral role in organised fraud</i></li> </ul>              |

| <b>HARM - Amount obtained or intended to be obtained (figures indicative and based on current guideline)</b> |   |
|--|---|
| <b>Category 1</b>  | £500,000 or more<br>Starting point based on £750,000                        |
| <b>Category 2</b>  | £100,000 or more and less than £500,000<br>Starting point based on £300,000 |
| <b>Category 3</b>  | £20,000 or more and less than £100,000<br>Starting point based on £60,000   |
| <b>Category 4</b>  | £5,000 or more and less than £20,000<br>Starting point based on £12,500     |
| <b>Category 5</b>  | Less than £5,000<br>Starting point based on £2,500                          |

## Step Two - Starting point and category range (figures indicative)

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. The court should then consider further adjustment within the category range for aggravating or mitigating features.

|   | Culpability Level  |   |   |
|---|--|---|---|
|   | A  | B   | C   |
| <b>£500,00 or more</b><br><br><b>Starting point based on £750,000</b>                         | <i>Starting point:</i><br>6 years custody<br><br><i>Range:</i><br>4-7 years custody              | <i>Starting point:</i><br>5 years custody<br><br><i>Range:</i><br>2-7 years' custody                            | <i>Starting point:</i><br>12 months custody<br><br><i>Range:</i><br>36 weeks custody–2 years' custody           |
| <b>£100,000 or more and less than £500,000</b><br><br><b>Starting point based on £300,000</b> | <i>Starting point:</i><br>3 years' custody<br><br><i>Range:</i><br>2-5 years' custody            | <i>Starting point:</i><br>2 years' custody<br><br><i>Range:</i><br>12 months–4 years' custody                   | <i>Starting point:</i><br>36 weeks' custody<br><br><i>Range:</i><br>12 weeks to 18 months' custody              |
| <b>£20,000 or more and less than £100,000</b><br><br><b>Starting point based on £60,000</b>   | <i>Starting point:</i><br>2 years' custody<br><br><i>Range:</i><br>15 months to 3 years' custody | <i>Starting point:</i><br>15 months' custody<br><br><i>Range:</i><br>12 weeks–30 months' custody                | <i>Starting point:</i><br>26 weeks' custody<br><br><i>Range:</i><br>Community order (MEDIUM)–12 months' custody |
| <b>£5,000 or more and less than £20,000</b><br><br><b>Starting point based on £12,500</b>     |  | <i>Starting point:</i><br>26 weeks' custody<br><br><i>Range:</i><br>Community order (MEDIUM)–12 months' custody | <i>Starting point:</i><br>Community order (HIGH)<br><br><i>Range:</i><br>Fine–18 weeks' custody                 |
| <b>Less than £5000</b><br><br><b>Starting point based on £2,500</b>                           |  | <i>Starting point:</i><br>Community order (HIGH)<br><br><i>Range:</i><br>Fine–18 weeks' custody                 | <i>Starting point:</i><br>Community order (LOW)<br><br><i>Range:</i><br>Fine–community order (MEDIUM)           |

*NB: The table is based on sentencing for a single fraudulent transaction.*

### Aggravating factors

- Involves multiple frauds
- Length of time over which the offence was committed
- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction

- Motivated solely by greed
- Offence committed whilst on bail
- Attempts to conceal/dispose of evidence
- Failure to comply with current court orders
- Offence committed on licence
- Offences Taken Into Consideration
- Failure to respond to warnings about behaviour
- Offences committed across national borders
- Attempt to place the blame on a third party
- Damage to third party (e.g. from identity theft)

### **Mitigating factors**

- No previous convictions **or** no relevant/recent convictions
- Remorse, particularly where the offender has paid back the sums that were fraudulently gained (although the fact that defrauded sums may have been recovered is not relevant to the choice of the type of sentence to be imposed)
- Good character and/or exemplary conduct
- Complete and unprompted disclosure of the extent of the fraud
- Offender experiencing significant financial hardship or pressure at time fraud was committed
- Involved through pressure, coercion, intimidation or exploitation
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Lapse of time since offender apprehended where this is not the fault of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Significant health issues

## **Money Laundering**

**Section 327 Proceeds of Crime Act 2002:**  
concealing/disguising/convertng/transferring/  
removing criminal property from England & Wales;

