

# Theft Offences

## Response to Consultation

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# Foreword



On behalf of the Sentencing Council I would like to thank all those who responded to the consultation on theft offences, and those who attended the consultation events. I would like to make particular mention of the members of the judiciary who gave their time to participate in the considerable research exercise undertaken to inform the development of these guidelines.

As with all Sentencing Council consultations, the views put forward by all consultees were carefully considered, and the range of views and expertise were of great value in informing the definitive guidelines.

The guideline covers a spread of different theft offences, and within these offences, there is a wide spectrum of different types of offending. The Council wanted to ensure that the definitive guideline would be as robust and comprehensive as possible. After the consultation, the Council decided that additional work and research was necessary in order to provide an effective guideline, thus resulting in a delay in the original anticipated timetable.

As a result of this work, the general approach outlined in the consultation has been maintained, but a number of amendments have been made, principally to the assessment of harm within certain theft offences. The Council wished to ensure that any additional harm caused to victims of theft could be taken into account by courts where appropriate, but that the process for assessing this harm should be clearer than the one outlined in the consultation. The Council hopes that these guidelines will improve consistency in the approach to sentencing these offences.

**Lord Justice Treacy**  
**Chairman, Sentencing Council**

# Introduction

In April 2014 the Sentencing Council published a consultation on draft guidelines on sentencing theft offences. The consultation ran for 12 weeks during which time a number of engagement events were held. The events were co-hosted with a cross section of interested parties. The response to the draft guidelines was favourable, subject to matters of detail or specific points, and quotes have been included throughout to give an indication of the views of consultation respondents.

‘The proposed guidelines appear well considered’  
West and Central Herts Magistrates’ Bench

‘Our response is very much in support of (the) proposals’  
National Policing Lead for Acquisitive Crime

Date	Co-hosts	Attended by	Location
6 May 2014	North London Magistrates	Magistrates	London
9 May 2014	British Transport Police	Police	London
12 May 2014	Prison Reform Trust and Leigh Day	NGOs and practitioners working with offenders	Birmingham
20 May 2014	Prison Reform Trust and Leigh Day	NGOs and practitioners working with offenders	London
3 June 2014	Association of Convenience Stores	Retailers	London
24 June 2014	Welsh Magistrates	Magistrates	Cardiff

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

In 2008, the predecessor body of the Sentencing Council, the Sentencing Guidelines Council (SGC) produced the definitive guideline, *Theft and Burglary in a building other than a dwelling*. This contains guidelines for theft from a shop, theft

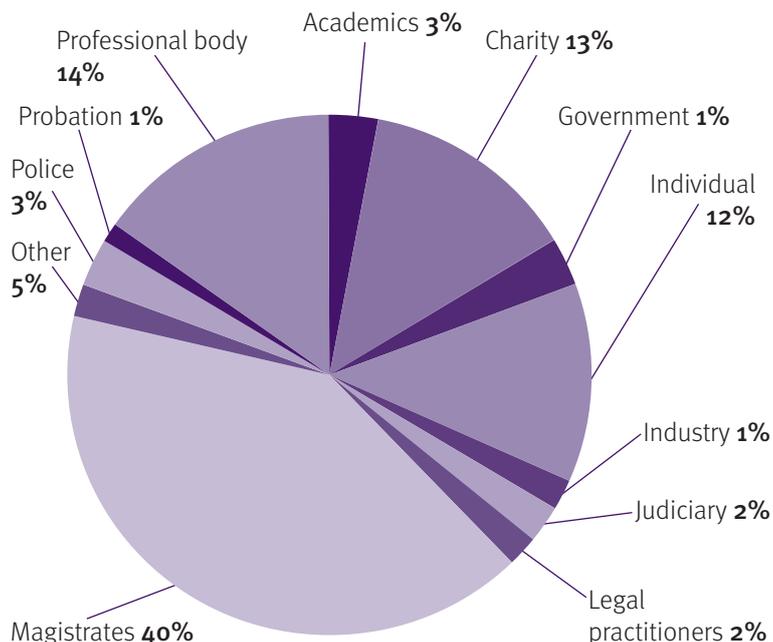
in breach of trust, theft in a dwelling, and theft from the person. There is also guidance for theft offences in the *Magistrates’ Court Sentencing Guidelines* (MCSG). For some common types of theft, such as theft of a motor vehicle or theft of a bicycle, there were no guidelines. The definitive theft guideline will now bring together guidelines for the most common theft offences in one place. A separate *Burglary Definitive Guideline* came into force in 2012.

In total 92 responses were received, mainly by e-mail or letter and 20 responses were submitted online.

### Research

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

- Qualitative research to explore the views of sentencers (magistrates, District Judges and Crown Court Judges) on the draft guidelines during the consultation and then on revised guidelines post consultation; in both phases of research views on the content of guidelines were explored, along with any potential behavioural implications of the proposals on sentencing practice. In total interviews with **63** sentencers were conducted over these two phases of work;
- Observational research in magistrates’ courts covering **42** cases; this followed a review of existing evidence and academic research, which highlighted that information on some important areas was not readily available (for example the values involved in some thefts); and
- Quantitative analysis of transcripts of sentencing hearings relating to **116** defendants in the Crown Court for theft offences. This provided indicative but valuable information on some of the key factors influencing sentencing decisions for theft cases together with providing additional information on current sentencing practice.



Breakdown of respondents<sup>1</sup>

Category	Number of responses
Academics	3
Charity	12
Government	1
Individual	12
Industry	1
Judiciary (from two representative bodies)	2
Legal practitioners	2
Magistrates (21 collective and 15 individual responses)	36
Other	5
Police	3
Probation	1
Professional body	14
<b>Total</b>	<b>92</b>

<sup>1</sup> A list of respondents is at Annex B

# Approach

'These seem to be very good guidelines'  
South Cambridgeshire Bench

'The range of theft related offences given is considered to be sensible and pragmatic'  
South and East Cheshire Bench

In the consultation the Council proposed that there should be six guidelines, as set out below:

- General theft
- Theft from a shop
- Handling Stolen Goods
- Going Equipped for Theft or Burglary
- Abstracting Electricity
- Making off Without Payment

The consultation document asked whether a single guideline was appropriate for general theft, for all section 1 of the Theft Act 1968 (the Theft Act) offences other than shop theft. The majority of those who answered this question agreed with the proposal. Of those who disagreed, criticism was made of the 'broad brush' approach taken. A small number also suggested that a separate approach was needed for more 'personal' types of thefts, or for breach of trust cases.