Triable either way

Maximum when tried on indictment: 14 years' custody

**Section 328 Proceeds of Crime Act 2002:**  
Entering into arrangements concerning criminal property;

Triable either way

Maximum when tried on indictment: 14 years' custody

**Section 329 Proceeds of Crime Act 2002:**  
Acquisition, use and possession of criminal property;

Triable either way

Maximum when tried on indictment: 14 years' custody

**Step one - determining the offence category**

- The court should determine the offence category with reference to the tables below. In order to determine the category the court should assess **culpability** and **harm**.
- The level of **culpability** is determined by weighing up all the factors of the case to determine the offender's role and the extent to which the offending was planned and the sophistication with which it was carried out. **Where there are characteristics present which fall under different categories, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

**CULPABILITY** demonstrated by one or more of the following:

**A - High Culpability:**

- A leading role where offending is part of a group activity; involvement of others through pressure, influence;
- Abuse of position of power or trust or responsibility;
- Sophisticated nature of offence/significant planning;
- Criminal activity conducted over sustained period of time.

**B - Medium Culpability:**

- A significant role where offending is part of a group activity;
- Other cases where characteristics for categories A or C are not present.

**C - Lesser Culpability:**

- Performed limited function under direction;
- Involved through pressure, coercion, intimidation or exploitation (not motivated by personal gain);
- Opportunistic 'one-off' offence; very little or no planning;
- Limited awareness of understanding of scale of criminal activity.

**Harm** is initially assessed by the monetary value of the offence. **In some cases, particularly where the value greatly exceeds the starting point in category 1, it will normally be appropriate to move outside the identified range.**

**Category 1** (£ figures indicative, not final proposal)

£500,000 or more  
Starting point based on £1 million

**Category 2**

£100,000 - £500,000  
Starting point based on £300,000

**Category 3**

£10,000 - £100,000  
Starting point based on £50,000

**Category 4**

Less than £10,000  
Starting point based on £5,000

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 antecedent offence to determine whether it warrants the sentence being moved up to the next category or to top of the range. Where it is

possible to identify the antecedent offence regard should be given to the relevant sentencing levels.

**Greater impact** demonstrated by:

- Money laundered is proceeds from serious criminality including but not limited to drug offences, terrorism, robbery, tax evasion.

**Move up a category; if in category 1 move up the range**

**Step two**

| <b>HARM</b>       | <b>CULPABILITY A</b>  | <b>CULPABILITY B</b>   | <b>CULPABILITY C</b>  |
|-------------------|---|--|---|
| <b>CATEGORY 1</b> | <p><b>Starting point</b><br/>9 years' custody</p> <p><b>Category range</b><br/>7-12 years' custody</p>                | <p><b>Starting point</b><br/>6 years' custody</p> <p><b>Category range</b><br/>5-7 years' custody</p>                        | <p><b>Starting point</b><br/>4 years' custody</p> <p><b>Category range</b><br/>3-5 years' custody</p>                         |
| <b>CATEGORY 2</b> | <p><b>Starting point</b><br/>6 years' custody</p> <p><b>Category range</b><br/>5-7 years' custody</p>                 | <p><b>Starting point</b><br/>4 years' custody</p> <p><b>Category range</b><br/>3-5 years' custody</p>                        | <p><b>Starting point</b><br/>2 years' custody</p> <p><b>Category range</b><br/>12 months–3 years' custody</p>                 |
| <b>CATEGORY 3</b> | <p><b>Starting point</b><br/>4 years' custody</p> <p><b>Category range</b><br/>3-5 years' custody</p>                 | <p><b>Starting point</b><br/>2 years' custody</p> <p><b>Category range</b><br/>12 months-3 years' custody</p>                | <p><b>Starting point</b><br/>6 months' custody</p> <p><b>Category range</b><br/>Community order (High)-12 months' custody</p> |
| <b>CATEGORY 4</b> | <p><b>Starting point</b><br/>2 years' custody</p> <p><b>Category range</b><br/>12 months custody-3 years' custody</p> | <p><b>Starting point</b><br/>6 weeks' custody</p> <p><b>Category range</b><br/>Community order (High)-12 months' custody</p> | <p><b>Starting point</b><br/>Community order (Med)</p> <p><b>Category range</b><br/>Discharge-High level community order</p>  |

### **Aggravating factors**

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction;
- Offence committed whilst on bail;
- Steps taken to prevent the victim reporting or obtaining assistance and/or from assisting or supporting the prosecution;
- Attempts to conceal/dispose of evidence;
- Established evidence of community/wider impact;
- Failure to comply with current court orders;
- Offence committed on licence;
- Offences Taken Into Consideration;
- Failure to respond to warnings about behaviour;
- Offences committed across borders;
- Blame placed on others;
- Damage to third party e.g. loss of employment to legitimate employees.