Given the large number of positive responses to a single general theft guideline (over 70 per cent), the Council decided to maintain this structure. Care had been taken in the development of the guideline to ensure that factors which reflected the specific nature

of different types of theft, such as breach of trust cases, were included. Earlier in the development of the guideline, the Council did consider separating 'personal' theft (such as theft from the person, theft in breach of trust) from other theft (such as theft of a bicycle, or car) but concluded that all types can be considered 'personal' to the victim and all the offences could and should be included within one guideline.

The consultation document also asked if it was appropriate to have separate guidelines for the abstraction of electricity and making off without payment, or whether they should be subsumed within other theft guidelines. The responses to both questions were strongly supportive of the approach taken (88.5 per cent and 88.9 per cent respectively) so the Council decided to maintain its approach of separate guidelines.

A few suggestions were made for additions to the guidelines. The Stolen and Missing Pets Alliance proposed that guidelines should be introduced for theft of pets. The Council considered this request but concluded that the general theft guideline adequately deals with this type of theft. The harm caused by the theft of a much loved pet can be taken into account as part the assessment of harm, in which the factor of '*emotional distress*' would enable the court to reflect any significant additional harm caused by the theft.

The UK Revenue Protection Association suggested that specific guidance for the abstraction of gas would be helpful in a similar way to that proposed in the abstraction of electricity guideline. The theft of gas is an offence under section 1 of the Theft Act, whereas the abstraction of electricity is not covered by section 1 but is specifically covered by section 13 of the Theft Act, and as such, the Council felt a separate guideline was needed for abstraction of electricity. The Council concluded that the general theft guideline is structured in a way that can reflect specific elements of theft of gas offences, such as the harm potentially caused: *'risk of actual injury to persons or damage to property'* is listed as a factor within the assessment of harm.

The Restorative Justice Council, the Justice Committee and the Prison Reform Trust suggested that all of the guidelines should contain a reference to deferring sentences so that pre-sentence restorative justice (RJ) can take place. The Council does not believe that a reference to RJ is appropriate. The guidelines deal with the sentencing of offenders only, and RJ is considered pre-sentence. Also, the provision of RJ services is not fully available nationally. For those offenders who successfully complete RJ activities, this can be taken into account as mitigation.

Question 12 in the consultation document asked: ***'Do you feel the shop theft guideline gives the right level of guidance?'*** Although this question specifically referred to shop theft, as the guidelines all follow a similar structure to shop theft, asking this question provided useful feedback on all the guidelines. The response to this question was overwhelmingly positive: 92 per cent of respondents agreed that the guideline gave the right level of guidance. A small number of respondents commented that it was unwieldy, overly prescriptive and not user friendly. As a result, the Council has endeavoured to make the guidelines clearer, more streamlined and easier to use.

All the guidelines apply to sentencing offenders convicted of conspiracy to commit the substantive offence, as well as attempts.

# Culpability

Across the six guidelines the same approach has been taken to assessing the culpability of the offender. The court is to assess culpability as high, medium or lesser on the basis of the role of the offender and the level of planning and sophistication of the offence. The factors are exhaustive. A short narrative directs the court to balance the factors where there are characteristics from different levels of culpability to reach a fair assessment of the offender's overall culpability. Respondents generally agreed with the approach taken to culpability on all of the draft guidelines.

## Cross cutting issues

In each section of the consultation views were sought on the proposed approach to culpability. A number of the factors appear throughout the guidelines; comments that apply to culpability factors across all guidelines are discussed below.

A number of respondents questioned why '*offence not involving a vulnerable victim*' featured in culpability C in both the general theft and making off without payment guidelines. The Council had included this factor as a way of balancing the assessment of culpability, from deliberate targeting of a vulnerable victim in high culpability at A, through to an offence not involving a vulnerable victim in lesser culpability at C. The Magistrates' Association commented that if a victim is not specifically targeted, the vulnerability or otherwise becomes a matter

of harm rather than culpability, so suggested that the factor be removed from culpability C. Given this comment, and the number of other respondents who disagreed with this factor, the Council decided to remove this factor from the two guidelines.

A number of respondents also questioned why '*not motivated by personal gain*' was included in culpability C within the shop theft, general theft and abstracting electricity guidelines. Respondents suggested that these offenders would already be captured through the '*involved through coercion, intimidation or exploitation*' factor in the same culpability category, and that it might be appropriate to instead include it as a mitigating factor for the few offenders to whom it might otherwise apply. However, other respondents such as the Prison Reform Trust welcomed the specific inclusion of this factor. The Council carefully weighed up the differing views on this issue, but on balance concluded that the factor should be removed, and that it was also not appropriate to include it as a specific mitigating factor. The list of mitigating factors is non-exhaustive, so a court would be able to take this factor into account if relevant.

A small number of respondents questioned why the wording of '*mental disorder or learning disability where linked to the commission of the offence*' was included in lesser culpability in shop theft, but not in any of the other guidelines. In the other guidelines the wording '*mental*

*disorder or learning disability (where **not** linked to the commission of the offence)* appeared as a step two mitigating factor. Respondents suggested that the same wording and placement should be used throughout the theft guidelines. The Council had only included this as a specific factor in lesser culpability in shop theft to reflect evidence which suggests links between offenders committing shop theft and certain mental illnesses. For the rest of the guidelines, it was included as a standard mitigating factor, albeit it was incorrectly worded: where it was not a factor in step one, it should just have read '*mental disorder or learning disability*'. Having considered the issue again, the Council has decided to maintain the inclusion of the factor in step one at shop theft and not within the rest of the guidelines, and to reword the factor where it appears in step two to avoid confusion.

A small number of respondents questioned why '*large number of victims*' had been included as a culpability factor in the general theft and making off without payment guidelines. The Council had included it within general theft to reflect the seriousness of an offence which has a number of victims, such as the theft of metal. However, on further consideration, the Council concluded that this was already taken into account in the assessment of harm. The Council also decided that a single theft which would affect a large number of people was less likely to occur in making off without payment offences, so removed this factor from that guideline.

During the research on the draft guidelines, a factor in culpability C in shop theft, '*opportunistic offence; little or no planning*' caused confusion with research participants. This factor was intended to capture the very low level, unsophisticated shop theft cases at the lowest range of culpability. Confusion about this factor could potentially have led to very low level cases being assessed as culpability B, which could lead to an inappropriate increase in the severity of sentencing for low level shop theft, something which the Council does not intend. For this reason, the Council decided to reword

the factor to '*little or no planning*', which is less ambiguous. For consistency, this factor has also been reworded where it appears within the other guidelines in general theft, handling, going equipped and making off without payment.

Several respondents requested the inclusion within culpability C of a factor to reflect an offender being in financial hardship or genuine need, for the shop theft and general theft guidelines. Also requested was a factor to reflect offences committed due to serious addiction. The Council gave careful thought to these issues, but decided that it would not be appropriate to include factors relating to these issues at step one. Instead, the Council decided to include a mitigating factor of '*offender experiencing **exceptional** financial hardship*' for shop theft alone, to reflect offenders who have stolen food to eat due to exceptional financial hardship, for example; a situation in which was unlikely to apply to the general theft guideline.

Further, the Council decided to expand upon the wording proposed in the consultation relating to offenders who have a drug addiction, for whom a community order with a drug rehabilitation requirement may be an alternative to custody. New wording has been included for courts to consider whether either a community order with an alcohol treatment requirement, or a mental health treatment requirement may also be an alternative to custody for appropriate offenders. The Council decided to include this wording just within the general and shop theft guidelines, as the guidelines where these considerations are likely to be most relevant.

A small number of respondents stated that there should be more factors within culpability B, medium culpability, and specifically mentioned that '*some degree of planning*', which was proposed only for the shop theft and going equipped guidelines, should be included across all the guidelines. The Council reconsidered the matter with the result that the wording has been added to the general theft and making off without payment guidelines. On reflection, the

wording was removed from the going equipped guideline, because all going equipped offences would require some degree of planning.

Across all of the guidelines a small number of respondents commented that the difference between ‘a **leading** role where offending is part of a group activity’ as a factor indicating high culpability and ‘a **significant** role where offending is part of a group activity’ as a factor indicating medium culpability is unclear.

This language is taken from the *Drugs offences Definitive Guideline* where it is used to determine the offender’s culpability, and is used in the *Fraud, bribery and money laundering offences Definitive Guideline*. Although some respondents did indicate confusion with this terminology the Council concluded that it would not change it because it creates a clear hierarchy of roles so that ‘a **leading** role’ is the most serious in terms of culpability and ‘a **significant** role’ would be demonstrated by the offender playing a significant part in the offence short of being a driving force behind it. It is hoped that by using consistent language across guidelines, sentencers will become increasingly familiar with how to interpret these factors.

A small number of respondents commented that the factor ‘*all other cases where characteristics for categories A or C are not present*’ is either confusing or too open ended. This had been included in more recent guidelines such as the *Fraud, bribery and money laundering offences Definitive Guideline*, partly as a response to some concerns that the earlier guidelines, such as the *Assault Definitive Guideline*, in only having two levels of culpability – either the most or the least serious – do not reflect the breadth of offending behaviour. Whilst it is possible to identify factors at the extremes of an offence, it is often more difficult to identify factors representing cases which are more commonplace and thus the middle category is defined by an absence of factors which appear in either A or C.

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

The Council’s intention was that this category may be used as what some respondents described as a ‘catch all.’ It is a legitimate assessment to weigh up the factors of the case and conclude that the offender’s culpability is neither high nor lesser. The presence of this factor combined with the narrative that directs the court to balance the factors of the offence to reach a fair assessment of the offender’s overall culpability will allow the sentencer to assess an offender as displaying neither the most nor the least serious level of culpability.

### Shop theft

‘Overall, the factors taken into account (for shop theft) seem eminently sensible’  
The Law Society

A number of respondents, including the Prison Reform Trust commented on the proposed wording of the factor in higher culpability of ‘*offender accompanied by a child who is involved in, aware of, or used to facilitate the offence*’. Some respondents were concerned that with the factor worded this way, the mere presence of a child whilst an offence was committed might place an offender in culpability A, which would not be appropriate. Respondents pointed to the wording in the existing SGC shop theft guideline, which notes that the mere presence of the child does not make the offence more serious. The Council gave this issue careful thought, and decided to change the wording to be clearer on this point. It now reads ‘*Child accompanying offender is actively used to **facilitate** the offence (not merely present when offence is committed)*’.

A number of respondents, including magistrates, judges and retail organisations suggested that repeat offending or victimisation, or deliberate targeting of a particular shop should be a factor included in high culpability. The Council considered this issue, and concluded that the element of repeat offending was already captured in the wording included around persistent offenders proposed at step two of the guideline. In addition, placing a factor of this kind in high culpability could place significantly more offenders within the highest category, and potentially increase the severity of sentencing. The Council does not intend to change current sentencing levels for theft offences with its new definitive theft guidelines, and so was not persuaded of the appropriateness of including such a factor within high culpability.

A small number of respondents questioned why *'limited awareness or understanding of the offence'* was included as a factor within lesser culpability in all other guidelines, but not within shop theft. This factor, which refers to offenders who have little understanding of criminality or possibly a learning disability is not relevant in shop theft because the factor of *'mental disorder/learning disability where linked to commission of the offence'* is already present.

### General theft

Some respondents questioned the wording of the factor *'significant breach of high degree of trust or responsibility'*, questioning whether the words 'high' and 'significant' were both needed. The Council agreed that this factor needed rewording; accordingly the factor now reads *'breach of a high degree of trust or responsibility'*. As discussed in cross cutting issues above, some respondents suggested that more factors in medium culpability would be helpful, and to this end the Council decided to include *'breach of some degree of trust or responsibility'* within culpability B. This would help to differentiate between the degree of breach of trust and responsibility involved, so that only the most serious cases would be captured in high culpability.

The Council further considered the balance of culpability factors and concluded that they needed revision. To this end, as discussed above, two factors have been added to medium culpability (*'breach of some degree of trust or responsibility'* and *'some degree of planning involved'*), and one has been removed (*'large number of victims'*). In addition, three further factors have been removed from high culpability. *'Significant steps taken to avoid detection and/or conceal identity'* and *'use of deception'* have been removed as the remaining factor *'sophisticated nature of offence/significant planning'* can capture these elements. *'Offence conducted over a sustained period of time'* has been moved to aggravating factors at step two.