### **Mitigating Factors**

- No previous convictions **or** no relevant/recent convictions;
- Remorse;
- Good character and/or exemplary conduct;
- Serious medical conditions requiring urgent, intensive or long-term treatment;
- Age and/or lack of maturity where it affects the responsibility of the offender;
- Lapse of time since apprehension where this is not the fault of the offender;
- Mental disorder or learning disability;
- Sole or primary carer for dependent relatives;
- Early active co-operation particularly in complex cases;
- Determination and/or demonstration of steps having been taken to address offending behaviour;
- Activity originally legitimate.

## **Bribery**

### **Bribery Act 2010**

#### **Section 1: Bribing another person**

#### **Section 2: Being bribed**

#### **Section 6: Bribery of foreign public officials**

Maximum when tried on indictment: 10 years' custody

### Step one - determining the offence category

The court should determine the offence category with reference to the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of **culpability** is determined by weighing up all the factors of the case to determine the offender's role and the extent to which the offending was planned and the sophistication with which it was carried out. **Where there are characteristics present which fall under different categories, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

**CULPABILITY** demonstrated by one or more of the following:

#### A - High culpability:

- A leading role where offending is part of a group activity;
- Involvement of others through pressure, influence;
- Abuse of position of significant power or trust or responsibility;
- Intended corruption (directly or indirectly) of a senior official performing a public function;
- Intended corruption (directly or indirectly) of a law enforcement officer;
- Sophisticated nature of offence/significant planning;
- Offending conducted over sustained period of time;
- Motivated by expectation of substantial financial, commercial or political gain.

#### B - Medium culpability:

- A significant role where offending is part of a group activity;
- All other cases where characteristics for categories A or C are not present.

#### C - Low culpability:

- Involved through coercion, intimidation or exploitation;
- Not motivated by personal gain;
- Peripheral role in organised activity;
- Opportunistic 'one-off' offence; very little or no planning;
- Limited awareness or understanding of corrupt activity.

**Harm** is 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.

**Risk of harm** involves consideration of both the likelihood of harm occurring and the extent of it if it does. Risk of harm is less serious than the same actual harm. Where the offence has caused risk of harm but no (or much less) actual harm, the normal approach is to move to the next category of harm down. This may not be appropriate if either the likelihood or extent of potential harm is particularly high.

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| <b>Harm demonstrated by one or more of the following factors:</b>  |
| <p><b>Category 1</b></p> <ul style="list-style-type: none"> <li>• Serious detrimental effect on individuals (for example by provision of substandard goods or services resulting from the corrupt behaviour);</li> <li>• Serious environmental impact;</li> <li>• Serious undermining of the proper function of local or national government, business or public services;</li> <li>• Substantial <i>actual or intended</i> financial gain to offender or another or loss caused to others.</li> </ul> |
| <p><b>Category 2</b></p> <ul style="list-style-type: none"> <li>• Significant detrimental effect on individuals;</li> <li>• Significant environmental impact;</li> <li>• Significant undermining of the proper function of local or national government, business or public services;</li> <li>• Significant <i>actual or intended</i> financial gain to offender or another or loss caused to others;</li> <li>• Risk of category 1 factors.</li> </ul>   |
| <p><b>Category 3</b></p> <ul style="list-style-type: none"> <li>• Limited detrimental impact on individuals, the environment, government, business or public services;</li> <li>• Risk of category 2 factors.</li> </ul>   |
| <p><b>Category 4</b></p> <ul style="list-style-type: none"> <li>• Risk of category 3 factors.</li> </ul>   |

**STEP TWO**

Having determined the category at step one, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

The court should then consider further adjustment within the category range for aggravating or mitigating features.