The Council was concerned that without the rebalancing of the culpability factors, the previously proposed structure could lead to an escalation in sentencing, whereas the Council's aim was to regularise current sentencing practice. The additional time taken by the Council on this guideline has allowed for more scrutiny of sentenced cases and court transcripts, in order to make the definitive guideline as robust as possible.

### Handling stolen goods

Several respondents questioned the wording of a number of the culpability factors, stating that they were confusing and unclear. Similar issues were also raised during research with sentencers. The Council took these concerns seriously, and as a result considered the culpability factors at great length, and made a number of changes. The Council's intention is to ensure that only the most serious offences will place offenders within culpability A, which leads to the highest custodial sentences. In pursuance of this, key factors in culpability A, B and C have been reworded to reflect the increase in the seriousness of the offending as culpability increases. The reworded factors are as follows:

- in lesser culpability C: *'Goods acquired for offender's own personal use'*,
- in medium culpability B: *'Offender acquires goods for resale'*,

- in high culpability A: '*professional and sophisticated offence*'; '*advance knowledge of the primary offence*'; and '*possession of very recently stolen goods from a domestic burglary or robbery*'.

The Council went back to first principles, considering court transcripts and sentenced cases in order to identify the key factors which indicated the level of seriousness for these offences, and was mindful of the principles for sentencing outlined in the leading case of *Webbe*.<sup>2</sup>

### Going equipped

A small number of respondents questioned the wording of two of the factors in culpability

A, specifically the addition of an example to illustrate the sophisticated nature of the offence, and the wording of '*going equipped for robbery or burglary*'. On consideration of the first issue, the Council has removed the example, because as a general rule, examples are not helpful within guidelines. On the second issue, the factor has been changed to '*offender equipped for robbery or domestic burglary*' to denote the particular seriousness of offences affecting individuals, rather than commercial targets.

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<sup>2</sup> R v *Webbe* and others [2001] EWCA Crim 1217

# Harm

‘Victim Support welcomes this move to considering the broader victim impact as a ‘step one’ consideration beyond the strictly financial interpretation of harm...for almost all victims of crime the impact is not limited to the financial’

Victim Support

Four of the guidelines: shop theft, general theft, making off without payment and handling stolen goods have a two stage assessment of harm. In the abstracting electricity and the going equipped guidelines, there is only a single stage to assess harm.

## Two stage harm assessment

The proposed assessment of harm used financial values as the initial harm factor at harm A, with any additional victim impact considered at harm B. The vast majority of consultation respondents strongly supported the Council’s approach to assessing harm, which recognises that financial loss alone does not fully reflect the harm that theft offending can cause and that the wider impact on the victim should be considered at step one of the guidelines. However, the Prison Reform Trust disagreed with this approach, believing that it would inevitably lead to an increase in sentences.

Some respondents commented that more clarity was needed on how the harm assessment worked in the guideline, and that some of the wording was confusing. A number of

respondents were unclear as to whether the list of factors showing detrimental effects on victims was exhaustive or not. These views were also expressed during research with sentencers during the consultation period. Participants found the wording that related to adjusting the starting point for value at harm A confusing. They also found the instructions to make an adjustment for additional harm at harm B complex and unclear. The consequences of this uncertainty about how to adjust for any additional harm could be significant because it could lead to inconsistency in sentencing.

The Council took this finding very seriously, as it was very mindful from the outset of the potential impact of a new guideline for theft offences, given the high volumes involved. The Council’s intention with the new guideline was to regularise sentencing practice for theft, but neither to increase nor decrease sentencing levels overall. Therefore, the Council decided to revise this section of the guideline, in order to provide clearer guidance on how the assessment of harm should be conducted.

The Council conducted a further round of research on a revised guideline containing clearer wording on how to adjust for any additional harm, and where to adjust the starting point to. However, the results showed that participants still found the guideline confusing. Accordingly, the Council decided to make further revisions, and produced a version with harm A and harm B combined, a

more directional approach to assessing harm, which also reduced the need to adjust the starting point for value. This also had the benefit of linking the two considerations of harm together, some respondents having commented that the financial considerations should not take precedence over the additional impact on victims.

Research on this version was also conducted, and showed that in general participants found the new structure simpler to use and more

straightforward. Using an approach to combine the assessment of financial value and any additional harm, the Council has retained the important principle that the Court must take into account any additional harm caused by theft to the victim, but reduced the complexity in how the assessment of this harm is conducted. This new structure has been incorporated across the shop theft, general theft, making off without payment and handling guidelines. For illustration, the revised structure in shop theft is set out below.

## HARM

**Harm** is assessed by reference to the **financial loss** that results from the theft **and any significant additional harm** suffered by the victim – examples of significant additional harm may include **but are not limited to:**

Emotional distress

Damage to property

Effect on business

A greater impact on the victim due to the size or type of their business

A particularly vulnerable victim

*Intended loss should be used where actual loss has been prevented.*

<b>Category 1</b>	High value goods stolen (above £1,000) <b>or</b> Medium value with significant additional harm to the victim
<b>Category 2</b>	Medium value goods stolen (£200 to £1,000) <b>and</b> no significant additional harm <b>or</b> Low value with significant additional harm to the victim
<b>Category 3</b>	Low value goods stolen (up to £200) <b>and</b> Little or no significant additional harm to the victim

The wording also makes clear that the factors suggested as examples of additional harm are not an exhaustive list, so courts will be able to include other factors as appropriate. The revised wording also stresses that any additional harm must be *significant*, to alleviate the concern that the assessment could lead to increases in sentences.

Some respondents, including Victim Support and the Victims' Commissioner questioned why specific references to Victim Personal Statements (VPS) were not included within the guidelines. The Council does not include a reference to the VPS in sentencing guidelines. The existence or otherwise of a VPS is not within the remit of the sentencer; it is the responsibility of the police. It would be inappropriate for the

Council, through its guidelines, to go further than the law or the Code of Practice for Victims of Crime in setting an expectation that a VPS will be available to the court or in placing a requirement on the prosecutor to produce a VPS. Courts must facilitate presentation of a VPS, if one exists. The rules for this are set out in the Criminal Practice Directions.<sup>3</sup> It would be inappropriate and outside the Council's remit to seek to prescribe such elements of criminal procedure. All guidelines include consideration of the impact on victims as an integral component of assessing seriousness. This need not be based on a VPS, although where one exists, it will be taken into account by the court.

<sup>3</sup> <http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu>

### Shop theft

As set out above, the harm assessment for this guideline has been revised. Within this revised structure, there has been one small change to the financial values: the upper limit of the lowest category has been reduced from £250 to £200. This follows the introduction of the summary only offence of low value shoplifting,<sup>4</sup> with a limit of £200. A number of respondents, including the Justices' Clerks' Society suggested this change. This recent amendment to legislation has also been referenced on the front of the guideline.

The suggested examples of additional harm remain largely the same as those proposed in consultation, with just a slight rewording of one factor to 'a particularly vulnerable victim' and the additional examples of types of vulnerability have been removed.

### General theft

As described above the harm assessment for this guideline has been revised. Within this revised structure, there have been changes to the financial values. Apart from the lowest financial category which remains at values up to £500 due to the level of low value offences covered by this guideline, category ranges have been widened, with the highest category increasing from offences with a value above £50,000 to offences with a value above £100,000. This is set out below.

Values in consultation	Revised values
<b>Category 1</b> £50,000 or more	<b>Category 1</b> £100,000 or more
<b>Category 2</b> £5,000 to £50,000	<b>Category 2</b> £10,000 – £100,000
<b>Category 3</b> £500 to £5,000	<b>Category 3</b> £500 – £10,000
<b>Category 4</b> Up to £500	<b>Category 4</b> Up to £500

During the period of further work on the guidelines post consultation, the Council concluded that the original financial values had been set too low. Following an examination of transcripts of recently sentenced cases of the type that would be sentenced by the guideline, the Council was concerned that the values used in consultation could have led to an escalation

in sentencing levels, something which the Council does not intend.

The suggested examples of types of harm remain largely the same as those proposed in the consultation, with the exception of two factors. 'Items stolen of an economic, sentimental or personal value' has been reworded for clarity to 'items stolen were of substantial value to the loser – regardless of monetary worth'. This change also means that 'greater impact on the victim due to their circumstances' which had previously been included is now superfluous and has been removed.

'Damage to heritage structures' has been reworded to 'damage to heritage assets'. English Heritage and several other respondents welcomed the inclusion of this factor, but commented that the term heritage assets (buildings, monuments, and so on) is more widely used and understood within this context.

### Making off without payment

As above, the assessment of harm for this guideline has been revised. There have been no changes to the financial values attached to each category, the vast majority of responses to the consultation (81.8 per cent) having agreed with the proposed values. There have also been no changes to the suggested examples of the type of additional harm caused by the offence.

### Handling stolen goods

As above, the assessment of harm for this guideline has been revised. Within this amended structure, the financial values have been revised. The categories have been widened, and the highest category increased from offences with a value above £50,000 to offences with a value above £100,000, as set out below. As with the general theft offences guideline, during the period of further work on the guidelines post consultation, the Council concluded that the original financial values had been set too low.

<sup>4</sup> <http://www.legislation.gov.uk/ukpga/2014/12/section/176/enacted>

Values in consultation	Revised values
<b>Category 1</b> £50,000 or more	<b>Category 1</b> £100,000 or more
<b>Category 2</b> £5,000 to £50,000	<b>Category 2</b> £10,000 – £100,000
<b>Category 3</b> £500 to £5,000	<b>Category 3</b> £1,000 – £10,000
<b>Category 4</b> Up to £500	<b>Category 4</b> Up to £1,000

The Council was concerned that the values used in consultation could have led to an escalation in sentencing. The Council wanted to ensure that only the most serious types of handling offences should fall into the highest category for sentencing, which contains long custodial sentences. The changes also reflect the principles as set out in *Webbe*.<sup>5</sup>

There have been some changes to the suggested types of harm. Due to the rewording of the culpability factors, one of the suggested harm factors has been revised to *'property stolen from a domestic burglary or a robbery (unless this has already been taken into account in assessing culpability)'* to avoid double counting. The reference to heritage structures has also been amended to heritage assets, and the factor revised to *'items stolen were of substantial value to the loser, regardless of monetary worth'*, as set out above in general theft.

## One stage harm assessment

### Abstracting electricity

A two stage process for assessing the harm caused by this offence was not used, because evidence of precise financial values for this offence was not available. Instead a single stage was proposed to consider whether the harm caused by the offence is greater or lesser. The vast majority of consultation respondents (92.3 per cent) agreed with the one stage assessment of harm for this offence. A large majority (72 per cent) also agreed with the factors proposed within greater and lesser harm. As the majority agreed with the approach to harm for this offence, the structure and harm factors remain unchanged.

The National Bench Chairmen's Forum suggested that it will not always be the case that there is no individual victim for this offence: electricity may be extracted from a neighbour's supply, which should be reflected in the guideline. Accordingly, the Council decided to add as an aggravating factor, *'electricity abstracted from another person's property'*.

### Going equipped for theft or burglary

This guideline relates to a preparatory offence where no theft has been committed; there are, therefore, no financial amounts for consideration. A single stage assessment of harm was proposed, comprising of greater and lesser harm. The vast majority of respondents agreed with the one stage harm assessment (94.7 per cent). The majority of respondents (69.5 per cent) also agreed with the harm factors proposed. English Heritage and the Institute for Archaeologists suggested that heritage assets should be specifically mentioned within greater harm, given the potential for this type of offence to affect a large number of people. Other suggestions included the need to reflect circumstances where a person was at physical risk or where a potential victim was vulnerable, and for a reference for the possession of multiple items to be included within greater harm.

The Council carefully considered the comments on this section. As the majority of respondents agreed with the proposals, the Council decided to maintain the general wording, but remove the examples, so that offences affecting a large number of victims or high value items would be considered as greater harm, and all other cases as lesser harm. As noted earlier, generally, including examples is not helpful as it may lead users to think only those examples may be taken into account.

This rewording would still capture the point made regarding heritage assets, which could potentially affect a large number of victims. Multiple items would also be captured within greater harm as the wording in this category refers to *'possession of item(s)'*. The vulnerability of a potential victim could be taken into account as an aggravating factor if relevant.