Consecutive sentences for multiple offences may be appropriate where large sums are involved.

| HARM CATEGORY     | CULPABILITY A   | CULPABILITY B  | CULPABILITY C   |
|-------------------|---|--|---|
| <b>CATEGORY 1</b> | <b>Starting point</b><br>7 years' custody<br><br><b>Category range</b><br>5-8 years' custody                      | <b>Starting point</b><br>4 years' custody<br><br><b>Category range</b><br>3-6 years' custody                                   | <b>Starting point</b><br>2 years' custody<br><br><b>Category range</b><br>18 months –<br>4 years' custody                       |
| <b>CATEGORY 2</b> | <b>Starting point</b><br>5 years' custody<br><br><b>Category range</b><br>3-6 years' custody                      | <b>Starting point</b><br>2 years 6 months' custody<br><br><b>Category range</b><br>18 months–<br>4 years' custody              | <b>Starting point</b><br>1 year's custody<br><br><b>Category range</b><br>6 months–<br>2 years' custody                         |
| <b>CATEGORY 3</b> | <b>Starting point</b><br>2 years 6 months' custody<br><br><b>Category range</b><br>18 months–<br>4 years' custody | <b>Starting point</b><br>1 year's custody<br><br><b>Category range</b><br>6 months–<br>2 years' custody                        | <b>Starting point</b><br>High level community order<br><br><b>Category range</b><br>Low level community order–36 weeks' custody |
| <b>CATEGORY 4</b> | <b>Starting point</b><br>1 year's custody<br><br><b>Category range</b><br>6 months–<br>2 years' custody           | <b>Starting point</b><br>High level community order<br><br><b>Category range</b><br>Low level community order–1 year's custody | <b>Starting point</b><br>Low level community order<br><br><b>Category range</b><br>Discharge–medium level community order       |

### Statutory aggravating factors

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

### Other aggravating factors

- Steps taken to prevent victims reporting or obtaining assistance and/or from assisting or supporting the prosecution;
- Attempts to conceal/dispose of evidence;
- Established evidence of community/wider impact;
- Failure to comply with current court orders;
- Offence committed on licence;

- Offences taken into consideration;
- Failure to respond to warnings about behaviour;
- Offences committed across borders;
- Blame wrongly placed on others;
- Pressure exerted on another party;
- Offence committed to facilitate other criminal activity.

### **Mitigating factors**

- No previous convictions **or** no relevant/recent convictions;
- Remorse, particularly where evidenced by voluntary reparation to victims;
- Good character and/or exemplary conduct;
- Lack of sophistication with little or no prospect of success;
- Serious medical conditions requiring urgent, intensive or long-term treatment;
- Age and/or lack of maturity where it affects the responsibility of the offender;
- Lapse of time since apprehension where this does not arise from the conduct of the offender;
- Mental disorder or learning disability;
- Sole or primary carer for dependent relatives;
- Early active co-operation particularly in complex cases.

## **Annex B – Scenarios from each phase of the research**

### **Phase 1**

#### **Crown Court scenario (Money laundering)**

After executing a search at D's home, the police seize £100,000 which is contained in a suitcase under D's bed. The police suspect that D assists a gang supplying drugs. He makes no comment in interview.

Forensic examination of the notes of money reveal that they have a higher than normal presence of drugs. He is charged with possession of criminal property contrary to section 329(1)(c) of the Proceeds of Crime Act 2002. No-one else is charged in respect of the investigation.

D pleads the day before trial. He is 40 years old and had been employed as a sales assistant with little or no assets to his name. He has historic previous convictions involving dishonesty and drug possession and expresses little remorse.

#### **District Judge scenario (Money laundering)**

D, a 20 year old male, on the request of an unknown male, allows his bank account to have £5,000 deposited in it, which he then withdraws and transfers via Western Union to an arranged destination. D receives 10% for this arrangement. The money represents a previous benefit fraud which D is not connected to.

D is arrested and charged with being concerned in an arrangement which controls criminal property (section 328). He pleads guilty at the first opportunity.

He did not know where the money came from but accepts he suspected it was not a legitimate arrangement. This is his first conviction. He expresses remorse and has a part-time job and some assets.

### **Phases 2 and 6 – Benefit fraud<sup>63</sup>**

#### **Crown Court scenario 1**

D is a 30 year old Nigerian national who made fraudulent claims for benefits using several false identities. She operated as part of a gang of ten individuals who between them fraudulently claimed over £3 million over a period of five years. She was not a main organiser, but pleaded guilty to 12 offences of fraud over two years relating to claims totalling £100,000 all of which were wholly fraudulent. She personally kept half of that money and sent much of it to Nigeria to fund the building of a house. She has no previous convictions in the UK and has no dependants in the UK.