5 R v Webbe and others [2001] EWCA Crim 1217

# Aggravating factors

## Cross cutting issues

### Treatment of previous convictions

A particular feature of theft is that offenders frequently have a high number of relevant and recent convictions, which have an impact on sentencing what, taken in isolation, may be low value offences. In order to assist sentencers in dealing with such issues, the Council proposed some wording which was included at step two of all the guidelines, between the sentencing table and the list of aggravating factors.

Consultation responses (88 per cent) strongly supported the Council's proposed approach. The Magistrates' Association commented that *'Flexibility is required to deal with situations as different as 50 offences over 10 years and a single further offence committed within 24 hours of a caution or conviction. We welcome the balance of allowing sufficient flexibility while regularising sentencing practice.'*

The Prison Reform Trust did not agree with the approach taken, and pointed to the fact that there is already a statutory aggravating factor regarding previous convictions. The Law Society also referred to the presence of the statutory factor in their response, and was concerned that the proposed approach could lead to double counting. It proposed instead to expand the narrative within the statutory aggravating factors.

The Council gave very careful thought to all the responses on this issue, and concluded that

the right approach would be to remove the standalone wording, and instead expand the wording of the statutory aggravating factors. The Council wished to give guidance on this issue which is frequently an important consideration for these offences, but did not want the inclusion of any additional wording to cause inappropriate escalation in sentencing. The Council was also mindful of the possible cumulative effects of short custodial terms increasing over time, and has included a reference to any custodial sentence being kept to the necessary minimum, as discussed in *Page*.<sup>6</sup> The revised wording is as follows:

Relevant recent convictions **may** justify an upward adjustment, including outside the category range. In cases involving significant persistent offending, the community and custodial thresholds may be crossed even though the offence otherwise warrants a lesser sentence. Any custodial sentence must be kept to the necessary minimum.

The Council further reflected that this expanded wording should only be included in the guidelines for those offences where it is a prominent factor, so it has only been included within the shop theft guideline. The text regarding this statutory aggravating factor throughout the rest of the guidelines has had key words highlighted to aid the court's consideration of this factor in all other cases.

## Prevalence

In the consultation the Council proposed to deal with prevalence as an aggravating factor at step two. The wording proposed reminded sentencers that they should have supporting evidence of prevalence from an external source and be satisfied that there is a compelling need to treat the offence more seriously than elsewhere.

Eighty-four per cent of respondents were in favour of the Council's approach to this issue. Some respondents however said that evidence of the impact of prevalence in an area would rarely be available, particularly in the form of Community Impact Statements (CIS). The Prison Reform Trust was concerned about the effect of this wording on the sentencing of individual offenders and thought it unjust. The Magistrates' Association also questioned the approach taken, and felt that the wording set too stringent a test. They suggested as an alternative having '*location and timing of offences*' as an aggravating factor.

Central and South West Staffordshire Bench suggested that the wording was altered to include the words in bold '*has supporting evidence from an external source, **where available**, for example, Community Impact Statements*'.

The Council considered all the views expressed on this issue thoroughly, and concluded that the wording should remain in the form proposed in the consultation document. The Council's intention is firstly to make it clear that courts must have evidence to justify taking prevalence into account and not merely rely on 'local knowledge', and secondly to ensure consistency of approach to sentencing by all courts across the country.

The reference to CIS is included as an example of evidence here because it is necessary to have evidence in order for courts to take prevalence into account.<sup>7</sup> This is in contrast to the situation

with Victim Personal Statements which are not required in order for the effect of an offence on victims to be taken into account.

For clarity, the wording has been moved from a series of bullet points within the list of aggravating factors to a paragraph below. The Council decided to retain the wording within the shop theft and general theft guidelines, where it is most likely to be relevant.

## Other aggravating factors

Respondents to the consultation supported the vast majority of the proposed aggravating factors within the guidelines. The Council reviewed the list of statutory aggravating factors and in those guidelines where it was thought to be relevant a statutory aggravating factor has been included: '*Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity*'.

As discussed in the preceding section on culpability, in general theft '*offence conducted over sustained period of time*' has been moved from culpability to aggravating factors. As discussed in the section on harm in abstracting electricity, an additional factor has been added: '*electricity abstracted from another person's property*'. For the rest of the guidelines, the aggravating factors remain the same as those consulted on. The list of aggravating factors in the guidelines is non-exhaustive, and the courts are therefore able to take any appropriate additional factors not listed into account when sentencing.

<sup>7</sup> R v Oosthuizen [2005] EWCA Crim 1978

## Mitigating factors

'We consider the mitigating factors outlined are comprehensive and will assist the court in sentencing'

The Crown Prosecution Service

Respondents to the consultation supported the vast majority of the proposed mitigating factors, which are very similar throughout the guidelines. Some respondents suggested that the mitigating factor '*remorse, particularly where evidenced by voluntary reparation to the victim*' which appeared within the shop theft, general theft and making off without payment guidelines should be shortened to just 'remorse', as appears within other definitive guidelines.

The Council considered this point, but concluded that the proposed wording should be retained, as it provided further context for courts to be able to see a demonstration of remorse by the offender within theft offences.

As discussed above in relation to culpability factors, the Council decided to add a mitigating factor to shop theft of '*offender experiencing exceptional hardship*'. There was some support from respondents also to include a similar mitigating factor within the abstracting electricity guideline. The Council considered this but decided it was not necessary to include it in a non-exhaustive list.

Some respondents also suggested including a mitigating factor within the general theft and handling guidelines for offenders who voluntarily reported the offending or co-operated in more complex offences. The Council considered this but concluded that it would be unnecessary in a non-exhaustive list bearing in mind that step three of all the guidelines deals with the situation where a formal agreement is reached to assist the prosecution.

As discussed in the earlier section on culpability, the wording of the mitigating factor that appears throughout all the guidelines except for shop theft of '*mental disorder or learning disability*' has been reworded as the wording used in consultation was incorrect.

# Sentence levels

'We welcome the deliberately broad sentencing ranges provided for in the draft guideline which affords sentencers appropriate flexibility'  
Council of Her Majesty's District Judges

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

The levels on which we consulted were developed using Ministry of Justice data on current practice, supplemented with data from the Crown Court Sentencing Survey and the expertise of the Council members. The levels were then tested against case law and in research with sentencers. The levels were also compared across the guidelines to ensure proportionality.