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<sup>63</sup> Minor amendments were made to the phase 2 scenarios for phase 6 – phase 6 versions shown here.

## **Crown Court scenario 2**

D is a mother of two teenage children. She made genuine claims for council tax and housing benefits for a number of years. Her husband died in a car accident and she began to receive his pension of over £250 per month along with a lump sum of £100,000 from his life insurance policy. She did not declare this to DWP and, in fact, falsely claimed to be in significant hardship to make claims for discretionary payments as well as falsifying documents to support her ongoing claims. For the three years following her husband's death she was paid over £35,000 in fraudulent claims for council tax and housing benefits and discretionary payments. The offences came to light as a result of an anonymous report to the authorities. She pleaded guilty at the first appearance in the magistrates' court. She has painful arthritis in her knees and one of her children (a boy aged 15) is recovering from cancer. She has one previous unrelated conviction for driving with excess alcohol.

## **Magistrates' court scenario 1**

D is a 28 year old mother of two school age children. She made genuine claims for income support, housing benefit and council tax benefit in January 2012 but failed to notify a change of circumstances when her boyfriend (who was in full-time employment) moved in with her in July 2012. The total amount overpaid was £5,500 over a period of 6 months; she did not renew her claim in January 2013.

The offence came to light as a result of an anonymous tip-off. She co-operated with the investigation and pleaded guilty at the first appearance in the magistrates' court. She is of good character and has now obtained employment which will enable her to support her family without recourse to benefits if she is not sent to custody.

## **Magistrates' court scenario 2**

D is a 60 year old widower. He made a genuine claim for incapacity benefit in 2009. After six months he took a job but continued to claim. At the time he was heavily in debt (mainly credit card debts that had accumulated over a number of years) and was caring for his terminally ill wife. He used the money to service his debts and provide for his wife's needs. However, after his wife died in May 2011 he continued to claim for a further two years until the fraud was uncovered by DWP (Department for Work and Pensions) staff. Between his original claim in 2009 and discovery in December 2012, he claimed a total of £25,000 of which he was entitled to only £4,583.

He is of previous good character. He suffers from mild depression and chronic back pain. He is still working and is paying off a substantial bank loan which he took out to clear his credit card debts. His means (after loan repayments and repayments to DWP) are very limited. He was convicted after a trial.

## **Phase 3 – Money laundering**

### **Crown Court scenario**

A (aged 40 and of previous good character) owned and ran a largely legitimate business which operated as an estate agency, letting agency and money transfer business. B (aged 48 and of previous good character) was the office manager.

B was observed by police taking two holdalls into the business premises. The premises were searched and the holdalls found to contain £250,000 in cash. Evidence from documents seized, CCTV and bank records showed £666,000 had been laundered in a 19 day period. It was a sophisticated money laundering operation and the origin of the money was uncertain. A led a lavish lifestyle and had gained substantially more from the offending than B, who led a modest lifestyle; his only income was from his office manager job.

They were convicted after a trial of concealing, disguising, converting, transferring criminal property or removing it from the jurisdiction under s327 Proceeds of Crime Act 2002.

### **Magistrates' court scenario**

D, a single mother with no previous convictions, was asked by a long standing friend if he could pay £1358 he had inherited into her account. She agreed but became suspicious that the money might not be legitimate. She benefited to the value of £108 which was left in her account when she withdrew £1250 as requested by her friend. The money was in fact part of the proceeds of a £200,000 holiday villa scam.

D initially pleaded not guilty to entering into an arrangement to facilitate the use or control of criminal property contrary to s328 Proceeds of Crime Act 2002, but changed her plea to guilty three months before the trial was scheduled. She showed genuine remorse. D was in receipt of benefits and was sole carer of 5 year old son.

## **Phase 4 – Bribery**

### **Crown Court scenario 1**

M was the head of the UK division of an IT company. Over a two year period M oversaw the making of corrupt payments totalling £1.5 million to a senior official involved in running a state owned institution in a developing country to secure business worth £25 million. M's bonus was increased as a result by £500,000. The corrupt activities inflated the price of the contract by around £5 million and although the IT systems supplied did work, they were not appropriate for the needs of the institution.

After initial denials, he cooperated with the inquiry and entered an early guilty plea.

### **Crown Court scenario 2**

N was a chief procurement officer for a local authority with responsibility for a budget of tens of millions of pounds. He gave a contract for the supply of office equipment to a personal friend and received payments totalling £18,000. The equipment supplied was suitable for the authority's needs but it was estimated that if the contract had gone out to open tender the authority could have saved £150,000 on the contract price. N had deleted all email correspondence with the friend awarded the contract and kept no record of any telephone conversations or meetings.

N denied any wrong doing and was convicted after a trial. He had no previous convictions.

## **Phase 5 – General fraud**

### **Crown Court scenario 1**

D (aged 55) had been looking after her mother in the 18 months before her mother's death. The mother's will divided her estate equally between D and her sister. D made a claim against her mother's life insurance policy without her sister's knowledge and forged her signature. She was paid £2,500, but failed to give her sister the half share due to her. D also took out a credit card in her sister's name without her knowledge, and over a 12 month period accumulated debt of £6,000. Her sister only became aware when debt collectors contacted her. In police interview D made full admissions and said that she had had her sister's mail re-directed. The pre-sentence report noted that D had stopped working to care for her mother and was therefore unable to obtain a credit card in her own name and so had used her sister's name. D had thought she would be the sole beneficiary of her mother's estate and so kept her sister's share of the life policy. D was remorseful and ashamed of what she had done. In a victim personal statement, S stated that she was fearful of opening her post and that her credit rating had been affected. D pleaded guilty to two counts of fraud under s1 Fraud Act at the earliest opportunity; she had no previous convictions.

### **Crown Court scenario 2**

L (aged 28) and M (aged 37) pleaded guilty to conspiracy to defraud. They were both former employees of a security company and had retained a database of their former employer's customers when they set up a security business on their own. The customers, many elderly and living alone, had been contacted by L and M, who posed as bona fide employees of their former employer and obtained or attempted to obtain money for usually non-existent servicing, overhauling or improving of the customers' existing alarm systems. M had posed as the salesman and L as the alarm engineer. Both pleaded guilty on the basis that they had been involved in 10 dishonest transactions totalling £5,000. The business had not been dishonest from the outset. L was of previous good character and had been frank during his interview. M had a previous conviction for dishonesty and was subject to a community order at the time of the offence. Victim impact varied from being angry at being cheated to several losing confidence in their ability to deal with callers to the home.

### **Magistrates' court scenario 1**

B (aged 45) purported to collect money for a popular local children's charity in a shopping centre. He was not an authorised collector for the charity. Police were alerted by suspicious shop keepers and he was arrested. He had £7.23 in his collection tin. He stated in police interview that he was an alcoholic and intended to use the money to buy alcohol. He was living in a hostel run by a charity. He had 20 previous convictions for offences of dishonesty (theft or fraud) and six convictions for being drunk and disorderly. He was not currently subject to any orders and pleaded guilty at the first opportunity.

### **Magistrates' court scenario 2**

K (aged 23) asked a cashier in a department store if he could open a store card account. He was asked for his identification. He produced a debit card in a false name. He gave a false address and falsely inflated his and his partner's income. He

failed a credit check, and was told that he could not open a credit account. He then went to a different part of the store and tried again. Again he failed. In the event, therefore, no actual loss was caused to the store. If credit had been granted, it would have been possible for K to have obtained goods or credit with a value of no more than £2,500. He was arrested and made no comment in interview. He pleaded guilty at the first opportunity in the magistrates' court. He had no previous convictions.

## **Phase 7 – Revenue fraud**

### **Crown Court scenario**

X (aged 56) was the main organiser of a large scale missing trader VAT fraud which defrauded the revenue of £60 million over a period of four years. He was the managing director of an import/export company which traded legitimately (but not very profitably) for 3 years before the period of offending.

Y (aged 28, the nephew of X) played a leading role, setting up his own company as part of the fraud and recruiting many of the buffer companies in the fraud. Both X and Y profited by many millions.

Z (aged 23) was employed by Y and completed VAT returns which he knew to be false. He was well paid by Y (£40,000 per year) and received several cash bonuses amounting to an extra £50,000, but did not receive any other profits from the fraud.

X and Y were convicted after a trial of conspiring (with each other and others unnamed) to cheat the public revenue. Z was convicted after a trial of four counts of fraudulent evasion of VAT amounting to £1.5 million.

They were all of previous good character. X and Y were involved with local charities and had made large donations (albeit from the proceeds of the fraud). X's wife suffered from chronic ill health and needed assistance with daily living. Y was the father of two young children. Z had completed one year of a three year university course and produced a glowing reference from his tutor.