For each of the scenarios, the consultation asked for views on the proposed sentence levels, including whether or not the proposed sentence for the scenario was proportionate. The majority of respondents agreed with the proposed sentence levels. Of those who disagreed, some thought the sentence ranges were too high, and others thought they were too low.

As discussed earlier in the paper, following the consultation the Council revised the approach to the assessment of harm for four of the

guidelines. This revision to the guidelines has necessitated adjustments to the sentence levels for shop theft, general theft, handling and making off without payment guidelines, as set out below. Generally, the Council has slightly reduced the sentence ranges. The revised approach to the assessment of harm allows a sentence to be increased, by moving into a higher category if there is significant harm caused. However, this adjustment for additional harm is controlled by the fact that the ranges have generally been slightly lowered. Generally, there are also small overlaps between the sentence ranges, which work to limit any increase in sentencing for additional harm. The Council throughout the development of the guidelines has been concerned not to cause an unwarranted escalation in sentencing.

The changes to the financial values in the guidelines for general theft and handling have also necessitated some further small changes to sentence levels to ensure proportionality within the ranges.

One further minor change is that in order to have consistency with other Definitive Guidelines, references to 13 weeks' custody within the sentence ranges used in the consultation have been amended to 12 weeks' custody.

Other specific changes to sentence level ranges are discussed below.

### Shop theft

The sentence ranges have been slightly lowered at some points, or kept the same as those proposed in the consultation. The top of the range for culpability A, category 1, offences over £1,000, has been reduced from four to three years, as on further examination of current sentencing practice, four years had been set too high. However, the guideline notes that where the value greatly exceeds £1,000, it may be appropriate to move outside the identified range.

Additional wording has been included underneath the sentencing table to remind the court that previous diversionary work with offenders does not stop it from considering that type of sentencing option again. The Council was mindful that a certain amount of educational or diversionary work may already have been conducted with offenders prior to a court appearance, but that should not stop courts from using these options again if appropriate. If courts automatically resort to custody solely because of a previous failure of diversionary work, this could lead to an unwarranted escalation in sentencing.

### General theft

The sentence ranges have generally been slightly lowered, following the changes described above to the assessment of additional harm, although the changes to the financial thresholds of the harm categories have also necessitated small increases to some of the ranges. The top of the range for culpability A, category 1, offences over £100,000 remains at six years' custody, one year below the statutory maximum for these offences.

In the consultation, wording had been included in this guideline that where the value greatly exceeded the amount of the starting point in category 1, it may be appropriate to move outside the category range. As the top of the range is so close to the statutory maximum, this wording would have little effect and has been deleted.

New wording has been included immediately below the sentencing table regarding multiple offences. Where multiple offences are committed

which may justify consecutive sentences, and the total amount stolen is in excess of £1 million, then an aggregate sentence of seven years may be appropriate. The Council was mindful of the guidance on these issues outlined in *Clark*.<sup>8</sup>

### Handling stolen goods

The sentence ranges have generally been slightly lowered, following the changes described above to the assessment of harm, although the changes to the financial thresholds have also necessitated some small increases to some of the ranges. In addition, the top of the range for culpability A, category 1, offences over £100,000 remains at 8 years' custody, although the starting point has been reduced by one year from six to five. On reflection the Council decided that six years was too high a starting point within the sentence range of three to eight years.

### Making off without payment

A few small adjustments have been made to the sentence ranges. The effect of the revisions discussed earlier is less significant on this guideline, due to the narrower sentence ranges given the statutory maximum of two years' custody.

### Abstracting electricity

The structure of part one of this guideline has not been revised. The Council reviewed the responses to the consultation on the sentence levels proposed for this offence, and also reviewed the ranges against current sentencing practice data. It concluded that the ranges proposed in consultation were broadly appropriate, but some of the ranges required small adjustments to ensure proportionality.

### Going equipped

The structure of part one of this guideline has not been revised. The Council reviewed the responses to the consultation on the sentence levels proposed for this offence, and also reviewed the ranges against current sentencing practice data. It concluded that the ranges proposed in consultation were broadly appropriate, but some of the ranges required small adjustments to ensure proportionality.

<sup>8</sup> R v Clark [1998] 2 Cr.App.R.(S) 142 B6-12003

## Next steps

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

The definitive guideline will apply to all individual offenders aged 18 and older and organisations sentenced on or after 1 February 2016, regardless of the date of the offence.

The online version of the *Magistrates' Court Sentencing Guidelines* will be updated on the day of publication as well as the downloadable PDF. Black and white hard copies will be available on request.

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

The Equality Impact Assessment Initial Screening is available on the Sentencing Council website. No evidence was provided during the consultation period which suggested that the guideline would have any adverse impact on equalities issues which would warrant a full Equality Impact Assessment.

# Annex A

## Consultation questions

### Section three – Theft from a shop

- Q1** Do you agree with the proposed factors within these 3 categories? If not, please tell us why.
- Q2** Do you think the financial amounts in the three categories are set at levels which will assist sentencers? If not, please suggest alternatives and reasons why you believe these will provide greater assistance.
- Q3** Is the wording at harm B clear? Is it clear how the additional harm should be considered?
- Q4** Do you agree with the proposed approach to the treatment of previous convictions? If you do not agree, please tell us why.
- Q5** Do you agree with the proposed aggravating factors? If not please specify which you would add or remove and why.
- Q6** Do you agree with the treatment of prevalence as an aggravating factor? If not, please tell us how else you think this issue could be reflected within the guideline.
- Q7** Do you agree with the proposed mitigating factors? If not please specify which you would add or remove and why.
- Q8** Do you consider that the sentence passed in Scenario A is proportionate? Specifically, do you consider that a short custodial sentence in such a case is appropriate?
- Q9** If you do not agree, please say what sentence should be passed and why.
- Q10** Please give your views on the proposed sentence levels for this offence.
- Q11** Do you think the mechanisms to move upwards from the starting point, including outside a category for previous convictions or for additional harm offer flexibility to sentencers? Are they clearly explained within the guidelines?
- Q12** Do you feel the shop theft guideline gives the right level of guidance? If not, please tell us why.

#### Section four – General theft

- Q13** Do you agree that a single guideline is appropriate for general theft offences? If not, please tell us why not, including any other options for grouping these offences together.
- Q14** Do you agree with the proposed factors within these three categories? If not, please tell us why.
- Q15** Do you agree the financial amounts in the three categories are set at levels which will assist sentencers? If not, please suggest alternatives and reasons why you believe these will provide greater assistance.
- Q16** Is the wording at harm B clear? Is it clear what the impact of additional harm can have?
- Q17** Do you agree with the proposed aggravating and mitigating factors? If not, please specify which you would add or remove and why.
- Q18** Do you consider that the mechanisms to move upwards from the starting point, including outside a category range due to the level of previous convictions/additional harm caused to the victim, and the prevalence leads to a proportionate sentence?
- Q19** Do you consider the mechanism to adjust the sentence upwards including outside the category range due to the additional harm caused to the victim/amount of previous convictions/prevalence issue is workable?
- Q20** Do you think the mechanism to adjust the sentence upwards including outside the category range in Scenario B leads to a proportionate sentence?

#### Section five – Abstracting electricity

- Q21** Do you agree that the new theft definitive guideline should include guidance for this low volume offence? If not, please tell us why.
- Q22** If you agree that this offence should be included, should it be within a single guideline?
- Q23** If not, should it be contained within one of the other five guidelines, with a separate sentencing table? If so, please state which other guideline it should be contained in and why.
- Q24** Do you agree with the culpability factors?
- Q25** Do you agree with the proposed one stage approach to the assessment of harm? If not, please tell us why.
- Q26** Do you agree with the factors included in greater and lesser harm? Are there any other factors which you think should be included?
- Q27** Do you agree with the proposed aggravating and mitigating factors? If not please specify which you would add or remove and why.
- Q28** Please give your views on the proposed sentence levels for this offence.

### **Section six – Making off without payment**

- Q29** Do you agree that this offence should be contained within its own guideline? If not, please state why and where you think guidance for this offence would best be placed.
- Q30** Do you agree with the list of culpability factors? If not, please tell us why.
- Q31** Do you think the financial amounts in the two categories are set at levels which will assist sentencers? If not, please suggest alternatives which you think may give greater assistance.
- Q32** Is the wording at harm B clear? Is it clear what the impact of additional harm can have?
- Q33** Do you agree with the proposed aggravating and mitigating factors? If not please specify which you would add or remove and why.
- Q34** Please give your view on the proposed sentence levels for this offence.

### **Section seven – Handling stolen goods**

- Q35** Do you agree with the culpability factors? If not please tell us why.
- Q36** Do you think the financial amounts in the four categories are set at levels which will assist sentencers? If not, please suggest alternatives which you think may give greater assistance.
- Q37** Is the wording at harm B clear? Is it clear what the impact of additional harm can have?
- Q38** Do you agree with the proposed aggravating and mitigating factors? If not please specify which you would add or remove and why.
- Q39** Please give your view on the proposed sentence levels for this offence – do you think it is proportionate?
- Q40** Please give your view on the proposed sentence level for this offence – do you think it is proportionate?
- Q41** Do you think the mechanism to move up for the greater harm in this case works in a proportionate manner?

### **Section eight – Going equipped for theft or burglary**

- Q42** Do you agree with the culpability factors?
- Q43** Do you agree with the proposed one stage approach to the assessment of harm?
- Q44** Do you agree with the greater and lesser harm factors? Are there any other factors which you think should be included?
- Q45** Do you agree with the proposed aggravating and mitigating factors? If not please specify which you would add or remove and why.
- Q46** Do you think the likely sentence levels in Scenario I are proportionate?

# Annex B

## Consultation respondents

### Responses were received from the following:

Hilary Allman	Grimsby & Cleethorpes Bench
Anonymous	Dr Louise Grove (Loughborough University)
Professor Andrew Ashworth (University of Oxford)	Gwent Bench
Association of Business Crime Partnership	Harrow Council for Justice
Association of Convenience Stores	PC Andrew Hayes (Northumbria Police)
Deborah Backhaus	S Hays
Birmingham Bench	Terry Hoare
Kathleen Boyce	Institute for Archaeologists
The British Institute of Organ Studies	Institute of Historic Building Conservation
British Retail Consortium	Justices' Clerks' Society
Buckinghamshire Bench	David King
Michael Cadman	The Law Society
Central & South West Staffordshire Bench	Beryl Leakin
Centre for Retail Research	Legal Committee of the Council of HM District
Church of England – Cathedral & Church	Judges (Magistrates Courts)
Buildings Division	London Criminal Courts Solicitors' Association
Clinks	Huw Lovesey
Ann Coffey MP	Magistrates' Association
Conway Bench	Peter Mahoney
Philip Cooke	Rod Mayall
Susan Cornish	Mid & South East Northumberland Bench
Miggie Cotton	Darren Moore
Council of HM Circuit Judges	National Association for the Care and
Criminal Justice Alliance	Resettlement of Offenders
Criminal Law Solicitors' Association	National Bench Chairmen's Forum
Crown Prosecution Service	National Federation of Retail Newsagents
Geoffrey Earl	National Policing Lead for Acquisitive Theft
Ecclesiastical Insurance	(DCC Matt Jukes)
Sharon Edge	Terry Neville
English Heritage	Oxfordshire Bench
Environment and Heritage Solutions	Nicky Padfield (University of Cambridge)
Gloucestershire Bench	Petrol Retailers Association

Police and Crime Commissioner for Cheshire  
(John Dwyer)  
Prison Reform Trust  
Probation Chiefs Association  
Quaker Peace & Social Witness Crime,  
Community and Justice Sub-Committee  
Restorative Justice Council  
Retail Loss Prevention Fashion Forum  
Juliet Rix  
Rebecca Rose  
Secretary of State for Justice on behalf of  
the Government  
Sefton Bench  
Somerset Bench  
South & East Cheshire Bench  
South Cambridgeshire Bench  
South East London Bench  
South London Local Justice Area  
Stolen and Missing Pets Alliance  
Swansea County Bench  
Peter Sweetman  
Transition to Adulthood (T2A) Alliance  
UK Criminal Law Blog (Lyndon Harris &  
Dan Bunting)  
UK Revenue Protection Association  
Union of Shop, Distributive and Allied Workers  
Victim Support  
Victims' Commissioner  
Richard Welch  
West & Central Hertfordshire Bench  
Bruce Westerman  
Westminster Magistrates' Court (Magistrates &  
District Judges)  
Simon Wolfensohn  
Women in Prison  
Mary Wyndham  
York & Selby Bench